

**STATE OF RHODE ISLAND
PROVIDENCE, S.C.**

SUPERIOR COURT

HOTEL MCINNIS MARIN LLC; EAST
THOMAS ROAD PHOENIX HOTEL LLC;
CENTURY BLVD NE ATLANTA HOTEL
LLC; HOTEL CROWN CP-ATL LLC;

Plaintiffs,

v.

AFFILIATED FM INSURANCE
COMPANY,

Defendant.

C.A. No.: PC - 2020 - _____

COMPLAINT AND DEMAND FOR JURY TRIAL

Plaintiffs, Hotel McInnis Marin LLC; East Thomas Road Phoenix Hotel LLC; Century Blvd NE Atlanta Hotel LLC and Hotel Crown CP-ATL LLC (“Plaintiffs”) bring this Complaint against Defendant, Affiliated FM Insurance Company (“Defendant” or “Affiliated FM”) and allege as follows:

NATURE OF THE CASE

1. This is a civil action seeking declaratory relief arising from Plaintiffs’ contract of insurance with Defendant.
2. Plaintiffs are hotel owners with hotels located in California, Arizona and Georgia.
3. In light of the Coronavirus global pandemic and state and local orders mandating that all non-essential in-store businesses must shut down, and the suffering of physical harm and impact and damages occurring both within Plaintiffs’ business premises/hotels and/or within the immediate area surrounding and outside their business premises/hotels, Plaintiffs were forced to significantly reduce the operations of their hotels, including suspending making available to

potential guests and customers many of the usual and customary amenities that the hotels had made available and provided to guests and customers prior to the occurrence of the Coronavirus global pandemic. The amenities that the Hotels were not able to provide to potential guests and customers included, *inter alia*, the use of the hotel restaurants, bars, gyms, meeting spaces, etc.

4. Plaintiffs were forced to suspend providing the aforesaid usual amenities to potential guests and customers on March 19, 2020 at its California hotel, March 31, 2020 at its Arizona hotel, and April 2, 2020 at its Georgia hotels.

5. The viability of the hotel located in California was placed in serious question as a result of all of the limits placed upon the ability to operate the hotel in its usual and normal manner by the state and local orders and the presence of the Coronavirus in and about the premise of the hotel and the nearby and adjoining property, causing the hotel to operate in an extremely limited manner that resulted in significant economic losses sustained by the hotel. On April 9, 2020, as a Short-Term lodging facility located within Marin ("County") the hotel was directed to cease all operations and services except as necessary to provide: (a) lodging for the County's homeless population; (b) lodging for County residents who have been displaced and cannot return to their residence because there is a person residing at their residence that must isolate or quarantine or is at high risk of severe illness from COVID-19; (c) lodging for County residents who need to isolate or quarantine; (d) lodging to support Healthcare Operations, Essential Infrastructure, Essential Businesses, and Essential Governmental Functions as defined in the March 31 Order (e.g., lodging for traveling nurses or government contractors); (e) lodging for County residents facing immediate displacement from their primary residence due to safety, sanitation, or habitability issues (i.e., inhabitable living conditions, violence, or threats of violence); or Minimum basic operations as defined in the County's March 31, 2020 Order. On April 29, 2020, that April 9 Order was extended

to May 31, 2020. On May 29, 2020, the County entered another Order substantially the same as the order set to expire, that became effective on May 31, 2020 that was to remain in effect until it is extended, rescinded, superseded, or amended in writing by the [County] Health Officer. These limitations on use and occupancy of the hotel resulted in occupancy below 20% for a prolonged period of time. Beginning during the month of July 2020, the hotel began to house prison guards for San Quinton that were imported to the market to help deal with a Covid-19 outbreak at the prison at a reduced room rate. This occupancy with prison guards temporarily increased hotel occupancy to about 70-80%, but at a significantly reduced rate such that the hotel still is suffering business income loss and interruption. The use of the hotel by prison guards nevertheless is short term and has caused the hotel to bear additional expenses to assure its sanitation and cleanliness and to eliminate the presence of COVID-19 being within the hotel property and around the hotel property. The situation in California has remained fluid and unstable as a result of the surge of the Pandemic in that state. The California hotel has not been able to return to normal operations. A copy of the Short-Term Rental Restriction Order of May 29, 2020 is attached hereto as Exhibit 1.

6. The viability of the hotel located in Arizona was placed in serious question as a result of all of the limits placed upon the ability to operate the hotel in its usual and normal manner by the state and local orders, and the presence of the Coronavirus in and about the premise of the hotel and the nearby and adjoining property, causing the hotel to operate in an extremely limited manner that resulted in significant economic losses sustained by the hotel. The volatile situation in Arizona as one of the hot spots in the nation during the summer of 2020 for the Coronavirus and its spread has caused governmental officials to take steps to combat the spread of the Coronavirus that has contributed to the continuing suffering of business losses and interruption by the Arizona hotel.

7. The viability of the hotels located in Georgia were placed in serious question as a result of all of the limits placed upon the ability to operate the hotels in their usual and normal manner by the state and local orders, and the presence of the Coronavirus in and about the premises of the hotels and the nearby and adjoining property, causing the hotels to operate in an extremely limited manner that resulted in significant economic losses sustained by the hotel. These hotels are located in two different municipalities. They each were subject to state restrictions that prevented conventions from taking place through at least July 1, 2020. Convention business is a primary source of business for these hotels. As to the Hotel Crown CP-ATL LLC, located in DeKalb County, Georgia, bars and restaurants were closed for all services from March 20, 2020 to April 20, 2020 pursuant to orders entered by DeKalb County, and the swimming pool was closed from March 20, 2020 to June 20, 2020. The DeKalb County's Executive Order of March 23, 2020 supplemented the Orders of Governor Kemp. A copy of the DeKalb County Executive Order of March 23, 2020 is attached hereto as Exhibit 2. The Century Blvd NE Atlanta Hotel LLC was also subject to Orders entered by Governor Kemp, as well as the required mask order entered by the Mayor of Atlanta on June 13, 2020. The Governor's Orders can be found at a link through the Fulton County web page at : <https://www.fultoncountyga.gov/covid-19/orders-and-legislation> (last visited July 31, 2020). Meeting space revenue at both hotels has been dramatically impacted by the affects of the closure orders.

8. The "Shelter in Place" orders entered by the state and local governments of California, Arizona and Georgia coupled with the presence of the Coronavirus in and about the premises of the hotels and the nearby and adjoining property, resulted in a significant negative economic impact on the hotels and their business operations. These "Shelter in Place" orders limited the ability of cities and states to operate normally. The mandated closure of many

businesses in and around the communities of the hotels, significantly reduced or eliminated demand for hotel rooms and amenities. The mandated closures eliminated the holding of conventions and eliminated many business meetings that would normally create a need for hotel space thereby impacting occupancy and room rates for the hotels.

9. Plaintiffs' insurance Policy provides coverage for all non-excluded business losses and thus provides coverage here

10. As a result, Plaintiffs is entitled to declaratory relief that its business is covered for all business losses that have been suffered and sustained, which losses are in an amount greater than \$150,000.00.

JURISDICTION

11. This Court has subject matter jurisdiction over this action pursuant to R.I.G.L. §8-2-14.

12. This Court has personal jurisdiction over Defendant. At all relevant times Defendant has engaged in substantial business activities in the State of Rhode Island. At all relevant times Defendant transacted, solicited, and conducted business in Rhode Island through its employees, agents, and/or sales representatives, and derived substantial revenue from such business in Rhode Island.

13. Venue is proper in this district pursuant to R.I.G.L. §9-4-3 because Defendant is a corporation headquartered in Rhode Island and has substantial, systematic, and continuous contacts in Rhode Island.

PARTIES

14. Plaintiffs own and operate hotels in California, Arizona and Georgia, under ownership names of Hotel McInnis Marin LLC; East Thomas Road Phoenix Hotel LLC; Century

Blvd NE Atlanta Hotel LLC; and Hotel Crown CP-ATL LLC, entities which are noted as Plaintiffs in this Complaint.

15. At all relevant times, Plaintiffs, were authorized to do business and were doing business in California, Arizona and Georgia. Plaintiffs operate, manage and own hotels at 101 McInnis Parkway, San Rafael, CA, 94903; 10 East Thomas Road, Phoenix, AZ 85012; 2000 Century Blvd. NE, Atlanta, GA 30345; and 1030 Crown Pointe Parkway, Atlanta, GA, 30338 (“Insured Properties”). Plaintiffs’ LLC have numerous partner members, some of whom are citizens of Rhode Island, thus precluding federal court diversity of citizenship jurisdiction because as alleged hereinafter, Defendant has Rhode Island citizenship which is the same citizenship of some of the members of the Plaintiffs’ LLCs. Case law holds that for purposes of diversity jurisdiction, Plaintiffs, as limited liability companies “has the citizenship of its *members*.” *Pramco, LLC ex rel. CFSC Consortium, LLC v. San Juan Bay Marina, Inc.*, 435 F.3d 51, 54 (1st Cir. 2006) (emphasis added).

16. Defendant, Affiliated FM is an insurance carrier that provides business interruption insurance to Plaintiffs. Affiliated FM is headquartered at 270 Central Avenue, Johnston, RI 02919-4949. Affiliated FM is a citizen of Rhode Island.

17. At all relevant times, Defendant is a corporation doing business in the State of Rhode Island. Defendant issued an insurance policy with Policy Number IA246 to Plaintiffs for the period June 19, 2019 to June 19, 2020. *See* Policy Declaration, attached hereto as Exhibit 3 and referred to hereinafter as the “Policy.”

18. The Policy for Plaintiffs is currently in full effect, includes coverage for, among other things, business personal property, business income, business interruption, special business income, and professional business income.

19. Plaintiffs submitted a claim for a business loss pursuant to its Policy, seeking coverage under the Policy. Defendant issued a reservation of rights response and did not confirm coverage existed under the terms and conditions of the Policy. Defendant purportedly plans to investigate the claim, though it is fully aware of the pandemic, the various civil authority orders entered at the state and local levels, and the severe economic impact suffered by businesses, including Plaintiffs' hotels. Defendant's failure to acknowledge that coverage exists, subject to a determination of the amount of damages sustained, demonstrates that Defendant has no intention of providing coverage for the losses and damages that Plaintiffs have sustained and that coverage has been essentially denied.

20. The expected reasons why Defendant has or will reject Plaintiffs' losses and claim are invalid. Plaintiffs expect, as has been published in the public domain, that Defendant, like other insurance carriers, will deny or has essentially denied Plaintiffs' claim on the basis that allegedly Plaintiffs did not suffer physical damage to the properties and in reliance on the Virus Exclusion provision of the Policy and on mischaracterizations of the civil authority order provisions of the Policy. These are invalid reasons to deny the claim and in violation of the provisions of and proper and fair interpretation of the Policy. The Virus Exclusion does not exclude coverage for losses associated with this pandemic and Plaintiffs has suffered physical damage or loss and the civil authority orders has caused damages and losses to Plaintiffs.

FACTUAL BACKGROUND

I. Insurance Coverage

21. Defendant entered into a contract of insurance with Plaintiffs, whereby payments were made to Defendant in exchange for Defendant's promise to indemnify Plaintiffs for losses including, but not limited to, business income losses at Plaintiffs' Insured Properties.

22. Plaintiffs' Insured Properties are covered under the Policy issued by Defendant. *See* Ex. 3.

23. The Policy provides, among other things property, business personal property, business income and extra expense, business interruption, contamination coverage, and additional coverages.

24. Plaintiffs faithfully paid Policy premiums to Defendant, specifically to provide, among other things, additional coverages in the event of business interruption or closures for a variety of reasons, including by order of Civil Authority.

25. Under the Policy, business interruption insurance coverage is extended to apply to, *inter alia*, the actual loss of business income sustained, and the actual, necessary and reasonable extra expenses incurred.

26. The Policy is an all-risk Policy, insofar as it provides that covered causes of loss under the Policy means direct loss or damage unless the loss is specifically excluded or limited in the Policy.

27. An all-risk Policy such as that purchased by Plaintiffs is one that protects against catastrophic events, such as the one occurring now, involving the global COVID-19 Pandemic that has resulted in the widespread, omnipresent and persistent presence of COVID-19 in and around Plaintiffs' Insured Properties, including adjacent properties. Coverage under an all-risk Policy is to be broadly interpreted and provided.

28. Plaintiffs' all-risk Policy includes coverage for business interruption, which is standard in most all-risk commercial property insurance policies, along with coverage for extended expenses.

29. Plaintiffs purchased the Policy expecting to be insured against losses, including, but not limited to, business income losses at the hotels.

30. Plaintiffs purchased, among other coverages, business interruption coverage for closure by Order of Civil Authority.

31. Based upon information and belief, the Policy provided by Defendant included language that is essentially standardized language adopted from and/or developed by the ISO (“Insurance Service Office”). The ISO, founded in 1971, provides a broad range of services to the property and casualty insurance industry. In addition to form policies, ISO collects and manages databases containing large amounts of statistical, actuarial, underwriting, and claims information, fraud-identification tools, and other technical services. ISO describes itself as follows: “ISO provides advisory services and information to many insurance companies. ... ISO develops and publishes policy language that many insurance companies use as the basis for their products.” ISO General Questions, Verisk, <https://www.verisk.com/insurance/about/faq/> (last visited June 5, 2020); *see also* Insurance Services Office (ISO), Verisk, <https://www.verisk.com/insurance/brands/iso/> (last visited June 5, 2020).

32. The language in the Policy is language that is “adhesionary” in that Plaintiffs were not participants in negotiating or drafting its content and provisions.

33. Plaintiffs possessed no leverage or bargaining power to alter or negotiate the terms of the Policy, and more particularly, Plaintiffs had no ability to alter, change or modify standardized language derived from the ISO format.

34. Upon information and belief, the Virus Exclusion in the policy was developed by the ISO in response to the SARS situation that occurred in or around 2005-2006, which was not a

Pandemic and not a global Pandemic as is the present COVID-19 Pandemic situation, and therefore was never intended to exclude coverage for a circumstance as presented in this matter.

35. Upon information and belief, the Virus Exclusion in the Policy was developed by the ISO in response to the SARS situation that occurred in or around 2005-2006, which was not a Pandemic and not a global Pandemic as is the present COVID-19 Pandemic situation, and therefore was never intended to exclude coverage for a circumstance as presented in this matter.

36. Upon information and belief, the Virus Exclusion was first permitted by state insurance departments due to misleading and fraudulent statements by the ISO that property insurance policies do not and were not intended to cover losses caused by viruses, and so the Virus Exclusion offers mere clarification of existing law. To the contrary, before the ISO made such baseless assertions, courts considered contamination by a virus to be physical damage. Defendant's use of the Virus Exclusion to deny coverage here shows that the Virus Exclusion was fraudulently adopted, adhesionary, unconscionable and as an attempt to expand the limitations of coverage without proper disclosures. See <https://www.propertycasualty360.com/2020/04/07/here-we-go-again-virus-exclusion-for-covid-19-and-insurers/> (last visited June 12, 2020).

37. Upon information and belief, the Virus Exclusion was improperly added to policies by insurance carriers to expand the exclusions of coverage in their policies without disclosing to insurance commissioners/state insurance regulators that the provision was reducing coverage. The reason that insurance carriers did not disclose the actual effect of the Virus Exclusion clauses to reduce coverage was so that insurance carriers could maintain premium levels as though coverage levels was not being reduced.

38. Upon information and belief, the Virus Exclusion clause was promoted as being part and parcel of prior provisions that limited coverage without causing a change when in fact that was not the case.

39. Upon information and belief, the Virus Exclusion was marketed by insurance carriers to insurance regulators as being nothing more than a clarification of the microorganism or bacterium language in policies when in fact the Virus Exclusion was added to policies to constitute an expansion of exclusionary language without disclosure.

40. Upon information and belief, the Virus Exclusion attempts to make losses or damage suffered or caused by a virus to be on equal footing with damages suffered or caused by a bacterium or microorganism so as to enable insurance carriers to assert the virus exclusion as a defense in the same manner as asserting bacterium or microorganism as a defense when there was no disclosure of this subterfuge to insurance regulators.

41. Regulatory estoppel applies and Defendant should not be permitted to rely on the Virus Exclusion because of its conduct and any associated conduct of the ISO to inappropriately obtain the permission of state insurance commissioners or departments to include the language of the Virus Exclusion in its policies.

42. Even so, the Virus Exclusion applies only to “loss or damage caused by or resulting from any virus, bacterium or other microorganism that induces or is capable of inducing physical distress, illness or disease.”

43. The Policy does not have an exclusion for a Pandemic. As an all-risks policy, coverage is presumed unless clearly and unambiguously excluded. There is no such exclusion for a Pandemic or for action taken in response to a Pandemic such as the entry of Civil Authority Orders.

44. Plaintiffs purchased the Policy with an expectation that it was purchasing a Policy that would provide coverage in the event of business interruption and extended expenses, such as that suffered by Plaintiffs as a result of COVID-19.

45. At no time had Defendant, or its agents, notified Plaintiffs that the coverage that Plaintiffs had purchased pursuant to an all-risk Policy that included, among other coverages, business interruption coverage, had exclusions and provisions that purportedly undermined the very purpose of the coverage, of providing benefits in the occurrence of business interruption and business losses and incurring extended expenses.

46. The purported exclusions of the Policy that Defendant has or is expected to raise in defense of Plaintiffs' claim under the Civil Authority coverage of the Policy are contradictory to the provision of Civil Authority Order coverage and violates the public policies of California, Arizona, and Georgia, respectively, and other states, as a contract of adhesion and hence is not enforceable against Plaintiffs.

47. Access to Plaintiffs' businesses was severely limited and/or prohibited by Civil Authority Orders which precluded Plaintiffs from operating their insured properties in the manner intended, for which such insurance was purchased. For example, use of the hotels' restaurants, meeting spaces, bars and gyms was prohibited causing a significant economic impact on Plaintiffs' hotels. The Policy provides for coverage for actual loss of business sustained and actual expenses incurred as a covered loss caused by the prohibitions of the Civil Authority Orders in the area of Plaintiffs' Insured Properties, which applies to circumstances presented by the Plaintiffs.

48. The reasonable expectations of Plaintiffs, *i.e.*, an objectively reasonable interpretation by the average policyholder of the coverage that was being provided, was that the business interruption coverage included coverage when a civil authority forced closure of the

business (and amenities within a business) for an issue of public safety involving the COVID-19 pandemic in the immediate area surrounding the Insured Properties.

49. The Policy does not exclude the losses suffered by Plaintiffs and therefore, the Policy does provide coverage for the losses incurred by Plaintiffs.

50. Plaintiffs suffered direct loss or damage within the definitions of the Policy as loss of use of property as it was intended to be used, as here, constitutes loss or damage.

51. The virus and bacterium exclusions do not apply because Plaintiffs' losses were not solely caused by a virus, bacterium or other microorganism. Instead, Plaintiffs' losses were also caused by the entry of Civil Authority Order, particularly those by the governors of California, Arizona and Georgia and by the states' respective Departments of Health, and by local governments, to mitigate the spread of COVID-19. The Civil Authority Orders were issued in an attempt to limit the damage to individuals and property caused by COVID-19. The Civil Authority Orders were more than mere social distancing enactments but required closure in fact of the amenities of the hotels such as their restaurants, bars, gyms, pools, meeting spaces, etc.

52. Covid-19 is omnipresent, impacting the environment causing the entry of Civil Authority Orders for the protection of businesses and the population from physical contact by Covid-19.

53. The Civil Authority Orders prohibited access to certain of the amenity aspects of Plaintiffs' Insured Properties. The Civil Authority Orders significantly limited travel thereby limiting the demand for the use of the hotels and hotel spaces. The Civil Authority Orders were entered for the variety of reasons stated in this Complaint including in response to dangerous physical conditions described resulting from COVID-19.

