

In the Supreme Court of Nevada

STARR SURPLUS LINES INSURANCE CO.,
Petitioner,

vs.

THE EIGHTH JUDICIAL DISTRICT COURT
of the State of Nevada, in and for the
County of Clark; and THE HONORABLE
MARK DENTON, District Judge,

Respondents,

and

JGB VEGAS RETAIL LESSEE, LLC,
Real Party in Interest.

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District Court Case No.
A-20-816628-B

**PETITIONER'S SECOND NOTICE OF SUPPLEMENTAL
AUTHORITIES**

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PETITIONER’S SECOND NOTICE OF SUPPLEMENTAL AUTHORITIES

Pursuant to NRAP 31(e), Petitioner Starr Surplus Lines Insurance Company (“Starr”) provides the following supplemental authorities from State Supreme Courts and Federal Appellate courts, which issued since briefing concluded and since Starr’s first such notice.

1. “Direct Physical Loss or Damage” requires a tangible alteration of the insured property.

At the heart of Starr’s briefing is that the phrase “direct physical loss or damage” as used in the Policy requires a tangible alteration of insured property to trigger coverage. Petition for Writ of Mandamus or Prohibition (Pet.) at 13-14; Reply in Support of Petition for Writ of Mandamus or Prohibition (Reply) at 9-12.

- 1) *Choctaw Nation of Oklahoma v. Lexington Ins. Co.*, 2023 OK 3 (Okla. Jan. 23, 2023) (slip opinion) (holding consistent with *Cherokee Nation v. Lexington Insurance Co.*, 521 P.3d 1261 (Okla. 2022) that “direct physical loss or damage ... to real and/or personal property” requires immediate, actual or tangible deprivation or destruction of property”).
- 2) *Muscogee (Creek) Nation v. Lexington Ins. Co.*, 2023 OK 4 (Okla. Jan. 23, 2023) (slip opinion) (holding consistent with *Cherokee Nation v. Lexington Insurance Co.*, 521 P.3d 1261 (Okla. 2022) that “direct physical loss or damage ... to real and/or personal property” requires immediate, actual or tangible deprivation or destruction of property”).
- 3) *Connecticut Dermatology Group, PC v. Twin City Fire Insurance Co.*, No. 20695, 2023 WL 1087214, at *5-8 (Conn. Jan. 27, 2023) (marking Connecticut the ninth State Supreme Court to interpret

“direct, physical loss or damage” to disallow coverage for COVID-19 pandemic);¹

4) *Hartford Fire Insurance Company v. Moda, LLC*, No. 20678 2023 WL 1087510, at *4-6 (Conn. Jan. 27, 2023) (under both Connecticut and New York law);

5) *ITT Inc. v. Factory Mutual Insurance Co.*, No. 22-1245, 2023 WL 1126772 (2d Cir. Jan. 31, 2023) (unpublished) (following *Connecticut Dermatology, supra*).

2. **Loss of use of insured property is not the same as a “direct physical loss.”**

Closely tied to the first principle of Starr’s briefing, noted above, is that the mere loss of use of the insured property is not a “direct physical loss” within the meaning of the Policy. See Pet. at 19-20; Reply at 18.

1) *Connecticut Dermatology Group, PC v. Twin City Fire Insurance Co.*, No. 20695, 2023 WL 1087214, at *8 (Conn. Jan. 27, 2023)

3. **The general presence of COVID in the community or at an insured location is not a material alteration.**

Starr’s briefing argued that the presence of COVID in the community, or even its assumed presence at the insured property, could not constitute the sort of tangible alteration “direct physical loss or damage” requires. Pet. at 14-18; Reply at 12-14.

¹ Connecticut joins in no particular order the highest courts in Washington, Oklahoma, Iowa, Wisconsin, Ohio, South Carolina, and Massachusetts in finding that the closure orders, the pandemic, or both do not constitute “direct physical loss or damage.” Thus far only Vermont has deviated from the clear majority, but as discussed in the briefing the Vermont ruling limited itself to Vermont’s “extremely liberal” pleading standard which is not applicable in this case.

- 1) *Connecticut Dermatology Group, PC v. Twin City Fire Insurance Co.*, No. 20695, 2023 WL 1087214, at *5-8 (Conn. Jan. 27, 2023);
- 2) *Hartford Fire Insurance Company v. Moda, LLC*, No. 20678 2023 WL 1087510, at *4-6 (Conn. Jan. 27, 2023) (under both Connecticut and New York law);
4. ***Starr’s position is consistent with the clear trend in the law of other jurisdictions.***

Starr’s briefing referenced the nearly unanimous authority from other jurisdictions that have read “direct physical loss or damage” as discussed above. Pet. at 20-21; Reply at 17-20.

- 1) *Choctaw Nation of Oklahoma v. Lexington Ins. Co.*, 2023 OK 3 (Okla. Jan. 23, 2023) (slip opinion) (holding consistent with *Cherokee Nation v. Lexington Insurance Co.*, 521 P.3d 1261 (Okla. 2022) that “direct physical loss or damage ... to real and/or personal property” requires immediate, actual or tangible deprivation or destruction of property”).
- 2) *Muscogee (Creek) Nation v. Lexington Ins. Co.*, 2023 OK 4 (Okla. Jan. 23, 2023) (slip opinion) (holding consistent with *Cherokee Nation v. Lexington Insurance Co.*, 521 P.3d 1261 (Okla. 2022) that “direct physical loss or damage ... to real and/or personal property” requires immediate, actual or tangible deprivation or destruction of property”).
- 3) *Connecticut Dermatology Group, PC v. Twin City Fire Insurance Co.*, No. 20695, 2023 WL 1087214, at *5-8 (Conn. Jan. 27, 2023);
- 4) *Hartford Fire Insurance Company v. Moda, LLC*, No. 20678 2023 WL 1087510, at *4-6 (Conn. Jan. 27, 2023) (under both Connecticut and New York law);
- 5) *ITT Inc. v. Factory Mutual Insurance Co.*, No. 22-1245, 2023 WL 1126772 (2d Cir. Jan. 31, 2023) (unpublished) (following *Connecticut Dermatology*, *supra*).

5. ***The Pollutants and Contaminants Exclusion, which includes any “virus” clearly and unambiguously applies to preclude coverage.***

Starr briefing recognized the referenced the unanimous² authority from other jurisdictions enforcing this and similar Pollutants and/or Contaminants exclusions which specifically incorporate “virus” into their applicable definitions. Pet. at 25-30; Reply at 23-27.

1) *AECOM v. Zurich Am. Ins. Co.*, No. 22-55092, 2023 WL 1281675, at *1 (9th Cir. Jan. 31, 2023). The Ninth Circuit affirmed the Central District of California’s 12(b)(6) dismissal based on the applicability of a “Contamination” Exclusion, where the definition of “Contamination” included “any ... virus,” despite the operative definition existing separate from the exclusion itself.

DATED: February 7, 2023

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² As noted in the Reply (at pg. 24), the sole case finding to the contrary has since been overturned. See *AC Ocean Walk, LLC v. Am. Guarantee & Liab. Ins. Co.*, 2022 WL 2254864, at *14 (N.J. Ct. App. June 23, 2022).

CERTIFICATE OF SERVICE

I certify that on February 17, 2023, I submitted the foregoing “*Second Notice of Supplemental Authorities*” for filing *via* the Court’s eFlex electronic filing system. Electronic notification will be sent to the following:

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I further certify that I served a copy of this document by mailing a true and correct copy thereof, postage prepaid, at Las Vegas, Nevada, addressed as follows:

The Honorable Mark R. Denton
DISTRICT COURT JUDGE – DEPT. 13
200 Lewis Avenue
Las Vegas, Nevada 89155

Respondent

/s/ Emily D. Kapolnai

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