BY THE COURT:

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION
ATLANTIC COUNTY
DOCKET NO.: ATL-L-0703-21

Civil Action

ORDER

AC OCEAN WALK, LLC :

Plaintiff, :

vs. :

AMERICAN GUARANTEE AND LIABILITY INSURANCE COMPANY; AIG SPECIALTY INSURANCE COMPANY; NATIONAL FIRE & MARINE INSURANCE COMPANY; and INTERSTATE FIRE AND CASUALTY COMPANY, :

Defendants. :

THIS MATTER having been brought before the court by defendants by way of a joint motion seeking an order dismissing the complaint pursuant to Rule 4:6-2(e) of the New Jersey Court Rules, and the court having read and reviewed the moving and opposition papers and having heard oral argument; and it appearing to the court that good cause has been shown; and for the reasons set forth by the court in its written decision of this date;

IT IS on this 22 day of December, 2021, **ORDERED** as follows:

1. As to defendant National Fire and Marine Insurance Company, the motion is granted and the complaint is dismissed.

2. The motion is denied as to the remaining defendants American Guarantee and Liability Insurance Company, AIG Specialty Insurance Company and Interstate Fire and Casualty Company.

3. A copy of this order shall be deemed served upon all counsel of record upon being uploaded to eCourts.

HON. MICHAEL WINKELSTEIN, J.A.D.
(retired and temporarily assigned on recall)

MOTION:

_X_. Opposed
____ Unopposed

NOT FOR PUBLICATION WITHOUT
THE APPROVAL OF THE COMMITTEE ON OPINIONS

AC OCEAN WALK, LLC, Plaintiff, vs. AMERICAN GUARANTEE AND LIABILITY INSURANCE COMPANY AIG SPECIALTY INSURANCE COMPANY, NATIONAL FIRE & MARINE INSURANCE COMPANY; AND INTERSTATE FIRE & CASUALTY COMPANY, Defendants.	SUPERIOR COURT OF NEW JERSEY LAW DIVISION ATLANTIC COUNTY DOCKET NO.: ATL-L-0703-21 Civil Action DECISION RE: R.4:6-2(e) MOTION

Decided: December 22, 2021

Stephen M. Orlofsky, Esquire (BLANK ROME) for plaintiff, AC Ocean Walk, LLC.

Edward M. Pinter, Esquire (FORD MARRIN ESPOSITO WITMEYER AND GLESER, LLP) for defendant, American Guarantee and Liability Insurance Company.

Peter E. Kanaris, Esquire (Pro Hac Vice) (HINSHAW AND CULBERSTON, LLP) for defendant, National Fire and Marine Insurance Company.

Michael D. Hynes, Esquire (DLA PIPER LLP) for defendant, Interstate Fire and Casualty Company.

Shawn L. Kelly, Esquire (DENTONS US LLP) for defendant, AIG Specialty Insurance Company.

MICHAEL WINKELSTEIN, J.A.D. (retired and temporarily assigned on recall).

AC Ocean Walk, LLC, the Ocean Casino, has filed suit against multiple insurance carriers seeking coverage for COVID-19 related losses under the quota-share insurance policies Ocean purchased from the insurers. The defendants are the American Guarantee and Liability Insurance

Company (the Zurich policy), the AIG Specialty Insurance Company (the AIG policy), the National Fire and Marine Insurance Company (the National Fire policy), and the Interstate Fire and Casualty Company (the Interstate policy). The insurers have declined coverage. They now move pursuant to R. 4:6-2(e) for dismissal of Ocean's complaint.

The insurance carriers make two primary and one secondary argument. First, they allege that to establish coverage, the policies require actual physical damage to the property, and the COVID-19 did not create any actual physical damage to Ocean's property. In policy terms, the carriers claim Ocean sustained no "direct physical loss of, or damage to, the insured property" and consequently the insurers are not required to provide coverage. The carriers also assert that even if plaintiff could meet its burden to establish direct physical loss of, or damage to, the property, the policies contain contamination exclusions, which explicitly exclude coverage for any loss due to a "virus."

The secondary argument applies only to the National Fire policy. That policy contains an endorsement that excludes coverage for damages in any way related to pathogenic or poisonous biological or chemical substances. National Fire asserts that the endorsement precludes coverage for damage caused by the COVID-19 virus.

Ocean asserts it is entitled to coverage. It claims that the COVID-19 virus caused a direct physical loss of plaintiff's property: that loss being the loss of use of the Ocean Casino, when the risk of damage to the health and property that accompanied the COVID-19 became imminent and the casino was forced to close. Ocean argues that direct physical loss is satisfied when the property is unable to be used for its intended purpose.

Plaintiff further asserts that the property did in fact suffer direct physical loss of its property because of the actual presence of the COVID-19 on the premises, which fundamentally altered and

damaged the surfaces and the air space within the casino, preventing Ocean's use of the property. Also, Ocean submits that the insurance policies included broad language insuring against "risks of" direct physical loss or damage to the property. Ocean asserts that these risks ultimately came to pass and resulted in the closure of the casino. In addressing the contamination exclusion, plaintiff maintains that as written, it is unenforceable under New Jersey law because the purpose of the exclusion is to preclude traditional environmental pollution, not a communicable disease such as the COVID-19 virus.

The legal standard under R.4:6-2(e)

Rule 4:6-2(e), requires the complaint be searched in depth with liberality to determine if a cause of action can be gleaned even from an obscure statement, particularly if further discovery will be taken. Every reasonable inference is consequently accorded a plaintiff and the motion should be granted only in rare instances and ordinarily without prejudice. Printing Mart-Morristown v. Sharp Electronics, 116 N.J. 739, 746 (1989). Nevertheless, if the complaint states no basis for relief and discovery would not provide one, dismissal of the complaint is appropriate. Camden County Energy Recovery Associates v. NJ Department of Environmental Protection, 320 N.J. Super. 59, 64 (App. Div. 1999), aff'd o.b., 170 N.J. 246 (2001). Simply making non-particularized allegations does not satisfy New Jersey's pleading requirements. Lederman v. Prudential Life Ins. Co., 385 N.J. Super. 324, 349 (App. Div. 2006).

The legal standard for insurance contract construction

The law addressing the construction of insurance policies in this state is well-settled. Insurance policies are contracts of adhesion. Longobardi v. Chubb Ins. Co., 121 N.J. 530, 537 (1990). The interpretation of an insurance policy, like any contract, is a question of law. Sosa v. Massachusetts Bay Ins. Co., 458 N.J. Super 639, 646-47 (App. Div. 2019). In performing its

interpretative task, the court looks first to the plain language of the policy, and if it is unambiguous, the court will not strain to provide a better policy than the one obtained. Ibid. The court is guided by general principles: "coverage provisions are to be read broadly, exclusions are to be read narrowly, potential ambiguities must be resolved in favor of the insured, and the policy is to be read in a manner that fulfills the insured's reasonable expectations." Id. at 646. The insurer bears the burden to establish that an exclusion applies. Ibid. In determining whether there is an ambiguity, the court "considers whether an average policyholder could reasonably understand the scope of coverage, and whether better drafting could put the issue beyond debate." Ibid. "If there is more than one possible interpretation of the language, courts apply the meaning that supports coverage rather than the one that limits it." Id. at 646-47.

The Policies

Plaintiff purchased four all-risk insurance policies, all insuring the Ocean property, a casino, in Atlantic City. The first policy provision in dispute is the insuring agreement. The specific question is: what is the meaning of "direct physical loss or damage?" The policies do not define that term. The insuring agreement substantially reads the same in each policy. It says:

> This policy insures against direct physical loss of, or damage caused by, a covered cause of loss to covered property, at an insured location [the casino] . . . subject to the terms, conditions and exclusions stated in this policy.

The next issue addresses the pollution exclusions. The question there is: does the inclusion of the term "virus" in the exclusions preclude coverage for COVID-19? "Virus" is included in the definition of contamination but is not listed as a contaminant. A **Contaminant(s)** is defined to include:

> Any solid, liquid, gaseous, thermal, or other irritant, pollutant, or contaminant, including but not limited to smoke, vapor, soot, fumes, acids, alkalis, chemicals,

> waste including material to be recycled, reconditioned, or reclaimed, asbestos, ammonia, other hazardous substances, **Fungus** or **Spores**.[1]
>
> **Contamination (Contaminated)**, includes:
>
> Any condition of property due to the actual presence of any foreign substance, impurity, pollutant, hazardous material, poison, toxin, pathogen or pathogenic organism, bacteria, virus, disease causing or illness causing agent, **Fungus**, mold or mildew.

The Interstate and National fire policies have an exclusion section referred to as a "Pollution Contamination Exclusion." They are substantially the same and read as follows:

> There will be no payment for "loss, damage, cost or expense caused directly or indirectly by . . . the release, migration, discharge, escape or dispersal of Contaminants . . . Contaminants means materials that may be harmful to human health, and include any impurity, pollutant, poison, toxin, pathogen or pathogenic organism, disease-causing or illness-causing agent, asbestos, dioxin, polychlorinated biphenyls, agricultural smoke, agricultural soot, vapor, fumes, acids, alkalis, bacteria, virus, and hazardous substances listed in the Federal Water Pollution control Act, Clean Air Act, Resource Conservation and Recovery Act of 1976, Toxic Substances Control Act, or as designated by the United States Environmental Protection Agency or any other local governmental agency . . . .

National Fire has an additional exclusion that the three other carriers do not. It is the Biological or Chemical Substances Exclusion Endorsement. The court will later address whether that exclusion precludes coverage for COVID-19. It states:

> This policy does not provide coverage for any loss, cost, expense or damage of any nature, however caused, directly or indirectly arising out of, resulting from, or in any way related to the actual or suspected presence or threat of any pathogenic or poisonous biological or chemical substance or material of any kind, including but not limited to, any malicious use of such substance or material, whether isolated or widespread, regardless of any other cause or event contributing at the same time or in any sequence.

Discussion

The Insuring Agreement

The insuring agreement provides coverage for <u>direct physical loss of, or damage caused by, a covered loss to covered property</u>. The carriers assert that this standard requires some type

[1] The terms Fungus and Spores are highlighted in the originals.

of physical alteration to the property, which, according to the carriers, plaintiff is unable to show. The Ocean, on the other hand, puts forth two primary arguments to show that it is entitled to coverage under the insuring agreements. It argues that the facts as pleaded in the complaint sufficiently show a physical alteration to the property to defeat a R.4:6-2(e) motion. Plaintiff also asserts that the insuring agreements language of "direct physical loss" is satisfied by a loss that renders the property unusable for its intended purpose; that a physical alteration to the property is not necessary to meet the policy standard of a direct physical loss.

The court's discussion begins with whether the complaint was sufficiently pleaded to articulate enough facts to state a claim for relief. Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570 (2007). In the complaint, at paragraphs 106-122, plaintiff alleged that the COVID-19 virus, which is transmitted through physical particles in the air and on surfaces, presented an imminent threat to Ocean's facilities, its customers and employees, rendering the casino unsafe. Para. 106-107. The complaint asserts that the respiratory droplets expelled from individuals land on, attach, and adhere to surfaces and objects, which renders physical changes to the property and its surface by becoming part of its surface; and as a result of that physical alteration, contact with those previously inert surfaces [the property] was made unsafe. Para. 113. Plaintiff further pleaded that numerous scientific studies documented that COVID-19 can physically remain on and alter property for extended periods of time. Para. 114. Ocean claims that the chain of events caused by the Pandemic created both actual direct physical loss or damage to Ocean's property, and a continued threat of direct physical loss or damage. Para. 120.

These claims constitute fact-based pleadings from which a cause of action that the COVID-19 damaged Ocean's physical premises may be gleaned. The facts may be in dispute, but that is an issue for another day. It is this court's opinion that the pleadings are sufficient to show that the

COVID-19 damaged the Ocean's premises; this meets the requirements for coverage pursuant to the insuring agreements, and, accordingly, the complaint satisfies the Printing-Mart criteria to survive a R.4:6-2(e) motion.

The court is also satisfied that the insuring agreement language that requires a "direct physical loss" to warrant coverage may be satisfied if the property becomes unusable for its intended purpose, whether or not the property is altered by the COVID-19 virus. Here is why.

In Wakefern Food Corp. v. Liberty Mutual Fire Insurance Co, 406 N.J. Super 524, 529 (App. Div. 2009), problems developed with the North America power system and electrical grids, which resulted in an electrical blackout over the Northeastern United States and portions of Canada. Wakefern is a group of supermarkets that suffered losses due to food spoilage during the blackout and sought coverage from its carrier, Liberty Mutual. The policy covered, among other things, damage due to the loss of electrical power. Id. at 530-31. The policy applied only in case of "physical damage to off-premises electrical plant and equipment." Id. at 531-32. Although the power grid was physically incapable of supplying power for four days, the transmission lines, connections and supply pipes suffered no "physical damage." Id. at 538. As a result, Liberty Mutual denied coverage. Id. at 538. "Physical damage" was an undefined term under the policy. Id. at 540.

Wakefern filed suit and the carrier moved to dismiss. The trial court agreed with the carrier and dismissed the complaint. The Appellate Division reversed. Id. at 524. The appellate court found that the term "physical damage" was ambiguous, and the trial court should not have construed the term so narrowly in favor of the insurance carrier in a motion to dismiss; rather, the court observed that the policy should be construed in a manner favoring the insured, rather than the insurer, in determining what was a reasonable expectation of the insured. Id. at 540. See

Flomerfelt v. Cardiello, 202 N.J. 432, 441 (2009) (if terms of insurance policy are not clear, but are ambiguous, they are to be construed against insurer not the insured, so as to give effect to insured's reasonable expectations).

The Wakefern court found that the electrical grid was "physically damaged" because, due to a series of incidents that occurred outside of the plaintiff's insured properties, the grid and its component generators and transmission lines were "physically incapable of performing their essential function of providing electricity." Id. at 540. And that failure resulted in damages to the supermarkets, which could not function without electricity. The court said that the loss of function was akin to direct physical damage under the terms of the policy. Id. at 541.

Similarly, here, Ocean argues its entitlement to coverage because of its inability to operate its gaming floor and hotel rooms as a result of the virus – a loss of the casino's function. Put simply, Ocean asserts that it was unable to operate according to its essential functions by the imminent risk of damage that would be caused by the COVID-19.

Plaintiff submits, and for purposes of this R.4:6-2(e) motion the court accepts as true, that the primary source of the property's revenue was its casino floor and guest accommodations, which were eliminated and destroyed by the presence and imminent threat of the COVID-19, in the air space and on the surfaces, rendering those parts of the property functionally useless and not fit for their intended purpose. That position is consistent with the principles discussed in Wakefern and supports Ocean's claim for coverage. The insurers here did not define the term "physical damage." The policy language is ambiguous. It can be construed to support Ocean's, as well as the carriers', positions as to the meaning of the insuring agreements. "[I]f there is more than one possible interpretation of the language, courts apply the meaning that supports coverage rather than the one that limits it." Sosa, 458 N.J. Super at 646-47.

Wakefern is not the only New Jersey decision that does not require physical alteration of the property to constitute direct physical loss for insurance coverage purposes. The case of Customized Distribution Services v. Zurich Ins. Co., 373 N.J. Super. 480 (App. Div. 2004) can similarly be read to support plaintiff's arguments. There, the Campbell Soup Company filed a complaint against Customized Distribution Services (CDS), which operated a warehouse in New Jersey. Id. at 483. In warehousing a Campbell beverage product named "Splash," CDS failed to locate and ship the beverage in a timely manner and as a result Campbell claimed damages. Ibid. CDS sought insurance coverage from the defendant Zurich, under an all-risk policy. Id. at 484. The claim by Campbell was that CDS failed to properly distribute the product. Id. at 485. The policy said: "covered causes of loss means risks of direct, physical loss to covered property." Id. at 486. Zurich contended there was no coverage because there was no "direct physical loss" as required by the policy.

The appellate court found that for coverage to apply, it was not necessary that the product's material or chemical composition be altered. Id. at 488. It explained that the term "risk" as in risk of direct, physical loss, supported the view that the policy did not require that there be any actual physical damage to or alteration of the material composition of the property or its packaging. Ibid. In considering the parties reasonable expectations and understanding that the Splash beverage did not undergo a change in material composition, but rather how the product was perceived by Campbell's customers as a result of an undue passage time, the court found that such a change was the "functional equivalent" of damage of a material nature or an alteration in physical composition. Id. at 490. The court found that coverage can exist without a product's material alteration or packaging alteration. Id. at 491. The court stated that the term "physical" can mean more than material alteration or damage, and it would have been incumbent upon the insurer to rule out

coverage clearly and specifically under the circumstances where material damage did not occur. Ibid.

Two federal cases support the same analysis. In Port Authority v. Affiliated FM Insurance Co., 311 Fed. 3d 226, 230 (3d Cir 2002), the plaintiff sought recovery from its insurance carrier for the abatement of asbestos contamination. The District Court held "that unless asbestos in a building was of such quantity and condition as to make the structure unusable, the expense of correcting the situation was not within the scope of a first party insurance policy covering physical loss or damage." Ibid. The Third Circuit affirmed. It agreed with the District Court's articulation of the proper standard for "physical loss" for asbestos contamination, accepting the proposition that "[w]hen the presence of large quantities of asbestos in the air of a building is such as to make the structure uninhabitable and unusable, there has been a distinct loss to its owner. Id. at 236. And if there is a release of asbestos-containing materials that contaminates the property to the extent "such that the function is nearly eliminated or destroyed, or the structure is made useless or uninhabitable, that would cause such a loss of utility." Ibid. Thus, asbestos in the air could, without actual damage to the building, be considered a physical loss or damage if the asbestos was of sufficient quantity to render the building unusable.

Said another way, though the structure in Port Authority, the World Trade Center, continued to function, had the asbestos contamination been sufficiently severe as to render the structure unusable, coverage would have been afforded under the policy. That is essentially the position Ocean takes here vis-a-vis the COVID-19 virus and its effect on the Ocean – the COVID-19 rendered the property unfit for its intended purpose, causing the property to lose is essential function.

In Gregory Packaging Co., Inc. v. Traveler's Property Casualty Company of America, 2014 Dist. Lexis 165232 (Dist. Of N.J. Nov. 25, 2014), ammonia had been physically released into the air in the plaintiff's packaging facility in Newark. Id. at 3. Those heightened ammonia levels rendered the facility unfit for occupancy until the ammonia dissipated. Id. at 5. The building was not otherwise physically damaged. The New Jersey District Court observed that under New Jersey law, physical loss or damage is provable without experiencing structural alterations. Id. at 13. Resting its decision in part on Wakefern and Port Authority, the court found that the ammonia release "physically transformed the air within the [packaging] facility so that it contained an unsafe amount of ammonia or that the ammonia levels rendered the facility unfit for occupancy until the ammonia could be dissipated." Id. at 16. And, significantly, the court concluded that the ammonia discharge inflicted "direct physical loss of or damage to" the packaging facility. Id. at 17. This fully supports plaintiff's position here.

Accordingly, the court concludes that the term "direct physical damage" in the carriers' policies in this case could support either plaintiff's or defendants' positions of what constitutes a direct physical loss; in other words, it is ambiguous. The carriers could have defined the term physical damage but declined to do so. Id. at 20-21. Consequently, construing the language against the insurance carriers and in favor of the insured as is required under New Jersey law, see, inter alia, Flomerfelt, 202 N.J. at 441, the court concludes that plaintiff has sufficiently pleaded a cause of action as to the insuring agreements entitling plaintiff to coverage for COVID-19 damages.

The Pollution Exclusion

In that the court has concluded that the COVID-19 infiltration satisfies the insuring agreement of direct physical loss or damage caused by a covered cause of loss, the court now turns to exclusionary language in the policies. The four policies contain language that the carriers claim

excludes a virus, such as COVID-19, from coverage, regardless of how the insuring agreement is construed. No doubt, however, that the insurer has the burden to prove the applicability of the exclusion. Flomerfelt, 202 N.J. at 442.

In the Zurich and AIG policies, a contaminant is defined to include:

> Any solid, liquid, gaseous, thermal, or other irritant, pollutant, or contaminant, including but not limited to smoke, vapor, soot, fumes, acids, alkalis, chemicals, waste including material to be recycled, reconditioned, or reclaimed, asbestos, ammonia, or hazardous substances, **Fungus** or **Spores**.

It is of note that this latter section, which listed contaminants, does not include viruses. Virus is, however, included in the policy provision that is headed Contamination (Contaminated). That definition reads as follows:

> Any condition of property due to the actual presence of any foreign substance, impurity, pollutant, hazardous material, poison, toxin, pathogen or pathogenic organism, bacteria, virus, disease causing or illness causing agent, **Fungus**, mold or mildew.

The Interstate and National Fire policies have exclusion sections referred to in each as the Pollution Contamination Exclusion. They are substantially the same in each policy and read as follows:

> There will be no payment for "loss, damage, cost or expense caused directly or indirectly by . . . the release, migration, discharge, escape or dispersal of Contaminants . . . Contaminants means materials that may be harmful to human health, and include any impurity, pollutant, poison, toxin, pathogen or pathogenic organism, disease-causing or illness-causing agent, asbestos, dioxin, polychlorinated biphenyls, agricultural smoke, agricultural soot, vapor, fumes, acids, alkalis, bacteria, virus, and hazardous substances listed in the Federal Water Pollution control Act, Clean Air Act, Resource Conservation and Recovery Act of 1976, Toxic Substances Control Act, or as designated by the United States Environmental Protection Agency or any other local governmental agency . . . .

These types of exclusion clauses were addressed in depth by the New Jersey Supreme Court in Nav-Its, Inc. v. Selective Ins. Co. of America, 183 N.J. 110 (2005). In Nav-Its, the insured brought a claim against a commercial liability insurer for declaratory judgment, seeking indemnity

in a lawsuit arising out of exposure to fumes from a floor coating sealant. Id. at 113. The policy contained a pollution exclusion endorsement, which defined pollutants as "any solid, liquid, gaseous or thermal irritant or contaminant, including smoke, vapor, soot, fumes, acids, alkalis, chemicals and waste." Id. at 115.

The policy also defined "Pollution Hazard" to mean an "actual exposure or threat of exposure to the corrosive, toxic or other harmful properties of any pollutants arriving out of the discharge, disposal, seepage, migration, release or escape of such pollutants." Ibid. The issue arose as to whether these exclusions were applicable, in that the exclusions are generally applied only to traditional environmental pollution claims. Id. at 113-14. The Appellate Division found that the pollution exclusion clauses were not necessarily limited to the cleanup of traditional environmental damage. Id. at 114. The New Jersey Supreme Court reversed. Id. at 127.

The Court characterized the issue as follows: "The central question presented in this case is whether we should limit the applicability of the pollution exclusion clause to traditional environmental pollution claims." Id. at 118. The answer was yes. Id. at 126. The Court observed that important to its analysis was the principle that "exclusions in the insurance policy should be narrowly construed." Id. at 119. In evaluating claims of coverage for environmental pollution, the Court was guided by Morton International, Inc., v. General Accident Ins. Co. of America, 134 N.J. 1 (1993). Id. at 119. The Nav-Its Court concluded, "applying the doctrine of reasonable expectations, . . . the common understanding of state regulators was that the 'overriding purpose [of the pollution clause] was to deny coverage to intentional polluters.'" Id. at 121, quoting Morton, 134 N.J. at 77. The Court said that the evidence suggested strongly that the pollution exclusion "was designed to serve the twin purposes of eliminating coverage for gradual environmental degradation, and government-mandated cleanup such as superfund response cost

reimbursement. Nav-Its, 183 N.J. at 122-23. Neither purpose is served by the pollution exclusions in this case.

The Court subsequently found that the purpose of the pollution exclusion clause in "various forms" was "to have a broad exclusion for traditional environmentally related damages." Id. at 123. The Court noted that if read literally, the exclusion "would require its application to all instances of injury or damage to persons or property caused by 'any pollutants arising out of the discharge, dispersal, seepage, migration, release or escape of . . . any solid, liquid, gaseous, or thermal irritant or contaminant, including smoke, vapor, soot, fumes, acids, alkalis, chemicals and waste.'" Id. at 123. Accepting such an interpretation of the pollution exclusion would essentially exclude all pollution hazards except those falling within a limited exception within the selected policy. Ibid. The Court consequently rejected the insurer's interpretation, finding the exclusions overly broad, unfair, and contrary to the objectively reasonable expectations of the New Jersey and other state regulatory authorities that were presented with an opportunity to disapprove the clause. Id. at 123-24, citing Morton, 134 N.J. at 30.

Significantly, the Court observed that it was the insurer's obligation to come forth with compelling evidence that the pollution exclusion clause in the subject case was approved by the Department of Insurance as intended to be read as broadly as the insurance company urged. Id. at 123. And the Court received no such compelling evidence to support that position. Ibid. Nor has this court.

The Appellate Division, in Birch v. Hanover Ins. Co., Docket No. A-2490, 221 N.J. Super, Unpub. Lexis 453, (App. Div. March 19, 2021), is also instructive. The case involved insurance coverage for a home inspection company policy. Id. at 1-2. The home inspector did not raise any problems with the propane tanks' connection to the house's hot water heater in his report. Id. at 1.

The homeowners purchased the house, hired a vendor to replace the propane tank, and the replacement tank subsequently exploded through a leaky valve. Ibid.

The homeowners sought coverage under their policy with Hanover, which contained an exclusion for claims "arising out of or based upon . . . flammable materials." Ibid. Hanover argued that the policy did not cover the property damage claim as it excluded coverage for escape of a "pollutant." Id. at 12.

In addressing the particular exclusion of damages caused by pollutants, the Appellate Division agreed with the plaintiffs that the exclusionary provisions in the professional liability policy did not pertain. Id. at 13. Citing to Nav-Its, the appellate court stated: "The scope of the pollution exclusion should be limited to injury or property damage arising from activity commonly thought of as traditional environmental pollution," thus reflecting "the exclusion's historical objective-avoidance of liability for environmental catastrophe related to intentional industrial pollution." Id. at 13-14.

The same scrutiny is warranted here. In the Zurich and AIG policies, contaminants include: "Any solid, liquid, gaseous, thermal, or other irritant, pollutant, or contaminant, including but not limited to smoke, vapor, soot, fumes, acids, alkalis, chemicals, waste including material to be recycled, reconditioned, or reclaimed, asbestos, ammonia, other hazardous substances, **Fungus** or **Spores**." Contamination includes: "Any condition of property due to the actual presence of any foreign substance, impurity, pollutant, hazardous material, poison, toxin, pathogen or pathogenic organism, bacteria, virus, disease causing or illness causing agent, **Fungus**, mold or mildew." For the most part the contaminants are associated with traditional environmental pollution damages, not reasonably related to the damages in this case, which are derived from a communicable disease.

The Interstate Fire and National Fire pollution exclusion provisions state: "There will be no payment for "loss, damage, cost or expense caused directly or indirectly by . . . the release, migration, discharge, escape or dispersal of Contaminants . . . Contaminants means materials that may be harmful to human health, and include any impurity, pollutant, poison, toxin, pathogen or pathogenic organism, disease-causing or illness-causing agent, asbestos, dioxin, polychlorinated biphenyls, agricultural smoke, agricultural soot, vapor, fumes, acids, alkalis, bacteria, virus, and hazardous substances listed in the Federal Water Pollution control Act, Clean Air Act, Resource Conservation and Recovery Act of 1976, Toxic Substances Control Act, or as designated by the United States Environmental Protection Agency or any other local governmental agency." This provision overwhelmingly refers to environmental and industrial pollution contaminants.

Applying an analysis like that articulated by Justice Wallace in Nav-Its, 183 N.J. at 123, these pollution exclusions are overly broad, unfair, and are without doubt contrary to objectively reasonable expectations of the insured. Inserting the term "virus" in the section defining contamination 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. The insurers, who have the burden to do so, have not presented the court with compelling evidence to show that the pollution exclusion clause in the present case should be construed as broadly as the insurers suggest.

A similar result was reached in JDG Vegas Retail v. Starr Surplus Lines, 2020 Nev. Dist. Lexis 1512, (Eighth Judicial District of the Court of Nevada, Clarke County, Nov. 30, 2020). In JDG, the court was faced with the same issues that are present here. The court was caused to decide whether the pollutant or contaminate exemption in its property insurance policy, which was similar, though not identical, to the exclusions claimed here, was applicable to preclude coverage

for direct physical loss of its property for loss of business as a result of the coronavirus. Id. at 3. And as is the case here, the word "virus, was added to what was otherwise language that the court attributed to pollution caused by traditional environmental and industrial pollution. Id. at 9. The court found that the defense had not demonstrated it would be unreasonable to interpret the pollution and contamination exclusion to apply only to instances of traditional environmental and industrial pollution. Accordingly, the court found that the pollution and contamination exclusion would not exclude the plaintiff's claims. Id. at 11.

New Jersey has a strong public policy that insurance policy coverage provisions are to be read broadly, and exclusions are to be read narrowly. Sosa, 458 N.J. Super at 647. Consistent with that public policy, it is not unreasonable to conclude that pollution exclusions in an all-risk policy that are substantially directed at traditional environmental and industrial damages do not pertain to damages for a virus such as COVID-19, which damages are the result of naturally occurring communicable diseases. Accordingly, the pollution exclusions in this case may not be used to preclude coverage.

That said, one more issue remains to be addressed: whether the National Fire Insurance Biological or Chemical Substance Exclusion bars coverage under that policy. The court finds that it does. The exclusion reads as follows:

> This policy does not provide any coverage for any loss, cost, expense or damage of any nature, however caused, directly or indirectly arising out of, resulting from, or in any way related to the actual or suspected presence or threat of any pathogenic or poisonous biological or chemical substance or material of any kind, including but not limited to, any malicious use of such substance or material, whether isolated or widespread, regardless of any other cause or events contributing at that same time or in any sequence.

This exclusion applies to damages directly or indirectly arising out of, resulting from, or in any way related to actual or suspected presence "of any pathogenic or poisonous biological or

chemical substance, . . . including, but not limited to, any malicious use of such substance." The exclusion is clear and unambiguous. The endorsement, in bold print, indicates that it "changes the policy."

COVID-19 falls within the category of pathogens covered by the endorsement. Pathogenic and biological substances include COVID-19. See 42 USCS 262, Regulation of Biological Products, Subsection (I)(1), (the term biological product includes a virus); Attorney's Dictionary of Medicine, 55d ed. 2021, defining pathogen as to include any microorganism (bacterium) capable of causing disease; the Interim Laboratory Biosafety Guideline for handling and processing specimens associated with Coronavirus disease 2019 (COVID-19) issued by the CDC (updated December 13, 2021) notes, as a key point, that suspected and confirmed SARS-CoV-2 positive clinical specimens, cultures, or isolates should be packed and shipped as [a] Biological Substance.

Counsel for Ocean suggested that this endorsement is to protect the casino against terrorism. Perhaps it could be viewed in that respect. But that would not affect its application to the COVID-19 virus. In all respects the clear focus of this endorsement is on pathogenic contaminants, such as COVID-19. And given that the National Fire's BH-1 endorsement is specifically directed to war risk and terrorism, the reasonable expectations of the insured would be consistent with an understanding that this pathogenic/biological endorsement affects pathogens, not terrorism.

Nor does the subject endorsement contain the language, as that previously discussed, which is derived from environmental or industrial pollution. The language substantially mirrors a virus such as COVID-19. Consequently, the court concludes that the endorsement precludes coverage under the National Fire policy.

Conclusion

In sum, the court denies the R. 4:6-2(e) motion for dismissal of the complaint by American Guarantee and Liability Insurance Company (Zurich policy), AIG Specialty Insurance Company, and Interstate Fire and Casualty Company. The court grants the motion by National Fire and Marine Insurance Company because of the Biological or Chemical Substances Exclusion endorsement and dismisses the complaint as to that carrier.