

IN THE SUPREME COURT OF THE STATE 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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Case No.: 84986

Eighth Judicial District Court
Case No.: A-20-816628-B

**REAL PARTY IN INTEREST'S RESPONSE TO PETITIONER'S
SEVENTH AND EIGHTH NOTICES OF SUPPLEMENTAL
AUTHORITIES**

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Pursuant to NRAP 31(e), Real Party in Interest JGB Vegas Retail Lessee, LLC (“JGB”) respectfully submits this Response to Petitioner Starr Surplus Lines Insurance Co.’s (“Starr”) Seventh and Eighth Notices of Supplemental Authorities (“Seventh Starr Notice” and “Eighth Starr Notice,” respectively). The Seventh Starr Notice advises the Court of five out-of-state rulings concerning (1) the phrase “direct physical loss or damage,” and (2) pollution and contamination exclusions with language different from Starr’s exclusion. Similarly, the Eighth Starr Notice advises the Court of four non-Nevada rulings concerning the phrase “direct physical loss or damage.” None are instructive here.

1. ***“Direct Physical Loss or Damage”***

Like nearly all of the cases Starr cited in its briefing and supplemental notices, in eight of Starr’s nine “physical loss or damage” citations the policyholders failed to allege (much less provide evidence) that SARS-CoV-2 was present on and rendered insured property unusable for its intended purpose, or that SARS-CoV-2 physically altered and damaged insured property.¹ See Answer at 25–26 (explaining

¹ See *Varanese Fusion, LLC v. Erie Ins. Exch., Member Erie Ins. Grp.*, 2023 WL 4982587, at *1 (Ky. Ct. App. Aug. 4, 2023) (failing to allege SARS-CoV-2 was present at or physically altered property); *H.J. Russell & Co. v. Landmark Am. Ins. Co.*, 2023 WL 5110268, at *1 (Ga. Ct. App. Aug. 9, 2023) (alleging only the “suspected, but not actual, presence” of SARS-CoV-2 and failing to allege any physical alteration to property); *Fontainebleau Florida Hotel, LLC v. Westchester Surplus Lines Ins. Co.*, 2023 WL 4195589, at *1 (Fla. Cir. Ct.

(continued on next page)

the same defect in nearly all of Starr’s cited cases). JGB, in contrast, provided substantial un rebutted evidence that SARS-CoV-2 was present on, physically attached to, and altered covered property, and that JGB undertook extensive physical remediation efforts to restore its property to its pre-COVID condition. *See* Answer at 25. Thus, these citations should not dictate the outcome for JGB’s materially different allegations and evidence made in accordance with longstanding Nevada insurance principles.

Starr’s arguments are plainly incorrect even on their own terms. Pointing to comments made in a Pennsylvania federal district court decision, Starr claims that all intermediate appellate courts, and all but one state supreme court, have held the presence of COVID-19 cannot cause direct physical loss or damage as a matter of law. *See* Seventh Starr Notice at 3 (citing *URBN US Retail LLC v. Zurich Am. Ins. Co.*, 2023 WL 4237077, at *4 (E.D. Pa. June 28, 2023)). Not so. The intermediate appellate court of the very state in which *URBN US Retail* was decided expressly

June 25, 2023) (“Plaintiffs did not plead ‘actual, tangible alteration to the insured property.’”); *Froedtert Health, Inc. v. Factory Mut. Ins. Co.*, 69 F.4th 466, 468 (7th Cir. 2023) (failing to allege SARS-CoV-2 attached to or physically altered property); *TP Racing LLLP v. Am. Home Assurance Co.*, 2023 WL 3750395, at *2 (9th Cir. June 1, 2023) (same); *Oregon Clinic, PC v. Fireman’s Fund Ins. Co.*, 2023 WL 4854808, at *2, *4 (9th Cir. July 31, 2023) (same); *Sullivan Mgmt., LLC v. Fireman’s Fund Ins. Co.*, 2023 WL 4934065, at *1 (D.S.C. Aug. 2, 2023) (same); *Graduate Hotels Real Est. Fund III LP v. Hartford Fire Ins. Co.*, 2023 IL App (1st) 220178-U, 2023 WL 4289524, at *2–3 (June 30, 2023) (alleging only “mere presence” of virus, not any physical alteration to property).

held that either the presence of COVID-19, or government orders directing property not be used for its intended purposes, may cause direct physical loss or damage to property, “even in the absence of actual physical harm to the property.” *Ungarean v. CNA*, 286 A.3d 353, 359, 361 n.3 (2022), *review granted*, 2023 WL 4530116 (Pa. July 13, 2023) (holding “direct physical loss” must mean something different from “physical damage,” and the “loss of use” of insured property “due to COVID-19 and the governmental orders equated to a direct physical loss of [the policyholder’s] property”). Further, as set forth in JGB’s Answer and Notices of Supplemental Authority, multiple California appellate courts have similarly held that COVID-19 and government orders cause physical loss or damage to property, with or without physical alteration to property.²

² See, e.g., *Coast Rest. Grp., Inc. v. Amguard Ins. Co.*, 307 Cal. Rptr. 3d 133, 141 (2023), *review denied* (June 28, 2023) (direct physical loss or damage “can include loss of use, even if the subject property is not physically altered or damaged”) (emphasis added); *Shusha, Inc. v. Century-National Ins. Co.*, 303 Cal. Rptr. 3d 100, 111–13 (2022), *review granted* (Apr. 19, 2023) (allegations that SARS-CoV-2 “adheres to, attaches to and alters . . . property” are sufficient to plead physical loss or damage to covered property); *Marina Pacific Hotel & Suites, LLC v. Fireman’s Fund Ins. Co.*, 296 Cal. Rptr. 3d 777, 787–88 (2022) (same); *Inns-by-the-Sea v. Cal. Mut. Ins. Co.*, 286 Cal. Rptr. 3d 576, 590–91 (2021) (physical loss or damage can occur when the presence of “an invisible airborne agent” (like COVID-19) “seriously impairs or destroys [the] function [of property],” or causes “a policyholder to suspend operations,” and “requir[es] the entire facility to be thoroughly sanitized and remain empty for a period”).

2. Pollution and Contamination Exclusions

Four of the cases in the Seventh Starr Notice also ostensibly concern a contamination exclusion, but importantly, are inconsistent with Nevada’s existing precedent.³ By virtue of this Court’s ruling in *Casino West*, Starr has been on notice for nearly a decade that pollution and contamination exclusions like its own are fatally overbroad and limited to traditional environmental pollution events, which does not encompass an unprecedented pandemic. *See* JGB Answer at 28–29 (citing *Century Sur. Co. v. Casino W., Inc.*, 130 Nev. 395, 400–01, 329 P.3d 614, 617–18 (2014)). Unlike JGB, however, none of the policyholders in Starr’s cases argued this critical distinction.

In *TP Racing*, decided under Arizona law which is in lockstep with *Casino West*, the policyholder simply failed to raise (and therefore the court did not address) controlling Arizona precedent on that issue. *See TP Racing*, 2023 WL 3750395, at *2 (arguing only “that the word ‘dispersal’ [in the contamination exclusion] is ambiguous and should be narrowly construed”); *but cf. Keggi v. Northbrook Prop. & Cas. Ins. Co.*, 13 P.3d 785, 790–91 (Ct. App. 2000) (limiting pollution and contamination exclusion with terms identical to Starr’s to traditional environmental

³ *See* Seventh Starr Notice at 3–4 (citing *Froedtert*, 2023 WL 3768639, at *3; *TP Racing*, 2023 WL 3750395, at *2; *Fontainebleau*, 2023 WL 4195589, at *8; *URBN US Retail*, 2023 WL 4237077, at *11).

pollution, even though substance at issue (fecal coliform bacteria) easily fit within exclusion’s broad definition of pollutant); *Casino W.*, 130 Nev. at 399–401, 329 P.3d at 616–18 (similarly limiting pollution and contamination exclusion even though carbon monoxide fit within exclusion’s broad definition of pollutant).⁴ When actually raised by the policyholder, courts applying Arizona law in the COVID-19 context have had “little trouble” recognizing that exclusions with language virtually identical to Starr’s “only appl[y] to traditional environmental pollution,” and “that no plausible interpretation of ‘traditional environmental pollution’ includes a virus outbreak.” *London Bridge Resort LLC v. Illinois Union Ins. Co. Inc.*, 505 F. Supp. 3d 956, 958–60 (D. Ariz. 2020) (rejecting that “COVID-19, a type of virus, can constitute traditional environmental pollution”) (citing *Keggi*, 13 P.3d at 790–91).

Starr’s other three cases were decided under Wisconsin, Florida, and Pennsylvania law, respectively—none of which limit pollution and contamination exclusions to traditional environmental pollution events, and are thus contrary to

⁴ Starr is well aware of *Keggi*, as the Arizona Court of Appeals more recently rejected Starr’s plea to overturn that precedent. *See Starr Surplus Lines Ins. Co. v. Star Roofing, Inc.*, 2019 WL 5617575, at *5–8 (Ariz. Ct. App. Oct. 31, 2019) (reaffirming *Keggi*’s holding that pollution exclusions exactly like Starr’s are limited to “traditional environmental pollution events, such as improper disposal or containment of hazardous waste,” and declining to extend the pollution exclusion to roofing material fumes, even though the substance fit within the broad definition of pollutant).

Casino West and not instructive here.⁵ Starr’s reliance on Florida law is particularly misplaced, as that state rejects the reasonable expectations doctrine—a fundamental tenet of Nevada insurance law that serves as this Court’s primary objective in interpreting insurance policies. *Compare Deni Assocs.*, 711 So. 2d at 1140 (“We decline to adopt the doctrine of reasonable expectations.”), *with, e.g., Powell v. Liberty Mut. Fire Ins. Co.*, 127 Nev. 156, 162, 252 P.3d 668, 672 (2011) (“Ultimately, a court should interpret an insurance policy to ‘effectuate the reasonable expectations of the insured.’”) (quoting *National Union Fire Ins. v. Reno’s Exec. Air*, 100 Nev. 360, 365, 682 P.2d 1380, 1383 (1984)).

* * *

JGB respectfully submits that this Court should adhere to longstanding principles of Nevada law and define the phrase “physical loss or damage” as

⁵ See *MESA Underwriters Specialty Ins. Co. v. Five Star Hotels, LLC*, 2015 WL 13838469, at *2 (Pa. Com. Pl. Nov. 2, 2015) (explaining that pollution exclusion with identical relevant terms as Starr’s (which “expressly includes ‘smoke’” in “the definition of pollutants”) would bar coverage for damage caused by smoke inhalation under Pennsylvania law, but would not bar coverage under New Jersey law because New Jersey limits pollution exclusions “to traditional environmental pollution claims”); *Preisler v. Kuettel’s Septic Serv., LLC*, 843 N.W.2d 710, ¶ 17 (Ct. App. 2014), *aff’d sub nom. Preisler v. Gen. Cas. Ins. Co.*, 360 Wis. 2d 129 (2014) (“Our supreme court has not confined the pollution exclusion to its traditional environmental context.”); *Deni Assocs. of Fla., Inc. v. State Farm Fire & Cas. Ins. Co.*, 711 So. 2d 1135, 1138 (Fla. 1998) (“We cannot accept the conclusion reached by certain courts [(like the Supreme Court of Nevada)] that because of its ambiguity the pollution exclusion clause only excludes environmental or industrial pollution.”).

including the presence of a deadly physical substance like SARS-CoV-2 that either (1) renders property partially or wholly unusable, unsafe or unfit for its intended purpose or (2) alters the surfaces or air of covered property. JGB also requests that this Court reaffirm its holding in *Casino West* that pollution and contamination exclusions like Starr's are limited to the context of traditional environmental pollution events (*e.g.*, wastewater treatment plant releasing virus-contaminated water onto property or into the water supply), even though the substance at issue falls within the exclusion's definition of "pollutant."

Dated this 15th day of August, 2023.

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CERTIFICATE OF SERVICE

I certify that I am an employee of Lemons, Grundy & Eisenberg and that on this date the foregoing document was filed electronically with the Clerk of the Nevada Supreme Court, and therefore electronic service was made in accordance with the master service list as follows:

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I further certify that on this date I served a copy of the foregoing by depositing a true and correct copy, postage prepaid, via U.S. mail to:

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Dated: August 15, 2023.

/s/ Margie Nevin

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