

## Calif. Panel Revives Real Estate Firm's COVID Coverage Suit

By Riley Murdock

*Law360 (October 2, 2023, 7:11 PM EDT)* -- A California state appellate court partially revived a real estate investment firm's bid to recover from its insurers up to \$250 million in pandemic-related lost income, finding Monday the company plausibly argued the physical presence of the virus caused its losses.

JRK Property Holdings Inc.'s claims that COVID-19 physically altered the air and surfaces of its properties were enough to show "direct physical loss or damage" required to trigger coverage and defeat the insurers' motion for judgment on the pleadings, a three-justice panel wrote in a partially published opinion.

When a trial court sustained the underlying motion in May 2022, the only California appellate court decision on COVID-19 pandemic property insurance coverage was *Inns by the Sea v. California Mutual Insurance Co.*, which found a hotel owner could not get business interruption coverage because its losses were caused by government orders instead of "direct physical loss of or damage to" its property, according to the opinion.

Since then, however, the same court that issued Monday's ruling found in *Marina Pacific Hotel and Suites LLC et al. v. Fireman's Fund Insurance Co.* that a hotel operator sufficiently alleged that the presence of the virus damaged its property in order to defeat a demurrer. *Marina Pacific* and the decisions that followed established that plaintiffs making similar allegations — like JRK — can survive the pleadings stage by plausibly arguing that the presence of the COVID-19 virus physically altered their property, the panel said.

"We agree with JRK that the complaint adequately alleges loss resulting from physical alteration of the insured property to support its causes of action for breach of contract and declaratory relief," Justice Gail Ruderman Feuer wrote for the panel. The judge added that "the allegations in JRK's complaint fall squarely within the type of allegations we found sufficient to allege coverage in *Marina Pacific* and *Shusha*."

Most California appellate courts have found that similar allegations aren't enough to trigger coverage, but the state Supreme Court will resolve that split in authority in the near future, the panel said.

In the published section of the opinion, the panel found that a pollution exclusion in JRK's policies did not bar coverage for pandemic-related claims. Though the policies define "pollutants or contaminants" to include "bacteria, virus, or hazardous substances" that can harm human health or damage property,

such exclusions have historically only applied to traditional environmental pollution, the panel held.

"We reject insurers' argument that inclusion of the term 'virus' in the definition of a contaminant transforms an exclusion that applies to 'pollution' (and typically environmental pollution) into one that encompasses the spread of a virus due to the normal human activities of breathing and touching surfaces," Justice Feuer wrote.

However, the panel affirmed the dismissals of excess insurers RSUI Indemnity Co. and Evanston Insurance Co., finding that pathogen exclusions in their policies bar coverage for the COVID-19 virus. While they use similar "traditional discharge" language to the pollution exclusions, the pathogen exclusions do not mention pollution and specifically apply to the organic spread of viruses, the panel held.

Meredith Elkins, counsel for JRK, said her client is looking forward to conducting discovery and proving its case before the lower court.

"JRK is obviously very happy with the decision," Elkins said. "It was good to see the court acknowledge that, while there were some negative decisions in California early on, there's recently been a lot of well-reasoned decisions reversing dismissal orders and allowing cases to move forward."

JRK had roughly 100 hotel and residential properties across 22 states at the time of the pandemic, according to the opinion. The company held \$250 million in business interruption coverage in a layered insurance program consisting of several functionally identical policies, filings show.

JRK sued in May 2021 for breach of contract, seeking a declaration that its insurers — including Colony Insurance Co., Ironshore Specialty Insurance Co., Nationwide unit Scottsdale Insurance Co. and certain Lloyd's underwriters — wrongfully refused to cover its losses. There were at least 178 confirmed cases of COVID-19 at JRK's properties during the pandemic, with at least 60 properties having at least one resident with a confirmed positive test, according to the opinion.

The insurers moved for judgment on the pleadings in January 2022, claiming the company didn't show any physical alteration to its property required to establish "direct physical loss or damage" under California law, filings show. JRK argued it sufficiently pled direct physical loss because the virus altered the air and surfaces of its properties, rendering them functionally useless, according to the opinion.

In April 2022, the trial court found JRK had suspended its operations because of government orders and not the presence of the virus, filings show. The court also found that the exclusions barred coverage but determined a triable issue of fact existed on whether up to \$2.5 million in coverage was available under communicable disease provisions, according to the opinion.

The court entered a dismissal order in May 2022, and JRK appealed that July, filings show.

Representatives of Colony and Evanston declined to comment.

Representatives for the other insurers did not immediately respond to requests for comment.

Justices Gail Ruderman Feuer, Dennis M. Perluss and Gonzalo Martinez sat on the panel for Monday's ruling.

JRK is represented by Kevin J. Minnick of Spertus Landes & Josephs LLP and Robin Cohen, Meredith Elkins and Orrie A. Levy of Cohen Ziffer Frenchman & McKenna.

The defendants are represented by Clyde & Co. LLP, Duane Morris LLP, Cummins & White LLP, Stewart Smith Law, Kennedys CMK, Phelps Dunbar LLP, Selman Leichenger Edson Hsu Newman & Moore LLP, Dickinson Wright PLLC, Akerman LLP, Faegre Drinker Biddle & Reath LLP and Riker Danzig LLP.

The case is JRK Property Holdings Inc. v. Colony Insurance Co. et al., case number B321806, in the Court of Appeal of the State of California, Second Appellate District.

--Additional reporting by Eli Flesch, Dorothy Atkins and Ben Zigterman. Editing by Emma Brauer.

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