

STATE OF LOUISIANA
24th JUDICIAL DISTRICT COURT
FOR THE PARISH OF JEFFERSON

DOCKET NO.: 812-460

DIVISION: H

VCS, LLC

VERSUS

MT. HAWLEY INSURANCE COMPANY;
MARSH & MCLENNAN AGENCY, LLC;
ARI UNDERWRITERS, INC.;
ABC INSURANCE COMPANY; AND
DEF INSURANCE COMPANY

FILED: _____ DEPUTY CLERK: _____

PETITION FOR INSURANCE PROCEEDS,
BAD FAITH PENALTIES,
BREACH OF CONTRACT,
AND NEGLIGENCE

PARTIES

1.

Plaintiff, VCS, LLC ("VCS"), is a Wyoming limited liability company admitted to do business in the state of Louisiana, with its principal business office at 1611 E. 2nd Street, Caspar, WY 82601. VCS owns Wingate by Wyndham Slidell/New Orleans East Area ("Wingate Slidell"), a hotel built in 2013 and located at 1752 Gause Blvd. E, Slidell, LA 70461.

2.

Defendant, Mt. Hawley Insurance Company ("Mt. Hawley"), is a corporation organized under the laws of the State of Illinois with its principal place of business in Peoria, Illinois. Mt. Hawley issued VCS Commercial Property Policy No.

24th E-Filed: 11/23/2020 17:28 Case: 812460 Div:H Atty:020446 MARTHA Y CURTIS

MCP0168587 ("Policy") effective November 26, 2019 to November 26, 2020, covering the Slidell Wingate. *See* Exhibit A.

3.

Mt. Hawley is a Delaware corporation with its principal place of business in Illinois. It may be served via the Louisiana long-arm statute through its designated agent for service of process in the Policy Craig W. Kliethermes, President, Mt. Hawley Insurance Company, 9025 N. Lindbergh Drive, Peoria, IL 61615. *See* Exhibit A, Wingate Slidell/Mt. Hawley/00113.

4.

Defendant Marsh & McLennan Agency LLC d/b/a Eustis Insurance & Benefits ("Marsh/Eustis") in collaboration with defendant ARI Underwriters, Inc. ("ARI") together worked on VCS's insurance program and advised and recommended insurance coverage to VCS, including, but not limited to the Policy and served as VCS's insurance agent/broker.

5.

Both Marsh/Eustis and ARI are specifically identified on the Policy's Declaration Page with ARI identified as the "Agent/Broker" and Marsh/Eustis identified as the "licensed Louisiana surplus lines broker." *See, e.g.,* Exhibit A, Wingate Slidell/Mt. Hawley-00007; *see also* A Summary of Insurance for VCS, LLC "Revised," Exhibit B. Marsh/Eustis has served as VCS's insurance agent for more than 10 years.

6.

Marsh is a Delaware limited liability company with its domicile address at 1209 Orange Street, Wilmington, DE 19801. Marsh is authorized to do business in Louisiana with its registered office in Louisiana at 3867 Plaza Tower Drive, Baton Rouge, LA 70816. Marsh may be served through its agent for service of process, C T Corporation System, 5615 Corporate Blvd., Ste. 400B, Baton Rouge, LA 70808. The member of Marsh is Marsh USA Inc. located at 1166 Avenue of the Americas, New York, New York 10036.

7.

ARI is a Louisiana corporation with its principal office address business at 80 Normandy Drive, Kenner, LA 70065. It may be served through its agent for service of process, Paul Dreher, 80 Normandy Drive, Kenner, LA 70065.

8.

Defendant ABC is the insurer of Marsh/Eustis for its errors and omissions at issue in this lawsuit which is being sued pursuant to the Louisiana Direct Action Statute, LSA-R.S. § 22:1269, and defendant DEF is the insurer of ARI for its errors and omissions at issue in this lawsuit which is being sued pursuant to the Louisiana Direct Action Statute, LSA-R.S. § 22:1269.

9.

Venue is proper in Jefferson Parish as this action is against joint or solidary obligors, and it is brought in a parish of proper venue under Article 42 against defendant ARI. *See* LA. CODE CIV. PROC. art. 42(2) & 73(A).

FACTS

A. The Covid-19-Related Claim as Against Mt. Hawley

10.

The Policy provides VCS with limits of \$500,000 for “Business Income/Rental Value (with Extra Expense)” (“BI”) for the Wingate Slidell. See Exhibit A, Wingate Slidell/Mt. Hawley-00010.

11.

VCS has suffered BI losses covered under the Policy due to Covid-19 as the Wingate Slidell building has been damaged and access, ingress, and/or egress to it was prohibited and/or impaired by civil authority. See, e.g., Exhibit A, Wingate Slidell/Mt. Hawley-00028-37 (Business Income (and Extra Expense) Coverage Form), *id.* -00111 (Civil Authority Endorsement), *id.* -00112 (Ingress or Egress Endorsement). Moreover, properties within one mile of the Wingate Slidell have been damaged due to Covid-19.

12.

The use of the Wingate Slidell building was prohibited and/or impaired for its intended use as a hotel for which BI coverage VCS paid premiums to Mt. Hawley.

13.

The business of the Wingate Slidell was “suspended” as defined in the Policy due to issues outlined above. The policy defines “suspension” as including the “slowdown” of VCS’s business activities or as including when “part or all of the described premises [that] is rendered untenable” as the policy provides coverage for Business Income including “Rental Value.” See Exhibit A, Wingate Slidell/Mt. Hawley-00037.

14.

Civil authority orders prevented access to and impaired ingress from or egress to Wingate Slidell for which specific Policy endorsements were issued. *See, e.g.,* Exhibit A, Wingate Slidell/Mt. Hawley-00111 (Civil Authority Endorsement), *id.* - 00112 (Ingress or Egress Endorsement). There were also curfews issued for the municipality of Slidell where the VCS's Wingate Slidell is located.

15.

The peril of impairing access to the Wingate Slidell by governmental "stay-at-home" and curfew orders due to coronavirus is similar to the perils of riot, strike, civil commotion, etc. which would impair access to the building and is clearly covered under the Policy. *See, e.g.,* Exhibit A, Wingate/Slidell Mt. Hawley-00090.

16.

VCS timely reported its claim to Mt. Hawley and supplied it satisfactory proof of loss demanding payment of the full BI limits under the Policy for Wingate Slidell, but to date, VCS has been paid nothing by Mt. Hawley for its claim.

17.

The presence of coronavirus in the Wingate Slidell building and in other properties within one mile of the Wingate Slidell constitute a direct physical loss. *See, e.g., Cajun Conti LLC v. Certain Underwriters at Lloyd's London*, No. 2020-02558 (La. Civ. Dist. Ct. Nov. 4, 2020) (denying insurers' motions for summary judgment on the issue that Covid-19 is not "direct physical loss or damage"); *Widder v. La. Citizens Prop. Ins. Corp.*, 2011-0196 (La. App. 4 Cir. 8/10/11), 82 So.3d 294, 296 (intrusion of lead or gaseous fumes is direct physical loss); *see also Studio 417*,

Inc. v. Cincinnati Ins. Co., 20-3127, 2020 WL 4692385, #1 (W.D. Mo. Aug. 12, 2020).

18.

Coronavirus physically infects and stays on surfaces of objects or materials, “fomites,” for up to twenty-eight days, particularly in humid areas below eighty-four degrees such as New Orleans. Indeed, the Center for Disease Control has noted the fact that Covid-19 attaches to surfaces on a molecular level, interacting with property’s surfaces. The rampant spread of Covid-19, as it adheres to surfaces for extended periods of time, creating a dangerous property condition and preventing the use of property, is a direct physical loss to property.

19.

Coronavirus was physically present in the Wingate Slidell’s building and properties within one mile of same.

20.

Moreover, the presence of coronavirus in other properties within one mile of the Wingate Slidell prohibited access to and impaired ingress to or egress from the Wingate Slidell.

21.

On June 17, 2020, Mt. Hawley denied VCS’s Covid-19 claim, paying it nothing under its half-million-dollar BI coverage.

B. The Covid-19-Related Claim as Against Marsh/Eustis and ARI

22.

While VCS submits its Covid-19 claim is covered under Mt. Hawley's Policy for the non-exclusive reasons above, if Mt. Hawley's Policy is found to not provide sufficient coverage, VCS alternatively sues its agent/broker Marsh/Eustis and ARI for their negligence and/or breach of contract related to same.

23.

On its website in a page entitled "Insurance for Your Business," Marsh/Eustis touts its experience in business insurance in general as follows and confirms that it evaluates its clients' business "potential risk exposures" and makes "recommendations" regarding insurance coverage for same as follows:

At Eustis, we work with our clients throughout Louisiana ***to fully understand their businesses and their potential risk exposures.*** Only then will ***we make recommendations.***

See <https://www.eustis.com/business-insurance/> (last visited June 5, 2020)

(emphasis added).

24.

Marsh/Eustis also specifically touts its experience specifically with hotels as follows and again confirms that it knows that "industry's unique needs and challenges"; works in a "consultative fashion" with those businesses; reviews their coverage "to look for areas in need of improvement"; and again makes "recommendations" regarding insurance coverage as follows:

Our decades of working in partnership with hotels, motels, and other hospitality-based businesses have given us insight into the industry's unique needs and challenges. Because we are an independent insurance agency with a long history in hospitality coverage, we're able to leverage our relationships with top-rated insurance companies to offer the most competitive pricing.

Eustis agents work with businesses in a consultative fashion to manage and mitigate risk. We take the time to fully understand your needs and objectives, and then *we review your current insurance coverage to look for areas in need of improvement.* Only once we've developed a complete picture of your current coverage needs will *we make recommendations.*

See <https://www.eustis.com/business-insurance/hotels-motels-hospitality>

(last visited June 5, 2020).

25.

Similarly, the ARI website touts its business insurance selection and analysis services, including “proper coverage selection” and “Business Income/Extra Expenses analysis” as follows:

[T]he founder of ARIUW is *uniquely* positioned to assist you with a variety of services, **including but not limited to proper coverage selection, . . . Business Income/Extra Expense analysis**

See <https://www.ariuw.com/> (last visited June 5, 2020) (bold emphasis in original; other emphasis added).

26.

The ARI website further touts “Hotels” as “accounts” for which it provides insurance brokerage writing services. See <https://www.ariuw.com/accounts> (last visited June 5, 2020).

27.

Thus, Marsh/Eustis and ARI held themselves out to VCS as advisors of hotel business income insurance.

28.

Marsh/Eustis provided VCS a Summary of Insurance “Revised” in which it failed to failed to note any exclusion or limitation for “virus” coverage in the Mt. Hawley policy. See Exhibit B at 6.

29.

Marsh/Eustis also failed to list possible “virus” or “pandemic” coverage as a possible coverage consideration for VCS. *See* Exhibit B at 28-37.

30.

VCS reasonably relied on Marsh/Eustis and ARI’s representations of their unique expertise in insurance coverage selection and policy recommendations for its industry following their reviews and analysis of VCS’s insurance and business.

31.

Marsh/Eustis and ARI were not mere “order takers” for VCS’s insurance, but rather specifically held themselves out as consultative insurance advisors to insureds who would recommend appropriate coverages.

32.

Based on these affirmative representations regarding their insurance-related services, Marsh/Eustis and ARI had a heightened duty to VCS regarding its coverage selections on which VCS reasonably relied.

33.

VCS’s assumption that it was properly insured by the Policy for its BI losses is warranted by Marsh/Eustis and ARI’s representations of their unique insurance expertise and advice.

34.

To the extent Mt. Hawley late pays and/or does not pay all of VCS’s BI damages, Marsh/Eustis and ARI are liable to VCS for the BI coverage they should have recommended to VCS due to their affirmative representations on which VCS relied.

C. The Water Damage Claim Against Mt. Hawley

35.

On March 1, 2020, a guest at the Wingate Sheraton set off the sprinkler system. All appropriate departments/agencies were notified. A total of ten hotel rooms were affected by the water. VCS timely made a claim to Mt. Hawley for building property damage, business personal property damage, and BI.

36.

On March 5, 2020, Mt. Hawley assigned adjuster Gordon Spears of Engle Martine & Associates to the claim.

37.

On March 30, 2020, Mr. Spears sent an email with a spreadsheet indicating that he was deducting four items from VCS's Business Personal Property Inventory ("BPPI") as building components instead of business personal property ("BPP"), indicating that VCS's remaining claimed BPP of \$104,375.71 would be paid. See Exhibit C.

38.

After numerous emails from VCS, on April 24, 2020, Mr. Spears called VCS's principal Brian Reine on his personal cell phone and stated he was not going to pay VCS anything for its BPP loss.

39.

On May 13, 2020, Mt. Hawley assigned another Engle Martin adjuster Carlo Pedalino to re-inspect VCS's BPP losses.

40.

Although both Mr. Spears and Mr. Pedalino had access and inspected to the Wingate Slidell's damaged BPP, Mt. Hawley did not provide VCS any payment for

same until a check dated June 18, 2020 which was more than 30 days and/or 60 days after VCS's satisfactory proof of loss and then was an underpayment of \$7,164.04 in violation of Louisiana law. *See Exhibit D.*

41.

Mr. Spears also calculated a net structure loss at the Wingate Slidell of \$66,595.43.

42.

Although previously done so, VCS reaffirms its rights to be paid all applicable holdbacks and withheld depreciation regarding all its physical losses regarding the water claim.

43.

Like the Covid-19-claim, to date, Mt. Hawley has paid VCS nothing to date for its BI loss related to the water claim in violation of Louisiana law.

44.

The interaction of the water claim and the Covid-19 claim have severely adversely affected VCS up to the full limits of the Policy and VCS has also suffered consequential damages regarding same for which Mt. Hawley is also liable.

**FIRST CAUSE OF ACTION AGAINST
MT. HAWLEY FOR INSURANCE PROCEEDS**

45.

VCS repeats and alleges the allegations in all preceding paragraphs as though fully set forth herein.

46.

As indicated above, VCS asserts a claim against Mt. Hawley for all proceeds due under the Policy.

**SECOND CAUSE OF ACTION AGAINST
MT. HAWLEY FOR BAD FAITH PENALTIES**

47.

VCS repeats and alleges the allegations in all preceding paragraphs as though fully set forth herein.

48.

VCS has submitted satisfactory proof of loss to Mt. Hawley for its claims, and Mt. Hawley has not paid VCS all its losses within 30 days, thereby subjecting Mt. Hawley to an additional 50% of the amount due and VCS's attorneys' fees as provided by LSA-R.S. § 22:1892.

49.

Alternatively, VCS submits this instant lawsuit is satisfactory proof of loss to Mt. Hawley of its claims under the Policy and that, if VCS does not pay VCS's claims up to the applicable limits under the Policy within 30 days of receipt of same, Mt. Hawley must pay VCS 50% of the amount due and VCS's attorneys' fees as provided by LSA-R.S. § 22:1892.

50.

Also, if Mt. Hawley does not pay VCS within 60 days of satisfactory proof of loss of VCS's claims either presented previously or by this Petition, Mt. Hawley must pay VCS the consequential damages VCS has sustained due to Mt. Hawley's non-payment as well as two times the damages VCS sustained under LSA-RS. § 22:1973.

THIRD CAUSE OF ACTION
BREACH OF CONTRACT AND/OR NEGLIGENCE OF
MARSH/EUSTIS AND ARI

51.

VCS repeats and alleges the allegations in all preceding paragraphs as though fully set forth herein.

52.

To the extent VCS is found to be uninsured and/or underinsured for its Covid-19-related losses under the Policy, VCS submits it was due to the breach of contract and/or negligence of Marsh/Eustis and ARI in the following non-exclusive particulars:

- (a) Failing to advise VCS about the need for broader virus-related coverage for its hotel business in which there are numerous people entering and exiting daily;
- (b) Failing to perform due diligence regarding VCS's business as affirmatively was represented would be done; and/or
- (c) Failing to recommend appropriate insurance coverages to VCS.

53.

The defendants, Mt. Hawley, Marsh/Eustis, and ARI, are all jointly and solidarily liable with each other for all damages VCS has suffered due to their negligence and/or breaches of contract for its Covid-19 losses.

FOURTH CAUSE OF ACTION
DIRECT ACTION CLAIM AGAINST INSURERS
OF MARSH/EUSTIS AND ARI

54.

VCS repeats and alleges the allegations in all preceding paragraphs as though fully set forth herein.

VCS asserts a claim under the Louisiana Direct Action Statute, LSA-R.S. § 22:1269, against the insurers of Marsh/Eustis and ARI, as ABC and DEF insurers, for all VCS's claims asserted against them. VCS reserves its rights to substitute the correct name of the insurers at issue once identified.

WHEREFORE, VCS respectfully prays, after due proceedings had, that:

- (1) Defendants, Mt. Hawley, Marsh/Eustis, and ARI, be held jointly and solidarily liable with each other for all losses suffered by VCS due to Covid-19;
- (2) Defendant Mr. Hawley be held liable for all losses suffered by VCS due to the water claim;
- (3) Mt. Hawley be held liable for bad faith penalties under Louisiana law for both VCS's water claim and Covid-19 claim;
- (4) Marsh/Eustis and ARI's insurers be held liable for all amounts they owe VCS; and
- (5) VCS receive any other equitable and general relief as the nature of this case will allow.

Respectfully submitted,

/s/ Martha Y. Curtis
MARTHA Y. CURTIS, #20446
ASHLEY G. COKER, #30446
WADE B. HAMMETT, #31186
**SHER GARNER CAHILL RICHTER
KLEIN & HILBERT, L.L.C.**
909 Poydras Street, Suite 2800
New Orleans, Louisiana 70112
Telephone: (504) 299-2100
Facsimile: (504) 299-2300
**ATTORNEYS FOR PLAINTIFF
VCS INVESTMENTS, LLC**

**PLEASE PROVIDE ATTORNEYS FOR PLAINTIFF THE CITATION AND
CONFORMED COPY OF THIS PETITION FOR LONG-ARM SERVICE FOR:**

Mt. Hawley Insurance Company
via the Louisiana long-arm statute
through its designated agent for service of process in its Policy
Mr. Craig W. Kliethermes
President
Mt. Hawley Insurance Company
9025 N. Lindbergh Drive
Peoria, IL 61615

PLEASE SERVE:

ARI Underwriters, Inc.
through its agent for service of process
Paul Dreher
80 Normandy Drive
Kenner, LA 70065

Marsh & McLennan Agency LLC
d/b/a Eustis Insurance & Benefits
C T Corporation System
3867 Plaza Tower Drive
Baton Rouge, LA 70816