NINETEENTH JUDICIAL CIRCUIT OF VIRGINIA

Fairfax County Courthouse
4110 Chain Bridge Road
Fairfax, Virginia 22030-4009

703-246-2221 • Fax: 703-246-5496 • TDD: 703-352-4139

August 18, 2021

Arden B. Levy, Esq.
Arden Levy Law PLLC
2121 Eisenhower Avenue, Suite 200
Alexandria, VA 22314

David J. Gogal, Esq.
Blankingship & Keith, P.C.
4020 University Drive, Suite 300
Fairfax, VA 22030

Peter Halprin, Esq.
Pasich LLP
757 Third Avenue, 20th Floor
New York, NY 10017

Philip Silverberg, Esq.
Hilary Henkind, Esq.
Mound Cotton Wollan & Greengrass LLP
One New York Plaza
New York, NY 10004

Michael S. Gehrt, Esq.
Pasich LLP
1230 Rosecrans Avenue, Suite 690
Manhattan Beach, CA 90266

Brian J. Young, Esq.
DLA Piper LLP (US)
500 8th Street, NW
Washington, DC 20004

Kirk Pasich, Esq.
Nathan M. Davis, Esq.
Pasich LLP
10880 Wilshire Boulevard, Suite 2000
Los Angeles, CA 90024

Brett Ingerman, Esq.
DLA Piper LLP (US)
6225 Smith Avenue
Baltimore, MD 21209

Re: *Crescent Hotels & Resorts, LLC, et al. v. Zurich American Insurance Company and Interstate Fire & Casualty Co.*
Case No. CL-2021-02974

Dear Counsel:

This matter came before the Court upon Defendant Zurich American Insurance Company's ("Zurich") Motion Craving Oyer and Defendant

OPINION LETTER

Interstate Fire & Casualty Company's ("Interstate") Motion Craving Oyer (collectively, "Defendants" or "Insurers"). As the Motions present similar issues, Defendants filed a joint memorandum in support of the Motions. Accordingly, this Court concurrently considered the Motions at the July 2, 2021 hearing.[1]

In these Motions Craving Oyer, the Insurers argue that correspondence used to transmit the two relevant insurance policies and certain accompanying endorsements should be attached to the Complaint because those documents are essential for the Court to resolve the choice-of-law issue raised on demurrer. The Plaintiffs, Crescent Hotels & Resorts, LLC; Crescent Hotel Management Services, LLC; and twenty-nine separately owned hotel properties scattered across the United States, (collectively, "Crescent" or "Plaintiffs") contend that the correspondence and accompanying endorsements are not properly the subject of a motion craving oyer. In the alternative, Crescent argues that, if oyer is granted, the transmittal documents do not affect the choice-of-law analysis.

Upon consideration of the written and oral arguments, and in accordance with the ruling announced from the bench, the Court finds that (1) on the facts of this case, choice-of-law is an essential issue that must be resolved in order to determine whether Plaintiffs have stated a claim; (2) a motion craving oyer is an appropriate means to introduce documents pertinent to a choice-of-law question raised on demurrer; and (3) the transmittal documents at issue do not assist the Court in resolving the choice-of-law issue. Accordingly, the Motions Craving Oyer are denied.

BACKGROUND

The Insurers issued two separate "all-risk" insurance policies to Crescent, the Zurich Policy and the Alternus Policy ("Policies"), for coverage applicable from May 31, 2019, to May 31, 2020. The Policies primarily cover Crescent "against direct physical loss of or damaged caused by" "[a]ll risks of direct physical loss of or damage from any cause unless excluded." Compl. ¶ 66, Ex. A ¶¶ 1.01 & 7.11, Ex. B ¶¶ 1.01 & 7.11. Crescent filed claims for coverage based on the presence of the SARS-CoV-2 virus (which causes COVID-19) at Crescent's hotel properties and the interruption of

[1] The Defendants' Demurrer was also heard on July 2, 2021. This Letter Opinion only addresses the Motions Craving Oyer.

Crescent's business at those properties caused by government lockdown orders. The Insurers denied Crescent's claims under the Policies.

Plaintiffs filed their Complaint against Defendants on February 26, 2021, raising claims of breach of contract, breach of the implied covenant of good faith and fair dealing, and seeking a declaratory judgment. Plaintiffs attached the actual Policies to the Complaint but omitted various transmittal letters and emails which accompanied those policies and subsequent endorsements transmitted to Crescent.

The Insurers seek oyer of (1) a June 25, 2019 email sent by a Zurich underwriting assistant located in Boston, Massachusetts, to Marsh USA, Crescent's New York–based insurance broker; and (2) a series of letters regarding the issuance of the Alternus Policy and separate notifications of Endorsements 8-16 sent by a member of the Alternus Underwriting Team (whose address is not listed in the letters) to Marsh USA (collectively, the "Transmittal Documents").[2]

ANALYSIS

The Court must first determine whether choice-of-law is essential to the claims raised by the Plaintiffs. If so, the Court must next identify what facts are needed to resolve the choice-of-law issue. Finally, this Court must determine whether the Transmittal Documents assist in resolving the choice-of-law issue.

I. Whether Choice-of-Law Is "Essential" to the Claims

A motion craving oyer is "a remedy afforded to a litigant who has been sued on a claim based upon a written document mentioned in a claimant's pleading but not made a part of the record. The motion should be granted only where the missing document is essential to the claim." *Byrne v. City of Alexandria*, 298 Va. 694, 700, 842 S.E.2d 409, 412 (2020). At early common law, the remedy was only available "to compel the production of deeds, writs, bonds, letters of probate and administration and other" documents under seal. *Id.* at 699, 842 S.E.2d at 411. Yet, the Virginia

[2] These letters are dated July 31, 2019, September 16, 2019, October 21, 2019, December 14, 2019, December 19, 2019, January 22, 2020, February 26, 2020, March 26, 2020, May 5, 2020, and May 8, 2020.

Supreme Court has gradually "expanded the remedy to include production of a much wider range of documents," such as an Act of Assembly, an arbitration award, an appellate record, and a construction contract. *Id.* at 699, 842 S.E.2d at 411-12 (canvassing nineteenth-century Virginia Supreme Court precedent).

For example, in *Byrne*, the Virginia Supreme Court held that in a landowner's appeal of a city council's decision, the entire legislative record considered by the city council was properly made part of the complaint through a motion craving oyer. *Id.* at 696, 701, 842 S.E.2d at 410, 413. The Supreme Court reasoned that the documents, minutes, reports, and transcripts contained in the legislative record were essential to resolve the landowner's claim that the city council's decision was "arbitrary, capricious, contrary to law and constituted an abuse of discretion." 298 Va. at 696-98, 700-01, 842 S.E.2d at 411-13 (internal quotations omitted).

In the case before this Court, the breach of contract and breach of the implied covenant of good faith and fair dealing claims both require a choice-of-law determination. The first element for a breach of contract action is "a legal obligation of a defendant to a plaintiff . . . ." *Hamlet v. Hayes*, 273 Va. 437, 442, 641 S.E.2d 115, 117 (2007) (citing *Caudill v. Wise Rambler*, 210 Va. 11, 13, 168 S.E.2d 257, 259 (1969)). In determining this first element, courts must review whether a legal obligation exists under applicable law. For example, at issue in the related Demurrer is whether the presence of COVID-19 or government shutdown orders constitute a direct physical loss or damage under the terms of the Policies. The Policies do not define "direct physical loss or damage."

Many states have addressed whether substantially similar policy language triggers a legal obligation for the respective insurers to cover the insured's losses.[3] While some courts have found coverage to exist,[4] other

---

[3] William H. Danne, Jr., Annotation, *Business Interruption Insurance*, 37 A.L.R. 5th 41, 60-63 (1996) (last visited Aug. 18, 2021) (discussing the multiple stances courts across the country have taken on whether COVID-19 or government shutdown orders may constitute direct physical loss or damage).

[4] *See, e.g., Studio 417, Inc. v. Cincinnati Ins. Co.*, 478 F. Supp. 3d 794, 800 (W.D. Mo. 2020) (holding under Missouri law that plaintiffs adequately alleged claims for a direct physical loss); *JGB Vegas Retail Lessee, LLC v. Starr Surplus Lines Ins. Co.*, No. A-20-816628-B, 2020 WL 7190023, at *3 (Nev. Dist. Ct. Nov. 30, 2020) (holding under Nevada law that plaintiffs "sufficiently allege[d] losses stemming from the direct physical loss and/or

courts deny that coverage exists.[5] Although one federal judge in Virginia has construed the phrase "direct physical loss or damage" to support a finding of coverage in substantially similar circumstances, the Virginia Supreme Court has not definitively construed the phrase in the context of COVID-19 and government shutdown orders. *See Elegant Massage, LLC v. State Farm Mut. Auto. Ins. Co.*, 506 F. Supp. 3d 360, 376 (E.D. Va. 2020) (Jackson, J.) (applying Virginia law).[6]

Here, the Court must decide the choice-of-law question to determine the Insurers' legal obligations under the breach of contract claims because the applicable law may be outcome-determinative.

Second, to prevail on their breach of the covenant of good faith and fair dealing claims, Plaintiffs must show "(1) the insurer's contractual liability to pay under the policy; and (2) the lack of a reasonable basis to deny or compromise the claim." *Manu v. GEICO Cas. Co.*, 293 Va. 371, 386, 798 S.E.2d 598, 606 (2017) (emphasis omitted). Thus, the breach of good faith

---

damage to property from COVID-19 to trigger Starr's obligations under the property and TIME ELEMENT coverage provisions in the Policy, including coverage for general business interruption and Interruption by Civil or Military Authority"); *Ungarean, DMD v. CNA*, No. GD-20-006544, 2021 WL 1164836, at *10 (Pa. C.P. Mar. 25, 2021) (holding under Pennsylvania law that "Plaintiff provided a reasonable interpretation that: [1] there was 'direct physical loss of or damage to property' other than Plaintiff's property; and [2] the 'direct physical loss of or damage to property' other than Plaintiff's property caused civil authorities to take action(s) that prohibited access to Plaintiff's property, this Court concluded that Plaintiff established a right to coverage under the Civil Authority provision of the contract").

[5] *See, e.g., Ascent Hospitality Mgmt. Co., LLC v. Employers Ins. Co. of Wausau*, Case No. 2:20-cv-770-GMB, 2021 WL 1791490, at *4 (N.D. Ala. May 5, 2021) (holding under New York and Georgia law the period of liability definition "leads to the conclusion that direct physical loss must be a loss requiring repair or replacement. Cleaning and disinfecting are all that is required for restoring the usefulness of a building contaminated by COVID-19"); *R.T.G. Furniture Corp. v. Hallmark Speciality Ins. Co.*, Case No. 8:20-cv-2323-T-30AEP, 2021 WL 686864, at *3 (M.D. Fla. Jan. 22, 2021) (holding under Florida law that "COVID-19 does not impact physical structures, other than to require additional cleaning and sanitizing of those structures"); *Visconti Bus Serv., LLC v. Utica Nat'l Ins. Group*, 142 N.Y.S.3d 903, 908 (N.Y. Sup. Ct. Feb. 12, 2021) (collecting leading New York cases in holding that coverage was properly denied under an "all-risk" insurance policy because COVID-19 does not constitute direct physical loss or damage under New York law).

[6] *See also TRAVCO Ins. Co. v. Ward*, 715 F. Supp. 2d 699, 708 (E.D. Va. 2010), *aff'd*, 504 F. App'x 251 (4th Cir. 2013) (applying Virginia law); *Lower Chesapeake Assocs. v. Valley Forge Ins. Co.*, 260 Va. 77, 84–87, 532 S.E.2d 325, 329–31 (2000) (discussing the meaning of direct physical loss).

and fair dealing claims likewise necessitate resolution of a choice-of-law issue as the applicable law on the Insurers' contractual liability may be outcome determinative.

Byrne provides further support that the resolution of choice-of-law is essential to the claims raised here. Just as the legislative record the city council based its decision on was essential to the circuit court's resolution of the landowner's capriciousness claim in *Byrne*, documents which are pertinent to resolving the choice-of-law questions presented in this case are essential to determining whether the Plaintiffs have stated valid claims. Accordingly, documents bearing on the choice-of-law issue are properly the subject of a motion craving oyer.

II. Necessary Facts to Determine Choice-of-Law for the Policies

Under Virginia's choice-of-law principles, "the law of the place where the contract was formed applies when interpreting the contract and determining its nature and validity." *Dreher v. Budget Rent-A-Car Sys.*, Inc., 272 Va. 390, 395, 634 S.E.2d 324, 327 (2006) (citing *Woodson v. Celina Mut. Ins. Co.*, 211 Va. 423, 426, 177 S.E.2d 610, 613 (1970)). A contract is formed only "when the last act to complete it is performed." *Res. Bankshares Corp. v. St. Paul Mercury Ins. Co.*, 407 F.3d 631, 635–36 (4th Cir. 2005). "[I]n the context of an insurance policy, the last act is the delivery of the policy to the insured." *Id.*

"[G]enerally, the law of the place where an insurance contract is written and delivered controls issues as to its coverage." *Buchanan v. Doe*, 246 Va. 67, 70–71, 431 S.E.2d 289, 291 (1993) (citations omitted). "When an insurer mails a contract of insurance to its agent for unconditional delivery to the insured, delivery is effected when deposited in the mail." *Rose v. Travelers Indem. Co.*, 209 Va. 755, 758-59, 167 S.E.2d 339, 342 (1969) (citations omitted).

In addition to any agency relationship an insurance agent has with an insured party, insurance agents in Virginia are also "held to be the agent of the insurer that issued the insurance sold, solicited, or negotiated by such agent in any controversy between the insured or his beneficiary and the insurer." Va. Code Ann. § 38.2-1801(A) (2021). Since Code Section 38.2-1801(A) does not supplant the common law of agency, it is possible that the insurance agent is both an agent for the insurer and the insured. *See Boyd v. Commonwealth*, 236 Va. 346, 349, 374 S.E.2d 301, 302 (1988) ("A

statutory change in the common law is limited to that which is expressly stated or necessarily implied because the presumption is that no change was intended."). "The insurance agent, within the general scope of the business he transacts, is *pro hac vice* the insurance company." *Virginia Auto Mut. Ins. Co. v. Brillhart*, 187 Va. 336, 345, 46 S.E.2d 377, 381 (1948).

Here, Marsh USA acting as Crescent's insurance broker makes Marsh USA Crescent's agent; however, pursuant to Code § 38.2-1801(A), Marsh USA is also an agent for the Insurers. Given Marsh USA's agency relationship with both Crescent and the Insurers, the Transmittal Documents were not unconditional deliveries between the Insurers (underwriters) and Marsh USA.

When an insurance agent is both an agent for the insurer and the insured, the last act of where an insured receives the unconditional delivery from the insured's agent is necessary to determine the applicable law for policy coverage. Since Marsh USA is the Insurers' agent, unconditional delivery sufficient for a last act could not have occurred by delivery to one's own agent. *See Rose*, 209 Va. at 758-59, 167 S.E.2d at 342. Unconditional delivery only occurred when Marsh USA delivered the Transmittal Documents to Crescent in Fairfax, Virginia.[7] But the Transmittal Documents here are communications between the Insurers and Marsh USA rather than between Marsh USA and Crescent. Thus, the Transmittal Documents have no bearing on where Marsh USA delivered the insurance documents to Crescent, and therefore, no effect on the choice-of-law issue.

Even if this Court were to accept that the unconditional delivery occurred when the Insurers sent the Transmittal Documents to Marsh USA, the Transmittal Documents each contain incomplete geographic information necessary to determine the applicable law. The Zurich Policy transmittal document at issue was emailed from an underwriting assistant from Boston, Massachusetts, to Marsh USA but without any indication of the recipient's location. Additionally, although the Interstate Transmittal Documents were mailed to Marsh USA in New York by an underwriter, the underwriter mailed the Alternus Policy Transmittal Documents without any indication of the sender's location. The incomplete geographic information alone is enough to preclude the Transmittal Documents from helping to resolve the issue of where the insurance Policies and subsequent endorsements were unconditionally delivered to Crescent.

---

[7] Crescent is organized under Delaware law and has its principal place of business in Fairfax, Virginia.

CONCLUSION

Although documents bearing on choice-of-law issues are properly the subject of a motion craving oyer, the Transmittal Documents here have no bearing on the pertinent choice-of-law issues for the Policies. Therefore, this Court denies the Motions Craving Oyer. An order consistent with this letter opinion is enclosed.

Sincerely yours,

[redacted]

Michael F. Devine
Circuit Court Judge

VIRGINIA:

IN THE CIRCUIT COURT FOR THE COUNTY OF FAIRFAX

CRESCENT HOTELS & RESORTS, LLC, et al.,	)	
	)	
Plaintiffs,	)	
v.	)	
	)	
ZURICH AMERICAN INSURANCE COMPANY and INTERSTATE FIRE & CASUALTY CO.,	)	Case No. 2021-02974
	)	
	)	
Defendants.	)	

ORDER

THIS MATTER CAME before the Court on July 2, 2021, upon the motions of Defendant Zurich American Insurance Company and Defendant Interstate Fire & Casualty Company, to crave oyer the correspondence dated June 25, 2019, July 31, 2019, September 16, 2019, October 21, 2019, December 14, 2019, December 19, 2019, January 22, 2020, February 26, 2020, March 26, 2020, May 5, 2020, and May 8, 2020, which Defendants allege accompanied the Policies and Endorsements referenced in and attached to the Complaint, and which Defendants argue is essential to the choice-of-law determination for Plaintiffs' claims because the correspondence reflects unconditional delivery of the Policies and Endorsements to Plaintiffs' broker and agent in New York.

UPON CONSIDERATION of the briefs and the arguments of counsel, it is hereby,

ORDERED, ADJUDGED and DECREED that Defendants' Motions Craving Oyer are DENIED for the reasons stated in the Letter Opinion and on the record at the July 2, 2021 hearing.

ENTERED this 18 day of August 2021.

[redacted]

HONORABLE MICHAEL F. DEVINE

SEEN AND OBJECTED TO ON GROUNDS THAT (1) PLAINTIFFS' BROKER IS NOT AN AGENT OF THE INSURERS, (2) VA. CODE § 38.2-1801 IS INAPPLICABLE, AND (3) THE CORRESPONDENCE ACCOMPANYING THE POLICIES AND ENDORSEMENTS SENT TO PLAINTIFFS' BROKER IN NEW YORK SHOWS THE LAST ACT OF FORMATION OF THE CONTRACT OF INSURANCE AND THUS ESTABLISHES THAT NEW YORK LAW GOVERNS THE INTERPRETATION OF THE POLICIES.

BLANKINGSHIP & KEITH, P. C.

By: Rule 1:13

David J. Gogal, VSB No. 28815
4020 University Drive, Suite 300
Fairfax, Virginia 22030
Phone: (703) 691-1235
Fax: (703) 691-3913
dgogal@bklawva.com

MOUND COTTON WOLLAN & GREENGRASS LLP

By: Rule 1:13

Philip Silverberg (*pro hac vice*)
Hilary Henkind (*pro hac vice*)
One New York Plaza
New York, NY 10004
Phone: (212) 804-4257
Fax: (212) 344-8066
psilverberg@moundcotton.com
hhenkind@moundcotton.com

Counsel for Defendant Zurich American Insurance Company

DLA PIPER LLP (US)

By: Rule 1:13

Brian J. Young, VSB No. 96070
500 8th Street, NW
Washington, DC 20004
Phone: (202) 799-4523
Fax: (202) 799-5116
brian.young@us.dlapiper.com

Brett Ingerman (*pro hac vice*)
6225 Smith Avenue
Baltimore, MD 21209
Phone: (410) 580-3000
Fax: (410) 580-3001
brett.ingerman@us.dlapiper.com

Counsel for Defendant Interstate Fire & Casualty Company

SEEN AND OBJECTED TO ON THE LIMITED GROUNDS THAT THE FINDING AT THE JULY 2, 2021 HEARING THAT CHOICE OF LAW IS ESSENTIAL FOR PURPOSES OF DETERMINING THE COMPLETENESS OF AN INSURANCE CONTRACT IN A MOTION CRAVING OYER IS NOT SUPPORTED BY APPLICABLE LAW.

ARDEN LEVY LAW PLLC

By: Rule 1:13

Arden B. Levy, Esq.
2121 Eisenhower Avenue, Suite 200
Alexandria, Virginia 22314
Phone: (703) 519-6800
Fax: (703) 684-3620
alevy@ardenlevylaw.com

Counsel for Plaintiffs

PASICH LLP

By: Rule 1:13

Peter Halprin
757 Third Avenue, 20th Floor,
New York, NY 10017
Phone: (212) 685-5000
Fax: (424) 313-7890
PHalprin@PasichLLP.com

Michael S. Gehrt
1230 Rosecrans Avenue, Suite 690
Manhattan Beach, CA 90266
Phone: (424) 363-7860
Fax: (424) 313-7890
MGehrt@PasichLLP.com

Kirk Pasich
Nathan M. Davis
10880 Wilshire Boulevard, Suite 2000
Los Angeles, CA 90024
Phone: (424) 313-7860
Fax: (424) 313-7890
KPasich@PasichLLP.com
NDavis@PasichLLP.com

Counsel for Plaintiffs