

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

DAT DOG ENTERPRISES, LLC *
Plaintiff * JUDGE:
*
versus * MAG:
*
CERTAIN UNDERWRITERS *
AT LLOYD’S, *
Defendant. *

PLAINTIFF’S ORIGINAL COMPLAINT

Plaintiff Dat Dog Enterprises, LLC, (hereinafter “Dat Dog”) files this Original Complaint against Defendants Certain Underwriters at Lloyd’s over their denial of coverage of the insurance claim submitted under a clearly applicable “**Building and Personal Property Coverage**” endorsement in the wake of the Severe Acute Respiratory Syndrome Coronavirus 2 (SARS CoV-2) (a/k/a COVID-19) Pandemic.

I.

PARTIES

1. Plaintiff **Dat Dog Enterprises, LLC** is a restaurant and hospitality chain with multiple locations in Louisiana, with its principal place of business located at 3336 Magazine Street, New Orleans, Louisiana 70115.
2. Defendants **Certain Underwriters at Lloyd’s** subscribing to Policy Number AVS011416400 (hereinafter collectively referred to as “Lloyd’s”) were, on information and belief, at all times material foreign insurers authorized to do and doing business in the State of Louisiana. Under the terms of the policy of insurance at issue, Lloyd’s has designated the Louisiana Secretary of State as its agent for service of process, and Sarah Mims as its agent

to accept such process from the Louisiana Secretary of State. Accordingly, Lloyd's can be served with process by serving the Louisiana Secretary of State, Agent for Service of Process of Certain Underwriters at Lloyd's, London, at P.O. Box 94125, Baton Rouge, Louisiana 70804-9125, Attn: Legal Services Section. The Secretary of State will then forward citation and the petition with discovery to defendant by and through Sarah Sims, General Counsel, 505 Eagleview Boulevard, Suite 100, Exton, Pennsylvania 19341-1120.

II.

JURISDICTION

3. The Court has jurisdiction over the lawsuit under 28 U.S.C. § 1332(a)(1) because Plaintiff and Defendants are citizens of different states and the amount in controversy exceeds \$75,000, excluding interest and costs.

III.

VENUE

4. Venue is proper in this district under 28 U.S.C. § 1391(b)(2) because a substantial part of the events or omissions giving rise to the claim occurred in this district and because a substantial part of the property that is subject to this action is situated in this district.

IV.

FACTUAL BACKGROUND

A.

LLOYD'S MARKETS A "BUILDING AND PERSONAL PROPERTY COVERAGE" ENDORSEMENT TO INSURE AGAINST "DIRECT PHYSICAL LOSS OF OR DAMAGE TO COVERED PROPERTY," AND A "BUSINESS INCOME (WITHOUT EXTRA EXPENSE" ENDORSEMENT WHICH INSURES AGAINST "LOSS OF BUSINESS INCOME" DUE TO SUSPENDED OPERATIONS DURING THE "PERIOD OF RESTORATION."

5. At all relevant times, Plaintiff operated a chain of restaurants, primarily in the Greater New Orleans Area, including Orleans Parish, but also in Lafayette Parish.
6. Plaintiff 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 property damage and losses including, but not limited to, business income losses and physical property damage at 5030 Freret Street, New Orleans, LA 70115, 3336 Magazine Street, New Orleans, LA 70115, 601 Frenchmen Street, New Orleans, LA 70116, and 201 Jefferson Street, Lafayette, LA 70501 (hereinafter "insured premises").
7. The insured premises are covered under a policy issued by Lloyd's with a policy number believed to be AVS011416400 (hereinafter "policy").¹
8. The policy is currently and was at all time material in full effect, providing property, business personal property, business income with rental value, and ordinance or law coverage between the period March 31, 2019 to March 31, 2020.
9. The policy does not provide any exclusion due to business or property losses, from a virus or global pandemic.
10. 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 global pandemics.
11. 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 shutdown due to a global pandemic virus.

¹ See Lloyd's Policy No. AVS011416400 attached as Exhibit 1.

12. The Dat Dog restaurant locations are located at 5030 Freret Street, New Orleans, LA 70115; 3336 Magazine Street, New Orleans, LA 70115; 601 Frenchman Street, New Orleans, LA 70116; 201 Jefferson Street, Lafayette, LA 70501. All of these addresses are “Covered Locations” under the Policy at issue.

B.

**SARS-COV-2 (“COVID-19”) SURFACE CONTAMINATION
IS A “DIRECT PHYSICAL LOSS.”**

13. COVID-19, a disease resulting from the SARS-CoV-2 novel coronavirus, is a deadly communicable disease that has already infected over 5.9 million people in the United States and killed more than 180,000 Americans.²
14. There are no drugs or therapeutics approved by the U.S. Food and Drug Administration (“FDA”) to prevent or treat COVID-19.³ Further, a vaccine does not exist for COVID-19.⁴
15. On March 11, 2020, the World Health Organization (“WHO”) declared the COVID-19 outbreak as a pandemic.⁵ On March 13, 2020, President Trump declared a national emergency due to the outbreak in the United States.⁶
16. The time between exposure to the coronavirus and first symptoms, otherwise known as the incubation period, for COVID-19 can last up to 14 days.⁷ Some COVID-19 patients show symptoms, and some are asymptomatic. Even asymptomatic persons can transmit COVID-

² See <https://www.cdc.gov/coronavirus/2019-ncov/cases-updates/cases-in-us.html> (last viewed August 31, 2020).

³ See <https://www.cdc.gov/coronavirus/2019-ncov/hcp/therapeutic-options.html> (last viewed June 11, 2020).

⁴ See <https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/prevention.html> (last viewed June 11, 2020).

⁵ See <https://www.who.int/dg/speeches/detail/who-director-general-s-opening-remarks-at-the-media-briefing-on-covid-19---11-march-2020> (last viewed June 11, 2020).

⁶ See <https://www.whitehouse.gov/presidential-actions/proclamation-declaring-national-emergency-concerning-novel-coronavirus-disease-covid-19-outbreak/> (last viewed June 11, 2020).

⁷ See <https://www.cdc.gov/coronavirus/2019-ncov/hcp/clinical-guidance-management-patients.html#:~:text=The%20incubation%20period%20for%20COVID,CoV%2D2%20infection.> (last viewed June 11, 2020).

- 19 for an extended period of time, thought to be even longer than 14 days.⁸ Those people who eventually show symptoms can also spread the disease even in their pre-symptomatic state.⁹
17. COVID-19 can also exist on surfaces for days. COVID-19 remains active on plastic and stainless-steel surfaces for up to three days, on cardboard for 24 hours, on copper for four hours, and is detectable in aerosols for up to three hours.¹⁰
18. All of these materials are used by Plaintiffs and otherwise present in the insured premises.
19. The scientific community, and those personally affected by COVID-19, recognize the Coronavirus as a cause of real physical loss and damage to both persons and property.¹¹
20. The COVID-19 pandemic is exacerbated by the fact that fomites shed by infected individuals are persistent on the surface of objects for up to twenty-eight days, particularly in humid areas below eighty-four degrees Fahrenheit.
21. Several countries including China, Italy, France, and Spain have implemented policies requiring the fumigation and sanitization of public areas prior to reopening to reduce the risk of transmission via fomites.
22. Courts have previously found coverage for physical loss in the absence of structural damage to insured property.¹²

⁸ See <https://www.acpjournals.org/doi/10.7326/M20-3012> (last viewed June 11, 2020).

⁹ See https://www.who.int/docs/default-source/coronaviruse/situation-reports/20200402-sitrep-73-covid-19.pdf?sfvrsn=5ae25bc7_2 (last viewed June 11, 2020).

¹⁰ See <https://www.nih.gov/news-events/nih-research-matters/study-suggests-new-coronavirus-may-remain-surfaces-days> (last viewed June 11, 2020).

¹¹ Joshua L. Santarpia, Danielle N. Rivera, *et. al.*, *Aerosol and surface contamination of SARS-CoV-2 observed in quarantine and isolation care*, *Sci. Rep.* 10, 12732 (2020) ; *See also*, Sophie Zuber, Harald Brussow, *COVID-19: Challenges for virologists in the food industry*, *Microbial Biotechnology* (2020).

¹² *See e.g.*, *Total Intermodal Serv's v. Travelers Prop. Ins. Co. of Am.*, 2018 WL 3829767 (C.D. Cal. July 11, 2018); *Port Auth. of New York & New Jersey v. Affiliated FM*, 311 F.3d 226 (3d Cir. 2002); *TRAVCO Ins. Co. v. Ward*, 715 F.Supp2.d 699, 709 (E.D. Va. 2010) *aff'd*, 504 Fed.Appx. 251 (4th Cir. 2013) (“The majority of cases appear to support [the] position that physical damage to the property is not necessary, at least where the building in question has been rendered unusable by physical forces).

23. It is clear that the pathogen contaminated surfaces of the insured premises would constitute a direct physical loss requiring remediation to sanitize the surfaces of said premises prior to reopening.

C.

PLAINTIFF INCURRED A COVERED LOSS OF BUSINESS INCOME AS A RESULT OF CIVIL AUTHORITY MANDATES WHICH RESTRICTED ACCESS TO PLAINTIFF'S RESTAURANTS.

24. On March 11, 2020, Governor John Bel Edwards issued Proclamation Number 25 JBE 2020 which declared a statewide public health emergency in response to COVID-19 and directed the Governor's Office of Homeland Security and Emergency Preparedness and the Secretary of the Department of Health and/or the State Health Officer to take all actions authorized under state law.¹³

25. On March 15, 2020, Mayor Latoya Cantrell issued guidance to bars and restaurants in response to the COVID-19 outbreak which restricted the operations of restaurants and reduced their seating capacity by 50%.¹⁴

26. On March 22, 2020, Governor John Bel Edwards issued Proclamation Number 33 JBE 2020 which ordered the closure of certain businesses and restricted public and private gatherings to no more than 10 people.¹⁵

D.

LLOYD'S REPUDIATES PLAINTIFF'S COVERAGE.

27. On March 18, 2020, Plaintiff provided a notice of claim under the Policy to Lloyd's appointed agent for notice of claims: Avondale Insurance Associates, Inc., ("AIA").

¹³ See Proclamation Number 33 JBE 2020, attached as Exhibit 2.

¹⁴ See Mayor Cantrell Issues Guidance to Bars and Restaurants in Response to Covid-19 Outbreak, <http://nola.gov> (last visited March 15, 2020).

¹⁵ See note 5 *supra*.

28. On May 21, 2020, Plaintiff received a formal denial of coverage from North American Risk Services (“NARS”), a third-party claims administrator for Lloyd’s, in which NARS stated that Lloyd’s “must respectfully deny coverage for the Insured’s claim.”¹⁶ Specifically, NARS and Lloyd’s denied coverage for all of Plaintiff’s claims, including Business Income loss for all four restaurant locations, and Civil Authority Coverage for Business Income loss.¹⁷ In denying these claims, NARS first stated that Civil Authority coverage only applies when a civil authority “prohibit[s] access to the described premises[.]”¹⁸ As to the Business Income loss due to property damage, NARS stated that “it is Insurers’ position that any such exposure [to COVID-19] does not constitute ‘direct physical loss or damage’ as required by the Policy.”¹⁹

29. But NARS and Lloyd’s “position” is meritless. First, “some of the government shutdown orders were expressly issued because COVID-19 contamination was “*causing property loss and damage.*”²⁰ Second, courts have held that actual structural damage is not required to trigger property damage coverage under a commercial insurance policy.²¹ Rather, a long line of jurisprudence has established that policyholders have “still suffered physical loss or damage if they cannot use their properties because it would be unsafe to do so.”²²

¹⁶ See NARS Denial Letter, attached as Exhibit 3.

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.* (citing Bill de Blasio, New York City Mayor, Emergency Exec. Order No. 101, 1 (Mar. 17, 2020) (“WHEREAS, this order is given because of the propensity of the virus to spread person-to-person and also because the virus is causing property loss and damage”) (emphasis in original), <https://www1.nyc.gov/assets/home/downloads/pdf/executive-orders/2020/eeo-101.pdf>).

²¹ See note 4 *supra*.

²² Christopher C. French, *COVID-19 Business Interruption Insurance Losses: The Cases for and Against Coverage*, 27 CTILJ 1, 21 (2020); See e.g., *Oregon Shakespeare Festival Ass’n v. Great Am. Ins. Co.*, 2016 WL 3267247, at *7-8 (D. Or. June 7, 2016); *Gregory Packaging, Inc. v. Travelers Prop. Cas. Co. of Am.*, 2014 WL 6675934, at *6 (D.N.J. Nov. 25, 2014); *Matzner v. Seaco Ins. Co.*, 1998 WL 566658, at *3 (Mass. Super. Aug. 12, 1998); *Western Fire Ins. Co. v. First Presbyterian Church*, 437 P.2d 52, 55 (Colo. 1968); *Hughes v. Potomac Ins. Co. of D.C.*, 199 Cal. App. 2d 239, 249 (Cal. App. 1962); *Essex Ins. Co. v. BloomSouth Flooring Co.*, 562 F.3d 399, 406 (1st Cir. 2009); *Mellin v. N. Sec. Ins. Co., Inc.*, 115 A.3d 799, 805 (N.H. 2015).

E.

**PLAINTIFF SEEKS AN EXPEDITED RULING ON THE APPLICABILITY OF THE
“BUSINESS INCOME LOSS” ENDORSEMENT TO AVOID RUINOUS FINANCIAL
DAMAGES.**

30. Because all of Plaintiff’s locations are currently forced to operated at reduced capacity due to the SARS-CoV-2 pandemic, the proceeds that Plaintiff reasonably expected to receive from its Business Income Loss insurance carrier during this outbreak are essential to pay Plaintiff’s fixed costs and other expenses at a time when significantly less revenue is being earned from patrons of Plaintiff’s restaurant business.

V.

CAUSES OF ACTION

31. The acts and omissions of Defendant described in the foregoing paragraphs give rise to the following causes of action:

A.

Declaratory Judgment of Coverage

32. Pursuant to 28 U.S.C. §§ 2201 and 2202 and Federal Rule of Civil Procedure 57, Plaintiff seeks the following declarations to determine questions of actual controversy between the parties:

- a. That Lloyd’s issued Policy No. AVS011416400, which insured the “Covered Locations” listed in footnote 1, *supra*;
- b. That COVID-19 contamination of the “insured premises” constitutes “direct physical loss or damage” under the policy at issue;²³

²³ See Exhibit 1, Lloyd’s Policy No. AVS0114161400, Business Income (Without Extra Expense) Coverage Form, 1.

- c. That Proclamation 33 JBE 2020, and Mayor Cantrell’s guidance constitutes an “actual loss of Business Income . . . sustain[ed] . . . by action of civil authority that prohibits access to the described premises;”²⁴
- d. That the policy was in effect on March 31, 2020.

B.

Breach of Contract – Anticipatory Breach/Repudiation

- 33. Plaintiff incorporates the above-referenced paragraphs as if stated fully herein.
- 34. The Policy constitutes a binding contract between the Plaintiff and Lloyd’s, which includes the terms set forth in the Business Income Loss endorsement contained the Policy which is attached hereto as Exhibit 1 and incorporated herein as if fully set forth.
- 35. Plaintiff fully performed its contractual obligations by paying all premiums due under the Policy.
- 36. Lloyd’s repudiated and breached and/or anticipatorily breached the Policy by denying coverage under the Policy to Dat Dog communicating to Plaintiff that COVID-19 contamination was and is not a “direct physical loss” under the Business Income Loss endorsement, and also by communicating that the reduced operational capacity of Plaintiff’s restaurants as a result of Governor and Mayoral orders and proclamations “did not trigger the Policy’s Civil Authority coverage.”²⁵
- 37. Lloyd’s repudiation and breach of the Policy has resulted in damages to Plaintiff that Plaintiff is entitled to recover, as more specifically addressed below.

²⁴ *Id.* at 2.

²⁵ *See* Exhibit 3, 2.

C.

Failure to Pay Claims Involving Immovable Property

38. Plaintiff incorporates the above-referenced paragraphs as if stated fully herein.
39. Under La. R.S. 22:1893, “the burden [of proof] is on the insurer to establish an exclusion under the terms of the policy.”²⁶
40. The above cited statute goes on to say, “Any insurer determined to be in violation of the provisions of this Section shall be liable pursuant to R.S. 22:1973.”²⁷
41. Lloyd’s, by arbitrarily and capriciously denying coverage under the terms of the Policy, failed to maintain its burden of proof as mandated under the cited statute, and is therefore liable for breach of the duty of good faith and fair dealing.

D.

Breach of Duty of Good Faith and Fair Dealing

42. Lloyd’s conduct constitutes a breach of the duty of good faith and fair dealing owed to insureds in insurance contracts under La. R.S. 22:1973.²⁸
43. Under the above-cited statute, insurers have “an affirmative duty to adjust claims fairly and promptly and to make a reasonable effort to settle claims with insured or the claimant, or both. Any insurer who breaches these duties shall be liable for damages sustained as a result of the breach.”²⁹
44. The above-cited statute also provides, “in addition to any general or special damages to which a claimant may be entitled for breach of the imposed duty, the claimant may be awarded penalties assessed against the insurer in an amount not to exceed two times the

²⁶ See La. R.S. 22:1983 (B).

²⁷ See La. R.S. 22:1983 (D).

²⁸ See also, *Weiss v. Allstate Ins. Co.*, 512 F.Supp.2d 463 (E.D. La. 2007).

²⁹ La. R.S. 22:1973(A).

damages sustained or five thousand dollars, whichever is greater. Such penalties, if awarded, shall not be used by the insurer in computing either past or prospective loss experience for the purpose of setting rates or making rate filings.”³⁰

45. By arbitrarily and capriciously refusing coverage to Plaintiff – here solely on the alleged basis that COVID-19 contamination of the insured premises does not constitute a “direct physical loss” to the insured premises, and that the government mandated restricted business operations do not trigger the Civil Authority coverage of the Policy – Lloyd’s is attempting to read out the most important provision of that section: namely, that it covers business income loss due to physical damage to the property, or to restricted access due to orders of a civil authority.
46. And Lloyd’s has no reasonable basis to immediately announce that COVID-19 does not constitute physical damage to property, especially when it has long been accepted by the scientific community that transmission via surface-borne fomites is a significant source of infection, and poses an especially prominent risk for restaurant patrons and employees.
47. Such facially meritless conduct – and with absolutely no supporting expert evidence – is simply egregious, especially in the midst of a pandemic where Plaintiff is relying on Lloyd’s “Business Income Loss” endorsement. Indeed, on its face, Lloyd’s conduct appears to be nothing more than an attempt to put insureds in a position where they will be forced to accept lowball settlement offers simply from the fear that their insurer will drag out proceedings well past the insured’s ability to remain financially viable.
48. As the foregoing establishes, Lloyd’s communication refusing coverage was, at best, a knee-jerk reaction. On information and belief, Lloyd’s denial of coverage was also based on an

³⁰ La. R.S. 22:1973(C).

internal, high-level directive to automatically deny all pandemic-related business-interruption-claims. Either way, Lloyd's denial was unreasonable and reflects a failure to adequately and reasonably investigate and evaluate Plaintiff's claim, even though Lloyd's knew, or should have known by the exercise of reasonable diligence, that its liability was reasonably clear under the circumstances. For these reasons, Lloyd's conduct as described herein constitutes a breach of the duty of good faith and fair dealing.

49. Lloyd's breach of the duty of good faith and fair dealing has resulted in damages to Plaintiff, that Plaintiff is entitled to recover, as set forth below.

VI.

DAMAGES

50. As a direct and proximate result of the acts and omissions of Lloyds complained of hereinabove and as will be more fully shown more fully at the time of trial, Plaintiff has suffered and continues to suffer business losses caused by the coronavirus pandemic which have and are continuing to cause it a significant and undue burden and hardship. To date, such losses exceed \$1 million.

51. Lloyd's failure to promptly accept and pay Plaintiff's claim has caused and will continue to cause it direct and consequential damages that in total will likely meet or exceed the limits of the Policy. Such damages are a direct result of Lloyd's mishandling of Plaintiff's claims in violation of the law set forth above.

52. In particular, Plaintiff would show that all of the aforementioned acts, taken together or singularly, constitute the producing causes of the damages sustained by Plaintiff.

53. For breach of contract, Plaintiff is entitled, at a minimum, to compensatory damages as measured by its covered losses under the Policy.

54. For breach of the statutory duty of good faith and fair dealing, Plaintiff is entitled, at a minimum, to all compensatory damages, including all forms of loss resulting from Lloyd's breach of duty, such as additional costs, economic hardship, losses due to nonpayment of the amount Lloyd's owes, and other direct and consequential damages, as well as nonpecuniary and exemplary damages.

55. Plaintiff is also entitled to recover its court costs and attorney's fees under 22 U.S.C. § 2202 as such an award is authorized by applicable Louisiana law for comparable actions. *See e.g.*, La. R.S. 22:1982.

56. Under La. R.S. 22:1982,

[A]ll insurers issuing any type of contract, other than those specified in [R.S. 22:1811](#), 1821, and Chapter 10 of Title 23 of the Louisiana Revised Statutes of 1950, shall pay the amount of any claim due any insured within thirty days after receipt of satisfactory proofs of loss from the insured or any party in interest. The insurer shall notify the insurance producer of record of all such payments for property damage claims made in accordance with this Paragraph.

57. The above cited statute goes on to provide that:

Failure to make such payment within thirty days after receipt of such satisfactory written proofs and demand therefor or failure to make a written offer to settle any property damage claim, including a third-party claim, within thirty days after receipt of satisfactory proofs of loss of that claim, as provided in Paragraphs (A)(1) and (4) of this Section, respectively, or failure to make such payment within thirty days after written agreement or settlement as provided in Paragraph (A)(2) of this Section when such failure is found to be arbitrary, capricious, or without probable cause, shall subject the insurer to a penalty, in addition to the amount of the loss, of fifty percent damages on the amount found to be due from the insurer to the insured, or one thousand dollars, whichever is greater, payable to the insured, or to any of said employees, or in the event a partial payment or tender has been made, fifty percent of the difference between the amount paid or tendered and the amount found to be due as well as reasonable attorney fees and costs. Such penalties, if awarded, shall not be used by the insurer in computing either past or prospective loss experience for the purpose of setting rates or making rate filings.

VII.

CONDITIONS PRECEDENT

58. All conditions precedent to recovery for all relief requested have been satisfied or waived.

VIII.

JURY DEMAND

59. Plaintiff asserts its right under the Seventh Amendment to the U.S. Constitution and demands in accordance with Federal Rule of Civil Procedure 38 a trial by jury on all issues.

PRAYER

Plaintiff Dat Dog Enterprises, LLC requests that Defendants Certain Underwriters at Lloyd's be cited to appear and answer, and that declaratory judgment be entered in Plaintiff's favor against Defendant as stated herein, and that Plaintiff have judgment against Defendant for all actual, consequential, and special damages, as well as exemplary damages, and that Plaintiff recover its attorney's fees, costs of court, and all such other relief, general or special, legal or equitable, to which Plaintiff may show itself justly entitled.

Respectfully Submitted,

KOCH & SCHMIDT, L.L.C.

s/ R. Joshua Koch, Jr.

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CERTIFICATE OF SERVICE

I hereby certify that a copy of this pleading has been served upon all parties of record via the Court's electronic filing system, this 4th day of September, 2020.

/s/R. Joshua Koch, Jr.

Rachel A. Meese

