

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT**

HEALTHTRAX INTERNATIONAL, INC.;)
HEALTHTRAX INC.; DARTMOUTH CLUB)
PROPERTIES, INC.; AND GLASTONBURY)
FITNESS AND WELLNESS, INC.)

Plaintiffs)

v.)

AGCS MARINE INSURANCE COMPANY AND)
ALLIANZ GLOBAL CORPORATE & SPECIALTY)

Defendants)

**JURY TRIAL
DEMANDED**

JANUARY 11, 2022

COMPLAINT

Plaintiffs, Healthtrax International, Inc., Healthtrax, Inc., Dartmouth Club Properties, Inc. and Glastonbury Fitness and Wellness, Inc. (“Plaintiffs”), bring this action against Defendants, AGCS Marine Insurance Company and Allianz Global Corporate & Specialty (“Defendants”). In support thereof, Plaintiffs’ state and allege the following:

I. INTRODUCTION

This case concerns whether Plaintiffs’ actual loss of Earnings and Extra Expenses incurred in response to the on-going COVID-19 pandemic are covered under the Defendants’ Commercial Output Policy. As more specifically pled herein, the Defendants agreed to pay for the actual loss of Earnings, Extra Expense, and Necessary Repairs and Emergency Measures that the Plaintiffs sustained due to the interruption of business at their health and fitness facilities and that the

interruption was caused by direct physical loss of or damage to property at the covered locations. Defendants have breached the contract and the implied covenant of good faith and fair dealing.

II. NATURE OF THE ACTION

1. This action arises out of Defendants' failures to provide insurance coverage for the losses sustained and expenses incurred by Plaintiffs due to the interruption of business caused by the ongoing COVID-19 Pandemic.

2. For many years, Plaintiffs have operated health and fitness facilities in Connecticut, Massachusetts, Rhode Island, New York, and North Carolina. Since March 2020, Plaintiffs' businesses have been wholly or partially interrupted by direct physical loss of or damage to property at covered locations as the result of a covered peril, i.e., the Pandemic. Plaintiffs anticipate that interruption of their businesses will continue.

3. To protect their businesses in the event that they suddenly had to suspend routine operations for reasons outside of their control, or in order to prevent property damage, Plaintiffs purchased insurance coverage from Defendants, including property coverage, as set forth in Defendants' Commercial Output Policy.

4. Defendants' Commercial Output Program-Income Coverage Part, Form CO 1001 04 02, provides loss of actual Earnings and Extra Expense coverage.

5. Defendants' Commercial Output Program – Property Coverage Part, Form 1000 10 02, under section titled, "What Must Be Done In Case of Loss",

requires in the event of a loss, the policyholder “must take all reasonable steps to protect covered property at and after an insured loss to avoid further loss, [and] ‘we’ will pay the reasonable costs incurred by ‘you’ for necessary repairs or emergency measures performed solely to protect covered property from further damage by a peril insured against has already caused a loss to covered property. ‘You’ must keep an accurate record of such costs.” (“Necessary Repairs and Emergency Measures” coverage.)

6. Plaintiffs were forced to suspend or reduce operations at and after an insured loss to protect covered property and to avoid further loss.

7. The Defendants have refused to pay the Plaintiffs under their Earnings and Extra Expense coverages for losses suffered. Defendants have also refused to pay for the reasonable costs incurred for Necessary Repairs or Emergency Measures performed to protect covered property and to avoid further loss. Defendants have also refused to appropriately investigate and nevertheless denied claims submitted by Plaintiffs under the Policy.

III. THE PARTIES

8. Healthtrax International, Inc. is a Connecticut corporation with a principal place of business in Glastonbury, Connecticut.

9. Healthtrax, Inc. is a Connecticut corporation with a principal place of business in Glastonbury, Connecticut.

10. Dartmouth Club Properties, Inc. is a Massachusetts corporation with a principal place of business in North Dartmouth, Massachusetts.

11. Glastonbury Fitness and Wellness, Inc. is a Connecticut corporation with a principal place of business in Glastonbury, Connecticut.

12. AGCS Marine Insurance Company is, and at all times relevant hereto has been, an insurance company writing policies and doing business in the State of Connecticut, capable of suing and being sued in the courts of this State. AGCS Marine Insurance Company is a corporation organized, incorporated and existing under the laws of the State of Indiana, with its principal place of business in Chicago, IL.

13. AGCS Marine Insurance Company is a wholly owned subsidiary of Allianz Global Corporate & Specialty.

14. Allianz Global Corporate & Specialty is, and at all times relevant hereto has been, an insurance company writing policies and doing business in the State of Connecticut, capable of suing and being sued in this State.

15. Allianz Global Corporate & Specialty is a corporation organized, incorporated and existing under the laws of Germany, with its principal place of business in Munich, Germany.

16. Allianz Global Corporate & Specialty exercises pervasive control over AGCS Marine Insurance Company.

IV. FACTUAL BACKGROUND

The Insurance Policy

17. At the time the Policy was issued, Allianz Global Corporate & Specialty included a letter thanking the Plaintiffs “for choosing Allianz” and

addressing Healthtrax International, Inc. as “Dear Valued Partner”. It also represented that “[e]ach and every day, we will work hard to earn your business throughout world-class service, solutions and expertise” and that “Allianz has long held a global reputation for delivering exceptional claims service.” Allianz Global Corporate & Specialty also represented that “[a]ll of us at Allianz are eager to support your business and share with you the capabilities and services we can bring to your firm.” Allianz Global Corporate & Specialty instructed Plaintiffs that “you can notify us of a new claim via any of the following reporting options...Mailing Address: Allianz Global Corporate & Specialty, Attn: FNOL Claims Unit, One Progress Point Parkway, 2nd Floor, O’Fallon, MO 63368... Thank you for your business. We value your relationship with AGCS.” The letter is signed by “Richard Soja, North American Head of Marine, Allianz Global Corporate & Specialty”. A true and accurate copy of these statements is on page 3 of the Policy and incorporated herein by reference.

18. In return for the payment of a premium, the Defendants issued Policy No. MZ193072070 to Plaintiffs for a policy period of April 1, 2019 to April 1, 2020. Policy No. MZ193072070 is attached hereto and incorporated by reference as *Exhibit 1*.

19. Plaintiffs are the Named Insureds under the Policy, which remains in force.

20. Defendants are the effective and liable insurers of the Policy.

21. Plaintiffs have performed all of their obligations under the Policy including the payment of premiums and cooperation with Defendants' claims investigation and preservation of the property.

22. The Commercial Output Program – Income Coverage Part states: “We’ provide the following coverage unless the coverage is excluded or subject to limitations. ‘We’ provide the coverages described below during the ‘restoration period’ when ‘your business’ is necessarily wholly or partially interrupted by direct physical loss of or damage to property at a ‘covered location’ or in the open (or in vehicles) within 1,000 feet thereof as a result of a covered peril”.

23. Defendants promised to provide coverage for loss of Earnings and Extra Expense during the restoration period when the Plaintiffs’ business is necessarily wholly or partially interrupted by direct physical loss of or damage to property at a covered location.

24. Defendants promised to cover the Plaintiffs’ actual loss of net income (net profit or loss before income taxes) that would have been earned or incurred and continuing operating expenses normally incurred by Plaintiffs’ business, including but not limited to payroll expense.

25. Defendants promised to cover only the extra expenses that are necessary during the “restoration period” that Plaintiffs would not have incurred if there had been no direct physical loss or damage to the property caused by or resulting from a covered peril. Defendants also promised to cover any extra expense to avoid or reduce the interruption of business and continue operating at a covered

location, replacement location, or a temporary location and to cover any extra expense to reduce the interruption of business if it is not possible to continue operating during the restoration period.

26. Losses caused by the Pandemic triggered the Earnings and Extra Expense coverages of the Policy.

27. In addition to the Earnings and Extra Expense coverage provided by the Policy, the Defendants promised to pay for the reasonable costs incurred by the Plaintiffs for necessary emergency measures performed solely to protect covered property from further damage caused by a covered peril. Defendants incurred reasonable costs for emergency measures performed solely to protect covered property from further damage caused by a covered peril. Defendants refuse to pay for such costs.

The COVID-19 Pandemic and the Covered Cause of Loss

28. The World Health Organization recognized on January 25, 2020, that what would become known as COVID-19 is a “global threat to human health...” and specifically characterized COVID-19 as a Pandemic on March 11, 2020, stating: “Pandemic is not a word to use lightly or carelessly... And we have never before seen a pandemic that can be controlled, at the same time.”

29. Since March 2020, the imminent risk of COVID-19 has been pervasive throughout Connecticut, Massachusetts, Rhode Island, New York and North Carolina, particularly in health and fitness facilities where in the absence of any extra measures to repair and protect physical property as well as patrons and

staff, there is a greater risk because of the nature of their operations including patrons and staff being in close proximity to each other.

30. Since March 2020, Plaintiffs' premises have been at imminent risk of suffering harm, including direct physical loss of or damage to property.

31. Plaintiffs have suspended, in whole or in part, operations at the covered locations thereby incurring direct physical loss of use of the covered locations and incurred substantive loss. The suspension, resulting in physical loss of covered property, was intended and necessary to protect people from imminent serious injury, including death. Plaintiffs have also incurred reasonable costs for emergency measures performed to protect covered property from further damage caused by the Pandemic.

32. The Pandemic and Plaintiffs' actions to address the Pandemic's deadly risks, are covered causes of deprivation of physical property.

Insurable Risk

33. Since at least 2006, the insurance industry has recognized that the risks associated with pandemics can constitute physical losses to the utilization of property and adversely impact the financial condition of businesses. The industry, including the Defendants, also recognize the distinction between "virus" and "pandemic" and that a virus exclusion does not exclude coverage for loss or damage caused by a pandemic.

34. The Defendants' SII SFCR 2019 Solvency and Financial Condition Report 2019 recognizes that the COVID-19 Pandemic constitutes a "important

development which substantially impacts the significance of the information published in the Solvency and Financial Condition Report”. A true and accurate copy of pages 1, 7 and 8 of the S11 SFCR 2019 Solvency and Financial Condition Report is incorporated by reference and attached hereto marked as *Exhibit 2*. The Annual Report states:

COVID-19 – IMPORTANT DEVELOPMENT TO
ARTICLE 54 OF THE EU DIRECTIVE

The COVID-19 Pandemic is currently affecting all aspects of our personal and professional lives, the health of the global population, economic development worldwide and the financial markets. Despite the uncertainties specified, AGCS SE is very well prepared for this situation...

* * *

Currently, AGCS has two insurance treaties placed with Allianz Re which provide coverage against pandemic losses...

...Underwriting risks associated with the COVID-19 pandemic could result, on the one hand, from a decline in premiums.... On the claims side, losses caused by COVID-19 could, for example, occur in the areas of business interruption insurance, insurance of events and liability insurance.

Annual Report, *Exhibit 2* at p. 7.

35. With respect to Valuation and Solvency Purposes, the Annual Report anticipates setting significant reserves: “On the liabilities side, financial liabilities and technical provisions represent the largest balance sheet items. The technical provisions at the end of 2019 do not contain any explicit reserves for the

pandemic triggered by the SARS Cov-2 virus that is currently underway. However, reserves will increase in the course of 2020. E128,000 thou reserves have already been set aside explicitly for losses triggered by the COVID-19 pandemic. E54,000 thou of which are provisions for anticipated losses. This reflected in particular the cancellation of events and productions in the entertainment sector.” Annual Report, *Exhibit 2* at p. 8.

36. A “virus” is not a “pandemic”.

37. The Annual Report reveals that the Defendants consider themselves liable for loss or damage caused by a disease pandemic notwithstanding its Virus or Bacterial Exclusion.

38. Despite the Defendants’ concerns about exposure for loss or damage caused by a pandemic, there is no pandemic exclusion in the Policy.

The Pandemic Caused a Direct Physical Loss of or Damage to the Property

39. Loss of use of tangible property constitutes “direct physical loss of or damage to property” for purposes of first-party property insurance.

40. As the drafters of the Policy, if Defendants had wished to exclude the loss of use of property that has not been physically altered, deformed, or contaminated, it could have used explicit language stating such a definition, but they did not do so.

41. The Pandemic has caused “direct physical loss of or damage to property” under the Policy by depriving the Plaintiffs of their business properties, making the Plaintiffs’ business properties imminently dangerous unless the

Plaintiffs made repairs to property, and transforming the Plaintiffs' business properties from a state in which they could be used for their intended, insured purposes into a state in which they could not be so used. Some or all of the foregoing caused the necessary interruption of business during the restoration period.

42. The Pandemic and the resulting suspension and limitation of operations has caused the Plaintiffs' loss of Earnings and Extra Expense.

43. The Pandemic has caused "direct physical loss of or damage to property at a 'covered location'" under the Policy by causing the necessary interruption of Plaintiffs' business as a result of a covered peril.

44. Merriam-Webster defines the word "or" as a disjunctive conjunction. *Disjunctive*, MERRIAM WEBSTER DICTIONARY, <https://merriam-webster.com/dictionary/disjunctive> (last visited December 19, 2021).

45. Merriam-Webster defines the word "disjunctive" as "expressing an alternative or opposition between the meanings of the words connected" and "expressed by mutually exclusive alternatives joined by *or*". *Disjunctive*, MERRIAM WEBSTER DICTIONARY, <https://merriam-webster.com/dictionary/disjunctive> (last visited December 19, 2021).

46. Using the Merriam-Webster Dictionary, when reading the phrase "direct physical loss of, or damage to property", it is reasonable for the Plaintiffs to interpret the phrase "physical loss" as meaning "an alternative or opposition" to the phrase "physical damage".

47. Using the Merriam-Webster Dictionary, when reading the phrase “direct physical loss of or damage to property”, it is reasonable for the Plaintiffs to interpret the phrase “physical loss” as meaning something “mutually exclusive” from the phrase “physical damage”.

48. Using the Merriam-Webster Dictionary, when reading the phrase “direct physical loss of or damage to property”, it is reasonable for the Plaintiffs to conclude that “physical loss” does not unambiguously mean “physical damage”.

49. Upon information and belief, on or about September 27, 2021, the definition of “loss” in Merriam-Webster was re-written, but still includes in the definition the concept of “privation”, i.e., “the harm or privations resulting from losing or being separated from ... something: and the “failure to ... utilize”. *Loss*, MERRIAM WEBSTER DICTIONARY, <https://merriam-webster.com/dictionary/loss> (last visited December 19, 2021).

50. The Connecticut Appellate Court has stated that “[t]o determine the common, material, and ordinary meaning of an undefined term, it is proper to turn to the definition found in a dictionary.” *New London City Mut. Ins. Co. v. Zachem*, 145 Conn. App. 160, 166 (2013).

51. When interpreting the Policy, it is reasonable for the Plaintiffs to regard dictionary definitions as useful guideposts in determining the meaning of “direct physical loss of, or damage to property”.

52. Using the Merriam-Webster Dictionary, when reading the phrase “direct physical loss of or damage to property”, it is reasonable for Plaintiff to

interpret “loss” as “the harm or privations resulting from losing or being separated from ... “property at a covered location and/or “failure to ... utilize” covered property.

Plaintiffs Submitted Notices of Loss to Defendants and Were Wrongfully Denied Coverage

53. Plaintiffs submitted a notice of loss and, by letter dated June 11, 2020, on the letterhead of Allianz Global Corporate & Specialty, and signed by “Michael Ewing, Allianz Global Corp. & Specialty”, Defendants denied coverage.

Defendants and Other Insurers Have Declined to Exclude Pandemic Coverage Despite Knowledge of Risk

54. The risks and losses created by pandemics have been well-known for many years. The 1918 influenza pandemic spread worldwide and caused an estimated 50,000,000 deaths, 675,000 in the United States. The 1957-1958 H2N2 pandemic caused an estimated 1,100,000 deaths, 116,000 in the United States. The 1968 H3N2 pandemic caused an estimated 1,000,000 deaths, and about 100,000 in the United States. The CDC estimated that the 2009-2018 H1N1 pandemic caused 274,304 hospitalizations and 12,469 deaths in the United States.

55. When the Defendants issued the Policy, they knew that pandemics were a risk of loss, could cause the suspension of operations on their insureds’ covered properties and result in loss of Earnings and Extra Expense. Despite that knowledge, Defendants did not include an exclusion for loss or damage caused by a pandemic.

56. The insurance industry employs a different endorsement to exclude loss or damage caused by a pandemic. The ISO Crisis Event Expense Coverage Endorsement, FA 283 05 16 contains an exclusion that applies to “losses attributable to...Avian Influenza...Influenza...severe Acute Respiratory Syndrome...or any pandemic or similar influenza which is defined by the United States Center for Disease Control as virulent human influenza that may cause global outbreak, or pandemic, or serious illness”. A copy of the ISO Crisis Event Expense Endorsement, FA 283 05 16 is attached hereto and incorporated by reference as *Exhibit 3*.

57. The Plaintiffs and Defendants did not include in the Policy an exclusion for loss or damage caused by any pandemic.

58. In the case at bar, the virus exclusion upon which Defendants rely clearly does not apply. In the alternative, if Defendants’ interpretation is to be credited, then the exclusion is ambiguous in the context of losses caused by a pandemic and does not clearly and unambiguously exclude Plaintiffs’ claim for loss of Earnings and Extra Expense. Had they intended to exclude loss of Earnings and Extra Expense caused by a pandemic, Defendants could have or should have, addressed the known pandemic risk directly.

V. LEGAL CLAIMS FOR RELIEF

Count I – Breach of Contract

59. Plaintiffs repeat and reallege the preceding paragraphs as if fully set forth herein.

60. The Plaintiffs plead the theories of coverage available to them in the alternative or cumulatively.

61. In order to protect their properties, businesses and income from losses, the Plaintiffs purchased the Policy sold by the Defendants.

62. The Policy is a contract under which Defendants were paid premiums in exchange for their promise to pay Plaintiffs' losses for claims covered by the Policy.

63. Defendants agreed to pay for Plaintiffs' actual loss of Earnings sustained due to the necessary suspension of their operations during the restoration period.

64. Plaintiffs' businesses have been necessarily wholly or partially interrupted during the "restoration period" by direct physical loss of or damage to property at covered locations or in the open (or in vehicles) with 1,000 feet thereof as a result of a covered peril.

65. "Earnings" means actual loss of net income (net profit or loss before income taxes) that would have been earned or incurred and continuing normal operating expenses normally incurred by 'your business' including but not limited to payroll expense".

66. The Pandemic has caused direct physical loss of or damage to property at covered locations and resulted in loss of Earnings.

67. Plaintiffs have complied with all applicable provisions of the Policy and/or those provisions have been waived by Defendants, or Defendants are

estopped from asserting them, and yet Defendants have abrogated their insurance coverage obligations pursuant to the Policy.

68. By denying coverage for Earnings losses incurred by Plaintiffs, Defendants have breached their coverage obligations under the Policy.

69. In the Policy, Defendants agreed to pay the Extra Expenses necessary during the “restoration period” that the insureds would not have sustained if there had been no direct physical loss or damage to property caused by or resulting from a covered peril.

70. “Extra Expense” includes extra expenses to reduce the interruption of business and continue operating at a covered location. Extra Expense also includes any extra expense to reduce the interruption of business if it is not possible for the insureds to continue operating during the restoration period.

71. Due to a covered peril, Plaintiffs have incurred Extra Expense at covered locations. Plaintiffs have complied with all applicable provisions of the Policy and/or those provisions have been waived by Defendants, or Defendants are estopped from asserting them, and yet Defendants have abrogated their insurance coverage obligations pursuant to the Policy.

72. By denying coverage for Extra Expense incurred by Plaintiffs, Defendants have breached their coverage obligations under the Policy.

73. By denying coverage for loss of Earnings and Extra Expenses incurred at covered locations, Defendants have breached their coverage obligations under the Policy.

74. In the Policy, Defendants agreed to pay the reasonable costs incurred by plaintiffs for necessary repairs or emergency measures performed solely to protect covered property from further damage by a peril insured against if a peril insured against has already caused a loss to covered property.

75. In suspending or limiting operations, Plaintiffs have incurred expenses in connection with emergency measures to protect covered property.

76. Plaintiffs have complied with all applicable provisions of the Policy and/or those provisions have been waived by Defendants, or Defendants are estopped from asserting them, and yet, Defendants have abrogated insurance coverage obligations pursuant to the Policy.

77. By denying coverage for any such emergency measures incurred by Plaintiffs, Defendants have breached their coverage obligations under the Policy.

78. As a result of Defendants' breaches of the Policy, Plaintiffs have sustained substantial damages for which the Defendants are liable, in an amount to be established at trial.

COUNT II – Breach of The Covenant of Good Faith and Fair Dealing

79. Plaintiffs repeat and reallege the preceding paragraphs as though fully set forth herein.

80. The contract of insurance carries with it a duty of utmost good faith on the part of the insurer because of the vulnerability of policyholders during and following an insured cause of loss.

81. The Defendants' duties include but are not limited to Defendants' obligation to fairly and quickly adjust the Plaintiffs' claims to determine coverage and amount of loss, adjust its insurance claims, and provide prompt payment.

82. The Plaintiffs and Defendants are parties to a contract under which the Plaintiffs reasonably expected to receive certain benefits; the Defendants engaged in conduct that injured the Plaintiffs' right to receive those benefits; and when committing the acts by which they injured the Plaintiffs' rights to receive benefits they reasonably expected to receive under the contract, the Defendants acted in bad faith.

83. The Defendants have taken a national approach, apparently in coordination with other members of the insurance industry, to uniformly deny similar claims.

84. The Defendants breached the covenant of good faith and fair dealing by using a predetermined decision to not cover any claim; failing to properly inquire into relevant facts supporting their denial including, but not limited to, failing to visit the covered properties; failing to take the appropriate procedures for handling Plaintiffs' claim; declining to make clear, and good faith efforts to resolve the contractual relationship between Plaintiffs and Defendants.

VI. REQUEST FOR RELIEF

WHEREFORE, Plaintiffs respectfully request that the Court enter judgment in its favor and against Defendants as follows:

- a. For a judgment against Defendants for the causes of action alleged against it;
- b. For compensatory damages in an amount to be proven at trial;
- c. For pre-judgment and post-judgment interest at the maximum rate permitted by law;
- d. For Plaintiffs' attorneys' fees';
- e. For Plaintiffs' costs incurred;
- f. For punitive damages; and
- g. For such other and further relief as the Court deems just and proper.

Respectfully submitted,

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