

New Jersey Supreme Court to rule on pandemic-related insurance exclusions

The Washington Post

New Jersey's Supreme Court is considering whether an Atlantic City casino can get payouts from business interruption insurance for losses during the COVID-19 outbreak, potentially providing guidance for policyholders nationwide regarding the scope of coverage for pandemic-related losses.

The state's high court heard arguments Wednesday in a case brought by the owners of the Ocean Casino Resort, which had \$50 million in business interruption insurance before the 2020 virus outbreak.

Three insurers — AIG Specialty Insurance Co., American Guarantee & Liability Insurance Co. and Interstate Fire & Casualty Co. — largely denied payouts to the casino, saying it did not suffer direct physical loss or damage because of the virus.

The casino sued and defeated an attempt by the insurers to dismiss the case. But that decision was reversed by an appellate court.

The issue has arisen in state and federal courts around the country, including cases where payouts were denied involving a chain of California movie theaters; a Los Angeles real estate firm; a group of hotels in Pennsylvania, and a group of hotels and a law firm in New Jersey.

"This case presents a generational legal dispute that this court should resolve in order to provide needed clarity to hundreds of thousands of affected New Jersey policyholders and their insurers regarding the scope of coverage for losses arising from the pandemic," Ocean wrote in court papers.

Lawyers for the insurance companies argued that their policies clearly included viruses among the list of things that could be excluded from coverage. They added the casino did not outline steps it was forced to take to repair or remove the virus, saying the sole cause of the closure was an order by New Jersey Gov.

Phil Murphy on March 16, 2020, closing the casinos until July 2 of that year.

Stephen Orlofsky, a lawyer for Ocean, said the casino took several steps to respond to the virus, including employing air filtration systems and using “industrial-strength” cleaning supplies.

But David Roth, a lawyer for American Guarantee, said the policies require there to be physical damage to the property, which he said did not occur at the casino. He said 14 state Supreme Courts around the nation have held that the mere interruption of business activity during the pandemic does not constitute physical losses.

Ocean maintains that in addition to the governor’s order closing the casinos, it also shut down due to “the concern that the virus was having on the physical surfaces and the air” inside the casino, Orlofsky said.

Last year, the Supreme Court agreed to resolve some questions regarding the case.

They include whether a claim that the coronavirus physically damaged insured property is enough to allege “direct physical loss of or damage to” it, and whether insurers can legally restrict coverage for pandemic-related losses by mentioning viruses in general pollution or “contamination” exclusions.

The casino sought payouts for losses incurred during that time under policies from the three insurers. Although its main claims were denied, the casino did receive \$850,000 under a separate policy provision governing communicable diseases.

“The actual and/or threatened presence of coronavirus particles at the Ocean Casino Resort rendered physical property within the premises damaged, unusable, uninhabitable, unfit for its intended function, dangerous, and unsafe,” the casino wrote in court papers.

United Policyholders, an advocacy group for insurance customers, urges the justices in a friend-of-the-court brief to rule in favor of the casino.

“The ruling sought by the (insurers) here would curtail coverage for millions of New Jersey policyholders,” it wrote. “The insurance industry at large understood, prior to the COVID-19 pandemic, that the presence of a virus or any dangerous substance, or the imminent risk of its presence at (an) insured property was

capable of satisfying their own understood meaning of ‘physical loss or damage’ to property.”

The justices did not issue a ruling on Wednesday and did not indicate when they might do so.