

Vegas Outdoor Mall Can Pursue COVID-19 Coverage Suit

By **Daphne Zhang**

Law360 (December 1, 2020, 3:05 PM EST) -- A Clark County, Nevada, judge rejected an insurer's bid to toss a COVID-19 business interruption coverage suit from the owner of Las Vegas' Grand Bazaar open-air mall, holding that the owner sufficiently alleged property damage and the policy's contamination and pollution exclusion does not apply to virus-related losses.

Judge Mark Denton ruled Monday that JGB Vegas Retail Lessee LLC has shown enough facts to allege a direct physical loss of or damage to its property under its policy with Starr Surplus Lines Insurance Co., finding that the insurer failed to demonstrate that the pollution exclusion bars coverage for COVID-19 related losses.

In June, JGB sued Starr in Nevada state court, seeking coverage for its losses from being forced to shut down due to state-mandated orders in March. The insurer removed the suit to Nevada federal court in July before the federal court remanded the action back to the state court in September, finding a lack of complete diversity between the parties for the case to stay in federal court.

On Monday, Judge Denton said JGB has adequately alleged the "physical presence" of COVID-19, including that the virus transmits through droplets that "are physical objects that attach to and cause harm to other objects" and can survive on property surfaces and infect individuals. According to the suit, JGB has alleged that it was "highly likely" that the novel coronavirus "has been present" on the property of its Grand Bazaar Shops.

In the order, Judge Denton said the court canceled a scheduled hearing in early November due to the ongoing pandemic, and made the determination to allow the case to proceed and deny Starr's dismissal motion based on written briefs and other documents submitted by the parties.

"The court finds that JGB's complaint sufficiently alleges losses stemming from the direct physical loss and/or damage to property from COVID-19 to trigger Starr's obligations under the property and time element coverage provisions in the policy, including coverage for general business interruption and interruption by civil or military authority," the judge concluded.

Judge Denton cited *Studio 417 Inc. v. Cincinnati Ins. Co.*, in which a Missouri federal judge ruled in August that the policyholder adequately demonstrated that COVID-19 "is a physical substance," which "live[s] on" and is "active on inert physical surfaces." The Missouri case was the first known instance of a policyholder's COVID-19 coverage suit surviving a dismissal bid. That judge allowed a group of hair

salons and restaurants to proceed with a proposed class action against Cincinnati Insurance Co.

In Monday's order, Judge Denton said the mall owner has adequately alleged that Starr "misrepresented facts" in stating that the government closure did not prohibit access to its property. The judge also sided with JGB that the policy's pollution and contamination exclusion does not bar coverage for virus-related losses.

"Starr has not shown that it is unreasonable to interpret the pollution and contamination exclusion to apply only to instances of traditional environmental and industrial pollution and contamination that is not at issue here, where JGB's losses are alleged to be the result of a naturally occurring, communicable disease," the judge said.

Additionally, Judge Denton said JGB has adequately alleged that relief can be granted for Starr's alleged violation of the Nevada Unfair Claims Practices Act and breach of good faith and fair dealing. The complaint showed evidence that Starr denied the coverage claim "with knowledge that denial was unreasonable," the judge said.

Counsel for JGB declined to comment and counsel for Starr did not immediately respond to the request for comment Tuesday.

JGB is represented by Don Springmeyer, Bradley Schragger and Royi Moas of Wolf Rifkin Shapiro Schulman & Rabkin LLP and Robin L. Cohen and Marc T. Ladd of McKool Smith PC

Starr is represented by Lee H. Gorlin and Amy M. Samberg of Foran Glennon Palandech Ponzi & Rudloff PC.

The case is JGB Vegas Retail Lessee LLC v. Starr Surplus Lines Insurance Co., case number A-20-816628, in the District Court of Clark County, Nevada.

--Editing by Stephen Berg.