EFiled: Mar 29 2022 04:34PM EDT
Filing ID 67433658
Case Number 393,2021

IN THE SUPREME COURT FOR THE STATE OF DELAWARE

APX OPERATING COMPANY, LLC, Plaintiff-Below/Appellant, v. HDI GLOBAL INSURANCE COMPANY, Defendant-Below/Appellee.	No. 393, 2021 On Appeal from the Superior Court of the State of Delaware C.A. No. N21C-03-058 AML CCLD

OPENING BRIEF OF PLAINTIFF-BELOW, APPELLANT APX OPERATING COMPANY, LLC

Dated: March 29, 2022

OF COUNSEL:

John N. Ellison
REED SMITH LLP
Three Logan Square
1717 Arch Street, Suite 3100
Philadelphia, PA 19103
(215) 851-8100

REED SMITH LLP
Brian M. Rostocki (No. 4599)
Benjamin J. Chapple (No. 5871)
1201 N. Market Street, Suite 1500
Wilmington, DE 19801
(302) 778-7500

Counsel for APX Operating Company, LLC

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Cases **Page(s)**

NATURE OF PROCEEDINGS

Plaintiff APX Operating Company, LLC ("APX") appeals from the memorandum opinion and order of the Delaware Superior Court, dated November 18, 2021, granting Defendant HDI Global Insurance Company's ("HDI") Motion To Dismiss APX's Complaint.

APX's Complaint asserts claims for declaratory judgment and breach of contract arising out of HDI's refusal to cover APX's pandemic-related business interruption losses under the terms and conditions of an "all risk" property insurance policy sold by HDI (the "Policy"). The Superior Court granted HDI's Motion To Dismiss based on the court's finding that HDI met its burden to demonstrate that the Policy's Pollution and Contamination Exclusion applied to preclude coverage for APX's losses. APX filed its Notice of Appeal in this matter on December 14, 2022.

In this appeal, APX challenges the Superior Court's interpretation of the Pollution and Contamination Exclusion.

SUMMARY OF ARGUMENT

1. This appeal presents a narrow issue of insurance policy construction, reviewed *de novo* by this Court. The trial court adopted an expansive construction of a policy exclusion to deprive APX of the potential coverage for business interruption claims that followed from the COVID-19 pandemic.[1] That broad construction, however, contravenes settled Delaware law and should be reversed.[2]

2. The relevant exclusion construed by the trial court, referred to as the "Pollution and Contamination Exclusion," included the word "virus," which the trial court applied to all of APX's pandemic-related business interruption losses. In so doing, the Superior Court erroneously considered the inclusion of the word "virus" in the definition of "Pollution and/or Contamination" in isolation, without properly reading the definition as a whole or adequately considering the portions of the definition that clearly limit "virus" to the context of traditional environmental pollution and/or contamination.[3]

3. The Superior Court's broad construction of the Policy's Pollution and Contamination Exclusion impermissibly eliminates coverage otherwise reasonably

[1] *See* Memorandum Opinion and Order at 14-17, attached hereto as Exhibit 1.
[2] *See RSUI Indem. Co. v. Murdock*, 248 A.3d 887, 906 (Del. 2021).
[3] *See* Ex. 1 at 14-17; *Alstrin v. St. Paul Mercury Ins. Co.*, 179 F. Supp. 2d 376, 388-89 (D. Del. 2002) (applying Delaware and Illinois law).

expected by a policyholder, and renders other policy provisions superfluous. None of this comports with Delaware law.[4]

4. For its part, APX has presented a reasonable interpretation of the Pollution and Contamination Exclusion that harmonizes it with all of the terms in the Policy, and provides for coverage. That result, in turn, comports with Delaware law.[5]

5. APX's interpretation of the Pollution and Contamination Exclusion has also been confirmed as reasonable by other courts in the COVID-19 context.[6]

6. The cases relied on by the trial court in rejecting APX's interpretation of the relevant exclusion are inapposite, and do not render APX's interpretation unreasonable.[7]

7. APX's reasonable construction of the exclusion should control under Delaware law, and the exclusion should not be construed to preclude coverage under the Policy for COVID-19-related losses.[8]

---

[4] *See Murdock*, 248 A.3d at 906; *Alstrin*, 179 F. Supp. 2d at 399.
[5] *See* A361-A363; A451-A457; *Alstrin*, 179 F. Supp. 2d at 388-89; *New Castle County v. Hartford Accident & Indem. Co.*, 970 F.2d 1267, 1271 (3d Cir. 1992) (applying Delaware law).
[6] *See JGB Vegas Retail Lessee v. Starr Surplus Lines Co.*, 2020 Nev. Dist. LEXIS 1512, at *7-8 (Nev. Dist. Ct. Nov. 30, 2020); *Urogynecology Specialist of Florida LLC v. Sentinel Ins. Co.*, 2020 WL 5939172, at *4 (M.D. Fla. Sept. 24, 2020).
[7] *See, e.g.*, *Circus Circus LV, LP v. AIG Specialty Ins. Co.*, 2021 WL 769660, at *6 (D. Nev. Feb. 26, 2021).
[8] *See Monzo v. Nationwide Prop. & Cas. Ins. Co.*, 249 A.3d 106, 118 (Del. 2021).

STATEMENT OF FACTS

A. The Parties

APX is a Delaware limited liability company.[9] Through its wholly-owned subsidiaries, APX operates six family entertainment centers and two water parks, which are located in California, Florida, and New Jersey (the "Insured Properties").[10]

HDI is an insurance company licensed to do business in the State of Delaware.[11] HDI sold the "all risk" property insurance Policy to Apex Parks Group, LLC ("Apex Parks").[12] APX subsequently acquired rights to payment under the Policy as part of APX's purchase of certain assets of Apex Parks.[13]

B. The Policy

The Policy covers the policy period May 8, 2019 to May 8, 2020 and insures the eight Insured Properties at issue in this action.[14] The Policy insures "risks of direct physical loss or direct physical damage, except as excluded, to Insured covered property while on described premises."[15] The Policy also insures "TIME ELEMENT loss," as provided in "TIME ELEMENT COVERAGES," including, in relevant part, "GROSS EARNINGS," "EXTRA EXPENSE," and "CIVIL OR

[9] A11, ¶ 9.
[10] A13, ¶¶ 21-23.
[11] A12, ¶ 16.
[12] A16, ¶ 31.
[13] A15, ¶¶ 28-30.
[14] A13-A14, ¶¶ 21-23; A16, ¶ 31; A119.
[15] A57 ("INSURING CLAUSE").

MILITARY AUTHORITY."[16] The "GROSS EARNINGS" and "EXTRA EXPENSE" coverages protect against loss of earnings and loss relating to extra costs incurred to "temporarily continue as nearly normal as practicable" the business "directly resulting from direct physical loss or damage of the type insured."[17] The "CIVIL OR MILITARY AUTHORITY" coverage protects against lost earnings and extra expenses if an order of civil or military authority prohibits access to an insured location.[18]

The Policy's exclusions include one referred to by the trial court as the "Pollution and Contamination Exclusion": "This Policy excludes the following unless directly resulting from other physical damage not excluded by this Policy: 1) contamination including but not limited to the presence of pollution or hazardous material."[19] The Policy sets out the following definition relevant to this exclusion:

> **Pollution and/or Contamination**
>
> The terms pollution and/or contamination shall mean the presence of any material which after its release or discharge can cause or threaten damage to human health and/or human welfare, or causes or threatens damage, deterioration, loss of value, marketability and/or loss of use to insured property, including, but not limited to, bacteria, virus, or hazardous substances as listed in the Federal Water Pollution Control Act, Clean Air Act, Resource Conservation and Recovery Act of 1976,

[16] A84-A85; A87; A93; A95.
[17] *See* A84-85; A87.
[18] *See* A95. APX includes the coverage grants here as background, but notes that the sole basis for the Superior Court's ruling was the Policy's Pollution and Contamination Exclusion. *See* Ex. 1 at 14-19.
[19] A80; A82 (paragraph D.1).

> and/or Toxic Substances Control Act, or as designated by the US Environmental Protection Agency or, local equivalent environmental agency.[20]

C. APX's Losses and HDI's Coverage Denial

Beginning in early 2020, APX's Insured Properties were severely and adversely impacted by the COVID-19 pandemic.[21] SARS-CoV-2 virions were present at or near the Insured Properties, including on surfaces and the air inside those locations.[22] Because of the danger posed by the SARS-CoV-2 virions, government orders mandated shutdowns of and/or operating limitations at the Insured Properties.[23] As a result, APX suffered a significant loss of earnings and incurred Extra Expense.[24] APX therefore made a claim under the Time Element coverages of the Policy.[25] HDI refused to pay the claim and this lawsuit followed.[26]

---

[20] A69. The Policy also includes a definition for "Pollutant(s) and/or Contaminant(s) and/or Hazardous Material(s)," which was not relied upon by the Superior Court. That definition states: "The term pollutant(s), contaminant(s), hazardous material(s) shall mean any solid, liquid, gaseous or thermal irritant or contaminant, including, but not limited to, smoke, vapor, soot, fumes, acids, alkalis, chemicals, bacteria, virus, vaccines and waste. Waste includes materials to be recycled, reconditioned or reclaimed." *Id.*

[21] *See* A28-A35, ¶¶ 73-102, 107-108; A37, ¶¶ 113-114; A38-A39, ¶ 120.

[22] *See* A35-A36, ¶ 110.

[23] *See* A28-A35, ¶¶ 73-102, 107-108.

[24] *See* A37, ¶¶ 113-114.

[25] *See* A8, ¶ 2; A40, ¶ 126.

[26] *See* A8-A9, ¶¶ 2-4; A40-A41, ¶ 127.

D. Relevant Procedural History

On May 28, 2021, HDI filed a motion to dismiss APX's Complaint raising multiple arguments relating to the absence of coverage and based on several Policy exclusions.[27] The parties' briefing focused primarily on whether APX adequately alleged "physical loss or damage" to trigger coverage under the Policy. Nevertheless, the trial court granted this motion solely on the basis of the Pollution and Contamination Exclusion.[28]

Specifically, the trial court looked to the Policy's definition of "Pollution and/or Contamination" and found that "[t]he Policy's express language unambiguously excludes coverage for viruses that cause or threaten damage to human health."[29] The court then determined that the Policy's plain language excludes APX's claim because "[t]he Complaint alleges that APX's losses resulted '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 the above-referenced civil authority orders or other applicable civil authority orders affecting the Insured Properties."[30]

---

[27] *See* A126-A319.
[28] *See* Ex. 1 at 14.
[29] *Id.* at 15.
[30] *Id.*

In reaching its determination, the court rejected APX's contention that the Pollution and Contamination Exclusion is limited to traditional environmental pollution or contamination. First, the court found that "[n]o such limitation appears in the Policy."[31] Second, while the court acknowledged that the Policy references substances listed in environmental statutes and regulations, it stated that the Policy "expressly states that 'pollution and/or contamination . . . include[s] but **[is] not limited to**' those substances."[32] Third, the court rejected that the Policy's use of the words "release" or "discharge" carried an environmental connotation, reasoning that the plain meaning of both words, according to Merriam-Webster dictionary, "encompasses the spread or emission of a substance in a general sense, not specifically an environmental one."[33] Fourth, the court found that "the Policy contains no language suggesting, as APX argues, that 'virus' should be interpreted as referring merely to a 'form[] of medical waste, which may also cause environmental pollution or contamination if not properly disposed.'"[34] The court concluded that "no reasonable interpretation of the Pollution and Contamination Exclusion would permit the conclusion that COVID-19 is not a 'virus,'" that the

[31] *Id.* at 16.
[32] *Id.*
[33] *Id.*
[34] *Id.*

exclusion is "unambiguous," and that HDI met its burden of showing that APX's claim falls within it.[35]

[35] *Id.* at 16-17, 19.

ARGUMENT

A. Question Presented

Whether the Superior Court erred as a matter of law by concluding that HDI satisfied its burden of proving on a motion to dismiss that the Policy's Pollution and Contamination Exclusion applied to preclude coverage for APX's pandemic-related business interruption losses.[36]

B. Scope of Review

The insurance policy interpretation question at the heart of this appeal is a question of law subject to *de novo* review.[37] The scope of this Court's review is plenary.[38]

Further, in reviewing the granting of a motion to dismiss, this Court applies the same legal standard as the trial court.[39] In that regard, it is well-established that "[t]he pleading standards governing the motion to dismiss stage of a proceeding in Delaware . . . are minimal."[40] When considering such motions, the court "should accept all well-pleaded factual allegations in the Complaint as true, accept even vague allegations in the Complaint as 'well-pleaded' if they provide the defendant notice of the claim, draw all reasonable inferences in favor of the plaintiff, and deny

---

[36] *See* A361-A365; A451-A457.
[37] *See O'Brien v. Progressive N. Ins. Co.*, 785 A.2d 281, 286 (Del. 2001).
[38] *Id.*; *Pierce v. International Ins. Co.*, 671 A.2d 1361, 1363-64 (Del. 1996).
[39] *Page v. Oath Inc.*, 2022 Del. LEXIS 20, at *14 (Del. Jan. 19, 2022).
[40] *Cent. Mortg. Co. v. Morgan Stanley Mortg. Capital Holdings LLC*, 27 A.3d 531, 536 (Del. 2011).

the motion unless the plaintiff could not recover under any reasonably conceivable set of circumstances susceptible of proof."[41]

C. Merits of Argument

1. Delaware Law Requires that Policy Provisions Be Read in the Context of the Policy as a Whole, and that Policy Exclusions Be Given a Strict and Narrow Interpretation To Ensure They Do Not Eviscerate Coverage Otherwise Reasonably Expected by the Insured.

The principles of insurance policy construction that control in this appeal are well-settled. Under Delaware law, "insurance contracts should be interpreted as providing broad coverage to align with the insured's reasonable expectations."[42] To this end, courts are to interpret policy exclusions "with a strict and narrow construction . . . [and] give effect to such exclusionary language [only] where it is found to be 'specific,' 'clear,' 'plain,' 'conspicuous,' and 'not contrary to public policy.'"[43] Further, Delaware courts do not construe exclusions in a manner which eviscerates most or all of the coverage reasonably expected by an insured.[44]

Moreover, exclusions are construed in light of the policy as a whole, with the view that "all provisions should be given meaning and the policy should not be

---

[41] *Id*.
[42] *RSUI Indem. Co. v. Murdock*, 248 A.3d 887, 906 (Del. 2021).
[43] *Id.* (internal quotations omitted).
[44] *See, e.g.*, *Alstrin v. St. Paul Mercury Ins. Co.*, 179 F. Supp. 2d 376, 399 (D. Del. 2002) (applying Delaware and Illinois law) (refusing to apply exclusion to securities coverage at issue where it would eviscerate coverage for the majority of securities claims).

interpreted to render any part superfluous."[45] "[A] word or a term cannot be considered in isolation; it must be read in the semantic and functional context of the policy or clause at issue."[46]

In the event an exclusion is found to be ambiguous, it must be strictly construed against the insurance company and in favor of coverage.[47] In other words, "if there is more than one reasonable interpretation of an insurance policy, Delaware courts apply the interpretation that favors coverage."[48] Contract language, in turn, is ambiguous if it is reasonably "susceptible of different interpretations or may have two or more different meanings."[49]

Application of these principles to the language of the Pollution and Contamination Exclusion in HDI's Policy leads to a reasonable construction that permits coverage on this record and establishes that the trial court's ruling to the contrary should be reversed.

---

[45] *Id.* at 388-89 (applying Delaware and Illinois law).
[46] *New Castle County v. Hartford Accident & Indem. Co.*, 970 F.2d 1267, 1271 (3d Cir. 1992) (applying Delaware law).
[47] *Monzo v. Nationwide Prop. & Cas. Ins. Co.*, 249 A.3d 106, 118 (Del. 2021).
[48] *Id.*
[49] *Id.*

2. The Trial Court's Interpretation of the Policy's Pollution and Contamination Exclusion Violates Settled Insurance Policy Construction Principles.

Here, despite acknowledging that it was required to give a "strict and narrow construction" to the Pollution and Contamination Exclusion,[50] the trial court read the exclusion broadly, drawing every inference against the potential for coverage and in a manner that is inconsistent with the provisions of the Policy read as a whole. Delaware law does not support that construction.

a. The Trial Court Construed the Word "Virus" Without Due Regard for the Language of the Policy as a Whole and the Need to Construe Exclusionary Language Narrowly.

The trial court's erroneous construction started with its reading of the word "virus," as contained in the definition of "Pollution and/or Contamination." In particular, the court extracted the word and read it in isolation without adequately considering the portions of the definition that immediately follow. That following language, however, clearly and necessarily limits "virus" to the context of traditional environmental pollution or contamination.

Thus, as previously set forth, the Policy excludes "contamination including but not limited to the presence of pollution or hazardous material,"[51] and defines "Pollution and/or Contamination" to mean:

---

[50] *See* Ex. 1 at 14.
[51] A82.

> the presence of any material which after its release or discharge can cause or threaten damage to human health and/or human welfare, or causes or threatens damage, deterioration, loss of value, marketability and/or loss of use to insured property, including, but not limited to, bacteria, virus, or hazardous substances as listed in the Federal Water Pollution Control Act, Clean Air Act, Resource Conservation and Recovery Act of 1976, and/or Toxic Substances Control Act, or as designated by the US Environmental Protection Agency or, local equivalent environmental agency.[52]

The Policy's inclusion of the phrases "as listed in" and "as designated by" in the definition of Pollution and/or Contamination, coupled with its immediate reference to certain environmental laws and agencies, demonstrates an intent to restrict the definition and the exclusion to viruses (and bacteria and hazardous substances) that can cause environmental contamination or pollution, and not to viruses (or bacteria) that can cause pandemics or epidemics.

Indeed, by connecting the term "virus" to environmental laws, the Policy sets out a touch point for how the term "virus" was meant to be interpreted. If the intent was to broadly include **any** "bacteria, virus, or hazardous substances," then there would have been no need to include the subsequent limiting language. The definition would have just stopped after "bacteria, virus, or hazardous substance." The trial court's truncated interpretation impermissibly renders meaningless nearly half of the definition, and employs a broad, rather than narrow, reading of exclusionary language. That result contravenes Delaware law.

[52] A69.

The Superior Court's explanation that the Policy states that "pollution and/or contamination . . . include[s], but **[is] not limited to**" substances listed in the identified environmental laws does not alter the fact that its interpretation was improper.[53] While the Policy notes substances listed in the enumerated environmental laws or as designated by federal or local environmental agencies as an example of "pollution and/or contamination," that language must still be credited and given meaning.[54] Here, the example informs the scope of the definition and sets forth a limiting principle for the incredibly broad language initially used. Without limiting "pollution and/or contamination" to a traditional environmental law context, the phrase could easily be interpreted in a manner that leads to absurd results, as described in greater detail below.

Additionally, contrary to the trial court's intimation, the inclusion of the "but not limited to" language does not mean that substances ***outside*** of the traditional environmental law context were intended to be deemed "pollution and/or contamination." Rather, the "but not limited to" language leaves open the inclusion of any pollution-creating substances regulated by ***other*** environmental laws beyond those specifically enumerated, including state or federal environmental laws besides those listed.

---

[53] *See* Ex. 1 at 16 (emphasis in original).
[54] *See Alstrin*, 179 F. Supp. 2d at 388-89.

The definition's use of the environmental terms of art "release" and "discharge" further demonstrates the Policy's intent to limit the Pollution and Contamination Exclusion to typical environmental pollution or contamination. While the trial court employed ordinary dictionary definitions to construe these terms,[55] that was not appropriate in this instance. Delaware law requires that terms of art be given their technical meaning.[56] The terms "release" and "discharge," used in the definition of "Pollution and/or Contamination," are well-known environmental terms.[57] As such, "Pollution and/or Contamination" should be reasonably construed within the context of that environmental connotation. Once these terms are considered in their appropriate context, it becomes even clearer that

---

[55] *See* Ex. 1 at 16.

[56] *See Penton Bus. Media Holdings, LLC v. Informa PLC*, 252 A.3d 445, 461 (Del. Ch. 2018) (setting forth contract interpretation principles under Delaware law and stating that, "[w]here a word has attained the status of a term of art and is used in a technical context, the technical meaning is preferred over the common or ordinary meaning").

[57] *See Roofers' Joint Training, Apprentice & Educ. Comm. v. Gen. Acc. Ins. Co. of Am.*, 275 A.D.2d 90, 92 (N.Y. App. Div. 2002) (concluding that the terms "discharge" and "dispersal" used in the pollution exclusion at issue "are terms of art in environmental law with reference to damage or injury caused by disposal or containment of hazardous waste") (internal quotation mark omitted); *see also MacKinnon v. Truck Ins. Exch.*, 73 P.3d 1205, 1216 (Cal. 2003) ("[T]hese terms, used in conjunction with 'pollutant,' commonly refer to the sort of conventional environmental pollution at which the pollution exclusion was primarily targeted."); *Motorists Mut. Ins. Co. v. RSJ, Inc.*, 926 S.W.2d 679, 681 (Ky. Ct. App. 1996) ("The drafters' utilization of environmental law terms of art ('discharge,' 'dispersal,' 'seepage,' 'migration,' 'release,' or 'escape' of pollutants) reflects the exclusion's historical objective avoidance of liability for environmental catastrophes related to intentional industrial pollution.").

the Pollution and Contamination Exclusion excludes only viruses that can cause traditional environmental contamination or pollution.

Similarly, while not referenced by the trial court, the Policy's definition of "Pollutant(s) and/or Contaminant(s) and/or Hazardous Material(s)" also makes clear that the Pollution and Contamination Exclusion was meant to exclude viruses only in the context of traditional environmental pollution/contamination. The definition references a list of "irritant[s] or contaminant[s]" that are either products of or used in industrial production (whether manufacturing, agricultural, or otherwise) or by-products or risks of such production, which may cause environmental pollution or contamination.[58] For instance, industrial agriculture involves risks of bacterial or viral contamination of waterways via livestock, and may involve considerations of proper disposal of vaccines administered to livestock. Further, the latter identified "contaminant[s]"—bacteria, virus, vaccines and waste—can also be forms of medical waste, which may also cause environmental pollution or contamination if not properly disposed. Reading the provision in the context of the Policy's related definition for "Pollution and/or Contamination," which necessarily informs the intent of this definition as well, and in considering each of the terms surrounding "virus" in this definition, it is clear that SARS-CoV-2 was not intended to be excluded under the Policy. Indeed, SARS-CoV-2 does not cause traditional

[58] *See* A69.

pollution, nor does it fall within the same categories as the specific irritants or contaminants enumerated in that definition.

The intent to limit the Pollution and Contamination Exclusion to traditional environmental pollution is still further illustrated through the placement of the pollution-related definitions in the section of the Policy that relates to coverage for Debris Removal. This location, too, underscores the historical connection of such exclusions to an environmental context.[59] Indeed, much of the phraseology used in the Policy's pollution-related definitions derives from pollution exclusions historically designed to exclude coverage for activities that a normal person would understand as creating environmental pollution.[60] Removal of contaminated debris is exactly the type of thing that a historical pollution exclusion would have been directed at excluding coverage for in the liability context. Thus, when considering the context of the definitions' placement in the Policy and historical underpinnings, as well as the "Pollution and/or Contamination" definition's express reference to environmental laws and use of environmental terms of art, it is eminently reasonable to construe the exclusion as limited to traditional environmental pollution. The trial court's failure to adopt this reasonable contractual construction that favored coverage was error.

---

[59] *See id.*

[60] *See, e.g.*, *RSJ, Inc.*, 926 S.W.2d at 680-81.

Moreover, had HDI intended to exclude coverage for losses from ***any*** virus, without regard to whether the virus was capable of causing environmental contamination or pollution, the mechanisms by which it tried to do so are needlessly Byzantine. Rather than cloak its intent through the use of an environmental pollution exclusion, HDI could and should have used a standard-form virus exclusion.[61] Such exclusions were in wide commercial use at the time HDI sold the Policy. Such virus exclusions exclude all loss or damage caused by ***any virus***, without reference to environmental laws or agencies, or employing other environmental language of limitation like HDI used in the Policy. Likewise, had HDI intended to exclude coverage for losses from an epidemic or pandemic, then HDI could have utilized an exclusion expressly precluding coverage for those events. HDI did not use either of those exclusions, but rather chose to include a Pollution and Contamination Exclusion that ties a virus to environmental laws. HDI's choice demonstrates its intent for the Pollution and Contamination Exclusion was that it ***not*** have the same broad application to viruses as standard-form virus exclusions or pandemic exclusions.

[61] For instance, a standard virus exclusion was at issue in *AFM Mattress Co., LLC v. Motorists Commercial Mutual Insurance Co.*, 2020 WL 6940984 (N.D. Ill. Nov. 25, 2020), which HDI cited in its Opening Brief in Support of its Motion To Dismiss. *See* A165 n.70. That virus exclusion provides, in relevant part, that the insurance company "will not pay for loss or damage caused by or resulting from ***any virus***, bacterium or other microorganism that induces or is capable of inducing physical distress, illness or disease." 2020 WL 6940984 at *2 (emphasis added).

b. The Trial Court's Broad Construction of the Exclusion To Deny Coverage Leads To Absurd Results.

Under Delaware law, a construction that leads to absurd results when the Policy is read in its entirety should also be avoided. Yet, the trial court's construction engenders those results in this case. In that regard, the trial court erred by focusing on the fact that the definition of "Pollution and/or Contamination" includes material that can "cause or threaten damage to human health," without recognizing that this phrase—as well as the other phrase in the definition, "cause[] or threaten[] damage, [and/or] loss of value . . . to insured property"—are extremely broad and would swallow up coverage otherwise reasonably expected by a policyholder if not narrowly construed as required by Delaware law. For example, under the trial court's expansive interpretation, virtually any substance or object in the world could be considered "Pollution" or "Contamination," including risks that are clearly covered by "all risk" property insurance policies such as the Policy.

Specifically, the term "Flood" is defined in the Policy with reference to water.[62] Water is certainly a "material" which can "cause or threaten damage to human health" or "cause[] or threaten[] damage . . . to insured property." People can drown in water, and water can cause significant damage to property. Nevertheless, under the trial court's broad interpretation, water would qualify as "Pollution and/or

[62] *See* A73.

Contamination" and damage from a Flood would be excluded under the Policy. This result is untenable.[63] It eviscerates the Policy's specific grant of coverage.

Hail during a hurricane or tropical storm also would be considered "Pollution" or "Contamination" under the trial court's reading, since "hail" is a "material" that may be "released" (in a non-environmental law context) from the sky during a storm and "can cause or threaten damage to human health" or property. In addition, despite the fact that the Policy also expressly covers damage caused by "any material, object or debris that is carried, propelled or in any manner moved by a named windstorm,"[64] such material, object or debris can "cause or threaten damage to human health" or property, and thus would actually qualify as "Pollution" or "Contamination" under the court's interpretation. In short, the trial court's construction extends the Pollution and Contamination Exclusion to key components of the Policy's coverage for Named Windstorms, reading that coverage out of the Policy as well. Delaware law does not countenance this entirely unreasonable result either.

The trial court's interpretation leads to a further evisceration of coverage in circumstances that involve no contamination or pollution as understood by a reasonable person. Consider falling meteor debris or falling objects from an aircraft.

[63] *See Alstrin*, 179 F. Supp. 2d at 388-89, 399.
[64] *See* A62.

Certainly these would be "materials" that are "released or discharged" (in a non-environmental law context) and "can cause or threaten damage to human health" or property. A bullet that is "discharged" from a gun threatens human health or could damage property. Even the "release" of a toy drone by a child in a nearby park that errantly crashes through a window causes damage to property. Each of these risks would be excluded as "Contamination" or "Pollution" under the court's interpretation. Surely these absurd results were not intended by the parties to this "all risk" Policy, and do not "align with the insured's reasonable expectations."[65] As these examples illustrate, a narrow interpretation of the Pollution and Contamination Exclusion is called for in order to ensure that coverage under the Policy is properly preserved.[66] The trial court's broad construction, however, conflicts with this limiting principle as well.

---

[65] *See Murdock*, 248 A.3d at 906.

[66] While not relied upon by the Superior Court, the Policy's definition of "Pollutant(s) and/or Contaminant(s) and/or Hazardous Material(s)" is similarly overbroad and would lead to the evisceration of coverage if not narrowly interpreted, as required by Delaware law. The Policy provides that: "The term pollutant(s), contaminant(s), hazardous material(s) shall mean any solid, liquid, gaseous or thermal irritant or contaminant, including, but not limited to, smoke, vapor, soot, fumes, acids, alkalis, chemicals, bacteria, virus, vaccines and waste. Waste includes materials to be recycled, reconditioned or reclaimed." A69. For the same reasons discussed above, water, hail or debris from a windstorm, falling objects from meteors/aircrafts, a bullet, a toy drone, and many other items and substances would, in the absence of some limiting principle, qualify as solid or liquid "irritants" as they could each irritate or damage some person or property. Even fire, one of the quintessential risks covered by all-risk property insurance policies, would arguably qualify as a "thermal irritant" and be excluded if the policy language is not strictly

c. The Trial Court's Construction of the Pollution and Contamination Exclusion Impermissibly Renders Superfluous Other Policy Provisions.

The trial court also erred by failing to recognize that its expansive interpretation of the Pollution and Contamination Exclusion renders other portions of the Policy superfluous, which also is contrary to Delaware law. For example, the exclusion for loss caused by radioactive contamination would be superfluous under the court's reading because "radioactive contamination" would fall within the broad ambit of "Pollution and/or Contamination" as the "release" of radioactive "material" certainly "can cause or threaten damage to human health" or property.[67] Additionally, the court's ruling renders at least portions of the exclusion for "accumulated effects of smog, smoke, vapor, liquid or dust" superfluous.[68] Liquid and dust are "materials" that "can cause or threaten damage to human health" or property. Yet, under the Superior Court's reading, the presence of these materials would already be excluded by the Pollution and Contamination Exclusion, making the remaining exclusions redundant. Delaware law does not permit that result either.

---

interpreted. Failing to construe the language narrowly would lead to absurd results by swallowing up a significant portion of the coverage reasonably expected by an insured and expressly provided for in the Policy.

[67] *See* A80-A81 (paragraph B.1).

[68] *See* A82 (paragraph C.8).

3. APX's Reading of the Pollution and Contamination Exclusion Is Reasonable.

a. APX's Interpretation Narrowly Construing the Word "Virus" as Used in the Pollution and Contamination Exclusion Is Reasonable.

For its part, APX has presented a reasonable interpretation of the Pollution and Contamination Exclusion that limits the exclusion to incidents of traditional environmental pollution.[69] Under this interpretation, SARS-CoV-2 would not be considered contamination or pollution within the exclusion and, therefore, APX could be afforded an opportunity to prove its covered losses.

The trial court nevertheless found that "no reasonable interpretation of the Pollution and Contamination Exclusion would permit the conclusion that COVID-19 is not a 'virus'."[70] However, that is not the argument that APX made or is making. APX maintains (for the reasons set forth above) that the exclusion should be limited to traditional environmental pollution, which would include viruses that can cause such pollution or contamination. APX also provided examples of risks of viral contamination in the environmental context, including risks involved in industrial agriculture (such as viral contamination of waterways via livestock waste or

[69] *See* A361-A363; A451-A457.

[70] Ex. 1 at 16-17.

improper disposal of vaccines administered to livestock) as well as risks relating to the disposal of medical waste, to substantiate the reasonableness of its construction.[71]

APX's interpretation gives meaning to all parts of the Policy, while also construing the Pollution and Contamination Exclusion in a manner that does not lead to absurd results. That is the preferred construction in this context under Delaware law.

b. Other Courts Have Confirmed APX's Reading of the Pollution and Contamination Exclusion Is Reasonable.

The reasonableness of APX's construction is substantiated by the reasoning of courts that have adopted it. For instance, in *JGB Vegas Retail Lessee v. Starr Surplus Lines Co.*, a state court addressed a Pollution and Contamination Exclusion that, in relevant part, precluded coverage for "contamination" and the release or discharge of pollutants.[72] Similar to the Policy here, the *JGB* policy defined pollutants or contaminants through reference to environmental laws and agencies.[73] The court denied the insurance company's motion to dismiss, holding that the Pollution and Contamination Exclusion did ***not*** exclude coverage for the policyholder's COVID-19-related claims.[74] The court reasoned that, "even though

[71] A362-363.
[72] 2020 Nev. Dist. LEXIS 1512, at *7-8 (Nev. Dist. Ct. Nov. 30, 2020).
[73] *Id.* at *8.
[74] *Id.* at *10.

the Exclusion contains the word 'virus,'" the insurance company has "not shown that it is unreasonable to interpret the Pollution and Contamination Exclusion to apply only to instances of traditional environmental and industrial pollution and contamination that is not at issue here."[75]

In addition, in *Urogynecology Specialist of Florida LLC v. Sentinel Insurance Co.*, a federal district court refused to dismiss a COVID-19-related complaint on the basis of a virus exclusion, which listed "fungi, wet rot, dry rot, bacteria or virus," because "[d]enying coverage for losses stemming from COVID-19 does not logically align with the grouping of the virus exclusion with other pollutants such that the Policy necessarily anticipated and intended to deny coverage for these kinds of business losses."[76]

These cases confirm that there are competing constructions for the exclusionary language at issue, leading to an ambiguity that must be construed in APX's favor.[77]

[75] *Id.* at *9.
[76] 2020 WL 5939172, at *4 (M.D. Fla. Sept. 24, 2020).
[77] *See Monzo*, 249 A.3d at 118.

c. The Cases the Superior Court Relied upon Are Inapposite, and Do Not Render APX's Interpretation Unreasonable.

Further, the cases the trial court relied on in dismissing APX's interpretation do not render APX's interpretation unreasonable.[78] The exclusions in those cases have critical distinctions in language from the exclusion at issue here. The first case considers a broader Contamination Exclusion, with "contamination" defined ***without*** expressly tying a "virus" to environmental laws or agencies or using environmental liability terms of art, as in APX's Policy.[79] The second case also considers a broader pollutants-or-contaminants exclusion that does not expressly tie "virus" to environmental laws or agencies.[80] Thus, these cases do not support application of the exclusion in this case to APX's SARS-CoV-2-related loss.

d. Because APX Has Set Forth a Reasonable Interpretation of the Pollution and Contamination Exclusion, That Interpretation Controls.

Even if HDI's broad interpretation of the Pollution and Contamination Exclusion is determined to be reasonable, that does not compel rejection of APX's narrower construction. For the reasons noted, APX's construction is a reasonable

---

[78] *See* Ex. 1 at 17 n.77.

[79] *Ascent Hosp. Mgmt. Co., LLC v. Emps. Ins. Co. of Wausau*, 2021 WL 1791490, at 5 (N.D. Ala. May 5, 2021), *aff'd on other grounds at* 2022 U.S. App. LEXIS 1161 (11th Cir. Jan. 14, 2022).

[80] *Circus Circus LV, LP v. AIG Specialty Ins. Co.*, 2021 WL 769660, at *6 (D. Nev. Feb. 26, 2021).

one and it should control. In particular, under Delaware law, APX need not provide the only reasonable interpretation of the exclusion, but simply **a** reasonable one. APX has done so and this Court should reverse for this fundamental reason.[81]

[81] While the only issue before this Court is the Policy's Pollution and Contamination Exclusion, APX notes that it adequately alleged that its loss falls within several of the Policy's coverage grants and that HDI has also not shown that the Policy's "Loss of Use" Exclusion bars coverage, for all of the reasons set forth in the briefing and argument below. *See* A333-A361; A366-37; A430-450; A457-459.

CONCLUSION

This Court should reverse the trial court's ruling granting HDI's motion to dismiss, and remand this case for further proceedings.

REED SMITH LLP

/s/ Benjamin P. Chapple
Brian M. Rostocki (No. 4599)
Benjamin J. Chapple (No. 5871)
1201 N. Market Street, Suite 1500
Wilmington, DE 19801
(302) 778-7500

Counsel for APX Operating Company, LLC

OF COUNSEL:

John N. Ellison
REED SMITH LLP
Three Logan Square
1717 Arch Street, Suite 3100
Philadelphia, PA 19103
(215) 851-8100