

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 SEVENTH NOTICE
OF SUPPLEMENTAL AUTHORITIES**

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Petitioner Starr provides the following supplemental authorities. These decisions have issued since Starr's Sixth Notice of Supplemental Authority.

STARR'S SEVENTH NOTICE OF SUPPLEMENTAL AUTHORITY

1. ***Whether economic loss during the pandemic is covered is a question of law and appropriate for summary judgment.***

Discovery is unnecessary here because the petition raises only legal questions, not factual disputes. Pet. at 11.

Graduate Hotels Real Est. Fund III LP v. Hartford Fire Ins. Co., held that a district court did not abuse its discretion by denying discovery because the question whether COVID-19 caused "direct physical loss or damage" was a "pure question[] of law" judged by the policy's language. No. 1-22-0178, 2023 WL 4289524 *3 (Ill. App. 1st June 30, 2023)

2. ***The general presence of COVID-19 in the community or at an insured location is not a material alteration.***

The presence of COVID-19 in the community, or even its assumed presence at the insured property, cannot be a tangible alteration, which "direct physical loss or damage" requires. Pet. at 14-18; Reply at 12-14.

In *Froedtert Health, Inc. v. Factory Mut. Ins. Co.*, the Seventh Circuit reasoned that a coverage grant for "direct physical loss or damage" does not cover COVID-19-related losses unless the policy expressly covers "communicable diseases, viruses, pandemics, or contamination." No. 22-2577, __ F.4th __, 2023 WL 3768639, at *3 (7th Cir. June 2, 2023).

The court in *Fontainebleau Florida Hotel, LLC v. Westchester Surplus Lines Ins. Co.* discussed prior case law and held that “COVID-19 does not cause direct physical loss or damage to property.” No. 2021-016874-CA-01, 2023 WL 4195589, at *2-*5 (Fla. Cir. Ct. June 25, 2023).

In *Graduate Hotels*, the court noted that “mere presence of the [COVID-19] virus at the property is insufficient” to show physical loss or damage). 2023 WL 4289524 *3.

And *URBN US Retail LLC, v. Zurich Am. Ins. Co.* cited Third Circuit precedent and noted that “every other Court of Appeals and all but one state supreme court to have considered the issue” had determined that the presence of COVID-19 did not cause direct physical loss or damage before holding in accord. No. CV 21-4807, 2023 WL 4237077, at *4-*6 (E.D. Pa. June 28, 2023)

3. **Contaminant Exclusions should be interpreted literally to preclude coverage for economic losses**

The caselaw is nearly unanimous that exclusions of coverage for “any . . . virus” precludes coverage for the virus that causes COVID-19. Pet. at 25-30; Reply at 23-28.

In *Froedtert Health*, the Seventh Circuit alternatively held that there was no coverage for COVID-19-related losses where a policy’s contamination exclusion barred coverage for “‘any condition of property due to the actual or suspected presence of,’ among other things, a ‘virus’” because “COVID-19 . . . [is] a viral respiratory illness.” 2023 WL 3768639, at *3.

Interpreting a similar exclusion to Starr’s, *TP Racing LLLP v. Am. Home Assurance Co.*, explained that “the very thing that [the insured] claims gives rise to coverage—namely, that the physical presence of virus particles resulted in ‘direct physical loss or damage’—necessarily triggers the Contaminant Exclusion”). No. 21-16910, 2023 WL 3750395, at *2 (9th Cir. June 1, 2023).

The court continued, “[w]e do not see how an insured reading the policy holistically as we have would get through the general provision and its exclusions to find general coverage given the policy’s expansive contamination exclusion. In clear and precise terms, that exclusion broadly applies to the policy’s general coverage to exclude any losses from contaminants, including viruses like COVID-19.” *Id.*, at *5.

The court in *Fontainebleau Florida Hotel* likewise noted that it did not need to assess the scope of a coverage exclusion because COVID-19 did not cause direct physical loss or damage, but that the exclusion would also bar coverage because pollutants “expressly encompass[ed] ‘virus[es]’”. No. 2023 WL 4195589, at *8.

And in *URBN US Retail*, the court held in the alternative that a contamination exclusion defining contamination as including any “virus, disease causing or illness causing agent” barred coverage for COVID-19 related losses. 2023 WL 4237077, at *11.

4. **The Insurance Services Office’s generic “all virus” exclusion has no bearing here**

Starr’s reply argued that “amici’s assertions as to what the ‘insurance industry’ supposedly knew because the ISO drafted this form language” are irrelevant to the interpretation of the policy. Reply at 27-28.

In *Fontainebleau Florida Hotel*, the court reasoned “[t]hat one or more insurers drafted a ‘communicable disease’ exclusion after the COVID pandemic also does not change the result.” 2023 WL 4195589, at *5 (citing *Fla. Windstorm Underwriting v. Gajwani*, 934 So. 2d 501, 506 (Fla. 3d DCA 2005) (“[T]hat [insurer] modified its policies . . . nearly a year after the loss in question is irrelevant to the case at issue, as the lower court [i]s required to consider the plain language of the policy at the time of the loss.”))

July 7, 2023.

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CERTIFICATE OF SERVICE

I certify that on July 7, 2023, I submitted the foregoing “Seventh Notice of Supplemental Authority” 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 United States mail, postage prepaid, at Las Vegas, Nevada, a true and correct copy thereof, as follows:

The Honorable Mark Denton
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Respondent

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