

RETURN DATE: 07/20/2021	:	SUPERIOR COURT
	:	
THE MOHEGAN	:	JUDICIAL DISTRICT OF
TRIBAL GAMING AUTHORITY	:	
	:	
	:	NEW LONDON
VS.	:	
	:	
FACTORY MUTUAL INSURANCE CO.	:	JUNE 9, 2021

COMPLAINT

For its Complaint against Factory Mutual Insurance Co., the Mohegan Tribal Gaming Authority alleges as follows:

Parties

1. The Mohegan Tribe of Indians of Connecticut (the “Mohegan Tribe”) is a sovereign, federally-recognized Indian tribe.

2. Plaintiff Mohegan Tribal Gaming Authority (the “Authority”) is the instrumentality of the Mohegan Tribe with the exclusive authority to conduct and regulate gaming activities for the Mohegan Tribe on tribal lands and the non-exclusive authority to conduct such activities elsewhere.

3. Factory Mutual Insurance Co. (“Factory Mutual”) is an insurance company that is incorporated under the laws of Rhode Island and maintains a principal place of business in Rhode Island. Factory Mutual is licensed to conduct insurance business in Connecticut and transacts insurance business in Connecticut.

Facts

A. The Resort

4. The Authority owns and operates an integrated entertainment resort located at One Mohegan Sun Boulevard in Uncasville, Connecticut, that features two hotel towers, casino table games and slot machines, restaurants and bars, spas, a convention center, a 10,000 seat arena, and numerous retail shops (collectively, the “Resort”).

5. Millions of people visit the Resort each year, many of whom are residents of Connecticut, and the neighboring States of New York, Massachusetts, and Rhode Island.

B. The Coronavirus Pandemic

6. In December 2019, the first instance of a respiratory illness caused by a novel coronavirus was identified in Wuhan, China. In a matter of weeks, the virus quickly spread across Asia, the United States and most of the world.

7. On February 11, 2020, the International Committee on Taxonomy of Viruses named this novel coronavirus “severe acute respiratory syndrome coronavirus 2 (SARS-CoV-2)” (the “Coronavirus”). The same day, the World Health Organization (“WHO”) named the disease caused by the Coronavirus, “COVID-19.”

8. The first confirmed case of COVID-19 involving a resident of New York was confirmed by the New York State Department of Public Health on or about March 1, 2020; the first presumptive positive case of COVID-19 involving a Massachusetts resident was confirmed by the Massachusetts Department of Public Health on or about March 2, 2020; the first presumptive positive case of COVID-19 involving a Rhode Island resident was confirmed by the Rhode Island Department of Health on or about

March 2, 2020; and, the first presumptive positive case of COVID-19 involving a Connecticut resident was confirmed by the Connecticut Department of Public Health on or about March 8, 2020.

9. The number of COVID-19 cases in Connecticut, New York, Massachusetts, Rhode Island and across the country increased significantly during the first three weeks of March 2020.

10. On March 10, 2020, Connecticut Governor Ned Lamont declared a public health emergency “[i]n response to the global pandemic of COVID-19 disease associated with a novel coronavirus that is currently affecting multiple countries and states and has resulted in the spread of infections in Connecticut and the surrounding states”

11. On March 11, 2020, the WHO declared the Coronavirus outbreak a worldwide pandemic¹ and noted its deep concern “by the alarming levels of spread and severity [of the Coronavirus].” According to numerous public health authorities, everyone is at risk of exposure to Coronavirus and falling ill with COVID-19. Due to its highly contagious and easily transmitted nature, a single instance of Coronavirus in a community can (and as time has progressed, does) quickly and exponentially grow into a massive, uncontrollable outbreak of COVID-19.

12. Coronavirus is present in viral fluid particles in the air, as well as on surfaces (e.g., walls, furniture, doors, fixtures, countertops and touch screens). It is

¹ See World Health Organization, *WHO Director-General's opening remarks at the media briefing on COVID-19 - 11 March 2020* (Mar. 11, 2020), <https://www.who.int/dg/speeches/detail/who-director-general-s-opening-remarks-at-the-media-briefing-on-covid-19---11-march-2020> (last visited March 11, 2021).

highly contagious and easily transmitted from person to person, from airspace to person, or from surface to person.

13. Coronavirus has several modes of transmission. According to the WHO and the Centers for Disease Control and Prevention (“CDC”), Coronavirus can spread from person to person through physical droplets from the nose or mouth that are spread when an infected person sneezes, coughs or exhales. The physical droplets then remain in and contaminate the air, and also land on and contaminate nearby objects and surfaces, where Coronavirus remains active and dangerous (even while in the air and on inert objects and surfaces) for long periods of time. People “catch” Coronavirus by being in the vicinity of a person who has Coronavirus and breathing in shed droplets, or by touching objects or surfaces on which droplets landed and then touching their own eyes, nose or mouth. Those people then further spread Coronavirus throughout their environments and communities in the same manner.

14. Coronavirus has spread widely in this manner, in Connecticut and nationwide, including through interactions with physical property inside premises, and encounters with airborne particles within premises.

15. Importantly, even asymptomatic infected persons (*i.e.*, those who have no sign of illness) can and do spread Coronavirus.² In fact, studies have estimated that over 40% of infected individuals may never develop symptoms, yet still spread Coronavirus through physical droplets.³

² See World Health Organization, *Coronavirus disease 2019 (COVID-19) Situation Report – 73* (Apr. 2, 2020), https://www.who.int/docs/default-source/coronaviruse/situation-reports/20200402-sitrep-73-covid-19.pdf?sfvrsn=5ae25bc7_2 (last visited March 11, 2021).

³ See, e.g. Erika Edwards, *Asymptomatic COVID-19 Cases May Be More Common Than Suspected* (May 27, 2020, 1:43 PM), <https://www.nbcnews.com/health/health-news/asymptomatic-covid-19-cases-maybe-more-common-suspected-n1215481> (last visited March 11, 2021).

16. Respiratory droplets expelled from infected individuals remain in the air, and land on, attach, and adhere to surfaces and objects. In doing so, they physically change the airspace of the relevant premises and the property and its surface by becoming a part of that surface. As a result of this physical alteration, contact with that previously safe, airspace, and inert surfaces (e.g., walls, tables, countertops) has been made unsafe.

17. Accordingly, because an individual with no symptoms can spread Coronavirus simply by breathing or talking, and because droplets containing Coronavirus can remain in the air and land and remain infectious on surfaces for many days, the risks posed by Coronavirus are not temporary. Even when the air and surfaces inside a building are thoroughly and effectively cleaned, each time an infected person enters that space the cycle renews such that infectious Coronavirus is likely (if not certain) to be present wherever people are located or congregate. The world has seen communities shut down and reopen, only to be shut down again following another outbreak. Until recently, with the advent and administration of COVID-19 vaccines to people across the country and world, the risk of spread of COVID-19 wherever people gathered was a near certainty. The virtually guaranteed risk of the spread of COVID-19 prior to the widespread administration of the vaccine is why it became necessary to close or strictly limit the use of indoor and outdoor spaces, such as the Resort.

C. The Authority's and Governmental Public Health Responses to the Pandemic

18. To limit the spread of COVID-19, Governor Lamont issued a series of Executive Orders in March 2020 that restricted the operations of non-essential businesses located in Connecticut.

19. Governor Lamont's Executive Order No. 7D, effective 8:00 p.m. on March 16, 2020, stated that "any restaurant or eating establishment and any location licensed for on-premises consumption of alcoholic liquor in the State of Connecticut, except for Class III and Class II Tribal Gaming enterprises, shall only serve food or non-alcoholic beverages for off-premises consumption." Executive Order No. 7D further stated that "[t]he Governor continues to work with the state's federally recognized tribes on the temporary closure of their casino operations"

20. Governor Lamont's prohibition of on-premises food and liquor consumption was a reasonable measure to prevent the spread of COVID-19.

21. The Mohegan Tribe is a sovereign nation that was not subject to the Governor's Executive Orders.

22. On March 16, 2020, the Mohegan Tribe issued a resolution titled "Declaration of Emergency on the Mohegan Reservation in Response to COVID-19 Disease" ("Declaration"). A copy of the Declaration is attached hereto as Exhibit A.

23. The Mohegan Tribe's Declaration states that "the coronavirus known as COVID-19 has infected multiple countries and the United States and has infected residents of the State of Connecticut (the 'State') and the "appearance of COVID-19 in the State indicates the potential for widespread exposure to an infectious agent that poses a significant risk of substantial harm to a large number of people"

24. The Declaration further states that "the Tribal Council does hereby declare an emergency on the Mohegan Reservation to protect the public health and safety and directs all commercial operations on the Mohegan Reservation to close no later than 8:00 p.m. on March 17, 2020 and remain closed through March 31, 2020 in order to

prepare for the impact that COVID-19 may have on the Mohegan Reservation and in the community and take all necessary steps to prevent widespread impact”

25. The Mohegan Tribe issued the Declaration to prevent the spread of COVID-19 at the Resort.

26. Effective 8:00 pm on March 17, 2020, the Authority shut down all of its operations at the Resort until March 31, 2020 pursuant to a resolution of the Authority dated March 16, 2020 and titled “Confirmation of Declaration of Emergency to Mohegan Sun” (“Confirmation of Declaration”). A copy of the Confirmation of Declaration is attached hereto as Exhibit B.

27. The Resort suffered millions of dollars in lost revenue while the Confirmation of Declaration was in effect.

D. The Factory Mutual Insurance Policy

28. For the period of March 1, 2020 to March 1, 2021, the Authority was insured under an insurance policy (“Policy”), numbered 1064319 and sold by Factory Mutual, “against ALL RISKS OF PHYSICAL LOSS OR DAMAGE, except as hereinafter excluded, while located as described in this Policy.” A complete copy of the Policy is attached hereto as Exhibit C.

29. Factory Mutual drafted the Policy.

30. Section 6 of the Policy includes a series of 27 “Additional Coverages for insured physical loss or damage.”

31. One of the “Additional Coverages for insured physical loss or damage” in section 6 of the Policy is titled “COMMUNICABLE DISEASE RESPONSE.” This “Additional Coverage” states that:

6. ADDITIONAL COVERAGES

This Policy includes the following Additional Coverages for insured physical loss or damage

F. COMMUNICABLE DISEASE RESPONSE

If a **location** owned, leased or rented by the Insured has the actual not suspected presence of **communicable disease** and access to such **location** is limited, restricted or prohibited by:

- 1) an order of an authorized governmental agency regulating the actual not suspected presence of **communicable disease**; or
- 2) a decision of an Officer of the Insured as a result of the actual not suspected presence of **communicable disease**,

this Policy covers the reasonable and necessary costs incurred by the Insured at such location with the actual not suspected presence of communicable disease for the:

- 1) cleanup, removal and disposal of the actual not suspected presence of communicable diseases from insured property; and
- 2) actual costs of fees payable to public relations services or actual costs of using the Insured's employees for reputation management resulting from the actual not suspected presence of communicable disease

32. The Policy defines "**communicable disease**" to include "disease which is: transmissible from human to human by direct or indirect contact with an affected individual or the individual's discharges"

33. COVID-19 is a "**communicable disease**" as the term is defined in the Policy.

34. Another of the "Additional Coverages for insured physical loss or damage" in Section 6 of the Policy is titled "PROTECTION AND PRESERVATION OF PROPERTY" and states that:

6. ADDITIONAL COVERAGES

This Policy includes the following Additional Coverages for insured physical loss or damage

U. PROTECTION AND PRESERVATION OF PROPERTY

This Policy covers:

- 1) reasonable and necessary costs incurred for actions to temporarily protect or preserve insured property; provided such actions are necessary due to actual, or to prevent immediately impending, insured physical loss or damage to such property

This Additional Coverage is subject to the deductible provisions that would have applied had the physical loss or damage happened.

35. Section 5 of the Policy, which is titled "TIME ELEMENT COVERAGE EXTENSIONS," states that "[t]his Policy also insures TIME ELEMENT loss, as provided by the TIME ELEMENT COVERAGES of this Policy, for the TIME ELEMENT COVERAGE EXTENSIONS described below."

36. Section 5 of the Policy contains numerous "TIME ELEMENT COVERAGE EXTENSIONS," including one titled "PROTECTION AND PRESERVATION OF PROPERTY."

37. The "PROTECTION AND PRESERVATION OF PROPERTY" time element coverage extension states that:

5. TIME ELEMENT COVERAGE EXTENSIONS

This Policy also insures TIME ELEMENT loss, as provided by the TIME ELEMENT COVERAGES of this Policy, for the TIME ELEMENT COVERAGE EXTENSIONS described below

G. PROTECTION AND PRESERVATION OF PROPERTY TIME ELEMENT

This Policy covers the Actual Loss Sustained by the Insured for a period of time not to exceed 48 hours prior to and 48 hours after the Insured first taking reasonable action for the temporary protection and preservation of property insured by this Policy provided such action is necessary to prevent immediately impending insured physical loss or damage to such insured property.

38. Factory Mutual's website describes how the Protection and Preservation of Property and Protection and Preservation of Property Time Element coverages are designed to work as follows:

[U]nder Protection and Preservation of Property (PPP), there is a specified period of business interruption coverage that extends 48 hours prior to the insured taking the first reasonable action of temporary protection of property, and then for 48 hours after that first action. The rationale is that many businesses either need to begin the process of shutting down or evacuating residents and/or guests before they can begin to board up windows, doors, etc. Then, unless physical damage is sustained, the policy anticipates a day or two to remove the temporary measures and resume operations

E. The Authority's Insurance Claim and Factory Mutual's Coverage Denial

39. At the time the Authority issued the Confirmation of Declaration, there was an immediately impending risk that persons infected with COVID-19 would enter the Resort and that those persons, in turn, would cause the actual presence of **communicable disease** at the Resort.

40. The actual presence of **communicable disease** within insured property constitutes "insured physical loss or damage" to such insured property as this phrase is used in the Policy.

41. To prevent the immediately impending actual presence of **communicable disease** at the Resort, effective 8:00 pm EDT on March 17, 2020, the Authority first took reasonable action for the protection of its Resort property by temporarily closing the Resort, which prevented guests who were infected with COVID-19 from entering the premises.

42. Pursuant to the PROTECTION AND PRESERVATION OF PROPERTY time element coverage extension in the Policy, Factory Mutual is obligated to cover the

Authority's "Actual Loss Sustained" during the period of March 15, 2020 at 8:00 pm EDT to March 19, 2020 at 8:00 pm EDT.

43. The Authority submitted a proof of loss establishing its Actual Loss Sustained to Factory Mutual.

44. By letter dated October 29, 2020, Factory Mutual denied coverage. A copy of Factory Mutual's October 29, 2020 letter is attached hereto as Exhibit D.

Count I – Breach of Contract

45. The Authority incorporates by reference and re-alleges each of the allegations contained in paragraphs 1 through 44.

46. The Policy obligates Factory Mutual to reimburse the Authority for "Actual Loss Sustained" by the Authority "for a period of time not to exceed 48 hours prior to and 48 hours after the Insured first taking reasonable action for the temporary protection and preservation of property insured by this Policy provided such action is necessary to prevent immediately impending insured physical loss or damage to such insured property."

47. The Authority ceased operations at the Resort pursuant to the Confirmation of Declaration for the temporary protection and preservation of the Resort because such action was necessary to prevent immediately impending insured physical loss or damage to the Resort in the form of the actual presence of communicable disease.

48. Factory Mutual has failed to reimburse the Authority for any portion of the Actual Loss that the Authority incurred.

49. Factory Mutual's failure to reimburse the Authority for its Actual Loss constitutes a breach of the Policy.

50. As a direct result of Factory Mutual's breach of the Policy, the Authority has incurred damages, including amounts due and owing under the Policy. The Authority also has been and will be forced to incur additional consequential damages including, without limitation, the cost of attorneys' fees and other expenses in connection with this action.

51. All conditions and requirements imposed by the Policy on the Authority including but not limited to payment of premiums and timely notice of claims, have been satisfied and/or have been waived and/or are subject to an estoppel or other avoidance against Factory Mutual.

Count II – Breach of Implied Covenant of Good Faith and Fair Dealing

52. The Authority incorporates by reference and re-alleges each of the allegations contained in paragraphs 1 through 51.

53. Factory Mutual owes the Authority a duty of good faith and fair dealing under the Policy.

54. Factory Mutual's October 29, 2020 coverage denial letter states that the Policy's Protection and Preservation of Property Time Element coverage extension does not apply because "the presence of COVID-19 at an insured location does not constitute 'physical damage of the type insured' as required by the Policy. Similarly, the possibility of the presence of COVID-19 at an insured location does not constitute 'immediately impending insured physical loss or damage to such insured property' as required by the above provision"

55. The prefatory language in Section 6 of the Policy (“Other Additional Coverages”) describes the Policy’s Communicable Disease Response coverage as one of the Policy’s “Additional Coverages for insured physical loss or damage.”

56. Factory Mutual’s position that the presence of COVID-19, a **communicable disease**, on insured property is not “physical damage of the type insured” by the Policy is contradicted by the plain language of Section 6 of the Policy.

57. By denying coverage based on a position that is contradicted by the express language of the Policy, Factory Mutual has deprived the Authority of coverage under the Policy that it reasonably expected to receive.

58. Factory Mutual’s coverage denial based on a position that is contradicted by the express language of the Policy was issued in bad faith with the sole purpose of favoring the economic interests of Factory Mutual over those of its insured, the Authority.

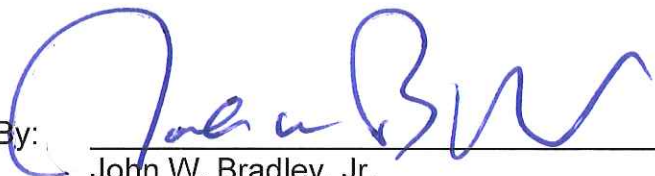
59. As a direct result of Factory Mutual’s breach of the covenant of good faith and fair dealing, the Authority has incurred damages, including amounts due and owing under the Policy. The Authority also has been and will be forced to incur additional consequential damages including, without limitation, the cost of attorneys’ fees and other expenses in connection with this action.

WHEREFORE, Plaintiff demands:

1. Money damages;
2. Attorney’s fees;
3. Interest;
4. Costs; and

5. Such other and further relief as the Court deems just and equitable.

**THE PLAINTIFF,
THE MOHEGAN TRIBAL GAMING
AUTHORITY**

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STATEMENT OF AMOUNT IN DEMAND

The Plaintiffs in the above-captioned matter hereby claim damages in excess of
FIFTEEN THOUSAND DOLLARS (\$15,000.00), exclusive of interest and costs.

THE PLAINTIFF,
THE MOHEGAN TRIBAL GAMING
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