

COVID-19 insurance coverage lawsuit pending in Nevada Supreme Court could be a game-changer

KTNV Las Vegas

Some Nevada business owners eagerly await a Nevada Supreme Court ruling about COVID-19 insurance coverage. The decision could set precedent on whether insurance companies need to reimburse businesses for pandemic-related losses.

The owner of Las Vegas Strip open air mall Grand Bazaar Shops, JGB Retail, sued its insurance company, Starr Surplus Lines Insurance Company, in 2020. The case is now in the hands of Nevada's high court justices.

JGB claimed the virus caused property loss, but the insurer argued airborne viruses didn't physically alter the shops.

UNLV law professor Jeffrey Stempel said the case could come down to policy language. According to Stempel, insurers started using "virus exclusion" clauses more often in policies after SARS outbreaks in 2003. But this specific clause wasn't in JGB's policy with Starr.

"In this case, I think the argument of no physical loss or damage is very weak on the part of the insurers, particularly since they didn't define the term in the policy," said Stempel. "Since the drafting history of the virus exclusion suggests that without a draft virus exclusion, there would be coverage for this type of event."

JGB's policy did, however, have a pollution and contamination exclusion clause — which Starr's attorney, Dan Polsenberg, said includes viruses.

“It excludes smoke, fumes, viruses and hazardous materials,” said Polsenberg. “So actually, the insured lose two ways. Number one, it’s not covered in the first place, because it’s not property damage. Number two, it’s excluded because it’s a virus.”

Stempel believes the pollution and contamination exclusion also excluding infectious diseases like COVID could be a stretch.

“If you look at the drafting history of the pollution exclusion, it’s pretty clear that what the insurers didn’t want to cover was smokestack pollution, groundwater pollution, stuff being dumped into the river, escaping fumes that spread throughout the neighborhood,” said Stempel. “And so when they add virus to pollution, they must have been concerned about virus in, say, contaminated water or smog or discharged from a plant.”

John Ellison is an attorney and the president of United Policyholders, a nonprofit in support of policyholders.

United Policyholders filed an amicus brief in support of JGB Retail. Ellison said JGB should be compensated based on the fact that the virus caused business interruption.

“The presence of COVID caused them to lose their ability to conduct their business the way they had before the pandemic started,” said Ellison. “Now, the insurance companies say that’s not physical loss or damage because the COVID doesn’t change the structure of the building or it doesn’t cause the roof to fall down. Our view is that that’s not required. That might be physical damage, but physical loss is something else.”

According to the University of Pennsylvania’s COVID coverage litigation tracker, there have been thousands of similar lawsuits nationwide. Many are currently pending decisions. But most ruled so far have sided with insurance companies.

“The insurers that won on the no physical loss or damage argument also had virus exclusions,” said Stempel.

Stempel believes even if a judge rules in favor of JGB in this particular case, because the policy didn’t explicitly have “virus exclusion,” some cases will continue to favor insurance companies.

“For the insurers that did put a virus exclusion in their policy, they’re still likely to keep winning even if JGB wins this case,” Stempel said.

The Nevada Supreme Court heard oral arguments from both sides on Monday. It’s unclear when the high court will hand down a ruling.

The American Property Casualty Insurance Association filed an amicus brief in support of Starr Surplus Lines.

In a statement to Channel 13, assistant Vice President Ken Stoller said the following:

“Judicial decisions or legislative enactments to mandate retroactive business interruption coverage to include COVID-19 losses not in contracts would undermine the stability of the insurance industry and its ability to pay claims on all existing insurance policies. Business interruption insurance is part of property insurance policies that cover actual physical loss of or damage to covered property. Actual physical loss is the total destruction of covered property by fire or tornado or the loss of covered property due to theft, for example. Damage to covered property is the partial alteration of the structural integrity of covered property by fire or tornado, for example. These policies are not intended to cover diseases or pandemic related losses. In the vast majority of cases, insurers did not price policies to include such coverage, and policyholders did not pay for it.

Pandemic-related claims have now been rejected by every federal circuit court except the D.C. Circuit, whose only pending case has now settled; by state high courts in Connecticut, the District of Columbia, Iowa, Louisiana, Maryland, Massachusetts, New Hampshire, Ohio, Oklahoma, South Carolina, Washington, and Wisconsin; by intermediate appellate courts in several other states (some of whose supreme courts have declined to review those decisions); and by the overwhelming majority of state and federal trial courts. The few outlier decisions have been on non-dispositive procedural grounds and driven by very lenient pleading standards, or have adopted coverage theories that have been repeatedly and soundly rejected elsewhere.”