

Amicus Briefs Piling Up as Calif. High Court Mulls Coverage for COVID-19 Shutdowns

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Major League Baseball, the Los Angeles Lakers and Ross Stores are among 10 parties that have filed amicus briefs as the California Supreme Court ponders whether the virus that causes COVID-19 can cause direct physical damage or loss to property.

The sports organizations and discount clothing retailer were among the organizations that filed six briefs supporting Another Planet Entertainment in a lawsuit against Vigilant Insurance Co. The San Manuel Band of Mission Indians, United Policyholders and a group of restaurants also filed briefs in support of the policyholder.

Three briefs were filed in support of Vigilant: One by the the American Property Casualty Insurance Association and National Association of Mutual Insurance Companies, another by the California FAIR Plan Association and a third by Oregon Mutual Insurance Co.

The California Medical Association has also filed an amicus brief that doesn't support either party to the dispute, but refutes a claim by Vigilant that SARS-CoV-2 is temporary and can easily be removed from surfaces.

"Even extraordinary cleaning measures do not remove the COVID-19 virus from surfaces," CMA's brief says. "In a 2021 study by the largest hospital network in New York State, the virus proved capable of surviving disinfection procedures used by trained hospital personnel in COVID-19 patient treatment areas."

The federal Ninth Circuit Court of Appeals asked the California Supreme Court last December to answer a certified question so it can rule on a lawsuit that Another Planet filed against Vigilant after the insurer

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denied the concert promotor's claim for its \$23,908,822 policy limit for business income lost because of the COVID-19 pandemic. Another Planet owns several California venues for music concerts that had to be shut down during the height of the pandemic.

Most courts that have considered the question have agreed with the insurance industry's argument that SARS-CoV-2 cannot cause a direct physical damage or loss that is covered even by so-called "all risk" commercial property policies.

Appellate courts in California are split on the question, although more cases have been decided in favor of insurers than policyholders, according to a COVID litigation tracker maintained by the University of Pennsylvania.

Ross Stores argues in an amicus brief filed on Friday that the Supreme Court should ignore the "legalistic interpretation" of the law asserted by insurers and uphold a longstanding principle that any "fortuitous event" that causes a property to become unsafe or unsatisfactory for normal use causes physical loss or damage that is covered by all-risk policies.

Ross filed a lawsuit against its insurer, Zurich America Insurance Co., after its claim for income lost when it was forced to close its stores in 2020 in a case being considered by the Alameda County, California Superior Court. Judge Evelio Grillo had put that case on hold until after the state Supreme Court answers the 9th Circuit's certified question, the amicus brief says.

Oregon Mutual Insurance Co. fought its own battle legal battles against policyholders that claimed losses because of COVID-19 and won at least two cases that reached California appellate courts. The insurer argues in its amicus brief that the fact that restaurants are now open even though the COVID virus continues to exist shows that it wasn't the virus that caused the business income losses. Instead, government orders that were intended to limit the spread of the disease are at fault.

The California Supreme Court has not yet scheduled oral arguments in the Another Planet case.