



VIRGINIA:

IN THE CIRCUIT COURT FOR THE COUNTY OF FAIRFAX

CRESCENT HOTELS & RESORTS, LLC, et al.,)

Plaintiffs,)

v.)

ZURICH AMERICAN INSURANCE)

Case No. 2021-02974



SEEN AND AGREED WHILE RESERVING ALL ARGUMENTS AS STATED IN
DEFENDANTS' DEMURRERS AND MEMORANDUM OF LAW IN SUPPORT THEREOF,
AND AS STATED ON THE RECORD OF PROCEEDINGS HELD BEFORE THE COURT ON
JULY 2, 2021,

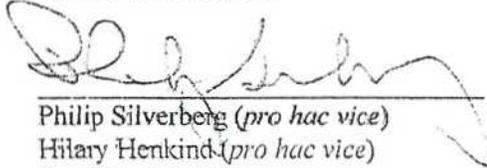
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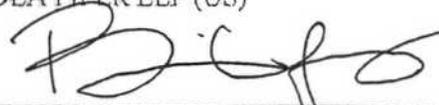
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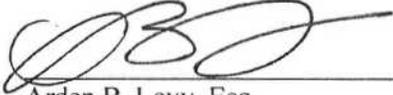
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Fire & Casualty Company*

SEEN AND OBJECTED TO FOR ALL REASONS AS STATED IN PLAINTIFFS' CONSOLIDATED OPPOSITION TO DEFENDANTS' DEMURRERS, AS STATED ON THE RECORD OF PROCEEDINGS HELD BEFORE THE COURT ON JULY 2, 2021, AND AS STATED **IN THE ATTACHED** PLAINTIFFS' OBJECTIONS TO FINAL ORDER ON DEFENDANTS' DEMURRERS

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PLAINTIFFS' OBJECTIONS TO FINAL ORDER ON DEFENDANTS' DEMURRERS

1. The SARS-CoV-2 virus is capable of causing “direct physical loss of or damage to property,” as that phrase has been interpreted under Virginia law. Plaintiffs alleged that the SARS-CoV-2 virus caused physical alterations to property, including Plaintiffs’ covered hotels and other properties, and otherwise posed a danger to property that rendered the property uninhabitable or dangerous to use, as required under Defendants’ insurance policies and Virginia law. [Complaint ¶¶ 88-99, 105, 129-49].
 - a. The Complaint adequately informs Defendants of what Plaintiffs intended to prove, and accordingly, under Virginia law Plaintiffs should be afforded the opportunity to prove their factual allegations.
 - b. The Court erred in sustaining the Demurrers because Plaintiffs’ Complaint is sufficient in that it clearly informs the Defendants of the true nature of the claims.
 - c. The Court failed to accept all factual allegations in the Complaint as true and failed to give effect to all reasonable inferences that support Plaintiffs’ allegations.
 - d. The Court failed to give effect to Plaintiffs’ reasonable interpretation of the insurance policies and Virginia law on the question of what constitutes “direct physical loss of or damage to property.”
 - e. The Court failed to accept as true that Defendants’ policies purport to exclude losses caused by viruses, which, together with the availability of an industry standard virus exclusion, shows that viruses can and do cause “direct physical loss of or damage to property.” Because such an interpretation of the policies is reasonable, the Court should have given it effect and overruled the Demurrer.

2. Plaintiffs alleged a wrongful denial of coverage for their “Time Element” (business income) losses arising from civil authority orders that impacted the use of covered hotels and their amenities. [Complaint ¶¶ 105, 112, 113, 127 & Exs. A & B §§ 5.02.03, 7.56.01]. The Court failed to recognize that the civil authority orders were issued, in part, because SARS-CoV-2 causes damage to property. [*Id.* ¶¶ 112, 113].
3. Plaintiffs alleged a wrongful denial of coverage for their “Contingent Time Element” losses arising from the suspension of business activities at nearby “Attraction Properties” and “Direct Dependent Time Element Locations,” as those terms are defined in Defendants’ policies. [Complaint ¶¶ 3, 8, 107, 128, 149, 153]. At the demurrer stage, matters of proof that are not capable of resolution include determining which specific properties fall within these definitions and how their businesses were affected.
4. Plaintiffs alleged that Defendants wrongfully denied Plaintiffs’ claims for Communicable Disease Coverage because civil authority orders required them to close and limit many of their facilities and their functions, in part to prevent the spread of COVID-19. [Complaint ¶¶ 106, 152, Ex. A at Endorsement 13 & Ex. B at Endorsement 14]. The Court improperly sustained the Demurrers when Plaintiffs sufficiently pled these allegations.
5. The Court improperly found that Plaintiffs are not entitled to coverage under the Policies, because those policies provide coverage for “Preservation of Property” costs that are triggered because the SARS-CoV-2 virus can and does cause “loss of or damage to property” under Virginia law, and because Plaintiffs are entitled to compensation for losses incurred to avoid damage to covered property, as long as the steps taken were reasonable under the circumstances.
6. The Court erred in failing to construe exclusions as required at the demurrer stage under Virginia law, including but not limited to the Court’s findings as to the

Contamination Exclusion in Defendant Zurich American Insurance Co.'s Policy and the Pollution Contamination Exclusion in Defendant Interstate Fire & Casualty Co.'s Policy:

- a. In a manner that is consistent with the facts as pled, the insurance policies' terms and conditions, and applicable law; and
 - b. In a manner that construes exclusions narrowly against the insurer and resolves all ambiguities in favor of coverage.
7. The Court improperly made findings and failed to afford Plaintiffs the opportunity to develop evidence regarding latent ambiguities in the policies, including with respect to an endorsement to Zurich's policy that, as pled, redefines "contaminant" to remove viruses from its definition in its "Amendatory Endorsement – Louisiana." For that endorsement, the Court improperly made findings as to the meaning and intent of the provision at the demurrer stage, thereby depriving Plaintiffs of the opportunity to develop evidence regarding the meaning, application and geographical reach of the endorsement and its exclusion.



Arden B. Levy