

**UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION**

FIRST WATCH RESTAURANTS, INC.,

Plaintiff,

Civil Action No.: 8:20-cv-2374

vs.

**ZURICH AMERICAN INSURANCE
COMPANY,**

Defendant.

COMPLAINT AND DEMAND FOR JURY TRIAL

Plaintiff, FIRST WATCH RESTAURANTS, INC. (“FIRST WATCH”), by and through the undersigned counsel, files this action against Defendant, ZURICH AMERICAN INSURANCE COMPANY (“ZURICH”), and states:

NATURE OF THE ACTION

1. This is an action for Declaratory Judgment pursuant to 28 U.S.C. § 2201 to determine questions of insurance coverage under a policy of insurance issued by Defendant to Plaintiff.

2. This is also an action for breach of an insurance contract for Defendant’s failure to pay insurance policy proceeds that were due and owing to Plaintiff under the policy of insurance.

JURISDICTION AND VENUE

3. Plaintiff, FIRST WATCH, is a corporation organized under the laws of the State of Delaware with its principal place of business at 8027 Cooper Creek Boulevard, #103, University Park, Florida.

4. Defendant, ZURICH, is an insurance company organized under the laws of the State of New York, with its principal place of business in Schaumburg, Illinois.

5. At all times material, Defendant was authorized to do business in the State of Florida. Defendant was and is engaged in a course of conduct in which revenue was derived from providing goods and/or services throughout Florida and maintained one or more agents and/or representatives in Florida. Defendant entered into insurance contracts with insureds located in Florida, including University Park, Florida.

6. The amount of coverage sought in this declaratory judgment action exceeds the jurisdictional limits of this Court.

7. The action also seeks damages in excess of Seventy-Five Thousand Dollars (\$75,000.00), exclusive of interest, costs and attorney's fees.

8. Venue is proper in this Court because Plaintiff's principal place of business is in the Middle District of Florida; the Policy was entered into, issued, and covers property located in the Middle District of Florida; and this cause of action arose in the Middle District of Florida.

FIRST WATCH RESTAURANTS

9. For 37 years, FIRST WATCH has operated its restaurants around the core service philosophy of "You First", doing whatever it takes to make each customer's visit memorable and keep them coming back for more.

10. As of March 2020, the FIRST WATCH family of restaurants had grown to more than 400 locations operating in 29 states, the vast majority of which are company-owned. This claim involves only the company-owned restaurants listed on the Schedule of Locations provided to Defendant, ZURICH, plus several additional restaurants that were scheduled to open after the inception of the policy.

11. FIRST WATCH restaurants serve breakfast, brunch and lunch daily and also accommodate take-out and delivery orders.

VIRUS/PANDEMIC

12. As this Court is well aware, SARS-CoV-2 (commonly called “COVID-19”) is a most recent strain of coronavirus. It is publicly acknowledged that COVID-19 is highly contagious and appears to have a higher mortality rate than other more common strains of virus.

13. A national state of emergency related to the COVID-19 outbreak was declared on March 13, 2020.

14. After the national state of emergency was declared, state and local governments began issuing orders impacting the ability of restaurants to operate and serve the general public.

15. Initially, where permitted, FIRST WATCH maintained limited service for take-out and/or delivery. However, on April 13, 2020, FIRST WATCH Chief Executive Officer Chris Tomasso announced the temporary closure of all company-owned restaurants.

16. FIRST WATCH began re-opening some of its company-owned restaurants in May of 2020 with many re-openings occurring around June 1, 2020 as permitted locally. The re-opening of some locations, including some in New Jersey and Pennsylvania, was not permitted locally until late Summer 2020.

17. Even after re-opening, many FIRST WATCH locations were required to operate with reduced dining room capacity pursuant to state and local orders.

FLORIDA EXECUTIVE ORDERS

18. On March 1, 2020, Florida Governor DeSantis issued Executive Order No.: 20-51 and declared a state of emergency in Florida as a result of COVID-19. A copy of Executive Order No.: 20-51 is attached as Exhibit “1.”

19. On March 20, 2020, Governor DeSantis issued Executive Order No.: 20-71, directly addressing “restaurants and bars.” A copy of Executive Order No.: 20-71 is attached as Exhibit “2.” Executive Order No.: 20-71 states, in pertinent part: “I hereby order all restaurants and food establishments licensed under Chapters 500 and 509, Florida Statutes, within the State of Florida to suspend on-premises food consumption for customers. . .” Exhibit 2, pp. 4.

20. On April 1, 2020, Governor DeSantis issued Executive Order No.: 20-91 and ordered all persons in Florida to practice “safer at home,” including limiting movements and interactions to only those necessary to obtain or provide essential services or conduct essential activities. A copy of Executive Order No.: 20-91 is attached as Exhibit “3.”

EXECUTIVE ORDERS IN OTHER STATES

21. In March of 2020, Governors in every state in the country issued Executive Orders relating to COVID-19 similar to those issued by Governor DeSantis in Florida.

22. For the purposes of this Complaint, it is alleged that Plaintiff, FIRST WATCH, was required to close or alter service at all of its restaurants outside of the State of Florida due to Executive Orders of each State’s Governor, or pursuant to local order.

23. Plaintiff, FIRST WATCH, maintains a proprietary spreadsheet identifying each restaurant, dates of closure and reopening with reference to the applicable Executive Order or local order. This document will be provided to ZURICH upon request and, if necessary, filed with the Court under seal.

POLICY

24. Defendant issued its ZURICH EDGE Policy No. ZMD7740168-00 to Plaintiff, FIRST WATCH, for the policy period of March 1, 2020 to March 1, 2021 (the “Policy”). A copy of the Policy in Plaintiff’s possession is attached as Exhibit “4.” A certified copy of the Policy is

in the exclusive control of Defendant, and Plaintiff expects Defendant will produce the certified copy in discovery.

25. At all times material hereto, the ZURICH EDGE Policy was in full force and effect and provided coverage to Plaintiff's company-owned restaurants located throughout the United States.

26. Section I of The ZURICH EDGE Policy is entitled "POLICY APPLICABILITY" and begins with "Section 1.01 Insuring Agreement" which provides FIRST WATCH with coverage:

1.01. INSURING AGREEMENT

This Policy Insures against direct physical loss of or damage caused by a Covered Cause of Loss to Covered Property, at an Insured Location described in Section II-2.01, all subject to the terms, conditions and exclusions stated in this Policy.

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27. The ZURICH EDGE Policy defines **Covered Cause of Loss** in Section 7.11:

Covered Cause of Loss - All risks of direct physical loss of or damage from any cause unless excluded.

(Ex. 4, pp. 62).

28. The ZURICH EDGE Policy does not define the phrase "direct physical loss of or damage from".

29. The ZURICH EDGE Policy provides policy limits of \$215,266,600 in Property Damage (PD) and \$80,880,000 in Time Element (TE) coverage. Property Damage coverage is detailed in Section III of the policy and Time Element coverage is detailed in Section IV of the policy.

¹ Policy terms written in bold in this Complaint are specifically defined in "Section VII - Definitions" of the ZURICH policy.

30. The Section III - Property Damage and Section IV - Time Element coverage descriptions include specific Exclusions for each type of coverage (*See* Sections 3.03 and 4.02.05).

31. The claims in dispute in this action are made under the Section IV - TIME ELEMENT coverage section of the ZURICH EDGE Policy.

32. Section 4.01 LOSS INSURED states:

The Company will pay for the actual Time Element loss the Insured sustains, as provided in the Time Element Coverages, during the Period of Liability. The Time Element loss must result from the necessary Suspension of the Insured's business activities at an Insured Location. The Suspension must be due to direct physical loss of or damage to Property (of the type insurable under this Policy other than Finished Stock) caused by a Covered Cause of Loss at the Location, ²

(Ex. 4, pp. 28).

33. Section 4.01.02 states:

There is recovery only to the extent that the Insured is:

unable to make up lost production within a reasonable period of time not limited to the period during which production is Suspended;

unable to continue such operations or services during the Period of Liability; and

able to demonstrate a loss of revenue for the operations, services or production Suspended.

34. The relevant Policy definition of **Suspension** (Suspended) is contained in Section 7.56.01 as “The slowdown or cessation of the Insured’s business activities”.

35. Section 4.02 includes the description of available damages under the “TIME ELEMENT COVERAGES. The sections relevant to this matter are:

² The general policy definition of “**Location**” is contained in Section 7.28.01 “As specified in the Schedule of Locations”. All of the claims made in this matter relate to First Watch locations included on the Schedule of Locations on file with ZURICH.

GROSS EARNINGS

Gross Earnings loss is the actual loss sustained by the Insured during the Period of Liability. ³

36. Section V of the policy is titled “SPECIAL COVERAGES & DESCRIBED CAUSES OF LOSS”. Section 5.02 contains the “Description of Special Coverages” relevant to this action, one of which is Section 5.02.03:

CIVIL OR MILITARY AUTHORITY

The Company will pay for the actual Time Element loss sustained by the Insured, as provided by this Policy, resulting from the necessary Suspension of the Insured's business activities at an Insured Location if the Suspension is caused by order of civil or military authority that prohibits access to the Location. That order must result from a civil authority's response to direct physical loss of or damage caused by a Covered Cause of Loss to property not owned, occupied, leased or rented by the Insured or insured under this Policy and located within the distance of the Insured's Location as stated in the Declarations. The Company will pay for the actual Time Element loss sustained, subject to the deductible provisions that would have applied had the physical loss or damage occurred at the Insured Location, during the time the order remains in effect, but not to exceed the number of consecutive days following such order as stated in the Declarations up to the limit applying to this Coverage.

(Ex. 4, pp. 34-35).

CLAIM FOR SECTION IV TIME ELEMENT AND SECTION V CIVIL AUTHORITY LOSSES

37. Due to the existence of COVID-19 and the related pandemic, Executive Orders were issued in the states in which Plaintiff operates restaurants variously ordering the closure of restaurants (including Plaintiff's restaurants), and requiring the public to practice “safer at home,” the insured properties are not able to function as intended by Plaintiff and Defendant. Plaintiff has suffered the direct physical loss of the ability to operate the insured properties and

³ The formula for calculating Gross Earnings value is contained in Section 4.02.01.02. Because ZURICH denied Plaintiff's claims in their entirety, it is unclear at this point whether there is any dispute as to the proper calculation of Plaintiff's Time Element losses of Gross Earnings.

as a result, lost the ability to operate as a dine-in restaurant and necessarily had to suspend and/or limit its business activities occurring at the insured properties.

38. Plaintiff's loss of use of the insured properties and insured property's inability to function as intended by Plaintiff and Defendant is a direct physical loss. As a result of this direct physical loss, Plaintiff has suffered loss of business income, has incurred "Extra Expense" to minimize the suspension of business and continue its operations, and has suffered other losses and damages recoverable under Section IV of the Policy.

39. Plaintiff has further suffered loss of business income and extra expense due to the action of civil authority that prohibits access to Plaintiff's insured premises. The action of civil authority was a result of direct physical loss of or damage to property, other than at the described premises, due to COVID-19, the related pandemic, and other covered causes of loss under Section V of the policy.

ZURICH'S JUNE 3, 2020 DENIAL LETTER

40. Defendant, ZURICH responded to FIRST WATCH's initial notice of claim with a Reservation of Rights letter dated April 22, 2020, attached as Exhibit 5. FIRST WATCH responded by letter of May 5, 2020 which resulted in a denial letter from ZURICH dated June 3, 2020, attached as Exhibit 6.

41. ZURICH's June 3, 2020 denial of coverage appears to be based on the unsupported conclusion that its EDGE Policy requires physical damage to a building or structure: "there does not appear to be any claim for *direct physical loss of or damage to*

property at an Insured Location. In any event, the presence of the COVID-19 virus does not constitute ‘*direct physical loss or damage*’ to property⁴.” (Ex. 6, pp. 2).

42. ZURICH’s denial letter then tries to hedge its position that the policy requires direct physical damage to an Insured Location: “Moreover, any damage to property would be excluded under the following “Contamination” exclusion set forth in Section 3.03 of the Policy.”⁵ (Ex. 6., pp. 2).

43. Of course, there is no direct evidence that any of FIRST WATCH’s insured locations were closed due to active contamination of the virus. Instead, FIRST WATCH experienced the “direct physical loss of” the insured properties due to inability to operate the restaurants as intended. It is these losses that are covered under Section IV - TIME ELEMENT of the ZURICH Policy.

44. Without explaining how or why a Section III Exclusion applies to the differently defined coverage under Section IV, ZURICH’s denial letter states: “Accordingly, any loss resulting from the presence of COVID-19 virus or and “**suspension**”⁶ of operations as a result of the presence of COVID-19 virus would be excluded under the Policy. (Ex. 6, pp. 3).

⁴ The ZURICH EDGE Policy contains the phrases “direct physical loss of or damage to” and “direct physical loss or damage”. By its denial letter, ZURICH seems to suggest that these phrases are interchangeable and mean the same thing. Yet, ZURICH’s position fails to account for or define what the word “of” means in the context of “direct physical loss”. If the differing phrases had the same legal effect and meaning, there would be no reason to include “of” in one version and not the other.

⁵ Section III of the Policy outlines the “PROPERTY DAMAGE” coverage, limitations and exclusions. The “PROPERTY DAMAGE” coverage, by definition, requires actual physical damage to property. Indeed Section 3.03.01 “EXCLUSIONS” states “This Policy excludes the following unless it results from direct physical loss or damage not excluded by this Policy.” Here, ZURICH has dropped the “of” without explanation or clarification. Perhaps this is because a claim under the PROPERTY DAMAGE coverage would not be established if the insured sustained a loss *of* the ability to utilize the property as intended vs. sustained actual physical loss or damage that required the expense of repair that would be covered under this section of the Policy.

⁶ Relevantly defined in Section 7.56.01 as “The slowdown or cessation of the Insured’s business activities”.

45. Later, in denying coverage under the Section IV - CIVIL OR MILITARY AUTHORITY Special Coverage, ZURICH's letter again states "[t]he presence of the COVID-19 virus does not constitute "direct physical loss or damage" to property." (Ex. 6, p. 3). Of course ZURICH's denials fail to acknowledge that the nationwide shutdown of their restaurants due to COVID-19 risks resulted in the "direct physical loss of" the ability to operate all of their insured locations.

46. ZURICH's denial letter concludes with a claim that Exclusion 4.02.05.01.01 applies. This exclusion addresses losses that an insured would have experienced even if the **suspension** of business activities from the covered event had not occurred. ZURICH then cites sub-exclusion language contained in 4.02.05.01.01.03 without noting that the word "of" is not included in the exclusionary language but is included in the description of coverage contained in SECTION 4.01.01 of the Policy. (Ex. 6, pp. 5).

COUNT I – DECLARATORY JUDGMENT

Plaintiff adopts and re-alleges all allegations contained in paragraphs 1 through 46 above, as though fully set forth in this Count.

47. Plaintiff is unsure of Plaintiff's right to coverage for direct physical loss, business interruption coverage, extra expense coverage, and civil authority coverage. Plaintiff believes the Policy provides coverage for all its COVID-19 and pandemic related damages and losses. Plaintiff has therefore filed this action seeking a determination whether the Policy provides coverage to Plaintiff for these injuries, damages, and losses.

WHEREFORE, pursuant to 28 U.S.C. § 2201, Plaintiff, FIRST WATCH RESTAURANTS, INC., respectfully requests that this Court grant Declaratory Judgment for Plaintiff, declaring:

- a) Plaintiff sustained direct physical loss of the ability to operate its individual restaurants.
- b) Plaintiff's loss is a covered loss which is not excluded or limited under the Policy.
- c) Plaintiff has sustained loss of Business Income at each impacted location due to the necessary suspension of its operations during the period of liability.
- d) The suspension of operations was caused by direct physical loss of the ability to operate the insured's individual restaurants as designed and intended.
- e) Plaintiff incurred extra expense to avoid or minimize the suspension of business and to continue operations.
- f) Plaintiff sustained loss of business income and incurred extra expense due to the action of civil authority that prohibits access to (and the operation of) Plaintiff's various insured premises.

COUNT II – BREACH OF THE INSURANCE POLICY

Plaintiff adopts and re-alleges all allegations contained in paragraphs 1 through 46 above, as though fully set forth in this Count.

48. During the Policy period of March 1, 2020 to March 1, 2021, Plaintiff sustained physical loss of covered property caused by a **Covered Cause of Loss**. Plaintiff suffered loss of business income and incurred extra expense as a result. Plaintiff also sustained loss of business income and incurred extra expense due to the action of civil authority that prohibits access to Plaintiff's insured premises, in addition to other losses and damages.

49. Plaintiff notified Defendant of its losses.

50. Plaintiff complied with all conditions precedent to entitle Plaintiff to recover under the Policy, or Defendant waived compliance with such conditions.

51. Defendant has failed to provide the coverages for Plaintiff's losses and has failed to pay for all of Plaintiff's losses. Defendant has denied all coverage for Plaintiff's claim.

52. Defendant's failure to pay for Plaintiff's covered losses is a material breach of contract.

53. As a result of Defendant's material breach of contract, it has become necessary for Plaintiff to retain the services of the undersigned law firm.

WHEREFORE, Plaintiff, FIRST WATCH RESTAURANTS, INC., demands judgment against Defendant, ZURICH AMERICAN INSURANCE COMPANY, for all covered losses, with interest on any overdue payments, any incidental and foreseeable consequential damages caused by Defendant's breach of contract, plus attorney's fees and costs pursuant to Sections 627.428, 57.041, and 92.231, Florida Statutes.

DEMAND FOR JURY TRIAL

Pursuant to Rule 38, Federal Rules of Civil Procedure, Plaintiff hereby demands trial by jury on all issues so triable.

Dated this ____ day of October, 2020.

**DELLECKER WILSON KING
MCKENNA RUFFIER & SOS
A Limited Liability Partnership**

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