

CIVIL DISTRICT COURT FOR THE PARISH OF ORLEANS

STATE OF LOUISIANA

NO.: 2020-02558

DIVISION "M"

SECTION 13

CAJUN CONTI LLC, CAJUN CUISINE 1 LLC, and CAJUN CUISINE LLC d/b/a

OCEANA GRILL

VERSUS

CERTAIN UNDERWRITERS AT LLOYD'S, LONDON

FILED: _____
DEPUTY CLERK

**PLAINTIFFS' SECOND SUPPLEMENTAL AND AMENDED PETITION FOR
DECLARATORY JUDGMENT**

NOW COMES Cajun Conti LLC, Cajun Cuisine 1 LLC, and Cajun Cuisine LLC d/b/a Oceana Grill, plaintiffs, who file this Second Supplemental and Amended Petition for Declaratory Judgment with leave granted by order of the Court on September 3, 2020, as follows:

PARTIES

1. Made plaintiffs herein are Cajun Conti, LLC, Cajun Cuisine 1, LLC, and Cajun Cuisine, LLC d/b/a Oceana Grill (hereinafter "Oceana"), who are Louisiana limited liability companies authorized to do business in the Parish of Orleans, State of Louisiana.

2. Made defendant herein is Certain Underwriters at Lloyd's, London, subscribing to Policy Number AVS011221002, who issued a contract of indemnity to the plaintiffs for the period of June 30, 2019 through June 30, 2020.

JURISDICTION AND VENUE

3. This Court has subject matter jurisdiction over the matters alleged herein.

4. Personal jurisdiction exists over Lloyd's pursuant to the Louisiana "long-arm" statute, La. R.S. 13:3201.

5. On June 30, 2019, Lloyd's entered into a contract of insurance with the plaintiffs in Louisiana, whereby the plaintiffs paid a premium to Lloyd's for their promise to compensate the plaintiffs in the event of a covered loss. Lloyd's is transacting the business of insurance in the state of Louisiana and the basis of this suit arises out of such conduct.

6. Venue in this action is proper under La. R.S. 13:5104 as Orleans Parish is the parish in which plaintiffs' cause of action arises.

FACTUAL BACKGROUND

7. Historically, the risk of loss due to virus or pandemic is a covered cause of loss under all-risk policies.

8. Payment of business interruption losses due to virus or pandemic were most recently issued in 2003 during the Severe Acute Respiratory Syndrome (SARS) pandemic caused by a coronavirus, SARS-CoV.

9. For example, the Mandarin Oriental International Ltd. secured a \$16 million payment for its business interruption losses for its hotels due to cancellations and reduced local food and beverage sales stemming from the SARS outbreak. Similarly, the Peninsula Hotel Group received a payment of \$12 million from their business interruption insurance to mitigate the loss of income due to SARS.

10. After SARS, the insurance industry moved to exclude losses stemming from virus or pandemic through exclusions to be added to new and renewed policies.

11. Under information and belief, the Louisiana Insurance Commissioner approved insurers use of virus and pandemic exclusions under the misrepresentation of the insurance industry that the exclusions would not affect coverage.

12. Virus and pandemic exclusions, similar to other exclusions, are not automatic and must be specifically included in each insurance policy.

13. Insurance policies vary in language and forms, and do not all provide the same coverage across the board.

14. Under information and belief, after SARS, Lloyd's issued all-risk policies of insurance both with and without virus and pandemic exclusions.

15. In June 2019, plaintiffs and Lloyd's entered into a contract of indemnity, whereby plaintiffs agreed to make cash payments to Lloyd's in exchange for Lloyd's promise to indemnify the plaintiffs for losses including, but not limited to, business income losses at 729, 735, 737, and 739 Conti Street, New Orleans, Louisiana, 70130 (hereinafter "insured premises"),

16. The insured premises are the location of Oceana Grill, a well-known New Orleans restaurant in the heart of the French Quarter.

17. The restaurant is open all three hundred and sixty-five days of the year between the hours of 8:00 a.m. till 1:00 a.m. with the capacity to hold approximately five (500) hundred guests.

18. The insured premises are covered under a policy issued by Lloyd's with policy number believed to be AVS011221002 (hereinafter "policy"). (See Lloyd's Policy No. AVS011221002

attached as Exhibit 1 to original Petition for Declaratory Judgment).

19. The policy was in full effect, providing property, business personal property, business income and extra expense, and ordinance or law coverage, between the period of June 30, 2019 and June 30, 2020.

20. Plaintiffs faithfully paid policy premiums to Lloyd's to specifically provide all-risk coverage, particularly the extension of coverage in the event of a business closure by order of civil authority. The policy's civil authority coverage provides that Lloyd's will pay the actual loss of business income sustained caused by action of civil authority that prohibits access to the insured premises as a result of a covered cause of loss on another's property within one mile of the insured premises and the civil authority is taken in response to a dangerous physical condition.

21. Under this civil authority coverage, the insured need not demonstrate or allege property loss or damage at its insured premises, rather property loss or damage within one mile of the insured premises of the type of loss or damage covered by the policy.

22. An "all-risk policy" is an insurance policy which covers all-risks unless clearly and specifically excluded. (*Dawson Farms, L.L.C. v. Millers Mut. Fire Ins. Co.*, 34,801 (La. App. 2 Cir. 8/1/01); 794 So. 2d 949, writ denied, 803 So. 2d 34 (La. 2001)).

23. Plaintiffs' policy is an all-risk policy as it provides that a covered cause of loss is any *physical loss* unless the loss is specifically excluded or limited in the policy.

24. The policy does not provide any exclusion due to losses, business or property, from a virus or pandemic.

25. The policy has only excluded losses due to biological materials such as pathogens in connection with terrorism or malicious use, therefore, providing coverage to other viruses or pandemics.

26. While some rogue media outlets have called the 2019-2020 Coronavirus SARS-CoV-2, also known as COVID-19, an exaggerated mass hysteria that will unlikely create significant physical damage, the scientific community, and those personally affected by the virus, recognize that COVID-19 is a cause of real physical loss.

27. Within six months, the novel COVID-19, has infected almost 3.5 million Americans and nearly one hundred thousand Louisianans to date, with almost ten thousand of those cases coming from Orleans Parish.

28. The virus is physically impacting public and private property, and physical spaces in cities

worldwide. Any effort by Lloyd's to deny the reality that the virus causes physical loss would constitute a false and potentially fraudulent misrepresentation that could endanger policyholders and the public.

29. The global pandemic is exacerbated by the fact that the deadly virus physically adheres to and stays on the surface of objects or materials, "fomites," for up to twenty-eight days. Indeed, the Center for Disease Control has noted the fact that COVID-19 attaches to surfaces on a molecular level, interacting with property's surfaces.

30. China, Italy, France, and Spain have implemented the cleaning and fumigating of public areas prior to allowing them to re-open publicly due to the viruses' attachment to surfaces.

31. In response to the pandemic, Governor John B. Edwards in his official capacity as Governor of Louisiana, issued a statewide Civil Authority Order, Proclamation Number JBE 2020-27, on March 13, 2020, banning gatherings of 250 or more people in a single space.

32. The Order provided specific exceptions for locations "like" airports, medical facilities, shopping centers or malls, office buildings, factories or manufacturing facilities, or grocery or department stores.

33. The Order did not specifically exempt restaurants and it was unclear if plaintiffs' restaurant was exempt under the Order.

34. Today, the Governor's Orders have been amended to include restaurants and the stricter restriction of limiting gatherings to 50 or less people in a single space.

35. The Mayor of New Orleans, LaToya Cantrell, issued restrictions on all full-service restaurants with seating to cease operations at 9 p.m. daily and limit their seating capacity to limit/reduce seating for up to 50% beginning on March 15, 2020.

36. On March 16, 2020, Mayor Cantrell signed an additional Order and Mayoral Proclamation, which was filed into this Court on March 17, 2020, providing further limitations on the operations and access of businesses in Orleans Parish.

37. Mayor Cantrell's Order recognized that "COVID-19 may be spread amongst the population by various means of exposure, including the propensity to spread person to person and the propensity to attach to surfaces causing property loss and damage in certain circumstances."

38. Civil Authority Orders across the nation, including those in New York City, San Francisco, Atlanta, and Houston, similarly provide that the cause of the Order in part is the dangerous property condition created by COVID-19's adherence on surfaces, which causes a loss of property.

39. It is undisputable that the Orders affecting the plaintiffs were issued in part because of COVID-19's attachment to surfaces and the dangerous property condition it creates.

40. COVID-19 is known to have been in and on properties within a one-mile radius from the insured premises in the French Quarter, contaminating the immediate area surrounding the insured premises.

41. COVID-19 has caused a property loss or damage covered under the policy within a one-mile radius of the insured premises, resulting in a prohibition of access to the insured premises by a civil authority order which triggering coverage under the policy.

42. Plaintiffs discovered the contamination of their business' immediate area through the orders and directives provided by its city government officials and the Center for Disease Control publicly available at their prospective official websites.

43. As a Louisiana and Orleans Parish business, plaintiffs must comply with the Orders, which impacts their business by severely limiting their operations.

44. Access to the plaintiffs' business, a traditional sit-down restaurant, was prohibited to the public, limiting operations to only takeout and delivery services between March 16, 2020 till May 16, 2020.

45. To mitigate their losses, the plaintiffs increased their take-out and delivery capabilities at an extra expense to the business. This includes enduring hefty fees by online food ordering and delivery applications and services.

46. During the prohibition of access to the dining rooms, the plaintiffs' management team of approximately 9 – 13 people, a staff of 10 – 20 workers, vendors, and 6 maintenance workers were at the insured premises during operating hours. Hours of operation were limited to 11 a.m. through 6 p.m. No members of the public were allowed on the insured premises, including delivery and take-out drivers who were handed orders outside the main entrance.

47. Vendors with continued access to the property since the prohibition of access include soft-drink distributors, liquor and beer distributors, pest control, kitchen equipment servicers, food suppliers, linen delivery, system servicers, and maintenance and technical crews.

48. New Orleans moved into Phase 1 of reopening on May 16, 2020, prohibiting access to 75% of the business' occupancy.

49. For operations in Phase 1, plaintiffs mitigated their properties exposure to contamination by transients with new disposable menus, single serve condiments, modified building layouts, safety

supplies such as masks, gloves, hand sanitizer, disinfectant wipes, no touch trashcans, signage, designated COVID-19 points of contact, ventilation monitoring, and new employee procedures.

50. In Phase 1, access to the insured premises by staff increased to approximately 42 workers, and take-out and delivery drivers were allowed into the main entrance area. Hours of operation were between 10 a.m. through 9:00 p.m.

51. On June 12, New Orleans moved into Phase 2 of reopening, which prohibited access to the property by 50% occupancy and events/gatherings with over 25 people.

52. In Phase 2, access to the insured premises by staff increased to approximately 86 workers. Hours of operation are between 8:00 a.m. through 1:00 a.m., as business allows.

53. Additionally, COVID-19 was present in the insured premises as individuals who tested positive for COVID-19 were at the property, including the owner of the plaintiffs' business, two management/office employees, one maintenance worker, and a prospective employee who interviewed at the insured premises. As a result, loss of use of the area where these individuals were located in the insured premises were closed off, including dining areas. Thereafter, restoration of the contaminated property and all common areas/surfaces included the use of EPA-registered disinfectant, air-out periods, and new HVAC filters for all units during each reported instance.

54. Even with the plaintiffs' mitigation efforts, plaintiffs suffered an approximate \$4 million decrease in revenue between March 2020 and August 2020, as compared to the same time period in 2018 and 2019.

55. While the business' revenue and profit have significantly decreased due to the dangerous property condition caused by COVID-19, plaintiffs have still been liable for continuing expenses such as mortgage, utility, insurance, payroll, parking, accounting fees, and servicing payments.

56. As a direct result of the property loss from COVID-19, the insured has experienced an actual business income loss.

57. Based on information and belief, Lloyd's has accepted the policy premiums with no intention of providing any coverage due to direct physical loss and/or from a civil authority order shutdown due a virus or pandemic.

58. Based on information and belief, Lloyd's has denied hundreds of business interruption claims across the nation due to COVID-19 losses on policies without virus or pandemic exclusions similar to the plaintiffs' policy.

59. The rampant spread of COVID-19, as it adheres to surfaces for extended periods of time,

creating a dangerous property condition and preventing the use of property is a direct physical loss to property.

60. COVID-19 has rendered property unsafe and unusable for ordinary use, which is a “direct physical loss” under Lloyd’s policy that triggers business income and civil authority order coverage.

61. Louisiana Courts have found that where property has been rendered unusable or uninhabitable, a physical loss has occurred. (*Widder v. Louisiana Citizens Prop. Ins. Corp.*, 2011-0196 (La. App. 4 Cir. 8/10/11); 82 So. 3d 294, 296.)

62. Courts have further determined that whether property is intact and functional is irrelevant because physical damage is not necessary to define physical loss. (*Id*; see also *Ross v. C. Adams Const. & Design, L.L.C.*, 10-852 (La. App. 5 Cir. 6/14/11); 70 So. 3d 949, 952.)

63. Lloyd’s does not define the term “physical loss” within the policy.

64. Under information and belief, Lloyd’s believes “physical loss” to be “structural damage.”

65. An interpretation that physical loss is only structural damage is contrary to Louisiana law and the plaintiffs’ reasonable expectations of their coverage.

66. Insurance policies must be construed to effect, not deny, coverage and any ambiguity should be interpreted in favor of the policyholder. (*Doerr v. Mobil Oil Corp.*, 774 So. 2d 119 (La. 2000)).

67. A declaratory judgment determining the coverage afforded under the policy for virus and pandemic losses will prevent the plaintiffs from being left without vital coverage acquired to ensure the survival of their business should operations cease due to a virus or pandemic and civil authorities’ response, as has occurred due to COVID-19.

68. In an effort to cease litigation, plaintiffs submitted a proposed consent judgment to Lloyd’s, which provided that the policy extends business interruption coverage for COVID-19 losses as a result of the civil authority order shutdown and dangerous property condition created by the virus’ attachment to surfaces as recognized by Mayor Cantrell’s Orders.

69. Lloyd’s declined the proposed consent judgment.

70. On August 14, 2020, Lloyd’s issued a formal letter affirming the foregoing allegations by denying coverage of plaintiffs’ business interruption loss.

71. Lloyd’s denial letter provides that Lloyd’s denies that the property’s contamination and exposure to COVID-19 would constitute a physical loss or damage under the terms of the policy.

72. Information regarding plaintiffs’ business operations during COVID-19 may only serve

to ascertain the scope of loss due to the dangerous property conditions, it would not change Lloyd's interpretation of policy terms defining what constitutes a covered cause of loss.

73. The present suit seeks to determine the parties' contractual rights and duties under the contract, not the scope of a loss. Nevertheless, plaintiffs have provided information, including presently known answers to Lloyd's loss questionnaire, regarding the scope of the loss. Indeed, Lloyd's had sufficient information to assess loss and issue a denial letter based on the information found in plaintiffs' pleadings. (*See* Lloyd's Loss Questionnaire attached as Exhibit 2)

74. COVID-19's impact to plaintiffs' business is real and debilitating. As Lloyd's declines the extension of coverage under its policy, businesses throughout the French Quarter and our community are permanently closings its doors.

DECLARATORY JUDGMENT

75. Each section below containing a cause of action fully incorporates all facts and allegations set forth in each section previously set forth herein.

76. Under La. Code of Civ. Pro. §1871 the Court may declare rights, status, and other legal relations whether or not further relief is or could be claimed.

77. Plaintiffs seek a Declaratory Judgment to determine whether the COVID-19 Civil Authority Orders restricting the operations of their business trigger the civil authority provision of the policy issued to the plaintiffs.

78. Plaintiffs ask the Court to affirm that because the all-risk policy provided by Lloyd's does not contain an exclusion for virus or pandemic, the policy provides coverage to plaintiffs for any civil authority orders shutting down or limiting the operations of restaurants in the New Orleans area due to physical loss from COVID-19 within one mile from the plaintiffs' business, and that the policy provides business income coverage for the contamination of the insured premises by COVID-19.

79. Plaintiffs do not seek any determination on the amount of damages or any other remedy besides the declaratory relief.

PRAYER FOR RELIEF

WHEREFORE, plaintiffs herein, Cajun Conti LLC, Cajun Cuisine 1 LLC, and Cajun Cuisine LLC d/b/a Oceana Grill, pray that this Petition be filed into the record, that defendant, Certain Underwriters at Lloyd's, London, be cited to appear and answer same, and after due proceedings are had, there be judgment rendered in favor of plaintiffs, Cajun Conti LLC, Cajun Cuisine 1 LLC, and Cajun Cuisine LLC d/b/a Oceana Grill and against defendant, Certain

Underwriters at Lloyd's, London, declaring that the policy of insurance extends coverage from direct physical loss and/or from a civil authority order shutdown due to virus and/or pandemic.

Respectfully Submitted,

GAUTHIER MURPHY & HOUGHTALING LLC



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PLEASE SERVE: 1) ORIGINAL PETITION FOR DECLARATORY JUDGMENT; 2) FIRST SUPPLEMENTAL AND AMENDED PETITION FOR DECLARATORY JUDGMENT; AND 3) SECOND SUPPLEMENTAL AND AMENDED PETITION FOR DECLARATORY JUDGMENT ON THE FOLLOWING DEFENDANT

CERTAIN UNDERWRITERS AT LLOYD'S, LONDON (hereinafter "Lloyd's") Subscribing to Policy Number AVS011221002, through its attorney of record:
Virginia Y. Dodd
II City Plaza
400 Convention Street, Ste. 1100
Baton Rouge, LA 70802-5618

Insured Name/Policy No.

If your Policy provides coverage for more than one location, please identify all Insured Locations for which you are submitting a claim for coverage, and answer the following questions separately for each location claimed.

Do you believe Covered Property at the Insured Location was contaminated by the COVID 19 coronavirus? If yes, please provide the following:

- (1) A complete description of the contamination, including the source of contamination, the scope/location of contamination, when and how the contamination was discovered and what efforts have been undertaken to remediate the contamination.
- (2) Copies of any instructions/directives/orders given to you by any governmental agency, including the Centers for Disease Control and Prevention (CDC) or any federal, state or local department of health.
- (3) If you have obtained any reports or advices or incurred any costs to remediate any alleged contamination sustained as a result of the COVID 19 coronavirus, please identify all third parties involved and provide copies of all such reports, advices, damage estimates/quotes or invoices.

Was access to the Insured Location prohibited by order of a civil authority? If yes, please provide the following:

- (1) The first date you were prohibited from accessing the Insured Location.
- (2) The identity of the civil authority issuing the order(s).
- (3) The effective date(s) of the civil authority order(s).
- (4) Please identify all persons or entities who had access to the Insured Location during the effective date(s) of the civil authority order(s) (i.e., employees, vendors, etc.).
- (5) The date(s) in which all operations at the Insured Location were prohibited by civil order.
- (6) The dates(s) in which business/operations at the Insured Location were partially suspended, if applicable.
- (7) If business/operations at the Insured Location were partially suspended at any time, please describe in detail (a) what business/operations were suspended; and (2) what business/operations continued.
- (8) Copies of all applicable civil authority orders or detailed information regarding how or from whom a copy of the order can be obtained.
- (9) Please provide any other information or documents you believe would assist the Insurers in their investigation of your claim. (i.e., news articles, police reports, etc.)

Completed by: _____
Title: _____
Phone No.: _____
Dated: _____

