

CIVIL DISTRICT COURT FOR THE PARISH OF ORLEANS

STATE OF LOUISIANA

NUMBER 2020-02558

SECTION/DIVISION "M-13"

**CAJUN CONTI LLC, CAJUN CUISINE 1 LLC, AND CAJUN CUISINE LLC D/B/A
OCEANA GRILL**

VERSUS

CERTAIN UNDERWRITERS AT LLOYD'S, LONDON, ET AL.

FILED: _____

DEPUTY CLERK

**MEMORANDUM IN SUPPORT OF PEREMPTORY EXCEPTION
OF NO CAUSE OF ACTION, DILATORY EXCEPTION OF PREMATUREITY AND
PRECAUTIONARY DECLINATORY EXCEPTION OF LIS PENDENS**

MAY IT PLEASE THE COURT:

NOW INTO COURT, through undersigned counsel, come defendants, Certain Underwriters at Lloyd's, London Subscribing to Policy No. AVS011221002 ("Underwriters"), and respectfully submit this Memorandum in Support of Underwriters' Peremptory Exception of No Cause of Action, Dilatory Exception of Prematurity and Precautionary Declinatory Exception of Lis Pendens concerning the Petition for Declaratory Judgment ("Petition") filed by plaintiffs, Cajun Conti, LLC, Cajun Cuisine 1, LLC, and Cajun Cuisine, LLC d/b/a Oceana Grill (collectively "Plaintiffs").

INTRODUCTORY STATEMENT

This is a declaratory judgment action brought by Plaintiffs over a coronavirus-related insurance coverage dispute that does not yet (and may never) actually exist involving a potential future claim for losses that may (or may not) arise as a result of hypothetical future events. Without ever having submitted a claim to Underwriters, Plaintiffs raced to file this first in the nation

declaratory judgment action requesting an advisory opinion as to whether the policy issued to them by Underwriters provides coverage with respect to a hypothetical claim for theoretical losses that Plaintiffs might incur “*in the event* that coronavirus has contaminated the insured premises” and/or “*should* operations cease” at Plaintiffs’ business at some unknown time as a result of “any *future* civil authority shutdowns of restaurants[.]” (*emphasis added*).¹

This hastily filed lawsuit should be dismissed for at least three reasons. First, the Petition does not present a justiciable controversy (i.e., “an existing actual and substantial dispute, as distinguished from one that is merely hypothetical or abstract,”)² and cannot be maintained because this Honorable Court lacks jurisdiction to decide abstract, hypothetical controversies, or render advisory opinions. Second, Plaintiffs’ demand for a declaration of rights under the Policy is premature and not ripe for adjudication because (i) it is premised on the hypothetical theory that Plaintiffs may sustain an unknown loss in the future based on possible events that have not yet and may never occur; and (ii) Plaintiffs filed this suit without first satisfying the loss reporting obligations imposed upon them under their insurance contract. Third, this Honorable Court should decline to render the premature judgment sought by Plaintiffs because any such judgment “would not terminate the uncertainty or controversy giving rise the proceeding.” To the contrary, any judgment issued now—based on incomplete, unresolved, and hypothetical facts—would only serve to foster uncertainty, sow confusion, and potentially result in significant prejudice to the parties.³

¹ Record at Petition, at ¶¶34-36 (*emphasis added*).

² *Abbott v. Parker*, 259 La. 279, 249 So.2d 908, 918 (1971), *appeal dismissed*, 404 U.S. 931, 92 S.Ct. 281, 30 L.Ed.2d 244 (1971).

³ Plaintiffs have previously filed a suit related to a fire against certain underwriters on another policy, *Cajun Conti LL, Cajun Cuisine 1 LLC, and Cajun Cusinie LLC d/b/a Oceana Grill vs. Certain Underwriters at Lloyd’s, London and Kenneth Jones*, Suit No. 2019-11354, Section 13, Civil District Court for the Parish of Orleans, State of Louisiana (“the Fire Suit”), which was filed prior to the suit herein. However, at the time this action was filed, the Fire Suit had no reference to *the* issues raised in this matter. Via Second Supplemental and Amending Petition for Damages for Declaratory Judgment, Plaintiffs amended the Fire

ALLEGATIONS OF THE PETITION

On March 16, 2020, Plaintiffs filed the first known lawsuit to have been filed in the United States as a result of COVID-19. Plaintiffs sued Underwriters, Governor John B. Edwards, and The State of Louisiana. As to Governor Edwards and The State of Louisiana, Plaintiffs sought a declaration as to whether certain governmental orders apply to Plaintiffs' restaurant business. Those defendants have since been dismissed. As to Underwriters, Plaintiffs ask the Court to issue an advisory opinion on the scope of insurance coverage available for theoretical losses, which, at the time of filing, had neither been incurred by Plaintiffs nor reported to Underwriters.

Plaintiffs assert Underwriters issued Policy No. AVS011221002 for the period June 30, 2019 to June 30, 2020 (the "Policy"), which policy provides commercial property coverage for Plaintiffs' business and property located at 729, 735, 737, and 739 Conti Street, New Orleans, Louisiana, also known as Oceana Gill (collectively, the "Subject Property"). Plaintiffs do not allege that they submitted a claim to Underwriters as required by the Policy. Nor do they allege that Underwriters have taken any position on coverage (much less an adverse position). Rather, in an attempt to manufacture a controversy where no actual dispute exists, Plaintiffs aver "upon information and belief" that Underwriters "accepted the policy premiums with no intention of providing any coverage due to direct physical loss and/or from a civil authority shutdown due to a global pandemic virus."⁴ Plaintiffs do not allege that their businesses have been shut down, nor do they allege that they have sustained any loss or damage. Instead, Plaintiffs purport to seek a

Suit to include reference to the Coronavirus. Underwriters maintain those allegations are improperly pled in the Fire Suit and should not remain. Further, as the amended pleading in the Fire Suit, Underwriters would suggest this suit is the first filed suit on these issues and, as such, any exception of *lis pendens* on these matters should be issued in the Fire Suit. However, to the extent the Court disagrees with Underwriters on either the peremptory exception of no cause of action or dilatory exception of prematurity herein, or with the anticipated filings with respect to the Fire Suit, Underwriters plead the alternative declinatory exception of *lis pendens*

⁴ See Record at Petition, ¶17.

declaratory judgment regarding coverage under the Policy that “will *prevent* the plaintiffs from being left without vital coverage acquired to ensure the survival of their business *should* operations cease due to a global pandemic virus and civil authorities’ response.”⁵ Plaintiffs do not allege that the virus is physically present at the insured premises (or any properties within a one-mile radius of the insured premises), which might actually be relevant to the specific coverage issues presented. Instead, apropos of nothing that would bear on coverage afforded under their Policy, Plaintiffs aver that “[t]he virus is physically impacting public and private property, and physical spaces in cities around the world”⁶ and Plaintiffs posit that “[a]ny effort by Lloyd’s to deny the reality that the virus causes physical damage and loss *would* constitute a false and potentially fraudulent misrepresentation that *could* endanger policyholders and the public.”⁷

Plaintiffs seek a declaratory judgment on whether a March 13, 2020 order issued by Governor Edwards and a March 15, 2020 order issued by the Mayor of New Orleans trigger “the civil authority provision” of the Policy and “to affirm that because the [P]olicy ... does not contain an exclusion for a viral pandemic, the [P]olicy provides coverage to plaintiffs for any *future* civil authority shutdowns of restaurants in the New Orleans area due to physical loss from Coronavirus contamination” and that “the [P]olicy provides business income coverage *in the event* that the coronavirus has contaminated the insured premises.”⁸ “Plaintiffs do not seek any determination of whether the Coronavirus is physically in the insured premises, amount of damages, or any other remedy besides the declaratory relief.”⁹

⁵ *Id.* at ¶18 (emphasis).

⁶ *Id.* at ¶20.

⁷ *Id.* at ¶20.

⁸ *Id.* at ¶¶34-36 (emphasis added).

⁹ *Id.* at ¶37.

I. THE PETITION FAILS TO ASSERT A VALID CAUSE OF ACTION AGAINST UNDERWRITERS BECAUSE PLAINTIFFS DO NOT ASSERT A JUSTICIABLE CONTROVERSY

For this Honorable Court to be vested with jurisdiction, the Petition must present a justiciable controversy, i.e., an existing and substantial dispute between parties with real adverse interests. Absent an actual dispute or controversy, the court cannot be “seized of jurisdiction in the first instance,” and the Court lacks jurisdiction to entertain this action for declaratory relief.¹⁰ An exception of no cause of action tests whether the Petition asserts a justiciable controversy against Underwriters.¹¹ No evidence may be introduced to support or controvert an exception of no cause of action, and the exception is triable on the face of the Petition alone.¹² The sufficiency of Plaintiffs’ cause of action therefore turns on whether they may properly seek declaratory judgment based solely on the facts alleged in the Petition.

Louisiana Code of Civil Procedure Article 1871 governs declaratory judgment proceedings, providing Louisiana courts authority to “declare rights, status, and other legal relations whether or not further relief is or could be claimed.” Like actions for conventional judgments, basic to the exercise of procedures for declaratory relief, the action must present a justiciable controversy.¹³ The Louisiana Supreme Court defined a justiciable controversy in the context of an action for declaratory relief as follows:

A “justiciable controversy” connotes ... an existing actual and substantial dispute, as distinguished from one that is merely hypothetical or abstract, and a dispute which involves the legal relations of the parties who have real adverse interests, and upon

¹⁰ See, e.g., *State of Louisiana v. Bd. Of Sup’rs, La. State Univ. & Agr. & Mech. Coll.*, 228 La. 951, 955-56, 84 So.2d 597, 599 (1955).

¹¹ La. C.C.P. art. 927(A)(5); *Stall v. State Farm Fire & Cas. Co.*, 2008-0649 (La. App. 4 Cir. 10/29/08); 995 So.2d 670, 673; *Deutsche Bank Nat’l Tr. Co. v. McNamara*, 2017-0173 (La. App. 4 Cir. 10/18/17); 2017 La. App. LEXIS 1867, writ denied, 2017-1918 (La. 2/2/18); 235 So.3d 1111 (citing *Moses v. Moses*, 2015-0140, p. 3 (La. App. 4 Cir. 8/5/15); 174 So.3d 227, 229, writ denied, 2015-1643 (La. 10/30/15); 180 So.3d 300).

¹² *Deutsche Bank Nat’l Tr. Co.*, 2017 La. App. LEXIS 1867 (quoting *Moses*, 174 So.3d at 229-230).

¹³ *Am. Waste & Pollution Control Co. v. St. Martin Par. Police Jury*, 627 So.2d 158 (La. 1993);

which the judgment of the court may effectively operate through a decree of conclusive character. Further ... the dispute presented should be of sufficient immediacy and reality to warrant the issuance of a declaratory judgment.¹⁴

“Without doubt, for a court to entertain an action for declaratory relief, there must be a justiciable controversy and the question presented must be real and not theoretical.¹⁵ “A court **must** refuse to entertain an action for a declaration of rights if the issue presented is based on a contingency that may or may not arise. Cases submitted for adjudication must be justiciable, ripe for decision, and not brought prematurely.”¹⁶

This action does not present a justiciable controversy. As an initial matter, Plaintiffs fail to allege the threshold requirement to state a cause of action against Underwriters: *a dispute*. The sole allegations against Underwriters are (1) that they issued the Policy; and (2) “[b]ased on information or belief” Underwriters “accepted the policy premiums with no intention of providing any coverage due to direct physical loss and/or from a civil authority shutdown due to a global pandemic virus.”¹⁷ These allegations do not present a real, active dispute between the parties.

The absence of a dispute is thrown into sharp relief by considering what Plaintiffs do *not* allege. Plaintiffs do not allege (i) that they have complied with the Policy—the law between the parties—by submitting a claim;¹⁸ (ii) that Underwriters have taken any position on coverage; (iii) that their businesses have been shut down; (iv) that the coronavirus is physically present at the insured premises; or (v) that Plaintiffs have sustained an actual loss. Indeed, the Petition is devoid of the most basic elements of any actual insurance coverage dispute: an insured and an insurer

¹⁴ *Abbott v. Parker*, 259 La. 279, 249 So.2d 908, 918 (1971), *appeal dismissed*, 404 U.S. 931, 92 S.Ct. 281, 30 L.Ed.2d 244 (1971).

¹⁵ *Am. Waste*, 627 So.2d at 162; *Abbott*, 249 So.2d at 918.

¹⁶ *Norfolk S. Corp. v. Cal. Union Ins. Co.*, 2002-0369, 2002-0371 and 2002-0372 (La. App. 1 Cir. 9/12/03); 859 So.2d 167, 185 (gathering cases) (emphasis added).

¹⁷ Record at Petition, ¶17.

¹⁸ La. Civ. Code art. 1983; *Peterson v. Schimek*, 98-1712 (La. 3/2/99); 729 So.2d 1024, 1028, *rehearing denied* (4/9/99).

taking contrary positions on coverage with a respect to a claim that has actually been submitted to the insurer for losses that have actually been sustained as the result of events that have actually occurred. In sum, the factual allegations fail to present *any* dispute between the parties, let alone an existing actual and substantial dispute which is of sufficient immediacy and reality to warrant the issuance of a declaratory judgment.

Further, even if the matter presented an active dispute between the parties, “[a] court must refuse to entertain an action for a declaration of rights if the issue presented is academic, theoretical, or based on a contingency which may or may not arise.”¹⁹ Such is the case here. The contingent and theoretical nature of Plaintiffs’ request is evident from the face of the Petition. Plaintiffs seek a coverage declaration that “will **prevent** the plaintiffs from being left without vital coverage ... **should** operations cease due to a global pandemic virus and civil authorities’ response.”²⁰ Plaintiffs ask this Court declare that the Policy would provide coverage to Plaintiffs “for any **future** civil authority shutdowns of restaurants in the New Orleans area due to physical loss from Coronavirus contamination and that the [P]olicy provides business income coverage **in the event** that the coronavirus has contaminated the insured premises.”²¹ The highlighted words demonstrate that the questions presented are, at best, theoretical as they are contingent upon on hypothetical situations which may or may not arise, *i.e.*, whether the Subject Property becomes contaminated by the coronavirus; whether the Subject Property will be, by an unknown order, at some unknown time, closed, and whether that the theoretical shutdown will be due to coronavirus contamination within the terms required by the Policy. Moreover, this hypothetical controversy is

¹⁹ *America Waste*, 627 So. 2d at 162; *See also, e.g., Fontaine v. Jackson Brewery Marketplace*, 2002-2337 (La. App. 4 Cir. 5/7/03); 847 So.2d 674 (affirming dismissal of declaratory judgment action where, as here, a factual contingency rendered any decision of the court necessarily advisory).

²⁰ *Id.* at ¶18 (emphasis).

²¹ Record at Petition, ¶37 (emphasis added).

predicated on contingencies that may well be cured by further action of Underwriters, Plaintiffs, or the fluidity of the situation. Any ruling based on these hypothetical facts and theoretical future events would necessarily be advisory, which Louisiana law prohibits.²²

II. THE COURT SHOULD DECLINE TO RENDER DECLARATORY JUDGMENT AS THE RELIEF SOUGHT IS PREMATURE

Plaintiffs' demand for a declaration of rights under the Policy is also premature and "shall be dismissed" under La. C.C.P. art. 933. The dilatory exception of prematurity tests whether the cause of action has matured to the point where it is ripe for judicial determination.²³ A suit is premature when it is brought before the right to enforce the claim sued upon has accrued.²⁴ Prematurity is determined by the facts existing at the time the suit is filed.²⁵ Evidence may be introduced to support a dilatory exception of prematurity when the grounds do not appear from the petition.²⁶ When an action is premised on a claim before the right to enforce that claim has accrued, the action shall be dismissed as premature.²⁷

²² While Underwriters acknowledge that declaratory judgment actions are commonly used in Louisiana to settle disputes over insurance coverage, such declaratory actions typically involve an insurer's duty to provide a defense to its insured under liability policies. The instant matter is distinguishable from typical declaratory judgment actions in that Plaintiffs do not claim to have suffered, or that they will suffer, damages as a result of any action by the insurer (i.e., that the event that triggers the obligation under the policy has actually occurred). *See, e.g., W. World Ins. Co. v. Paradise Pools & Spas*, 93-0723 (La. App. 5 Cir. 2/23/94); 633 So.2d 790, 793 (overturning trial court's refusal to issue declaratory judgment in matter seeking a determination on duty to defend because it would remove uncertainty and a determination of no coverage because it would terminate the litigation as to the insurer); *Hadley v. Centex Landis Constr. Co., Inc.*, 2007-0915 c/w 2007-0916 (La. App. 4 Cir. 7/23/08); 990 So.2d 68; *Poynter v. Fidelity & Casualty Company of New York*, 140 So.2d 42 (La. App 3 Cir. 1962) (wherein an insured sought a declaratory judgment that its liability insurer had a duty to defend him under a liability policy. The court found that the insured had successfully pleaded a valid cause of action for a declaratory judgment because he alleged: (i) a written contract of liability insurance; (ii) that he had been sued on a liability covered by the policy; and (iii) that his insurer had refused to defend him against the lawsuit).

²³ *Williamson v. Hospital Service Dist. No. 1 of Jefferson*, 2004-0451 (La. 12/1/04); 888 So.2d 782, 785.

²⁴ *Houghton v. Our Lady of the Lake Hosp., Inc.*, 2003-0135 (La. App. 1 Cir. 7/16/03); 859 So.2d 103, 106.

²⁵ *See, id.*

²⁶ *See*, La. C.C.P. art. 930.

²⁷ *See*, La. C.C.P. art. 423.

This action is premature because it seeks a declaration of coverage with respect to a hypothetical insurance claim for losses that have not yet (and may never) be sustained as a result of future events that have not yet (and may never) actually occur. It is axiomatic that before this Court or any court can be called upon to adjudicate coverage, the events giving rise to an actual claim must have actually occurred. Moreover, the right to seek a determination of coverage under the Policy does not accrue until such time as an actual claim is submitted and the insurer makes an adverse coverage determination. The relationship between the parties arises from the Policy. An insurance policy is a conventional obligation that constitutes the law between the insured and insurer, and the agreement governs the nature of their relationship.²⁸ The Policy requires, *inter alia*, that the insured give Underwriters prompt notice of the direct physical loss or damage and, as soon as possible, give Underwriters a description of how, when, and where the direct physical loss or damage occurred.²⁹ Here, Plaintiffs filed this action without first satisfying the loss reporting obligations imposed upon Plaintiffs under their insurance contract and without affording Underwriters the opportunity to investigate the claim and make a coverage determination. Until Plaintiffs perform their obligations under the Policy—and until the events upon which Plaintiffs’ claim is predicated actually occur—the suit is premature and should be dismissed pursuant to La. C.C.P. art. 926(1) and La. C.C.P. art. 933(A).

²⁸ La. C.C. art. 1983; *Peterson*, 729 So.2d at 1028.

²⁹ See, Policy No. AVS011221002, attached hereto as Exhibit “1,” at Building and Personal Property Coverage Form (Form CP 00 10 10 12) at pp. 10-11 and Business Income (and Extra Expense) Coverage Form (Form CP 00 30 10 12) at p.5.

III. ALTERNATIVELY, THE COURT SHOULD REFUSE TO RENDER DECLARATORY JUDGMENT BECAUSE THE JUDGMENT WOULD NOT TERMINATE THE UNCERTAINTY GIVING RISE TO THE PROCEEDING

Alternatively, this Honorable Court should exercise its discretion and decline to render the premature declaratory judgment sought by Plaintiffs because any judgment rendered in this case would not terminate the uncertainty or (hypothetical) controversy giving rise to this proceeding. Louisiana Code of Civil Procedure Article 1876 provides that a trial court “may refuse to render a declaratory judgment or decree where such judgment or decree, if rendered, would not terminate the uncertainty or controversy giving rise to the proceeding.” “A trial court must render declaratory judgment where such judgment would terminate uncertainty or controversy giving rise to proceeding; however, within its sound discretion, it may choose or refuse to render declaratory judgment which would not terminate such uncertainty.”³⁰

Plaintiffs are asking this Court to render a declaratory judgment premised on the hypothetical theory that Plaintiffs may, or may not, sustain an unknown loss in the future as a result of events that may, or may not, occur. Rendering a judgment based on facts that do not yet exist will not resolve any (hypothetical) controversy. Unless and until Plaintiffs actually submit a claim for an actual loss sustained as a result of actual events, there can be no definitive adjudication of coverage under the Policy. Any judgment issued now—based on incomplete, unresolved, and hypothetical facts—would only serve to foster uncertainty, sow confusion, and potentially result in significant prejudice to the parties.

³⁰ *In re Interment of LoCicero*, 2005-1051 (La. App. 4 Cir. 05/26/06); 933 So.2d 883, 886 (citing *Morial v. Guste*, 365 So.2d 289 (La.App. 4 Cir. 11/8/1978)).

IV. ALTERNATIVELY, IF THE COURT SUSTAINS THAT PLAINTIFFS' CLAIMS HEREIN ARE ALSO PROPERLY PLED IN THE FIRE SUIT, UNDERWRITERS SEEK A DECLINATORY EXCEPTION OF LIS PENDENS.

Plaintiffs have pending another suit related to a wholly separate loss, *Cajun Conti LLC, Cajun Cuisine 1 LLC, and Cajun Cuisine LLC d/b/a Oceana Grill vs. Certain Underwriters at Lloyd's, London and Kenneth Jones*, Suit No. 2019-11354, Section 13, Civil District for the Parish of Orleans, State of Louisiana ("Fire Suit"). However, at the time this action was filed, the Fire Suit had no reference to the issues raised in this matter. Via Second Supplemental and Amending Petition for Damages and Declaratory Judgment,³¹ Plaintiffs amended the Fire Suit to include reference to the Coronavirus. Underwriters maintain those allegations are improperly pled in the Fire Suit and should not remain. Further, as the amended pleading in the Fire Suit was the first reference to the Coronavirus, Underwriters would suggest this suit is the first filed suit on these issues under La. C.C.P. art. 531 and, as such, any exception of lis pendens on these matters should be issued in the Fire Suit dismissing therein any such claims. However, to the extent the Court disagrees with Underwriters on either the peremptory exception of no cause of action or dilatory exception of prematurity herein, or with the anticipated filings with respect to the Fire Suit, Underwriters plead the alternative declinatory exception of lis pendens. Underwriters must emphasize that they do not believe the claims asserted herein to be properly pled in the Fire Suit and this declinatory exception is only pled in the extreme alternative.

CONCLUSION

For the foregoing reasons, Underwriters respectfully urge the Court to sustain their Peremptory Exception of No Cause of Action, Dilatory Exception of Prematurity and

³¹ Second Supplemental and Amending Petition for Damages and Declaratory Judgment, attached herein as Ex. "2".

Precautionary Declinatory Exception of Lis Pendens and dismiss the Petition for Declaratory Judgment.

Respectfully submitted,

PHELPS DUNBAR LLP

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**ATTORNEYS FOR DEFENDANTS,
CERTAIN UNDERWRITERS AT
LLOYD'S, LONDON SUBSCRIBING TO
POLICY NO. AVS011221002**

CERTIFICATE OF SERVICE

I do hereby certify that I have on this 8th day of June, 2020, served a copy of the foregoing *Memorandum In Support of Peremptory Exception of No Cause of Action, Dilatory Exception of Prematurity and Precautionary Declinatory Exception of Lis Pendens* on counsel for all parties to this proceeding, by mailing the same by United States mail properly addressed, and first-class postage prepaid and/or facsimile and/or electronic mail.



Virginia Y. Dodd