

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS**

**THE CINCINNATI INSURANCE
COMPANY,**

Plaintiff,

v.

**RAMEN TATSU-YA HOLDINGS, LLC,
RAMEN TATSU-YA I, LLC, RAMEN
TATSU-YA II, LLC, RAMEN TATSU-
YA III, LLC, RAMEN TATSU-YA
COMAL, LLC, KEMURI, LLC, DIP DIP
DIP TATSU-YA, LLC**

Defendants.

CASE NO. 21-245

COMPLAINT SEEKING DECLARATORY RELIEF

TO THE COURT:

Plaintiff The Cincinnati Insurance Company (“Cincinnati”) files this Complaint Seeking Declaratory Relief against Defendants Ramen Tatsu-Ya Holdings, LLC, Ramen Tatsu-Ya I, LLC, Ramen Tatsu-ya II, LLC, Ramen Tatsu-ya III, LLC, Ramen Tatsu-ya Comal, LLC, Kemuri, LLC, Dip Dip Dip Tatsu-ya, LLC (“Defendants”) and in support would respectfully show this Court as follows:

I. RELIEF SOUGHT

1. Pursuant to 28 U.S.C §2201 and CIV. PRAC. & REM. CODE § 37.001 et seq., Cincinnati seeks a declaration from this Court that no coverage is owed for the claims made by Defendants for business income, extra expense, civil authority and dependent property coverage under a policy of insurance written by Cincinnati.

II. PARTIES

2. Cincinnati is an insurance carrier with its headquarters and principal place of business in Fairfield, Ohio. It is a citizen of the State of Ohio.

3. Ramen Tatsu-Ya Holdings, LLC is a Texas limited liability company with its principal office located in Austin, Texas. Its member is Tatsu Atkawa, who resides at 1907 W. 38th Street, #A, Austin, Texas 78731. It is a citizen of the State of Texas.

4. Ramen Tatsu-Ya I, LLC is a Texas limited liability company with its principal office located in Austin, Texas. Its sole member is Ramen Tatsu-Ya Holdings, LLC. It is a citizen of the State of Texas.

5. Ramen Tatsu-Ya II, LLC is a Texas limited liability company with its principal office located in Austin, Texas. Its sole member is Ramen Tatsu-Ya Holdings, LLC. It is a citizen of the State of Texas.

6. Ramen Tatsu-Ya III, LLC is a Texas limited liability company with its principal office located in Austin, Texas. Its sole member is Ramen Tatsu-Ya Holdings, LLC. It is a citizen of the State of Texas.

7. Ramen Tatsu-Ya Comal, LLC is a Texas limited liability company with its principal office located in Austin, Texas. Its sole member is Ramen Tatsu-Ya Holdings, LLC. It is a citizen of the State of Texas.

8. Kemuri, LLC is a Texas limited liability company with its principal office located in Austin, Texas. Its sole member is Ramen Tatsu-Ya Holdings, LLC. It is a citizen of the State of Texas.

9. Dip Dip Dip Tatsu-Ya I, LLC is a Texas limited liability company with its principal office located in Austin, Texas. Its sole member is Ramen Tatsu-Ya Holdings, LLC. It is a citizen of the State of Texas.

III. JURISDICTION & VENUE

10. Jurisdiction of this Court is invoked pursuant to 28 U.S.C. 1332 as there is complete diversity of citizenship between the Plaintiff and all Defendants and the amount in controversy exceeds \$75,000, exclusive of interest and costs.

11. Venue is proper in this judicial district under 28 U.S.C. §1391(b)(1) because this is the judicial district in which Defendants conduct business and because a substantial part of the events or omissions giving rise to this lawsuit have occurred in this district.

12. This Court has jurisdiction to grant declaratory relief, under 28 U.S.C. §2201 because an actual controversy exists between the parties as to their respective rights and obligations under the Policy as detailed below.

IV. BACKGROUND

13. Defendants operate restaurants in Austin, Texas and Houston, Texas under the names Ramen Tatsu-ya, Kemuri, Tatsu-ya and Dip Dip Dip Tatsu-ya.

14. Cincinnati issued a commercial property policy to Defendants under policy number ECP 0509039 (“the “Policy”). The Policy was issued in Texas with a policy period from October 1, 2019 to October 1, 2020. The Commercial Property Coverage provides insurance for nine of the insureds’ restaurant locations. A true and correct copy of the Policy is attached as **Exhibit A**.

15. On July 14, 2020, Defendants submitted a claim to Cincinnati, alleging that they suffered certain economic losses as a result of orders entered by the State of Texas arising out of the COVID-19 pandemic.

16. Cincinnati assigned Senior Field Claims Superintendent Heidi VanBrocklin to Defendants' claim. Ms. VanBrocklin issued a Reservation of Rights letter to Defendants, advising that Cincinnati was beginning its investigation. With the filing of this pleading, Cincinnati advises the Defendants that Ms. VanBrocklin will be fully indemnified by Cincinnati for any claim made against her in relation to her involvement with Defendants' claim for coverage.

17. In support of their claim, Defendants submitted correspondence to Cincinnati, dated July 23, 2020, providing information regarding their alleged loss. A true and correct copy of Defendants' July 23, 2020 correspondence is attached as **Exhibit B**.

18. Defendants claim that they were forced to suspend business operations at their restaurants due to COVID-19 and various orders issued by civil authorities. Copies of the pertinent orders are attached hereto as **Exhibit C**.

19. Cincinnati denied Defendants' claim on July 27, 2020.

20. Defendants claim to be entitled to coverage under the Policy for lost business income, extra expenses, civil authority, and extended business income coverages under the Policy. Defendants claim to have suffered monetary losses that exceed \$1,000,000 as a result of the suspension of their operations related to the COVID-19 pandemic.

V. THE POLICY

21. The Policy includes business income coverage under Form FM 101 (05/16) and Form FA 213 05/16). The pertinent language is substantially similar. Form FA 213 05/16 provides:

Business Income

- a. We will pay the for actual loss of "Business Income" you sustain due to the necessary "suspension" of your "operations" during the "period of restoration". The "suspension" must be caused by direct "loss" to property at "premises" which are described in the Declarations and for which a "Business Income" Limit of Insurance is shown in the Declarations. The "loss" must be caused by or result from a Covered Cause of Loss.

22. Policy Section A, Paragraph 2 Extra Expense (form FA 213 05/16) states:

Extra Expense

- b. Extra Expense coverage is provided at “the premises” described in the Declarations only if the Declarations show that “Business income” coverage applies at that “premises”.
- b. Extra Expense means necessary expenses you sustain (as described in Paragraphs 2.c., d. and e.) during the "period of restoration" that you would not have sustained if there had been no direct "loss" to property caused by or resulting from a Covered Cause of Loss.
- c. If these expenses reduce the otherwise payable "Business Income" "loss", we will pay expenses (other than the expense to repair or replace property as described in Paragraph 2.d.) to:
 - (1) Avoid or minimize the "suspension" of business and to continue "operations" either:
 - (a) At the "premises"; or
 - (b) At replacement "premises" or temporary locations, including relocation expenses and costs to equip and operate the replacement location or temporary location; or
 - (2) Minimize the "suspension" of business if you cannot continue "operations".

23. Policy Section A, Paragraph 5.b. Civil Authority (in form FA 213 05/16) states:

Civil Authority

When a Covered Cause of Loss causes direct damage to property other than Covered Property at the “premises”, we will pay for the actual loss of “Business Income” you sustain and necessary Extra Expense you sustain caused by action of civil authority that prohibits access to the “premises”, provided that both of the following apply:

- (1) Access to the area immediately surrounding the damaged property is prohibited by civil authority as a result of the damage; and
- (2) The action of civil authority is taken in response to dangerous physical conditions resulting from the damage or continuation of the Covered Cause of Loss that caused the damage, or the action is taken to enable a civil authority to have unimpeded access to the damages property.

24. Policy Section A, Paragraph 5.c. Extended Business Income (in form FA 213 05/

16) states:

Extended Business Income

(1) "Business Income" Other Than "Rental Value"

If the necessary "suspension" of your "operations" produces a "Business Income" "loss" payable under this Coverage Part, we will pay for the actual loss of "Business Income" you sustain during the period that:

- a) Begins on the date property (ex-cept "finished stock") is actually repaired, rebuilt or replaced and "operations" are resumed; and
- (b) Ends on the earlier of:
 - (i) The date you could restore your "operations", with reasonable speed, to the level which would generate the "Business Income" amount that would have existed if no direct "loss" had occurred; or
 - (ii) 60 consecutive days after the date determined in **c.(1)(a)** above.

However, Extended Business Income does not apply to loss of "Business Income" sustained as a result of un-favorable business conditions caused by the impact of the Covered Cause of Loss in the area where the "premises" are located.

Loss of "Business Income" must be caused by direct "loss" at the "premises" caused by or resulting from any Covered Cause of Loss.

25. Form FCP 201 05/16 amends the Business Income and Extra Expense coverage provisions to provide:

(9) Business Income From Dependent Properties

(a) We will pay for the actual loss of "Business Income" you sustain due to the necessary "suspension" of your "operations" during the "period of restoration". The "suspension" must be caused by direct "loss" to "dependent property" caused by or resulting from any Covered Cause of Loss...

The most we will pay for "loss" in any one occurrence for each "dependent property" location is \$10,000. This \$10,000 of coverage for Business Income From Dependent Properties does not increase the Limit of Insurance provided in this Coverage Extension.

"Dependent property" means property operated by others whom you depend on to:

- 1) Deliver materials or services to you, or to others for your account (Contributing Locations). But, any property which delivers the following services is not a Contributing Location with respect to such services:
 - a) Water supply services;
 - b) Power supply services;
 - c) Communication supply services, including services relating to internet access or access to any electronic network;
- 2) Accept your products or services;
- 3) Manufacture products for delivery to your customers under contract for sale; or
- 4) Attract customers to your business.

The "dependent property" must be located in the coverage territory of this Coverage Part.

(FCP 201 05/16 at p. 3).

26. The Policy (form FM 101 05/16) contains the following language:

We will pay for direct "loss" to Covered Property at the "premises" caused by or resulting from any Covered Cause of Loss.

3. Covered Causes of Loss

a. Covered Causes of Loss

Covered Causes of Loss means direct "loss" unless the "loss" is excluded or limited in this Coverage Part.

b. Exclusions

- (1) We will not pay for "loss" caused directly or indirectly by any of the following, unless otherwise provided. Such "loss" is excluded regardless of any other cause or event that contributes concurrently or in any sequence to the "loss".

(a) Ordinance or Law

Except as provided in SECTION A. COVERAGE, 4. Additional Coverages, g. Ordinance or Law, the enforcement of or compliance with any ordinance or law:

- 1) Regulating the construction, use or repair of any building or structure"

(2) We will not pay for “loss” caused by or resulting from any of the following:

(b) Delay or Loss of Use

Delay, loss of use or loss of market.

(3) We will not pay for "loss" caused by or resulting from any of the following in Paragraphs **(3)(a)** through **(3)(c)**. However, if an excluded cause of loss that is listed in Paragraphs **(3)(a)** through **(3)(c)** results in a Covered Cause of Loss, we will pay for that portion of "loss" caused by that Covered Cause of Loss:

(b) Acts or Decisions

Acts or decisions, including the failure to act or decide, of any person, group, organization or governmental body.

27. “Loss” is defined in the Policy to mean “accidental physical loss or accidental physical damage.”

28. The Policy, in form FM 101 05/16, defines “period of restoration” as follows:

"Period of restoration" means the period of time that:

a. Begins at the time of direct "loss".

b. Ends on the earlier of:

(1) The date when the property at the "premises" should be repaired, rebuilt or replaced with reasonable speed and similar quality;

(2) The date when business is resumed at a new permanent location; or

c. "Period of restoration" does not include any increased period required due to the enforcement of or compliance with any ordinance or law that:

(1) Regulates the construction, use or repair, or requires the tearing down of any property; or

(2) Requires any insured or others to test for, monitor, clean up, remove, contain, treat, detoxify or neutralize, or in any way respond to or assess the effects of "pollutants".

d. The expiration date of the Coverage Part will not cut short the "period of restoration".

VI. RELIEF SOUGHT

29. Defendants' claim for Business Interruption and Extra Expense coverage as a result of the COVID-19 pandemic and related government orders does not satisfy the prerequisites for coverage as established in the Policy. The Defendants have not sustained direct physical loss or direct physical damage to property. The Coronavirus does not cause physical alteration to property. This is, in part, because it can be cleaned. See CDC Guidelines attached as **Exhibit D**.

30. There is no coverage under the Policy's Civil Authority, Extended Business Income or Dependent Property additional coverages because Defendants have not sustained direct physical loss or direct physical damage to property.

31. Civil Authority coverage is also not available because no action of civil authority has prohibited access to the "premises" and the remaining requirements of Civil Authority coverage have not been met.

32. Defendants claim that Texas government officials issued stay-at-home orders and orders restricting or prohibiting gatherings, which resulted in Defendants' decision to temporarily close. The Ordinance or Law exclusion of the Policy excludes coverage for the enforcement of government orders that regulate the use of Defendants' premises.

33. Defendants claim that COVID-19 and various government orders caused a loss of use of their property. The Policy excludes coverage for "loss" caused by or resulting from loss of use under the Delay or Loss of Use exclusion.

34. Defendants claim to have suspended their operations because of government shut down and stay-at-home orders. To the extent Defendants claim a “loss” caused by or resulting from acts or decisions by a governmental body, the Acts or Decisions exclusion precludes coverage under the Policy.

35. Cincinnati seeks a declaration from this Court of no coverage pursuant to 28 U.S.C §2201 and Chapter 37 of the Texas Civil Practices & Remedies Code. Additionally, Cincinnati is entitled to a declaration from this Court that it has no duty to provide indemnity for any alleged losses claimed by Defendants.

VII. PRAYER

THE CINCINNATI INSURANCE COMPANY prays that after consideration of this matter, either through trial or dispositive motion, that this Court order and declare the following:

- A. That no coverage exists under Defendants’ commercial property policy for any claims made by Defendants related to the COVID-19 pandemic;
- B. That THE CINCINNATI INSURANCE COMPANY has no duty under the Policy to indemnify Defendants for the claims made by Defendants;
- C. That THE CINCINNATI INSURANCE COMPANY be entitled to recover its fees and costs; and,
- D. That THE CINCINNATI INSURANCE COMPANY receive all other relief, general or special, at law or in equity, to which it shows itself entitled to receive.

Respectfully submitted,

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