

**IN THE DISTRICT COURT OF JOHNSON COUNTY, KANSAS
CIVIL COURT DEPARTMENT**

MNR LLC,)	
)	
Plaintiff,)	
)	
v.)	Case No.
)	Division:
LIBERTY MUTUAL INSURANCE)	
COMPANY,)	
Serve: Commissioner of Insurance)	
Kansas Insurance Department)	
420 SW 9th Street)	
Topeka, KS 66612,)	
)	
Defendant.)	

PETITION

COMES NOW Plaintiff, MNR LLC d/b/a Hampton Inn, by and through its counsel of record, and for its Petition against Defendant Liberty Mutual Insurance Company (“Liberty Mutual” or “Defendant”) states as follows:

1. Plaintiff brings this action against Defendant due to Defendant’s failure to provide insurance coverage for the losses sustained and expenses incurred to Plaintiff because of the ongoing Coronavirus (COVID-19) pandemic.

2. For several years Plaintiff has operated two hotels; one in Littleton, Colorado and one in Longmont, Colorado. Plaintiff’s operations have been and continue to be suspended and threatened by the Novel Coronavirus, which causes the infectious disease COVID-19 (“COVID-19”).

3. On March 11, 2020 the World Health Organization declared the COVID-19 outbreak a worldwide pandemic: “WHO has been assessing this outbreak around the clock and we are deeply concerned by both the alarming levels of spread and severity, and by the alarming levels

of inaction. We have therefore made the assessment that COVID-19 can be characterized as a pandemic.”¹

4. On March 16, 2020 the Centers for Disease Control and Prevention and members of the National Coronavirus Task Force issued to the American Public guidance styled as “Thirty Days to Slow the Spread” for stopping the spread of COVID-19. This guidance advised individuals to adopt far-reaching social distancing measures, such as working from home, avoiding shopping trips and gatherings of more than 10 people, and staying away from bars, restaurants, gyms and food courts.²

5. Following this advice, many state governments, including Colorado, took measures in the form of emergency orders to protect the health and safety of their residents from the human-to-human and surface-to-human spread of COVID-19.

6. As a result, many governmental entities, including Colorado, entered Civil Authority Orders suspending or severely limiting business operations of “non-essential businesses” that interact with the public and provide gathering places for the individuals.

7. Over forty (40) states within the United States issued some type of “stay-at-home” emergency order closing private non-essential business operations.

8. The result of these closures has been catastrophic for most of the non-essential businesses, especially retail establishments that were forced to close, furlough employees, and endure a sudden shut-down of cash flow that threatens their survival.

¹ See <https://www.who.int/dg/speeches/detail/who-director-general-s-opening-remarks-at-the-media-briefing-on-covid-19-11-March-2020>

² https://www.whitehouse.gov/wp-content/uploads-2020/03/03_16_20coronavirus_guidance_8.5x11_315pm.pdf

9. Many businesses pay significant premiums to insure against such catastrophic events like the government-issued orders mandating suspension of business activities through all-risk commercial property insurance policies.

10. These policies promise to indemnify the policy holder for actual business losses incurred when business operations are involuntarily suspended, interrupted, curtailed, when public access is prohibited because of direct physical loss or damage to the property, or by civil authority order that restricts or prohibits access to the property. This coverage, generally known as “business interruption coverage,” is standard in most all-risk commercial property insurance policies.

11. Defendant is denying its obligation to pay for business income losses and other covered expenses incurred by Plaintiff for the physical loss and damage to the insured property from measures put in place by the civil authorities to stop the spread of COVID-19 among the population.

12. Plaintiff, through this action, seeks a declaratory judgment that affirms that the orders issued by civil authorities to stop the spread of the COVID-19 outbreak triggers coverage, has caused physical property loss and damage to the insured property, provides coverage for future civil authority orders that result in future suspensions or curtailments of business operations and finds that Defendant is liable for the losses suffered by Plaintiff.

13. In addition, this action brings claim against Defendant for its breach of its contractual obligation under common all-risk commercial property insurance policies to indemnify Plaintiff and others similarly situated for business losses and extra expenses, and related losses resulting from actions taken by civil authorities to stop the human-to-human and surface-to-human spread of the COVID-19 outbreak.

Jurisdiction and Venue

14. This Court has jurisdiction over this matter in that Plaintiff is a Kansas limited liability company and Defendant is engaged in providing policies of insurance in this state.

15. Venue is proper in this Court under the provisions of K.S.A. 60-604.

Parties

16. MNR, LLC is a Kansas limited liability company active and in good standing.

17. MNR, LLC's registered office is located at 15520 S. Mahaffie Street, Olathe, Kansas 66062.

18. MNR, LLC operates two (2) Hampton Inns, one located at 7611 Shaffer Parkway, Littleton, Colorado 80127-3005 and one at 850 S. Main St., Longmont, Colorado 80501-6457.

19. Liberty Mutual is one of the world's largest property and casualty insurers with its principal place of business located at 175 Berkley St., Boston, MA.

20. Liberty Mutual through its subsidiaries, directly and indirectly, issue among other things, property insurance.

21. Liberty Mutual issued to Plaintiff policy number DKS (20) 55 15 90 54 for the policy period between July 25, 2019 to July 25, 2020 (the "Policy").

22. Plaintiff has continually and without interruption paid the policy premiums to Liberty Mutual specifically to provide coverages for coverage of loss, business income, and extra expenses in the event of an involuntary business interruption.

Factual Background

23. Liberty Mutual's insurance policies issued to Plaintiff are "all-risk" commercial property policies that cover loss or damage to the covered premises resulting from all risk other than those expressly excluded.

24. Plaintiff did not participate in the drafting or negotiating of the policies with Liberty Mutual.

25. The policy includes standard forms used by Liberty Mutual for all insureds having applicable coverage.

26. Among the coverages provided by the policy was business interruption insurance which, generally, would indemnify Plaintiff for lost income and profits if its business were shut down.

27. The Business Income (and extra expense) Coverage Form, Commercial Property Form CP 00 30 10 12 in the policy provided coverage for Plaintiff as follows:

We will pay for the actual loss of business income you sustain due to the necessary “suspension” of your “operations” during your “period of restoration”. The “suspension” must be caused by direct physical loss of or damage 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 or damage must be caused by or result from a Covered Cause of Loss. With respect to loss of or damage to personal property in the open or personal property in a vehicle, the described premises include the area within 100 feet of such premises.

In the same policy form, the Policy provided the following additional coverage for Plaintiff:

5. Additional Coverages

a. Civil Authority

In this Additional Coverage, Civil Authority, the described premises or premises to which this Coverage Form applies, as shown in the Declarations.

When a Covered Cause of Loss causes damage to property other than property at the described premises, we will pay for the actual loss of Business Income you sustained and necessary Extra Expenses caused by action of civil authority that prohibits access to the described 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 the described premises are within that area but are not more than one mile from the damaged property; and
- (2) The action of civil authority is taken in response to dangerous physical conditions resulting from a 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 damaged property.

Civil Authority Coverage for Business Income will begin 72 hours after the time of the first action of civil authority that prohibits access to the described premises and will apply for a period of up to four consecutive weeks from the date on which such coverage began.

Civil Authority Coverage for Extra Expense will begin immediately after the time of the first action of civil authority that prohibits access to the described premises and will end:

- (1) Four consecutive weeks from the date of that action; or when the civil authority for business income ends; whichever is later; or
- (2) When the Civil Authority Coverage for Business Income ends; whichever is later.

28. The Business Income (and Extra Expense) Coverage Form defines Business Income as:

- a. Net Income (Net Profit or Loss before income taxes) that would have been earned or incurred; and
- b. Continuing normal operating expenses incurred, including payroll.

29. The Business Income (and Extra Expense) Coverage Form defines Extra Expense as:

Necessary expenses you incur during the “period of restoration” that you would not have incurred if there had been no direct physical loss or damage to property caused by or resulting from a Covered Cause of Loss.

We will pay Extra Expense (other than the expense to repair or replace property to:

- (1) Avoid or minimize the “suspension” of business and to continue operations at the described premises or at the described premises or at replacement premises or temporary locations, including relocation expenses and costs to equip and operate the replacement location or temporary location.
- (2) Minimize the “suspension” of business if you cannot continue “operations.”

We will also pay Extra Expense to repair or replace property, but only to the extent it reduces the amount of loss that otherwise would have been payable under this Coverage Form.

30. Plaintiff has suffered a direct physical loss of and damage to its property because they have been unable to use its property for its intended purpose.

31. On or about April 14, 2020, Plaintiff was advised its claim with Liberty Mutual for Business Interruption Insurance was denied because Plaintiff had allegedly not suffered direct physical loss or damage for purposes of that coverage and that no surrounding property had suffered direct physical loss or damages or for purposes of the Civil Authority Coverage.

32. Defendant Liberty Mutual's denial was wrongful because Plaintiff had suffered direct physical loss or damage within the definition of the policy.

33. As the drafter of the policy, if Defendant Liberty Mutual had wished to exclude from coverage as "physical loss or damage" loss of use of property that has not been physically altered, it could have used explicit language stating such definition of "physical loss or damage". It did not do so.

34. Any virus and bacteria endorsement does not apply because Plaintiff's losses were not caused by a "virus, bacterium or other microorganism that induces or is capable of inducing physical distress, illness or disease". Rather, the proximate cause of Plaintiff's losses were cautionary measures taken by the State of Colorado and other government authorities to prevent the spread of COVID-19 in the future, not because Coronavirus was found in or on Plaintiff's insured property.

The Colorado Closure Orders

35. On March 11, 2020, Colorado Governor Jared Polis issued Executive Order D 2020 003 which declared a Disaster Emergency due to the Covid-19 outbreak.

36. On March 22, 2020, Colorado Governor Jared Polis issued Executive Order D 2020 013 which ordered employers to reduce the in-person workforce by fifty percent.

37. On March 25, 2020, Colorado Governor Jared Polis issued Executive Order D 2020 017 which ordered Coloradans to stay home and directed businesses to close. On April 6, 2020, Governor Jared Polis issued Executive Order D 2020 024, which extended Executive Order D 2020 017 to April 26, 2020.

COUNT I – DECLARATORY JUDGMENT-BUSINESS INCOME COVERAGE

38. Plaintiff incorporates by reference the allegations contained in Paragraphs 1 through 37 as if fully set forth herein.

39. Policies or contracts under which Liberty Mutual was paid premium in exchange for its promise to pay Plaintiff's losses for claims covered by the policies.

40. Plaintiff has complied with all applicable provisions of the policies and/or those provisions have been waived by Liberty Mutual or Liberty Mutual is estopped from asserting them, and yet Liberty Mutual has abrogated its insurance coverage obligations pursuant to the policies' clear and unambiguous terms and have wrongfully and illegally refused to provide coverage for which Plaintiff is entitled.

41. Liberty Mutual has denied claims related to COVID-19 on a uniform basis, without individual basis's or investigations, so the Court can render a Declaratory Judgment.

42. Pursuant to KSA 60-1701, *et seq.*, an actual case or controversy exists regarding Plaintiff's rights and Liberty Mutual's obligations under the policies to reimburse Plaintiff for the full amount of Business Income Losses incurred by Plaintiff in connection with the suspension of its businesses stemming from orders intended to mitigate the COVID-19 pandemic.

43. Pursuant to KSA 60-1701 *et seq.*, Plaintiff seeks a Declaratory Judgment from this Court declaring the following:

1. Plaintiff's Business Income Losses incurred in connection with the Closure Order and the necessary interruption of its business stemming from orders intended to mitigate the COVID-19 pandemic are insured losses under its policy; and
2. Liberty Mutual is obligated to pay Plaintiff for the full amount of Business Income Losses related to the Closure Order during the period of restoration and the necessary interruption of its businesses stemming from the orders intended to mitigate the COVID-19 pandemic.

COUNT II – BREACH OF CONTRACT-BUSINESS INCOME COVERAGE

44. Plaintiff incorporates by reference the allegations contained in Paragraphs 1 through 43 as if fully set forth herein.

45. The Policies issued by Liberty Mutual are contracts whereby Liberty Mutual was paid premium in exchange for its promise to pay Plaintiff's losses for claims covered by the Policies.

46. In the Business Income (and Extra Expense) Coverage Form, Liberty Mutual agreed to pay for its insureds' actual loss of Business Income sustained due to the necessary suspension of its operations during the "period of restoration."

47. In the Business Income (and Extra Expense) Coverage Form, Liberty Mutual agreed to pay for its insureds' actual loss of Business Income sustained due to the necessary "suspension" of its operations during the "period of restoration" caused by direct physical loss or damage. "Business Income" under the Policy means the "net income (net profit or loss before

income taxes) that would have been earned or incurred if no physical loss or damage had occurred”, as well as “[c]ontinuing the normal operating expenses incurred, including payroll”.

48. The Closure Orders referred to above (the “Closure Orders”) caused direct physical loss and damage to Plaintiff requiring suspension of operations. Losses caused by these Orders thus triggered the Business Income provision of Plaintiff’s Policies.

49. Plaintiff has complied with all applicable provisions of the Policy and/or those provisions have been waived by Liberty Mutual or Liberty Mutual is now estopped from asserting them and yet Liberty Mutual has abrogated its insurance coverage obligations pursuant to the Policies’ clear and unambiguous terms.

50. By denying coverage for any Business Income Losses incurred by Plaintiff as a result of the Orders, Liberty Mutual has breached its coverage obligations under the Policies.

51. Because of Liberty Mutual’s breaches of the Policies, Plaintiff has sustained substantial damages for which Liberty Mutual is liable, in an amount to be established at trial.

COUNT III – ANTICIPATORY BREACH OF CONTRACT

52. Plaintiff incorporates by reference the allegations contained in Paragraphs 1 through 51 as if fully set forth herein.

53. The Policy is a contract under which Liberty Mutual was paid premium in exchange for its promise to pay Plaintiff’s losses for claims covered by the Policy.

54. In the Business Income (and Extra Expense) Coverage Form, Liberty Mutual agreed to pay for its insureds’ actual loss of Business Income sustained due to the necessary suspension of its operations during the “period of restoration.”

55. In the Business Income (and Extra Expense) Coverage Form, Liberty Mutual agreed to pay for its insureds’ actual loss of business Income sustained due to the necessary

“suspension” its “operations” during the “period of restoration” caused by the direct physical or damage. A “partial slow down or complete cessation” of business activities of the covered property is a “suspension” under the Policy for which Liberty Mutual agreed to pay for loss of Business Income during the “period of restoration” “that occurs within 24 consecutive months after the date of direct physical loss or damage.”

56. “Business Income” under the policy means “net income (net profit or loss before income taxes) that would have been earned or incurred if no physical loss or damage had occurred”, as well as “[c]ontinuing the normal operating expenses incurred, including payroll”.

57. The Closure Orders caused direct physical loss and damage to Plaintiff’s covered properties, requiring suspension of operations at the covered properties. Losses caused by the Closure Order thus triggered the Business Income provisions of the Policies.

58. Notwithstanding the foregoing, Liberty Mutual will pay Business Interruption Claims only if the subject property is physically altered.

59. As a result, Liberty Mutual has anticipatorily breached the policies of Plaintiff who has suffered physical loss or damage to the property because the use of the property has been substantially impaired and, thus, would be entitled to coverage under their Policies under applicable law, but for Liberty Mutual’s anticipatory breach of contract.

60. Plaintiff has complied with all applicable provisions of its Policy and/or Liberty Mutual has waived those provisions or Liberty Mutual is estopped from asserting them, and yet Liberty Mutual has abrogated its insurance coverage obligations pursuant to the policies’ clear and unambiguous terms.

61. Because of Liberty Mutual’s breaches of the policies, Plaintiff has sustained substantial damages for which Liberty Mutual is liable in an amount to be established at trial.

COUNT IV – DECLARATORY JUDGMENT-CIVIL AUTHORITY COVERAGE

62. Plaintiff incorporates by reference the allegations contained in Paragraphs 1 through 61 as if fully set forth herein.

63. The Policy is a contract under which Liberty Mutual was paid premium in exchange for its promise to pay Plaintiff's losses for claims covered by the Policy.

64. Plaintiff has complied with all applicable provisions of its Policy and/or Liberty Mutual has waived those provisions or Liberty Mutual is estopped from asserting them, and yet Liberty Mutual has abrogated its insurance coverage obligations pursuant to the policies' clear and unambiguous terms and has wrongfully and illegally refused to provide coverage for which Plaintiff is entitled.

65. Liberty Mutual has denied claims related to COVID-19.

66. An actual case or controversy exists regarding Liberty Mutual's obligations under the Policy to reimburse Plaintiff for the full amount of coverage Civil Authority Losses incurred by Plaintiff in connection with Closure Orders and the necessary interruption of its businesses stemming from the Orders intended to mitigate the COVID-19 Pandemic.

67. Pursuant to KSA 60-1701 *et seq.*, Plaintiff seeks Declaratory Judgment from this Court declaring the following:

1. Plaintiff's Civil Authority Losses incurred in connection with the Closure Orders and the necessary interruption of its businesses stemming from the COVID-19 Pandemic are insured losses under the Policy; and
2. Liberty Mutual is obligated to pay Plaintiff the full amount of the Civil Authority Losses incurred and to be incurred in connection with the covered losses related to the Closure Orders and the necessary interruption of its

businesses stemming from the Orders intended to mitigate the COVID-19 Pandemic.

COUNT V – BREACH OF CONTRACT-CIVIL AUTHORITY COVERAGE

68. Plaintiff incorporates by reference the allegations contained in Paragraphs 1 through 67 as if fully set forth herein.

69. The Policy is a contract under which Liberty Mutual was paid premium in exchange for its promise to pay Plaintiff's losses for claims covered by the Policy.

70. Liberty Mutual Business Income (and Extra Expense) Coverage Form provides "Civil Authority" coverage, which promises to pay "the actual loss of Business Income you sustain and necessary Extra Expense caused by action of Civil Authority that prohibits access to the described 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 the described premises are within that area but are not more than one mile from the damaged property; and
- (2) The action of civil authority is taken in response to dangerous physical conditions resulting from a 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 damaged property."

71. The Closure Orders triggered the Civil Authority provision under the Policy.

72. Plaintiff has complied with all applicable provisions of its Policy and/or Liberty Mutual has waived those provisions or Liberty Mutual is estopped from asserting them, and yet Liberty Mutual has abrogated its insurance coverage obligations pursuant to the policies' clear and unambiguous terms and has wrongfully and illegally refused to provide coverage for which Plaintiff is entitled.

73. By denying coverage for any Business Losses incurred by Plaintiff in connection with the Closure Orders and Orders intended to mitigate the COVID-19 Pandemic, Liberty Mutual has breached its coverage obligation under the Policy.

74. Because of Liberty Mutual's breaches under the Policy, Plaintiff has sustained substantial damages for which Liberty Mutual is liable, in an amount to be established at Trial.

COUNT VI – DECLARATORY JUDGMENT-EXTRA EXPENSE COVERAGE

75. Plaintiff incorporates by reference the allegations contained in Paragraphs 1 through 74 as if fully set forth herein.

76. The Policy is a contract under which Liberty Mutual was paid premium in exchange for its promise to pay Plaintiff's losses for claims covered by the Policy.

77. Plaintiff has complied with all applicable provisions of its Policy and/or Liberty Mutual has waived those provisions or Liberty Mutual is estopped from asserting them, and yet Liberty Mutual has abrogated its insurance coverage obligations pursuant to the policies' clear and unambiguous terms and has wrongfully and illegally refused to provide coverage to which Plaintiff is entitled.

78. Liberty Mutual has denied claims related to COVID-19.

79. An actual case or controversy exists regarding Liberty Mutual's obligation under the Policy to reimburse Plaintiff for the full amount of Extra Expense Losses incurred by Plaintiff in connection with Closure Orders and the necessary interruption of its businesses stemming from Orders intended to mitigate the COVID-19 Pandemic.

80. Pursuant to KSA 60-1701 *et seq.*, Plaintiff seeks Declaratory Judgment from this Court declaring the following:

1. Plaintiff's Business Income Losses incurred in connection with the Closure Order and the necessary interruption of its business stemming from orders intended to mitigate the COVID-19 pandemic are insured losses under its policy; and
2. Liberty Mutual is obligated to pay Plaintiff for the full amount of Extra Expenses Losses incurred and to be incurred in connection with the Covered Losses related to the Closure Order during the period of restoration and the necessary interruption of its businesses stemming from the orders intended to mitigate the COVID-19 pandemic.

COUNT VII – BREACH OF CONTRACT-EXTRA EXPENSE COVERAGE

81. Plaintiff incorporates by reference the allegations contained in Paragraphs 1 through 80 as if fully set forth herein.

82. The Policy is a contract under which Liberty Mutual was paid premium in exchange for its promise to pay Plaintiff's losses for claims covered by the Policy.

83. In the Business Income (and Extra Expense) Coverage Form, Liberty Mutual also agreed to pay necessary Extra Expenses that its insureds incur during the "period of restoration" that the insureds would not have incurred if there had been no direct physical loss or damage to the described premises. "Extra Expense" means expenses "to avoid or minimize the "suspension" of business and to continue operations" and to repair or replace property.

84. Due to the Closure Orders, Plaintiff incurred Extra Expense of covered property.

85. Plaintiff has complied with all applicable provisions of its Policy and/or Liberty Mutual has waived those provisions or Liberty Mutual is estopped from asserting them, and yet

Liberty Mutual has abrogated its insurance coverage obligations pursuant to the policies' clear and unambiguous terms.

86. By denying coverage for any Business Losses incurred by Plaintiff in connection with the Closure Orders and Orders intended to mitigate the COVID-19 Pandemic, Liberty Mutual has breached its coverage obligation under the Policies.

87. Because of Liberty Mutual's breaches of the Policies, Plaintiff has sustained substantial damages for which Liberty Mutual is liable in an amount to be established at trial.

WHEREFORE, Plaintiff demands judgment against Defendant as follows:

1. Issuing a Declaratory Judgment declaring the parties' rights and obligations under the policy;
2. Awarding Plaintiff compensatory damages from Liberty Mutual's breach of the policy in an amount to be determined at trial, together with appropriate pre-judgment interest at the maximum rate allowed by law;
3. Awarding Plaintiff costs and reasonable allowance for the fees of Plaintiff and reimbursement of expenses; and
4. Awarding such other and further relief the Court deems just, proper and equitable.

Respectfully submitted,

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