DOCKET NO.: X07-HHD-CV- 21-6140378-S	:	SUPERIOR COURT
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MASHANTUCKET PEQUOT TRIBAL NATION	:	COMPLEX LITIGATION
	:	JUDICIAL DISTRICT OF
v.	:	HARTFORD
	:	
FACTORY MUTUAL INSURANCE CO.	:	AUGUST 18, 2021

Memorandum of Decision Granting in Part Motion to Strike

1. In insurance, "yes" leads to "no" and "no" to maybe.

When we study the world of insurance we scrutinize a land of "yes", "no", and "maybe".

Most insurance policies begin with a broad promise—for instance, "yes, we cover 'all risks'". Insureds can then expect that promise to be whittled down considerably with a series of noes —exclusions involving no coverage: "all risks, but not the following". Finally, if you pay something more, you can make your way to "maybe" and get back some of what was taken away by the exclusions.

This case is about one of those maybes. It's about COVID-19. It's about over $76 million in business losses and cleaning expenses at the vast casino complex run by the plaintiff Mashantucket Pequot Tribal Nation on its Eastern Connecticut tribal lands.

The Pequots bought an "all risk" insurance policy from the defendant Factory Mutual Insurance Company. Factory Mutual promised the Pequots over $1.6 billion in coverage for all risks.

But that was only the property damage "yes" part. The "no" part of the property damage section of the policy is fairly long. It begins by whittling down the $1.6 billion in some instances to as little as $100,000 or $200,000 and then it pares a bit more off with deductibles that in some cases enter the millions.

The trimming continues as the policy lops off certain property from coverage, sometimes in whole categories like timber, dams, dikes, crops, bullion, money, and works of art. With other property it takes away the coverage then grants back a bit as it does with land where parking lots are exceptions, or residences where hotel rooms are exceptions.

The policy goes on to exclude broad swaths of losses "unless otherwise stated" that includes things like "indirect damage," "mysterious disappearance", "loss of use", etc.

The policy also lists dozens of causes of damage that it doesn't cover.

At last we reach something relevant to COVID. On page 14 of the policy, among the property damage cast into the nether regions of "no", is "any cost due to contamination", "unless directly resulting from other physical damage not excluded by this Policy." A similar thing happens when the policy reaches "time element" (business interruption) coverage which, at policy page 44, along with its own exclusions, incorporates all of the other property damage exclusions, including contamination.

"Contamination" on page 66 of the policy is defined to include various poisons and pathogens and any "virus"—a virus like SARS-CoV-2, the virus associated with the disease COVID-19.

So this policy language is plain. After reading it, any reasonable person would have to conclude that a virus is a contamination and contamination isn't covered. It means that—at least at the "no" stage— the policy assumes, unless otherwise provided for, that no costs due to a virus are covered—costs like those incurred when the Pequot casino was shuttered by government edict, lost business, and had to be cleaned up and recalibrated.

Indeed, this language only leaves open the possibility that COVID costs are covered if they are "directly resulting from other physical damage not excluded by this Policy." We will see what use the Pequots try to make of this later to get to "yes", but let's talk about "maybe" first. It's more promising for them.

2. Getting to Maybe.

In the face of the policy's virus exclusion, the Pequots bought extra coverage in two relevant categories for: 1. communicable disease "response" costs that include money for clean up and for communications designed to protect the Pequots' business reputation, and 2. communicable disease business interruption losses called "time element" losses.

The trouble for the Pequots is that one of the policy's many dollar limits on liability reduces Factory Mutual's liability for communicable disease coverage to $1 million dollars rather than $1.6 billion dollars. The trouble for Factory Mutual is that the coverage is at least a million dollars a year rather than its preferred coverage of nothing.

Facing these dilemmas, both sides exploit the policy's traditional structure to make their case. The Pequots strain the hardest. After all, they have over $76 million at stake, so they try mightily to escape the $1 million restriction.

3. Around the yard and back to no.

The Pequot's main aim is to establish virus coverage for claims outside of the dollar-limited communicable disease coverage. They seem to concede that response cost and time element losses for contamination are capped. They focus instead on other kinds of losses and on defeating the contamination exclusion by pointing to where it says the exclusion applies to contamination losses, "unless directly resulting from other physical damage not excluded by this Policy."

The Pequots try to show that costs caused by a virus are directly resulting from other physical damage not excluded.

This is no small undertaking. Costs caused by a virus are the very thing the policy does not cover by virtue of the contamination exclusion. Any argument that simply brings you back to costs caused by the virus brings you back to the costs that that are expressly excluded. By definition, damage from the virus cannot be "directly resulting from *other* physical damage *not excluded* by this Policy."

Yes. There are kinds of contamination that *might* be covered by virtue of this language. One kind of contamination that might result from *other* physical damage not excluded by the policy could be mold that is the product of water damage from a burst pipe. Mold is defined on page 66 as contamination, but page 10 of the policy suggests that mold damage caused by water flowing from a burst piping system might be covered.

If so, water damage from a burst pipe causing mold contamination would be *other* physical damage not excluded. The other physical damage is damage to the pipe. In that case the physical damage isn't the mold. The mold is merely something that has to be cleaned up because of the damage to the pipe.

But the Pequots don't have a pipe to point to. They can't escape the fact that their damage was directly caused by the virus, not some *other* covered cause like a broken pipe.

So they chase the language in a circle. They suggest that they have found an escape clause on policy page 16, paragraph 6 where it begins a list of things described as "Additional Coverages for insured physical loss or damage". That list in subparagraph F on page 22 includes as one kind of insured physical loss a loss caused by "communicable disease response"—the losses with liability capped at $1 million. Later, on page 53 of the policy, it makes another exception to the exclusion for business interruption by communicable disease—again with a liability limit of $1 million.

In reading this language the Pequots ignore that the language still requires a loss that is *insured* and loses caused by viruses are still not insured losses beyond the two exceptions made for them. No matter how fast and no matter how many times, the Pequots run around this obstacle they always come back to where the policy started—no coverage for the virus beyond the two exceptions. This result is so unavoidable, that it is the only rational way to read the policy.

4. The Pequots have adequately alleged the actual presence of the virus.

Factory Mutual says the Pequots don't have any coverage because they haven't alleged any covered loss. It says there is no coverage because both kinds of communicable disease coverages depend on "the actual not suspected presence of communicable disease", and the Pequots haven't adequately pled the actual presence of the communicable disease. Factory Mutual says the Pequot complaint relies on only the probable presence of the disease and then only supports it with speculation.

But Factory Mutual is wrong. The Pequots include in their amended complaint a long list of material facts that support their claim that the presence of the disease was more probable than not. The Pequots' amended complaint makes over a dozen specific allegations about the casino's thousands of employees, its hundreds of real or suspected employee and visitor COVID cases, the thousands infected in Connecticut, the high infection rate at the relevant time, the universal spread of the disease and the hundreds of thousands of visitors at the casino from near and far during the relevant time.

Practice Book §10-1 required the Pequots to include a "plain and concise" statement of the material facts they rely on to support the claim that it was more probable than not that the virus was actually present in the Pequot casino. They have done so. Even if we consider true only the claims that the disease was everywhere—hence "pandemic"—and that the casino had thousands of visitors at a time when thousands in Connecticut had the disease it would be enough to make it likely that the disease was actually present at the casino.

The Pequots have done more than allege a "suspected presence." They have alleged an actual presence and supported it with facts. The allegations might have been insufficient if an actual presence wasn't alleged such as it is in paragraph 82 of the

amended complaint. The allegations might also have been insufficient if the facts alleged in support wouldn't be enough if true for a factfinder to conclude that the virus was actually present. But those facts alleged are sufficient for a reasonable fact finder to believe the virus was actually present.

Remember, that for the Pequots to win a claim that the virus was *actually* present at the casino all they have to prove is that it was more probably than not present. As our Supreme Court reminded us in 2012 in *Curran v. Kroll* that is the civil burden of proof.[1] Because the Pequots have alleged material facts that if true would support a verdict on that issue, they have met their pleading burden.

5. All counts of the complaint remain in place to a degree

The Pequots have a claim for some coverage. It's not what they want, but it means that all four counts of their complaint remain in place.

The court's holding about the policy plain language saves it from having to consider some of the parties' arguments. First and foremost, the court doesn't have to decide if the damage from COVID-19 is physical damage to the property. This issue was principally a premise of the Pequot attempt to circumvent the liability limits that attach to communicable disease claims. It doesn't matter for the communicable disease response and time element claims that are the only policy language claims left to the Pequots. Factory Mutual maintains that these claims don't require proof of physical property damage.

[1] 303 Conn. 845, 856.

Likewise, the court doesn't have to address the question of concurrent and indirect causation. The complaint doesn't suggest that the virus was in any way an indirect cause of the costs at issue. So this issue is irrelevant.

The court also doesn't have to consider evidence outside of the four corners of the policy. After viewing all the relevant parts of the policy and seeing how they work together as a whole, the court concluded that the policy language was unambiguous. Specifically, this review led the court to conclude that the Pequot claim beyond the limits for communicable disease was plainly unreasonable. Likewise, it concluded that the virus exclusion, modified by the communicable disease extension, doubtless applies. There is no other rational way to read the language.

As our Supreme Court held in *R.T. Vanderbilt Co., Inc. v. Hartford Accident & Indemnity Co.*, this means the court may interpret the policy coverage as a pure matter of law.[2] Indeed the policy is attached to the complaint and made part of it. Therefore, as our Supreme Court held in 1962 in *Redmond v. Matthies*, the court is free to render its definitive interpretation of the policy language in a ruling on a motion to strike. [3]

And so it will. To the extent count one and two claim no limit bars or excludes the Pequots' claims for coverage beyond the communicable disease provisions and their liability limits, the court strikes those allegations because they fail as a matter of law. To the extent that they solely seek covered costs under the policy provisions for

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[2] 333 Conn. 343, 364-65.
[3] 149 Conn. 423, 426-27.

communicable disease response and time element coverage, the motion to strike is denied. [4]

Counts three and four of the complaint are for bad faith and unfair trade practices. Factory Mutual moves to strike them because they are dependent on there being coverage, and Factory Mutual says there isn't any coverage. Because the court has held there is some coverage, Factory Mutual's motion to strike these claims is granted and denied to the same extent it is granted and denied as to counts one and two.

In short, what is left of the Pequot claim under the policy is for covered costs under the provisions granting coverage for communicable disease response and time element costs. Factory Mutual's liability under the policy is limited to: 1. $1 million in the aggregate during any policy year for communicable disease response, and 2. $1 million in the aggregate during any policy year for interruption by communicable disease.

At trial, the Pequots must prove covered costs and their amounts. They must also prove their allegation that, at the relevant time, the relevant property had "the actual not suspected presence of communicable disease". They must also prove whatever is left of their bad faith and unfair trade practices claims.

BY THE COURT

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Moukawsher, J.

[4] Subject to the stated limits this would embrace claims preparation costs as state on policy page 21. This coverage applies by its terms to every form of coverage under the policy, no matter how narrow.