

New Jersey Court Declines To Dismiss COVID-19 Coverage Suit, Finding That Loss Of Use Of Casino May Satisfy Direct Physical Loss Requirement (Insurance Law Alert)

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A New Jersey trial court denied insurers' motion to dismiss a COVID-19-related coverage suit, finding that a casino's inability to use its property for its intended purpose could satisfy the policies' physical loss requirement. *AC Ocean Walk, LLC v. American Guar. & Liab. Ins. Co.*, 2021 WL 6091224 (N.J. Super. Ct. Dec. 22, 2021).

The casino alleged that COVID-19 presented an imminent threat to its facilities and employees, rendering the property unsafe. It further alleged that viral particles attach and adhere to surfaces and objects, which render physical changes to property. The court ruled that these allegations, accepted as true for purposes of a motion to dismiss, sufficiently stated a claim for physical damage to property. The court further stated that policy language requiring direct physical loss may be satisfied by demonstrating a loss of use of property for its intended purpose, whether or not the property has been altered by the COVID-19 virus.

In addition, the court ruled that a pollution exclusion in four applicable policies did not bar coverage for the casino's claims. In two policies, contaminant was defined to include a list of substances that did not include "virus," whereas a policy provision entitled "Contamination" did include "virus" in its definition. In two other policies, the pollution exclusion expressly excluded "virus." Nevertheless, relying on a body of New Jersey case law in which pollution exclusions have been construed as applying only to traditional environmental contamination, the court ruled that the exclusions at issue did not bar coverage for COVID-19-related claims. The court noted that the provisions overwhelmingly referred to environmental and industrial pollution contaminants and stated: "Inserting the term 'virus' . . . does not change the substance of the exemption. When read as a whole, the exclusion remains applicable to more traditional environmental-related damages and as such will not fulfill the insured's reasonable expectations."

However, the court deemed a Biological or Chemical Substance Exclusion in one policy applicable to bar coverage, ruling that the COVID-19 virus was a "pathogenic" substance under the clear meaning of that provision.

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