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Re: Cajun Conti LLC, et al. v. Certain Underwriters at Lloyd's, London
CDC, Parish of Orleans No. 2020-2558, Div. "M-13"

Counsel:

We enclose Certain Underwriters at Lloyd's, London's Reply Memorandum in Support of Motion *in Limine*, which we have filed today with the Court.

Very truly yours,

Allen C. Miller

ACM/pmc

Enclosure

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CIVIL DISTRICT COURT FOR THE PARISH OF ORLEANS

STATE OF LOUISIANA

NUMBER 2020-02558

SECTION "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

FILED: _____

DEPUTY CLERK

REPLY IN SUPPORT OF MOTION *IN LIMINE*

MAY IT PLEASE THE COURT:

Certain Underwriters at Lloyd's, London Subscribing to Policy No. AVS011221002 ("Underwriters") respectfully submit this reply to Cajun Conti LLC, Cajun Cuisine 1 LLC, and Cajun Cuisine LLC dba Oceana Grill's (collectively "Cajun") Opposition to Underwriters' Motion *in Limine*.

A. The Court Has Not Ruled, Nor Is The Policy Ambiguous.

In an effort to defend its pervasive reliance on parol evidence and to distract from the Policy language "direct physical loss of or damage to property", Cajun now wrongfully asserts that this Court **previously concluded** that the Policy is ambiguous. Opposition, pp. 1-2 ("Indeed, the Court acknowledged that the terms are ambiguous in finding that there is a genuine issue of material fact regarding 'direct physical loss or damage' – meaning the defendants' narrow interpretation of the undefined terms cannot be the only interpretation possible or reasonable.") (generally citing the Court's ruling on Underwriters' motion for summary judgment). This is (at best) revisionist history and more accurately, a misstatement of the Court's ruling. Cajun does not quote the Court's purported "finding of ambiguity" because the Court made no such finding. The Court has never made a finding of ambiguity. Indeed, if this Court had concluded that any Policy language was ambiguous as a matter of law,¹ the Court would have explicitly stated as such. Cajun wrongfully misstates the Court's prior ruling.

¹ Cajun further errs when it contends that a finding of a disputed fact issue is a finding of ambiguity. "[T]he determination of whether a contract is clear or is ambiguous is also a question of law." *Landis Const. Co. v. St.*

Cajun then relies upon two out-of-state citations to support its ambiguity argument. Surely Cajun would not have the Court resolve this dispute based on the state of the national jurisprudence. Indeed, Courts across America are—on an almost daily basis—finding that SARS-CoV-2 does not cause “direct physical loss of or damage to property” or otherwise trigger business income or civil authority coverage. A brief (and incomplete) string cite illustrates this point: *See e.g. Zwilllo V, Corp. v. Lexington Ins. Co.*, 2020 WL 7137110, *5 (W.D. Mo. Dec. 2, 2020) (string-citing decisions that have found that SARS-CoV-2 does not cause “direct physical loss of or damage to” property); *Natty Greene’s Brewing Co., LLC et al v. Travelers Cas. Ins. Co., et al*, 2020 WL 7024882, at *4 (M.D.N.C. Nov. 30, 2020) (“[E]xtrinsic evidence from the Insurance Services Office is only relevant if the policy language is ambiguous, which it is not.”); *Toppers Salon & Health Spa, Inc. v. Travelers Prop. Cas. Co. of Am.*, 2020 WL 7024287, at *3 (E.D. Pa. Nov. 30, 2020) (“No one disputes that Toppers suspended its operations at each of its premises as a result of the Shutdown Orders. So the only question is whether physical loss or damage caused that suspension. It did not.”); *Sultan Hajer d/b/a Rug Outlet, v. Ohio Sec. Ins. Co.*, 2020 WL 7211636, at *2 (E.D. Tex. Dec. 7, 2020) (“The scope of the term ‘physical loss’ is far narrower than plaintiff contends and is only reasonably read in context as meaning ‘a distinct, demonstrable, physical alteration of the property.’”). Cajun’s attempt to cherry-pick two outlier decisions fails when confronted with the plethora of decisions rejecting Cajun’s strained interpretation.

Finally, Cajun claims that Underwriters must also find the policy language ambiguous because Underwriters relied on “parol evidence” in the form of the Merriam-Webster Dictionary. Opposition, p. 2. This is yet another baseless argument presented without any legal support. Louisiana courts have repeatedly used the Merriam-Webster Dictionary to conclude that contracts are **not** ambiguous (*i.e.*, that parol evidence is not needed to interpret them). *See Townsend v. State Farm Mut. Auto. Ins. Co.*, 34,901 (La. App. 2 Cir. 8/22/01), 793 So. 2d 473,

Bernard Par., 2014-0096 (La. App. 4 Cir. 10/22/14), 151 So. 3d 959, 963, *writ denied*, 2014-2451 (La. 2/13/15), 159 So. 3d 467.

478, *writ denied*, 2001-2637 (La. 12/14/01), 804 So. 2d 635²; *Levier v. Jeff Davis Bancshares, Inc.*, 2017-472 (La. App. 3 Cir. 4/18/18), 244 So. 3d 504, 507.³

B. Cajun's Citations to Ethan Gow's Deposition and ISO's Interactions with State Regulators Establish Nothing.

Cajun dedicates a substantial portion of its Opposition paraphrasing generic statements⁴ from the deposition of Ethan Gow (a representative from Underwriters' managing general agent, Avondale). Cajun emphasizes that Avondale uses Insurance Services Office ("ISO") form documents to compile policies. However, Cajun's argument fails on the assertion that Underwriters "bind themselves to the terms drafted by ISO without question. Therefore, ISO's intent in drafting the policy language given to Oceana is relevant as to the interpretation of the binding terms between the parties." Opposition, p. 4 (emphasis supplied). There is nothing in Louisiana law that imputes ISO's "intentions" to Underwriters. Indeed, Cajun does not even attempt to supply a citation to any source of Louisiana law to substantiate this assertion.

Cajun's omissions do not end with a lack of controlling law. Cajun further fails to acknowledge ISO has "hundreds and hundreds and hundreds" of forms,⁵ the Policy contains both ISO and non-ISO forms, and—most importantly—Gow was not aware of any ISO virus exclusion at the time the subject policy was underwritten (a fact that must not be viewed with the 20/20 hindsight of the post-COVID-19 world).⁶ Cajun has failed to lay a foundation regarding the relevance of any purported virus exclusion, as there is **no** evidence Underwriters (through Avondale) **ever** considered any virus exclusion when assembling the Policy. Accordingly, references to a virus exclusion should be excluded under the parol evidence rule and because there is no evidence that any exclusion was considered by Underwriters in constructing the

² ("We do not find any support for the position that the term 'repair' is a term of art that has a particular meaning, other than its generally prevailing meaning. As defined by Merriam Webster's Collegiate Dictionary, Tenth Edition, the verb repair means . . .").

³ ("The words of a contract must be given their generally prevailing meaning.' La.Civ.Code art. 2047. In that regard, we turn to the general and ordinary meaning of the word 'vote' which is a "formal expression of opinion or will in response to a proposed decision" and/or "an indication of approval or disapproval of a proposal." Merriam-Webster's Collegiate Dictionary, 1403 (11th ed. 2004). The amendment document signed by the lot owner states, 'that [she/he] does hereby approve the Amendment to Restrictions to permit Lots 13, 14 and 15 of Block F to be used for commercial purposes.' We find this language to be unambiguous.").

⁴ For example, Cajun cites Gow's testimony for the proposition that "[h]igher risks increase the premium rates." Opposition, p.3. This, of course, is how underwriting works.

⁵ Gow deposition, p. 150; Exhibit A.

⁶ Gow deposition, pp. 156-57; Exhibit A.

Policy. Virus exclusions are irrelevant in interpreting the plain terms of the Policy at issue in this case.

Cajun's Opposition then moves even further afield by discussing ISO's interactions with the Louisiana Department of Insurance in 2006. Cajun has not sued the entire "insurance industry." Cajun has, instead, sued certain subscribers to a single policy of insurance. There is no basis in law or fact to assume that Avondale and Underwriters were working hand-in-glove with ISO or to otherwise impute ISO's conduct to Underwriters.

Without conceding the admissibility or relevance of the "ISO Circular" in this case, Cajun once again only partially cites the Court to the relevant text. ISO's view of what it intended to cover irrespective of any exclusion is clear:

While property policies have not been a source of recovery for losses involving contamination by disease-causing agents, the specter of pandemic or hitherto unorthodox transmission of infectious material raises the concern that insurers employing such policies may face claims in which there are efforts to expand coverage and to create sources of recovery for such losses, contrary to policy intent.

Cajun Ex. 4, p. 6 (emphasis supplied). ISO's "intentions" are irrelevant in this case. However, to the extent Cajun seeks to explore a third party's intentions, Cajun need only look to the full comments of what ISO relayed to the Department of Insurance. The Court should preclude this ISO shell game and exclude "evidence" of third-party intent.

C. Claims Investigation Evidence and Financial Evidence are Irrelevant as Established by Cajun's Petition.

It is an uncontested fact that Underwriters denied coverage in this case. Yet Cajun claims that Underwriters' third party administrator's investigation is relevant to this litigation Opposition, p. 5. Cajun's Petition says otherwise:

77. Plaintiffs seek a Declaratory Judgment to determine whether the COVID-19 Civil Authority Orders restricting the operations of their business trigger the civil authority provision of the policy issued to the plaintiffs.

78. Plaintiffs ask the Court to affirm that because the all-risk policy provided by Lloyd's does not contain an exclusion for virus or pandemic, the policy provides coverage to plaintiffs for any civil authority orders shutting down or limiting the operations of restaurants in the New Orleans area due to physical loss from COVID-19 within one mile from the plaintiffs' business, and that the policy provides business income coverage for the contamination of the insured premises by COVID-19.

79. Plaintiffs do not seek any determination on the amount of damages **or** any other remedy besides the declaratory relief.

Second Amended Petition, p. 8. There is nothing in Cajun's declaratory judgment action that extends to the justification(s) for Underwriters' denial; the only issue in this case is whether coverage exists. Underwriters object to Cajun's efforts to expand the scope of its pleadings by raising issues concerning the adjustment of Cajun's insurance claim.

Information related to Cajun's "profit and loss statements" are likewise irrelevant given Cajun's assertion that it does not "seek any determination on the amount of damages or any other remedy besides the declaratory relief." *See* Opposition, p. 6 and Second Amended Petition, p. 8. Likewise, it is undisputed that Underwriters do not issue policies for free, and Cajun's justification for discussing the "he relative wealth or poverty of the parties" on these grounds is a non sequitur. Underwriters again object to Cajun's efforts to expand the scope of its pleadings by raising issues concerning Cajun's claimed damages.

D. Conclusion

For the reasons stated above and in their original memorandum in support, Underwriters pray that the Court grant their Motion *in Limine*.

* * *

Respectfully submitted,

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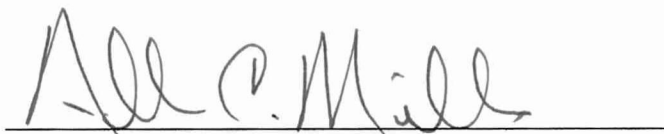
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**ATTORNEYS FOR CERTAIN
UNDERWRITERS AT LLOYD'S, LONDON
SUBSCRIBING TO POLICY NO.
AVS011221002**

CERTIFICATE OF SERVICE

I hereby certify that I have on this 8th day of December, 2020, delivered a copy of the foregoing to all known counsel of record by United States Mail, proper postage prepaid, Electronic Mail and/or Facsimile.



CIVIL DISTRICT COURT
PARISH OF ORLEANS
STATE OF LOUISIANA

NO. 2020-02558 DIVISION "M" SECTION 13

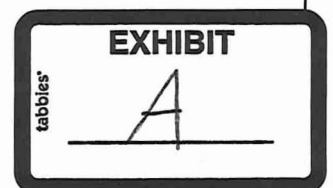
CAJUN CONTI LLC, CAJUN CUISINE I LLC,
and CAJUN CUISINE LLC d/b/a/ OCEANA GRILL

VERSUS

CERTAIN UNDERWRITERS AT LLOYD'S, LONDON

VOLUME II

Continuation of the 1442 Zoom
Deposition of CERTAIN UNDERWRITERS AT LLOYD'S,
LONDON, through its Representative, ETHAN GOW,
taken on Monday, November 9, 2020, commencing at
4:35 p.m.



KAY E. DONNELLY & ASSOCIATES
504.299.8220

1 MR. MILLER:

2 Objection. Lacks foundation. But
3 you can answer.

4 THE WITNESS:

5 So I would -- I would have to say I
6 don't know the edition dates of ISO forms or
7 when they start to update.

8 I would say that our base policy has
9 stayed static for several years.

10 EXAMINATION BY MR. HOUGHTALING:

11 Q. And when you say "base policy," what are
12 you referring to when you say "base policy?"

13 A. So that would be the, again, "what is
14 covered," "how it is covered" portion.

15 Q. When you say "base policy," are you
16 speaking also of endorsements?

17 A. I can't -- that is what I can't speak
18 to. I can't speak to how often they would
19 update endorsements.

20 We don't use -- I mean, ISO has, as you
21 probably know, you know, hundreds and hundreds
22 and hundreds of forms, which are not applicable
23 to this program.

24 So I don't want to make a guesstimate as
25 to those types of things. But, again, our

1 THE WITNESS:

2 The policy certainly isn't written
3 to cover a pandemic, no.

4 EXAMINATION BY MR. HOUGHTALING:

5 Q. Was the risk that the policy could be
6 interpreted as covering a pandemic? Was that a
7 consideration?

8 A. No.

9 Q. Okay. When you issued the policy, did
10 you consider that the risk of viral
11 contamination warranted attention?

12 A. No.

13 Q. Did you know that the drafter of the
14 policy, the author of the policy, ISO, told that
15 to the Insurance Commissioner of Louisiana in
16 2006?

17 MR. MILLER:

18 Objection to the form of the
19 question.

20 THE WITNESS:

21 I don't -- I don't know the answer
22 to that.

23 EXAMINATION BY MR. HOUGHTALING:

24 Q. Were you aware at the time that this
25 policy was issued that there was an ISO virus

1 exclusion form?

2 A. Not at the time, no.

3 Q. You do now?

4 A. Again, ISO has -- I mean, ISO has
5 hundreds and hundreds of forms. So that is not
6 a form that we used as part of our policy.

7 Q. Okay. The question is: Do you use it
8 now?

9 A. We do.

10 Q. When did you start using it?

11 A. April of 2020.

12 Q. Do you know the number, the CP number of
13 the endorsement that you are using now?

14 A. I can bring it up for you, but --

15 Q. Sure. Yeah.

16 A. Yeah. Just give me -- give me one
17 second. And when I say one second, I mean,
18 like, two minutes.

19 Q. Okay. I'm not going to hold you to it.
20 Let me give you what is marked as Plaintiffs
21 Exhibit 4. Let me see which one you got here.
22 Oh, Exhibit 2. I'm sorry. Exhibit 2. And I
23 will pull it up on the screen for you.

24 A. I have it, if you need it.

25 Q. If you go to --