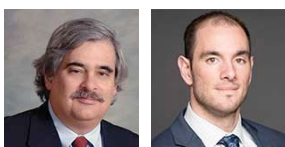


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## New Jersey Alert

# New Jersey State Court Allows Casino to Proceed with its Covid-19 Business Interruption Claims



By **Robert D. Chesler**  
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## *Key points:*

**New Jersey state court holds that an Atlantic City casino can proceed with its COVID-19 business interruption claim**

**Complaint constitutes “fact-based pleadings from which a cause of action that the COVID-19 damaged Ocean’s physical premises may be gleaned.”**

**Contamination exclusion pertains only to traditional environmental pollution**

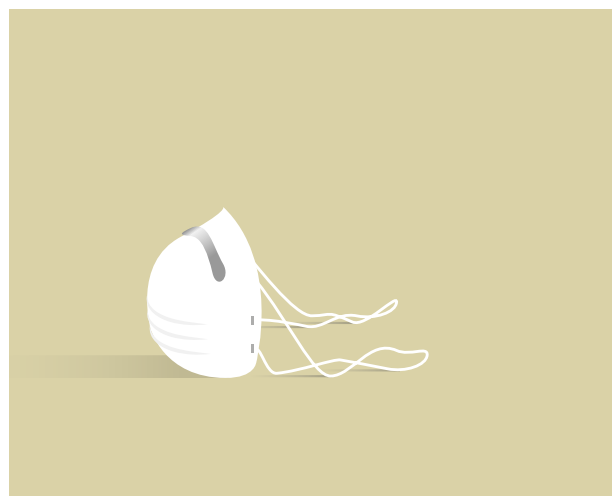
**Policyholders pursuing COVID-19 claims should be mindful of two-year suit limitation clauses**

On December 22, 2021, a New Jersey state court judge held that an Atlantic City casino could proceed with its COVID-19 business interruption claim.

Ocean Casino Resort (“Ocean”) is an Atlantic City-based casino. Like many policyholders, Ocean was forced to suspend or reduce its business operations as a result of the COVID-19 pandemic. Despite purchasing coverage for such losses, Ocean’s insurance companies refused to honor their coverage obligations, prompting Ocean to file suit in the Superior Court of New Jersey, Atlantic County.

On March 3, 2021, Ocean filed a two-count complaint against American Guarantee and Liability Insurance Company (“Zurich”), AIG Specialty Insurance Company (“AIG”), National Fire & Marine Insurance Company (“National Fire”), and Interstate Fire & Casualty Company (“Interstate”) for breach of contract and declaratory judgment.

Through its complaint, Ocean sought coverage under its all-risks commercial property insurance program. Ocean’s insurance policies provide a number of different extensions



of coverage, including for time element (business interruption), civil or military authority, ingress or egress, and communicable disease. Notably, each coverage part is triggered by a “Covered Cause of Loss,” which is defined as “[a]ll risks of direct physical loss of or damage from any cause unless excluded.” Ocean’s policies did not include virus exclusions.

On May 12, 2021, the insurance companies moved to dismiss Ocean’s Complaint, pursuant to Rule 4:6-2(e), alleging the complaint fails to state a claim upon which relief may be granted. In support of their motions, the insurance companies made a number of

arguments. First, the insurance companies argued that to establish coverage, Ocean failed to plausibly allege “physical loss or damage” because, they contended, COVID-19 does not cause physical or structural alteration to property. Second, the insurance companies argued that, even if Ocean could show “physical loss or damage” to property, the “contamination” exclusion bars coverage because the policy’s definition of “contamination” includes “virus.” In addition, National Fire argued that coverage is barred by a “pathogen” exclusion that bars coverage for damages in any way related to pathogenic or poisonous biological or chemical substances.

By Order dated December 22, 2021, the Court denied Zurich’s, AIG’s, and Interstate’s motion, and granted National Fire’s motion. The Court held the allegations in Ocean’s complaint constitute “fact-based pleadings from which a cause of action that the COVID-19 damaged Ocean’s physical premises may be gleaned.” Op. at 7. The Court also held the insuring agreement, which requires “direct physical loss,” may be satisfied if the property becomes unusable for its intended purposes, whether or not the property is altered by COVID-19, and that the policy language is ambiguous.

In analyzing the contamination exclusion, the Court relied on *NavIts, Inc. v. Selective Ins. Co. of America*, 183 N.J. 110 (2005), a New Jersey Supreme Court case, which held that pollution exclusions, like the ones at issue in Ocean, are limited to traditional environmental pollution claims. As such, the Court refused to extend the contamination exclusion beyond the scope of traditional environmental pollution, and held the contamina-

tion exclusion did not bar coverage for Ocean’s losses.

Next, the Court analyzed the pathogen exclusion in the National Fire policy. The Court held that COVID-19 falls within the category of pathogens set forth in National Fire’s policy because pathogenic and biological substances include COVID-19. Accordingly, the Court granted National Fire’s motion to dismiss.

For many policyholders and advocates alike, the *Ocean Casino* case serves as a stark reminder that the fight over COVID-19-related insurance claims is far from over. Many cases are currently pending before the New Jersey Appellate Division and Third Circuit, and will continue to make their way through the court system in 2022. It is also important to note that the Judge that wrote the decision in *Ocean Casino* is a respected, retired appellate judge, sitting in the trial court by designation. It is critical that policyholders keep abreast of these developments, especially as these cases are adjudicated at the appellate level.

In the meantime, policyholders should review their property policies and take the necessary steps to preserve their business interruption claims. A critical step is to ensure the policy’s suit limitation clause has not expired. In most first-party property policies, there are suit limitation clauses that limit the time within which a policyholder may file suit — sometimes within two years from the date of the loss. To the extent a suit limitation has not expired, or time is running out, policyholders should contact their insurance companies and request that the insurance company enter into a tolling agreement.

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A tolling agreement generally pauses the accrual of a claim, meaning that the limitation period will not run while the agreement is in place.

In 2022, Policyholders should be encouraged by the *Ocean Casino* case, as it is the third New Jersey case that has allowed policyholders to proceed with their COVID-19-related business interruption claims. ▲

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