

**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA**

AXIS SURPLUS INSURANCE
COMPANY,

Plaintiff,

v.

HIGHPOINTE HOSPITALITY, INC.,

Defendant.

Case No. _____

**COMPLAINT FOR
DECLARATORY JUDGMENT**

Plaintiff AXIS Surplus Insurance Company (“AXIS”) alleges as follows:

NATURE OF ACTION AND RELIEF SOUGHT

1. AXIS brings this action for a declaratory judgment under a property insurance policy that AXIS issued to Highpointe Hospitality, Inc. (“Highpointe”) (the “Policy”). AXIS seeks a declaration that it has no obligation, under certain sections of the Policy, to provide coverage for Highpointe’s claimed loss of business income related to the SARS-CoV-2 virus (commonly known as the “Coronavirus”) and the resulting COVID-19 pandemic. A copy of the Policy is attached hereto as Exhibit A.

2. AXIS understands that the COVID-19 Pandemic has affected the public and the vast majority of businesses throughout the country in unprecedented ways.

But these challenging and unfortunate circumstances do not create insurance coverage for losses that fall outside the terms of a policyholder's insurance contract.

3. Here, Highpointe claims that it lost business income because of the Coronavirus and governmental orders issued to prevent the spread of Coronavirus. While AXIS is sympathetic to all its customers experiencing economic losses during this challenging time, Highpointe did not purchase insurance for the losses that it now claims. Even without reference to its exclusions, the Policy requires "direct physical loss of or damage to property" as a prerequisite to coverage, and the suspected presence of a virus does not constitute the requisite "direct physical loss of or damage to property."

4. Moreover, the Policy has exclusions that preclude coverage for loss or damage resulting from the Coronavirus. For example, the Policy contains a "pollutants or contaminants" exclusion that precludes coverage for loss "caused directly or indirectly by the release, discharge, dispersal, seepage, migration, or escape of pollutants or contaminants." The Policy also contains a Nuclear, Chemical and Biological Exclusion that excludes coverage for loss "arising directly or indirectly from the dispersal, application or release of, or exposure to, chemical or biological materials or agents that are harmful to property or human health." Both of these exclusions squarely apply to preclude coverage for Highpointe's claimed

loss, as the Coronavirus is a human-health-harming “chemical or biological material[.]” and a “pollutant[.] or contaminant[.]”

5. For these and other reasons, the Policy does not afford coverage for Highpointe’s claimed loss of income.

PARTIES, JURISDICTION, AND VENUE

6. Plaintiff AXIS is a corporation organized and existing under the laws of the State of Illinois, with its principal place of business in Alpharetta, Georgia.

7. Defendant Highpointe is a corporation organized and existing under the laws of the State of Florida, with its principal place of business in Gulf Breeze, Florida.

8. This Court has subject matter jurisdiction over this action pursuant to 28 U.S.C. § 1332 because the parties are citizens of different states and the amount in controversy exceeds \$75,000, exclusive of interest and costs. For diversity purposes, AXIS is a citizen of Illinois and Georgia, and Highpointe is a citizen of Florida. Highpointe is claiming losses in excess of \$1 million. This Court has personal jurisdiction over Highpointe because it is incorporated in Florida, it has its principal place of business in Florida, and the loss of business income claimed by Highpointe includes losses from the operation of Highpointe’s hotels in Florida.

9. Venue is proper in this District pursuant to 28 U.S.C. § 1391(b)(1) and (2) and § 1391(c)(2) and (d) because Highpointe is deemed to reside in this District,

where there is personal jurisdiction over Highpointe, and a substantial part of the events or omissions giving rise to the claim occurred in this District.

HIGHPOINTE’S INSURANCE CLAIM

10. Highpointe submitted a claim under the Policy that seeks coverage for Highpointe’s loss of income resulting from the Coronavirus. In the Loss Notification form that it submitted to AXIS, Highpointe described the loss as follows: “Loss of Income as it relates to damages suffered from the COVID-19 virus.”

11. Highpointe’s claim seeks coverage under the “Business Interruption,” “Extensions of Time Element Coverage,” and “Loss of Attraction” sections of the Policy.

12. Highpointe contends that it suffered “direct physical loss of or damage” to property due to the COVID-19 virus. Highpointe contends that “COVID-19 has spread throughout the community and is ubiquitous; therefore, [Highpointe] must reasonably conclude that the entirety of their insured properties (as specified in the preceding sentence) have suffered damage due to COVID-19.”

13. Contrary to Highpointe’s contentions, the information that AXIS received from Highpointe did not evidence or identify any “direct physical loss of or damage” to property.

14. By letter of April 7, 2021, AXIS advised Highpointe of its coverage determination. In that letter, AXIS reserved its rights with respect to the portion of Highpointe's claim that sought coverage under the Loss of Attraction provision of the Policy, but disclaimed any obligation to provide coverage to Highpointe for the remainder of its claim under the other provisions of the Policy.

15. AXIS has agreed to pay, up to the applicable sub-limit per occurrence, the portion of Highpointe's claim that sought coverage under the Loss of Attraction provision of the Policy. However, AXIS has maintained its disclaimer under the other provisions of the Policy.

APPLICABLE POLICY PROVISIONS

16. AXIS issued the Policy to Highpointe for the policy period of May 1, 2019 to May 1, 2020.

17. Pursuant to the Policy's Participation Endorsement, AXIS participates in 50% of the primary layer of coverage, being \$5 million part of the Policy's \$10 million limit of liability, and \$250,000 part of the Policy's \$500,000 sub-limit per occurrence for Loss of Attraction, excess of a \$10,000 deductible.

18. The Policy provides the following with respect to "Business Interruption" coverage:

11. BUSINESS INTERRUPTION- This policy shall cover the loss resulting from the complete or partial interruption of business conducted by the Insured including all

interdependent loss of earnings between or among companies owned or operated by the Insured caused by loss, damage, or destruction by any of the perils covered herein during the term of this policy to real and personal property as covered herein.

(Ex. A at AXIS00013.)

19. The Policy contains a section addressing “Extensions of Time Element Coverage,” which provides in pertinent part:

20. Extensions of Time Element Coverage: This policy, subject to all its provisions and without increasing the amount of said policy, insures against ACTUAL LOSS SUSTAINED by the Insured resulting from direct physical loss or damage from the perils insured against, to:

d) the actual loss sustained for a period not to exceed sixty (60) consecutive days when, following direct physical damage caused by a peril insured against, access to real or personal property within five (5) miles of the Insured's premises is impaired or hindered by order of civil or military authority irrespective of whether the property of the Insured shall have been damaged.

(Ex. A at AXIS00018-19.)

20. The Policy defines “Perils Insured Against” as follows:

26. PERILS INSURED AGAINST- This policy insures against risks of direct physical loss of or damage to property described herein including general average, salvage, and all other

charges on shipments covered hereunder, except as hereinafter excluded.

(Ex. A at AXIS00021.)

21. The Policy also contains a “pollutants or contaminants” exclusion, which states the following:

27. PERILS EXCLUDED- This policy does not insure:

h) loss or damage caused directly or indirectly by the release, discharge, dispersal, seepage, migration, or escape of pollutants or contaminants unless the release, discharge, dispersal, seepage, migration, or escape is caused by a peril not otherwise excluded herein. However, if a peril not otherwise excluded herein ensues due to the release, discharge, dispersal, seepage, migration, or escape of pollutants or contaminants, such ensuing loss or damage shall be covered.

(Ex. A at AXIS00021.)

22. The Policy further contains a “Nuclear, Chemical and Biological Exclusion Endorsement,” which provides:

This insurance does not apply to:

B. Loss or damage arising directly or indirectly from the dispersal, application or release of, or exposure to, chemical or biological materials or agents that are harmful to property or human health, all whether controlled or uncontrolled, or due to any act or condition incident to any of the foregoing,

whether such loss be direct or indirect, proximate or remote, or be in whole or in part caused by, contributed to, or aggravated by, any physical loss or damage insured against by this Policy, however such dispersal, application, release or exposure may have been caused.

- C. This exclusion applies to all coverage under the Policy notwithstanding any coverage extension or any other endorsement.

(Ex. A at AXIS00042.)

23. The Policy's "Loss of Attraction" provision states the following:

- 13. Loss of Attraction - This policy shall cover the actual loss sustained during a Period of Liability resulting from the cancellation by guests and/or customers of bookings or reservations for accommodation, and/or an inability of the Insured to accept bookings in consequence of:

- VI. Any occurrence of pollution or contamination by oil, chemical or other substance which results in the mandatory closure of any beach, waterway within a radius of 10 miles of the premises of the Insured by order of the local authority, notwithstanding any pollution or contamination exclusion under this policy...

Definition of 'Period of Liability' when used in this coverage:

The period during which the results of the business is affected in consequence of the occurrence discovery or accident, beginning with the date from which the restrictions on the Insured location are applied (or in the case of IV. And VI. Above,

with the date of the occurrence) and ending not later than 365 days thereafter.

No extensions of coverage granted by this endorsement shall be restricted by operation of any exclusions contained within the contents of this policy.

(Ex. A at AXIS00014-15.)

**APPLICATION OF THE POLICY
TO HIGHPOINTE’S INSURANCE CLAIM**

24. There is no coverage for Highpointe’s claim under the “Business Interruption” provision of the Policy quoted above because any interruption of Highpointe’s business was not caused “by any of the perils covered” under the Policy, which perils are specifically defined to be “risks of direct physical loss of or damage to property.” (Ex. A at AXIS00013 and AXIS00021.) The presence of SARS-CoV-2 (*i.e.* the Coronavirus) in the air, or on surfaces, at Highpointe’s properties does not cause direct physical loss or damage to the properties.

25. There is no coverage for Highpointe’s claim under the “Extensions of Time Element Coverage” provision of the Policy quoted above because Highpointe’s loss did not result from “direct physical loss or damage from the perils insured against,” which perils are specifically defined as “risks of direct physical loss of or damage to property.” (Ex. A at AXIS00018-19 and AXIS00021.) The

presence of SARS-CoV-2 (*i.e.* the Coronavirus) in the air, or on surfaces, does not cause direct physical loss or damage to any property.

26. Even if there were the requisite “direct physical loss of or damage to property,” any such direct physical loss or damage would be excluded from coverage based on the Nuclear, Chemical and Biological Exclusion quoted above. (Ex. A at AXIS00042.) This exclusion precludes coverage for loss “arising directly or indirectly from the dispersal, application or release of, or exposure to, chemical or biological materials or agents that are harmful to property or human health.” SARS-CoV-2 (*i.e.* the Coronavirus) is a chemical or biological material that is harmful to human health.

27. Moreover, even if there were the requisite “direct physical loss of or damage to property,” any such direct physical loss or damage would be excluded from coverage based on the “pollutants or contaminants” exclusion quoted above. (Ex. A at AXIS00021.) This exclusion precludes coverage for loss “caused directly or indirectly by the release, discharge, dispersal, seepage, migration, or escape of pollutants or contaminants.” (Id.) SARS-CoV-2 (*i.e.* the Coronavirus) is a “pollutant or contaminant.”

28. Highpointe has acknowledged that SARS-CoV-2 and/or the Coronavirus is a “pollutant or contaminant” because Highpointe sought coverage under the Policy’s Loss of Attraction provision. The Policy’s Loss of Attraction

provision provides coverage for losses from a mandatory beach closure only if the closure results from an occurrence of “pollution or contamination.” (Ex. A at AXIS00014-15.) By seeking coverage under that provision, Highpointe has acknowledged that SARS-CoV-2 and/or the Coronavirus is a “pollutant or contaminant.” AXIS has agreed to pay, up to the applicable sub-limit per occurrence, the portion of Highpointe’s claim that sought coverage under the Loss of Attraction provision of the Policy.

COUNT ONE

(Declaratory Judgment Pursuant to 28 U.S.C. § 2201)

29. AXIS repeats and re-alleges the foregoing allegations as if fully set forth herein.

30. Highpointe seeks coverage under the “Business Interruption” and “Extensions of Time Element Coverage” provisions of the Policy for claimed business income losses related to the COVID-19 Pandemic.

31. AXIS denied coverage for the claims made by Highpointe under these provisions of the Policy.

32. An actual controversy has arisen as to whether, under the terms, conditions, exclusions and limitations of the Policy, AXIS has an obligation to provide coverage for the losses claimed by Highpointe under these provisions of the Policy.

33. Pursuant to 28 U.S.C. § 2201, AXIS is entitled to a declaration that it has no obligation to provide coverage for the losses claimed by Highpointe.under the “Business Interruption” and “Extensions of Time Element Coverage” provisions of the Policy.

REQUESTS FOR RELIEF

WHEREFORE, AXIS respectfully requests that the Court grant it the following relief:

- A. Enter a declaratory judgment that the Policy does not provide coverage for the losses claimed by Highpointe; and
- B. Grant such other relief as this Court deems just and appropriate.

Date: April 7, 2021

Respectfully submitted,

/s/ Jedidiah Vander Klok

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