

10th Circuit rules Black Hawk casino's insurance policy did not cover COVID-19 closure

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The Colorado Supreme Court and the 10th Circuit have both found COVID-19 harms people, but does not damage property

The federal appeals court based in Denver decided last week that a Black Hawk casino's insurance policy, with limited exception, did not provide for hundreds of millions of dollars in coverage during the period in 2020 when COVID-19 forced businesses to halt or modify their operations.

Monarch Casino & Resort, Inc. sued its insurer, Affiliated FM Insurance Company, under a \$350 million policy covering its Monarch Casino in Black Hawk and a second facility in Reno, Nev. Monarch alleged the presence of COVID-19 constituted "physical loss or damage" under its policy and it was entitled to payment during the months it was subject to various public health restrictions.

However, a three-judge panel of the U.S. Court of Appeals for the 10th Circuit pointed to an opinion it issued in January finding that COVID-19 did not cause physical damage and, therefore, could not support an insurance claim. The same logic applied to Monarch, wrote Judge Allison H. Eid in the panel's Oct. 31 opinion.

She noted an additional reason why Monarch's case was not viable: Its insurance policy broadly excluded payments for contamination — including viruses.

The case attracted the attention of multiple interest groups. The American Property Casualty Insurance Association, which represents insurers, warned a decision forcing insurance companies to compensate

policyholders for COVID-19-related closures would bankrupt insurers and force them to cover more routine impacts to businesses going forward — like a new noise ordinance that affects hours of operation.

“Funding for businesses in duress must come from government-backed pandemic recovery solutions, not efforts to force property insurers to pay for economic losses,” they contended.

United Policyholders, which advocates for insurance consumers, deemed the industry’s argument a scare tactic, noting insurers turned a profit even in 2020.

Monarch’s policy gave its casinos general coverage, subject to exclusions. The contamination exclusion applied to viruses, precluding insurance coverage. However, Monarch’s policy did contain “communicable disease” coverage, compensating it for the costs of cleaning, removing and disposing of any disease in response to public health regulations.

Monarch’s policy allowed for a maximum of \$100,000 under the communicable disease provision. Given the \$350 million potentially available elsewhere in the policy, Monarch took Affiliated FM Insurance to court in an attempt to recover a vastly greater sum.

In September 2021, U.S. District Court Judge Regina M. Rodriguez agreed that while Monarch may be eligible for the \$100,000 communicable disease payout, the contamination exclusion barred the hundreds of millions of dollars Monarch claimed it was owed.

“Even if the presence of COVID-19, coupled with government closure orders, did constitute physical loss or damage, those damages would still be excluded pursuant to the Contamination Exclusion,” she wrote.

On appeal to the 10th Circuit, Monarch’s attorney argued the insurance policy was “extraordinarily confusing and ambiguous.” During oral arguments in March, Judge Carolyn B. McHugh described the policy as “stacked” — broadly offering coverage, excluding certain items, then adding back special allowances, such as for communicable diseases.

“You read the first paragraph and you think, ‘I’m insured against everything.’ Then it says, ‘subject to exclusions.’ You go through your exclusions and see what’s excluded. Then they have exceptions to the exclusions,” she said. “This isn’t my first rodeo. I’ve seen a lot of insurance policies, and they all seem to

be written like that.”

Despite characterizing the policy as straightforward, the appellate panel struggled to understand the terms of coverage, prompting Affiliated FM Insurance’s lawyer to correct them on multiple occasions.

Monarch’s “claimed physical loss or damage is the presence of COVID-19,” said attorney Scott G. Johnson. “It’s not physical loss or damage. End of story. You don’t have to go any further than that.”

The 10th Circuit stood by its prior decision from January finding COVID-19, as Johnson argued, does not cause physical damage. This time, the panel’s position had backup from Colorado’s highest court.

While the appeal was pending, Monarch attempted to get the 10th Circuit to transmit a legal question to the Colorado Supreme Court to answer whether COVID-19 amounts to physical loss or property damage that is coverable by insurance policies. After Monarch made its request, but before the 10th Circuit ruled, the Supreme Court decided a cohort of appeals with a similar conclusion: COVID-19 affects people, but it does not affect property.

The 10th Circuit observed that Monarch was entitled to some coverage from the shutdowns — specifically, the \$100,000 in the policy’s communicable disease provision.

“What Monarch now seeks is coverage beyond the \$100,000 limit set by the policy,” added Eid. “But we cannot rewrite” the policy.

The case is Monarch Casino & Resort, Inc. v. Affiliated FM Insurance Company.