

## Delaware Superior Court Finds Pollution Exclusion Precludes Coverage for COVID-Related Claims

Leaves Door Open on Whether the Presence of COVID-19 Virions is Direct Physical Loss or Damage

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Relying on the HDI policy's coverage for risks of "direct physical loss or direct physical damage... to covered property while on described premises," APX argued that its business suffered physical loss and/or damage "from the statistically-certain presence of SARS-CoV-2 virions at or near the Insured Properties, and/or the ubiquitous and inevitable presence of SARS-CoV-2 virions throughout the locales and states where the Insured Properties are located, and/or [from] the [government mandated closure] affecting the Insured Properties."

The court concluded that there was no need to address APX's primary contention because the plain language of the HDI policy's Pollution and Contamination Exclusion precluded coverage even under the strict and narrow construction normally applied to policy exclusions. The court refused to accept APX's argument that the pollution exclusion should be limited to "traditional environmental pollution or contamination," because there was no such express limitation to the exclusion in the HDI policy, and the "Policy's express language unambiguously exclude[d] coverage for viruses that cause or threaten damage to human health." In short, the court refused to "contort the Policy's plain terms to avoid the [pollution] exclusion's application."

While this decision left for another day a pronouncement of Delaware law on the hotly debated issue of whether the COVID-19 pandemic caused "direct physical loss or direct physical damage" to property, it did enforce the clear and unambiguous language of the policy's pollution exclusion as applied to COVID-19 "contamination," joining the courts in numerous other jurisdictions that have refused — despite compelling and unprecedented circumstances — to arbitrarily limit unambiguous policy exclusions to find coverage for COVID-19 pandemic-related losses.

This decision has been appealed to the Delaware Supreme Court.

The case is *APX Operating Company, LLC vs. HDI Global Insurance Company*, Superior Court of Delaware, C.A. No. N21C-03-058 AML CCLD. White and Williams LLP was co-counsel for HDI Global Insurance Company in this matter.

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