

Louisiana Worship Hospitality LLC v. Lexington Insurance Company

**United States District Court -Eastern District of Louisiana
Civil Acton No.: 08-3740**

Expert Report

FOR MEDIATION PURPOSES ONLY

Respectfully Submitted by:

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Section I – Opinions to be Rendered

I have been asked by the Merlin Law Group to review and analyze documents as listed in Section II of this report (below) and to opine on Lexington Insurance Company’s (“Lexington”) denial of coverage of the claim of Louisiana Worship Hospitality LLC DBA New Orleans Grand Palace Hotel (“Grand Palace Hotel”) (assigned a date of loss of May 25, 2007) based on the reasons enumerated in the September 19, 2007 letter of AIG Domestic Claims, Inc. (“AIG Claims”) to Eddie Bhatt of the Grand Palace Hotel.

Section II – Data or Information Considered

- Examination Under Oath of Ashok (Eddie) Bhatt – August 16, 2007;
- Letter of September 19, 2007 from AIG Domestic Claims Brent Barton to Eddie Bhatt;
- Letter of December 4, 2007 from The Greenspan Company’s Masood Khan to Wayne R. Glaubinger, Mound, Cotton, Wollan & Greengrass and Brent Barton AIG Domestic Claims, including attached estimate of damage amounts by peril and by floor;
- Letter of December 14, 2007 to Masood Khan of The Greenspan Company from GAB Robins General Executive Adjuster Roger Sawyer;
- Letter of January 10, 2008 to Masood Khan of The Greenspan Company from GAB Robins General Executive Adjuster Roger Sawyer;
- Letter of January 28, 2008 to Masood Khan of The Greenspan Company from GAB Robins General Executive Adjuster Roger Sawyer;
- Civil District Court for the Parish of Orleans, State of Louisiana, Louisiana Worship Hospitality LLC versus Lexington Insurance Company – Petition for Damages May 19, 2008;

- Answer and Affirmative Defenses July 17, 2008;
- Plaintiff's First Set of Requests for Production of Documents to Defendant – November 7, 2008
- Defendant's Responses to Plaintiff's First Set of Requests for Production of Documents – December 2008;
- Lexington Insurance Company – Policy issued to Louisiana Hospitality LLC from December 29, 2006 to December 29, 2007 – policy number CA 91118
- Deposition of Eddie Bhatt – January 19, 2008
- Deposition of Hemlata Vyas – January 20, 2009
- Deposition of Jake Mello – February 10, 2009
- Deposition of Roger Sawyer – February 11, 2009
- Deposition of Edward A. Mossien, Jr. – February 19, 2009
- Deposition of Brent Barton – February 20, 2009
- Lexington Produced Documents 0000001 to 00000613

Section III – Qualifications

I have been providing in depth insurance and risk advice to businesses and organizations for over 20 years. I have attained the designation of CPCU (Chartered Property and Casualty Underwriter) CIC (Certified Insurance Counselor) and AU (Associate in Underwriting) and regularly speak as a National Faculty member for the Society of Certified Insurance Counselors. As an Expert Commentator for the International Risk Management Institute (IRMI), I research and write articles on various coverage issues. For additional information on my qualifications, see the Curriculum Vitae attached.

Section IV – Opinions

Opinion #1 – The Grand Palace Hotel was not vacant or unoccupied.

The Lexington Insurance Company policy #1115726 (LEX 0000001 to 0000048) issued to Louisiana Hospitality, LLC does not define the term “vacant.”

Vacant

First, it is important to consider the term “vacancy” as a term of art in the hotel or hospitality industry and contrast the usage of that industry to its usage as a term of art the insurance industry. For example, when a hotel puts out a sign that indicates “vacancy,” no reasonable insurance company would conclude that such an advertisement would render the hotel building “vacant” for the purposes of property insurance.

Yet, AIG Claims does not attempt to make any distinction between “vacancy” as a term of art in the hospitality industry and “vacant” as a term of art in the insurance industry when relying on

Ashok “Eddie” Bhatt’s Examination Under Oath taken on August 16, 2007 to determine the Grand Palace Hotel was vacant.¹

Second, given the above, and considering Lexington has not defined “vacant” in its policy, it is equally important to determine the meaning of this term of art in the insurance industry.

The following is taken from *Black’s Law Dictionary [Eight Edition]* regarding the definition of “vacant.”

Empty; unoccupied. Courts have sometimes distinguished vacant from unoccupied, holding that vacant means completely empty while unoccupied means not routinely characterized by the presence of human beings. [Underlined supplied]

Based on the above definition, and applying it to the Grand Palace Hotel, the hotel building was *not vacant* as it was *never completely empty*. Throughout the Lexington policy period, substantial amounts of personal property were kept in the hotel. In fact, Roger Sawyer, Executive General Adjuster for GAB Robins recommended “retaining an expert to inventory the contents for future reference” (GAB 0376). That expert, Nardone & Company, did submit a report dated July 23, 2007, complete with photos, depicting various contents, including furniture such as double, king and queen beds located in guest rooms, office furniture (desks and chairs), as well as inventory (headboard, lamps, chairs) in storage (GAB 0095 to 0124). In addition, Mr. Sawyer did testify that there were contents within the hotel building.²

In his deposition, Brent Barton of AIG Claims readily admits that he was not aware of personal property items within the hotel, but nonetheless believed the building was vacant.³ While Mr. Barton could not recall whether or not the Lexington policy *even had a definition of vacancy*, let alone what the actual definition might be⁴, he nevertheless applied *his own definition of vacancy* – as the hotel was not being used as a hotel it was, he concluded, (without any apparent basis) vacant.⁵

¹ Deposition of Brent Barton – Page 157, lines 18-24 “Q: So it is your position today that the property was vacant for more than 60 days; is that correct? A: That is my position based upon what the insured’s representative told us in his EUO and told our adjuster. Also - Page 180, lines 2-5, “I think the insured was fully aware of the basis *they told us about the vacancy and unoccupancy of the building...*” [Emphasis supplied]

² Deposition of Roger Sawyer – Page 114, lines 7-14, “Q: As of the May 25, 2007 you would agree that there were contents, personal contents, within the structure, correct? A: Yes. Q: Everything hadn’t been removed from the structure; is that accurate? A: Yes.”

³ Deposition of Brent Barton – Page 157, lines 10-17, “Q: Do you know whether or not it had personal property items within it? A: I’m not aware that it had personal property items by any guests of the hotel. Q: What about personal property items owned by the hotel? A: *It may – I’m not aware that it had personal property items owned by the hotel.*” [Emphasis supplied]

⁴ Deposition of Brent Barton – Page 159, lines 3-7, “Q: Is there a definition within the policy for vacancy? A: As I sit here today I don’t recall whether this particular policy there was a definition for vacancy.”

⁵ Deposition of Brent Barton – Page 156-157, lines 21-25 and lines 12-9, “Q: Is the position of your approval that the building was vacant at the time of the loss? A: That’s my understanding based upon the facts told to Roger Sawyer by the insured and from the insured’s EUO testimony. *The building was not being used for the purpose it was intended, which was a hotel.* Q: Is that your understanding of what the definition of vacancy is? A: It’s my understanding that the hotel was vacant. It had no guests. And was not open as a hotel at the time.” [Emphasis supplied]

Unoccupied

The Lexington Insurance Company policy #1115726 (LEX 0000001 to 0000048) issued to Louisiana Hospitality LLC does not define the term “unoccupied.”

Recalling Black’s definition noted above, “unoccupied” means “not routinely characterized by the presence of human beings.” Clearly, the Grand Palace Hotel cannot be said to lack for the presence of human beings. At the outset, it is important to note that the definition merely requires the presence of human beings, not that human beings must be *residing in the building*.

In his first report to AIG Claims dated July 3, 2007 (GAB 0373 to 0377), Roger Sawyer of GAB Robins reported (GAB 0376) “Since the hotel lost electricity on February 10, 2007, the Insured used staff employees to walk the premises at various hours of the evening. Since the hotel lost electricity, due to the vandalism of 2/10/07, security has been very minimal and generally consisted of the building engineer who was residing on the premises. The building engineer would walk the hallways of the building at various hours in the evening in an effort to keep vandals out of the building.”

In addition, in his August 16, 2007 EUO, Eddie Bhatt testified that after the February 10, 2007 electrical shutdown, he and several of his employees were present. Mr. Bhatt and an employee, Daniel Adame, both lived on the premises in two separate trailers.⁶ In addition, Mr. Bhatt spent time working in the office of the hotel, and was in the hotel office on May 16, 2007 when he witnessed vandalism by Joel E. Buss.⁷ Mr. Barton of AIG Claim acknowledges this in his deposition.⁸

When applying *Black’s* definition of “unoccupied” to the Grand Palace Hotel, it becomes apparent that the building was not “unoccupied.” Put another way, the record does clearly show that there was, in fact, a 24 hour presence of Mr. Bhatt and his employees in and around the Grand Palace Hotel building after February 10, 2007.

Thus the building cannot reasonably be characterized as not routinely having the presence of human beings and thus cannot be deemed to be unoccupied.

The record shows that Mr. Barton of AIG Claims viewed “unoccupied” in the same manner as he viewed the term “vacant.” He did not know if the Lexington policy even included a definition for “unoccupied.” In fact, Mr. Barton asserts the “the words speak for themselves” even though it is

⁶ Examination Under Oath – Ashok (Eddie) Bhatt, page 63, lines 9-13, “The Lopez, my own employees, the security people, and the, you know, caretaker of the building. We were all there. So I have a trailer in the building in the service alley. I live in the trailer.”

⁷ See Exhibit #5 to Bhatt EUO – Statement to police “I was awake and sitting at the front desk in the lobby. I saw Mr. Buss throw a brick at a window.”

⁸ Deposition of Brent Barton – Page 158-159, lines 16-25 and line 2, “Q: And was your understanding that there was nobody in the place for more than 60 days? A: It was my understanding it had no guests and the hotel was closed. There were individuals that went in and out of the hotel, including the insured’s representatives and his employees, but they were not staying in the hotel. My understanding is they stayed in trailers behind the hotel.”

clear he does not know what words are “speaking” or if any words actually exist in the policy related to “unoccupancy”.⁹ As with “vacant,” Mr. Barton supplies his own definition of “unoccupied” for the purposes of the claim denial, which he concludes, again without apparent basis, means that no guests are in the hotel.¹⁰

Conclusion

The Lexington Insurance Company policy does not define either the term “vacant” or “unoccupied.” As Lexington Insurance Company has failed to provide its own definition within its policy, the plain meaning of these terms, which can be found in *Black’s Law Dictionary*, must be applied to the terms “vacant” and “unoccupied.” Consequently, AIG Claims is not free, on behalf of Lexington Insurance Company, to supply their own definitions of “vacant” and “unoccupied” as they have clearly done in their claim denial. The Grand Palace Hotel was neither “vacant” nor “unoccupied” from December 29, 2006 to May 25, 2007, the date of the claim in dispute. Therefore, Lexington Insurance Company cannot deny coverage based on the Grand Palace Hotel building being either “vacant” or “unoccupied.”

Opinion #2 – Even if the Grand Palace Hotel is found to be vacant or unoccupied, Lexington was fully aware in the summer of 2007 the hotel had not reopened after the February 10, 2007 claim.

In the alternative, even if the Grand Palace Hotel is somehow found to be vacant or unoccupied (which it is not), Lexington Insurance Company was fully aware the Grand Palace Hotel had not reopened as late as the summer of 2007. The record shows that GAB Robins on behalf of Lexington Insurance Company handled the Grand Palace Hotel’s February 10, 2007 claim and GAB and Lexington knew this claim resulted in the cutting of the power and the evacuation of hotel guests from the hotel. Thus Lexington was fully aware of the status of the hotel. Further, Lexington Insurance Company eventually paid a claim of approximately \$1.3 million, most of which was not paid until the summer of 2007.¹¹

Lexington Insurance Company knew the Grand Palace Hotel was not operating as a hotel and would not be operating as a hotel, *at the earliest*, until the full amount of the February 10, 2007 claim was paid, which Lexington or its representatives knew was not until the summer of 2007. Yet, Lexington collected and retained the full annual premium of \$119,736 (LEX 0000001), despite Lexington’s current contention that as of April 10, 2007, or a little more than four months into the policy term, its policy provided no coverage.

⁹ Deposition of Brent Barton – Page 159, lines 8-12, “Q: Is there a definition for unoccupancy within the policy? A: Again as I sit here I don’t recall whether there was a definition the words speak for themselves.”

¹⁰ Deposition of Brent Barton – Page 159, lines 9-15, “Q: What does the term unoccupancy mean? A: It was unoccupied by guests of the hotel. The hotel was not being used as a hotel. Q: Define the term unoccupied. A: Well, this is used as – this term is unoccupancy, but the meaning there is no one in the place.”

¹¹ Deposition of Eddie Bhatt – page 21, lines 18-22, “Q: Okay. I understand. Now, when you got the 1.3 million that you’ve testified was not used to repair anything, on or about what date was that money received? A: I think it was July or August, 2007.”

Stated differently, Lexington collected and retained premium for approximately eight months, or over \$86,000 of premium, for an insurance policy which Lexington now contends *provided virtually no coverage for Louisiana Hospitality LLC*.

Conclusion

Lexington Insurance Company knew of the cutting of power and evacuation of the hotel in February, 2007 and further knew that the hotel had not reopened as late as the summer of 2007. Nonetheless, *Lexington continued to collect and retain the full annual premium*. Retaining the full annual premium, when combined with the knowledge possessed by Lexington regarding the operation of the hotel, strongly suggests that Lexington was providing coverage and is thus tantamount to waiving any policy limitation for vacancy or unoccupancy that is related hotel closing. In sum, it is exceedingly unfair for Lexington to collect the *full annual premium* with complete knowledge that the hotel was not operating and then contend that the policy *did not* provide any coverage for the hotel building because the *hotel was not operating*. The only reasonable inference from such actions is that Lexington did intend to provide coverage for the hotel whether or not it was operating, and thus waived any policy defense for vacancy or occupancy.

Opinion #3 – AIG Claims erroneously contends the vacancy and unoccupancy clause “precludes coverage for any vandalism claim after February 10, 2007.”¹²

In the AIG Claims (LEX 0000114 to 0000118) denial letter of September 19, 2007, Brent Barton cites clause 36. **Vacancy and Unoccupancy** and denies that any coverage exists for any vandalism claims *after “February 10, 2007.”* Even the most cursory reading of this policy limitation plainly shows the limitation does not apply unless the property “has remained vacant or unoccupied for a period of sixty (60) or more days.”¹³

Conclusion

AIG Claims misreads its own policy and asserts a policy limitation that is clearly erroneous. The limitation, if it applies at all, *requires the property to be vacant or unoccupied for a period of sixty days or longer*, not the *day after* the location purportedly becomes vacant or unoccupied as AIG claims wrongly contends in its September 19, 2007 letter.

Opinion #4 – The Lexington Insurance Company policy #1115726 (LEX 0000001 to 0000048) effective December 29, 2006 to December 29, 2007, issued to Louisiana Hospitality, LLC, did not include the Louisiana Standard Fire Policy.

In the AIG Claims denial letter of September 19, 2007 (LEX 0000114 to 0000118), Brent Barton cites the Louisiana Standard Fire Policy (LEX 00000116), specifically the **Conditions Suspending or Restricting Coverage**.

¹² AIG Claims letter date September 19, 2007, page 2 (LEX 0000111), states “This exclusion precludes coverage for vandalism claims *after February 10, 2007.*” [Emphasis supplied]

¹³ LEX 0000032 – page 16, MAN PR8545 (09/02)

However, Mr. Barton fails to recognize that the Lexington Insurance Company #1115726 (LEX 0000001 to 0000048) issued to Louisiana Hospitality LLC does NOT contain the Louisiana Standard Fire Policy form nor does the policy Lexington Forms Schedule (LEX 0000002) provide any reference to the Louisiana Standard Fire Policy.

Conclusion

Simply stated, Lexington Insurance Company has failed to include the Louisiana Standard Fire Policy on its policy issued to Louisiana Hospitality LLC but nevertheless seeks to use the terms of the non-existent Louisiana Standard Fire policy to its advantage - to restrict the coverage available to its policyholder. Attempting to enforce policy terms that cannot be found anywhere in the policy is both unreasonable and unfair. In sum, Lexington cannot enforce any provisions of the Louisiana Standard Fire policy against Louisiana Hospitality LLC as such terms were never a part of its policy.

Opinion #5 – Even if it is determined that the Louisiana Standard Fire Policy is incorporated into the Lexington Insurance Company policy (LEX 0000001 to 0000048), Lexington has expressly waived any and all of the Louisiana Standard Fire Policy’s terms and conditions.

Should Lexington Insurance Company somehow be successful in arguing that the Louisiana Standard Fire Policy is incorporated by reference or Lexington is otherwise allowed to reform the policy to include the Louisiana Standard Fire, it is important to note that Lexington has expressly waived any of the Louisiana Standard Fire Policy’s terms and conditions.

Specifically, clause 40. **Full Waiver** of the Lexington Insurance Company Manuscript form (MAN PR9545 (09/02)) also (LEX 0000035), states the following:

The terms and conditions of this form and endorsements are substituted for those of the policy to which it is attached, terms and conditions and endorsements of latter being waived.

The Louisiana Standard Fire Policy provides coverage for fire and extended coverage only. Therefore, it becomes apparent that the Lexington Insurance Company policy is generally intended to be attached to the Louisiana Standard Fire Policy. Put another way, the Louisiana Standard Fire Policy is the base policy and the Lexington policy is attached to that base policy. As Lexington has expressly stated that the terms and conditions of its form are substituted for those of the policy *to which it is attached* (it is attached to the Louisiana Standard Fire Policy), the terms and conditions of the Louisiana Standard Fire Policy have been waived by Lexington.

Conclusion

Lexington Insurance Company has expressly waived all terms and conditions of the policy to which it is attached. Therefore, even if somehow it is determined that the Louisiana Standard Fire Policy is part of Lexington policy, Lexington has *expressly waived* any of its defenses under the Louisiana Standard Fire Policy and cannot now assert the defense found in the Louisiana Standard Fire Policy clause entitled **Conditions Suspending or Restricting Insurance**.

