

IN THE CIRCUIT COURT OF JEFFERSON COUNTY, ALABAMA
TENTH JUDICIAL CIRCUIT

SHARECROPPER LLC d/b/a OLLIE
 IRENE, an Alabama limited liability
 company,

Plaintiff,

vs.

FARMERS INSURANCE
 EXCHANGE, INC., d/b/a Farmers
 Insurance, a Georgia corporation and
 DOES 1 to 25, inclusive,

Defendants.

CIVIL ACTION

Case No.

COMPLAINT

For its Complaint, Plaintiff respectfully alleges as follows:

PARTIES

1. Sharecropper LLC d/b/a Ollie Irene (“*Ollie Irene*” or “*Plaintiff*”) is an Alabama limited liability company with its principal place of business located in Mountain Brook, Alabama.

2. At all times relevant hereto, Ollie Irene, as a restaurant, was engaged in the business of providing food and beverages for sale and consumption, on a dine-in basis, to the public.

3. Ollie Irene operates a restaurant business located at 75 Church Street, Mountain Brook, Alabama 35213 (the “*Premises*”), which is located within Jefferson County.

4. As a TripAdvisor rated restaurant, Ollie Irene is among the top ten best restaurants in Mountain Brook, Ollie Irene is a bustling neighborhood bistro serving a

thoughtful cocktail and dinner menu of fresh and seasonal dishes, both local and global in inspiration.

5. Ollie Irene's loyal following of customers, both new and old, keep coming back for its seasonally inspired handcrafted food, which is made from scratch using fresh ingredients sourced locally and regionally. Ollie Irene is also known for its seasonal cocktails, craft beers, and nightly specials.

6. Ollie Irene has been recognized twice by the James Beard Foundation with award nominations.

7. Ollie Irene is the beneficiary of a commercial insurance policy issued by Farmers Insurance Exchange and identified as policy number 6066885260000 (the "*Policy*"). A true and correct copy of Ollie Irene's Policy is attached hereto as Exhibit A.

8. Farmers Insurance Exchange, Inc. d/b/a Farmers Insurance ("*Farmers*" or "*Defendant*") is a Georgia corporation, with its principal place of business in Los Angeles, California.

9. Does 1 through 25, (hereinafter referred to as "*Does*"), inclusive, are sued in this complaint under fictitious names. Their true names and capacities are unknown to Ollie Irene. When their true names and capacities are ascertained, Ollie Irene will amend this complaint by inserting their true names and capacities.

10. Defendant and Does are hereinafter collectively "*Defendants.*"

11. Ollie Irene is informed and believes and thereon alleges that at all times material to this complaint, each of the Defendants, both those named and those identified as Does, in addition to acting for himself, herself, or itself, and his, her, or its own behalf individually, is and was acting as the agent, servant, employee and representative of, and in conspiracy with, each and all of the Defendants and within the course, scope and authority of the agency's service, employment, representation and conspiracy. Ollie Irene further alleges on information and belief that the acts of each of the Defendants were fully

ratified by each and all of the Defendants. Specifically and without limitation, Ollie Irene alleges on information and belief that the actions, failure to act, breaches, conspiracy, and misrepresentations alleged herein and attributed to one or more of the specific Defendants were approved, ratified, and done with the cooperation and knowledge of each and all of the Defendants.

12. At all times relevant hereto, Defendants operated within the State of Alabama by and through, *inter alia*, David Slowikowski in Homewood, Alabama as its agent. Mr. Slowikowski is identified in the Policy as Defendants' local agent and is further identified as Agent Number 50-02-334.

13. By and through Defendants' agent, Ollie Irene and Defendant entered into the Policy within the State of Alabama, County of Jefferson.

14. By and through Defendants' agent, Ollie Irene entered into the Policy to insure, *inter alia*, real property located within the State of Alabama, Country of Jefferson, City of Mountain Brook.

JURISDICTION AND VENUE

15. The Circuit Civil Court of Jefferson Country has subject matter jurisdiction over this civil action pursuant to Rule 4.2(a)(2) of the Alabama Rules of Civil Procedure because Defendants, by and through their Homewood, Alabama based agent, and Ollie Irene entered into a contract to insure, *inter alia*, property or risk located within the State of Alabama and Defendants, by and through their agent, routinely transact business within Jefferson County, Alabama.

16. Venue in the Circuit Civil Court of Jefferson County is appropriate because Ollie Irene is both domiciled and operates in Jefferson County, Alabama and a substantial part of the events, acts, or omissions giving rise to Ollie Irene's claims occurred in Jefferson

Country, and performance of the Policy between Ollie Irene and Defendants occurred wholly within Jefferson County, Alabama.

FACTUAL ALLEGATIONS

Policy Information

17. On or about September 19, 2017, Farmers entered into a contract of insurance with Ollie Irene, whereby Ollie Irene agreed to make payments to Farmers in exchange for Farmers' promise to indemnify Ollie Irene for losses including, but not limited to, business income losses at the Premises.

18. The Premises, including, but not limited to, the business personal property located therein, is covered under the Policy issued by Farmers.

19. The Policy is currently in full effect, providing property, business personal property, business income and extra expense, and additional coverages, which renews on or about September 19 of each year.

20. Ollie Irene has faithfully paid all policy premiums to Farmers and has otherwise complied with all of its obligations under the Policy.

21. As identified in the Policy, Farmers "will pay for direct physical loss of or damage to Covered Property at the premises described in the Declarations caused by or resulting from any Covered Cause of Loss." *See* Policy at Business Owners Special Property Coverage Form, Pg. 1, Sec. A. This is an all-risk Policy that provides coverage for direct physical loss of or damage to Covered Property that is not expressly excluded or limited by the Policy.

22. Under the Policy, Covered Causes of Loss include all "[r]isks of Direct

Physical Loss” unless the loss is excluded or limited.

Restaurant Information

23. Ollie Irene operates a restaurant business located at 75 Church Street, Mountain Brook, Alabama 35213, which is located within Jefferson County.

24. As a restaurant, Ollie Irene is engaged in the business of providing food and beverages for sale and consumption, on a dine-in basis, to the public.

25. Ollie Irene’s Premises and its Covered Property within the Premises are used for all food and beverage storage, preparation, sales, and dine-in consumption by its customers.

26. As a business establishment operating at the pleasure of and pursuant to Alabama’s relevant health laws, Ollie Irene sells food and beverages for consumption within its Premises in such a manner as to assure, implicitly or explicitly, compliance with regulatory standards applicable to food establishments (i.e., applicable Federal, State, County, and City laws).

Acts or Decisions of a Governmental Body

27. On March 13, 2020, Donald J. Trump, the President of the United States, declared a National Emergency concerning the Novel Coronavirus Disease (COVID-19).

28. On this same day, March 13, 2020, Kay Ivey, Governor of the State of Alabama, declared a State Public Health Emergency in the State of Alabama. A true and correct copy of the Governor’s Proclamation is attached hereto as Exhibit B.

29. On March 16, 2020, Dr. Mark Wilson, Health Officer, Jefferson County Health Department, has declared a Health Emergency for Jefferson County. A true and

correct copy of the Order of the Jefferson Country Health Officer Suspending Certain Public Gatherings Due to Risk of Infection by COVID-19 is attached hereto as Exhibit C.

30. Also on March 16, 2020, Stewart Welch, Mayor of the City of Mountain Brook, declared that a Public Health and Safety Emergency Exists. A true and correct copy of the Mayor's Declaration of Public Health Emergency is attached hereto as Exhibit D.

31. On March 19, 2020, Scott Harris, the State Health Officer, issued an Order of the State Health Officer Suspending Certain Public Gatherings Due to Risk of Infection by COVID-19. A true and correct copy of this Suspension Order is attached hereto as Exhibit E. That order was updated the following day. A true and correct copy of the Order of the State Health Officer Suspending Certain Public Gatherings Due to Risk of Infection by COVID-19 Amended March 20, 2020, is attached hereto as Exhibit F.

32. Most recently, on March 27, 2020, Scott Harris, the State Health Officer, issued an updated Order of the State Health Officer Suspending Certain Public Gatherings Due to Risk of Infection by COVID-19. A true and correct copy of the Order of the State Health Officer Suspending Certain Public Gatherings Due to Risk of Infection by COVID-19 Amended March 27, 2020, is attached hereto as Exhibit G.

33. The State Health Officer's March 27, 2020, Order amended its March 20, 2020 Order, in relevant part, by: (i) extending the applicable timeframe of the Order's prohibition on on-premises consumption of food and beverages; (ii) reducing the permissible size of "non-work related gatherings," and; (iii) prohibiting the continued operation of "non-essential businesses, venues, and activities."

34. As a direct result of the foregoing governmental declarations and orders, Jefferson County’s Health Officer directed that “[e]ffective Tuesday March 17, 2020, any restaurant, bar, brewery or establishment that offers food or drink, including those in food courts, *shall not permit on-premises consumption of food or drink*” (emphasis added). See Exhibit C.

35. Similarly, the City of Mountain Brook has directed that “*all restaurants and bars will be closed to dine-in/bar service*” (emphasis added). See Exhibit D.

36. Citing its statutory authority to abate conditions prejudicial to health in public places, the State Health Officer directed that “[e]ffective today, March 19, 2020, at 5:00 p.m., all restaurants, bars, breweries, or similar establishment *shall not permit on-premises consumption of food of drink*” (emphasis added). See Exhibits E and F. And, the State Health Officer prohibited “*all non-work related gatherings of 10 persons or more, or non-work related gatherings of any size that cannot maintain a consistent six-foot distance between persons*” (emphasis added). See Exhibit G.

Governmental Exercise of Police Power

37. The orders of the Alabama State Health Officer constituted a valid exercise of the government’s executive police power.

38. Ollie Irene, as an Alabama limited liability company and an operator of a restaurant within the State of Alabama, is subject to the orders of Alabama’s State Health Officer.

39. The orders of the Alabama State Health Officer apply to both citizens and businesses.

40. With respect to “restaurants, bars, breweries, or similar establishments,” Ollie Irene “shall not permit on-premises consumption of food or drink.” Exhibit G.

41. With respect to Alabama citizens, Alabama’s State Health Officer prohibited “all non-work related gatherings of 10 persons or more, or non-work related gatherings of any size that cannot maintain a consistent six-foot distance between persons.” Exhibit G.

42. As a restaurant, the Alabama State Health Officer’s prohibition of on-premises consumption of food or drink constitutes an order of a civil authority prohibiting access to Ollie Irene’s Premises and Covered Property.

43. As applied to the general public, the Alabama State Health Officer’s prohibition of on-premises consumption of food or drink at a restaurant constitutes an order of a civil authority prohibiting access to Ollie Irene’s Premises and Covered Property.

44. The Alabama State Health Officer’s exercise of the government’s police power resulted in a direct physical loss of Ollie Irene’s Covered Property¹.

45. The Alabama State Health Officer’s exercise of the government’s police power deprived Ollie Irene of the value and function of its Premises, thereby impairing said Premises, and Ollie Irene has suffered a direct physical loss of Covered Property.

46. The application of the Alabama State Health Officer’s Order to Ollie Irene triggered coverage because it resulted in the direct physical loss of Covered Property.

¹ Unless defined herein, undefined capitalized terms herein shall have the same meaning as they are ascribed in the Policy.

Injury Mitigation

47. Ollie Irene's damages began on or about March 17, 2020, and continue on a day-to-day basis.

48. Prior to the issuance of the foregoing series of executive orders, Ollie Irene had not offered take-out, delivery, or curbside pick-up services.

49. Ollie Irene is a casual to fine dining restaurant and does not sell the type of food and beverage items commonly sold by establishments with drive through service or curbside deliveries.

50. The orders of Alabama's State Health Officer resulted in a direct physical loss of Covered Property and that loss of Covered Property resulted in the necessary suspension of Ollie Irene's normal business operations.

51. However, these same orders allow for restaurants and bars to "offer food for take-out or delivery provided the social distancing protocols, including maintaining a consistent six-foot distance between persons are followed." *See Exhibits C, E, & F.* The establishment of curbside pick-up for food is also encouraged. *Id.*

52. Ollie Irene closed briefly in order to establish a curbside pick-up service that follows County and City established health and safety protocols. This service began on or about March 18, 2020, and will continue as long as possible (i.e., economically feasible) or until the restaurant is able to return to normal operation, though, because of the nature of Ollie Irene's business, substantial damages have accrued and will continue to accrue until the relevant governmental authorities allow dine-in restaurants to resume their normal business.

53. In an effort to prevent the complete failure of its business, Ollie Irene is working, in good faith, to provide curbside service to customers as a means to mitigate the injury it has incurred, and continues to incur.

CAUSE OF ACTION

DECLARATORY JUDGMENT & REQUEST FOR SPEEDY HEARING

(Against Farmers and Does 1 to 25)

54. Ollie Irene re-alleges paragraphs 1 through 53 as though fully set forth herein.

55. Under Alabama Code 6-6-220 *et seq.*, the court has the power to declare rights, status, and other legal relations whether or not further relief is or could be claimed. The declaration may be either affirmative or negative in form and effect, and such declarations shall have the force and effect of a final judgment. *See* AL Code 6-6-222.

Notice of Injury and Demand for Coverage

56. On March 25, 2020, Ollie Irene, by and through its undersigned counsel, provided Defendants with written notice of: (i) the alleged injury to the covered Premises; (ii) the ongoing injury mitigation activities; and (iii) its claim for coverage under the Policy. A true and correct copy of Ollie Irene's foregoing notice and claim to Defendant is attached hereto as Exhibit H.

57. Defendant, by and through its agent, acknowledged receipt of Ollie Irene's claim and in fact reported said claim to Farmers on March 25, 2020.

58. On March 26, 2020, the counsel for Ollie Irene spoke with a claims adjustor at Farmers about Ollie Irene's notice and claim letter via telephone. At the conclusion of this call, Farmers informed Ollie Irene that it has decided to deny coverage.

59. On May 6, 2020, Ollie Irene received written notice of Defendants' election to deny coverage. A true and correct copy of the coverage denial letter is attached hereto as Exhibit I.

60. Defendants deny coverage based on their assertion that: (i) "there was no direct physical loss of or damage to property at the described premises"; (ii) the government's use of its civil authority to close businesses, access to the described premises was not prohibited due to direct physical loss or damage to property other than at the described premises, and; (iii) because the Policy excludes "loss or damage caused by or resulting from any virus that is capable of inducing physical distress, illness or disease." *See* Exhibit I.

61. Defendants rely upon language in the Policy that says, "we will not pay for loss or damage caused by or resulting from any virus...."

62. Ollie Irene's coverage claims are not based on any loss or damage "caused by or resulting from any virus."

Actual Controversy Exists

63. An actual controversy has arisen between Ollie Irene and Defendants as to the rights, duties, responsibilities, and obligations of the parties under the Policy in that Ollie Irene contends, and the Defendants dispute and deny, that: (i) the executive orders of the Alabama State Health Officer constitutes a prohibition of access to Ollie Irene's insured Premises; (ii) the executive orders of the Alabama State Health Officer deprived Ollie Irene of the value and function of its Covered Property, thereby impairing said Covered Property; (iii) the impaired value and function of the Covered Property resulted in Ollie Irene's direct

physical loss of or damage to said Covered Property; (iv) as a direct result of Ollie Irene's direct physical loss of or damage to Covered Property, it became necessary for Ollie Irene to suspend normal business operations; (v) the direct physical loss of Covered Property resulting from the executive orders of the Alabama State Health Officer triggers coverage because the Policy exempts "acts or decisions of a governmental body" that "results in a Covered Cause of Loss" from exclusion; and (vi) Ollie Irene's direct physical loss of or damage to Covered Property resulted from a Covered Cause of Loss that is not otherwise excluded or limited under the Policy.

64. The Court's entry of a declaratory judgment would terminate the uncertainty or controversy giving rise to the instant civil action.

Events Subject to Actual Controversy

65. The orders of the Alabama State Health Officer constitutes a prohibition of access to Ollie Irene's insured Premises and its Covered Property.

66. The orders of the Alabama State Health Officer deprived Ollie Irene of the value and function of its Covered Property.

67. The loss of the value and function of its Covered Property constituted a direct physical loss of or damage to Covered Property.

68. As a result of a direct physical loss of or damage to Covered Property, it became necessary for Ollie Irene to suspend normal business operations.

69. Ollie Irene's direct physical loss of Covered Property resulting from the orders of the Alabama State Health Officer triggered coverage because the Policy provides

coverage for acts or decisions of governmental bodies that “results in” a Covered Cause of Loss.

Exception to Exclusion for Acts or Decisions of the Government

70. The Policy expressly addresses and excludes coverage for loss or damage caused by or resulting from any acts or decisions, including the failure to act or decide, of any governmental body.

71. The Alabama State Health Officer’s orders qualify as “any act or decision” of a “governmental body.” As such, any loss or damage “caused by or resulting from” the Alabama State Health Officer’s orders is expressly excluded unless the Policy’s exception to this exclusion applies.

72. As stated in the Policy, if any excluded cause of loss, the orders of Alabama’s State Health Officer herein, results in a Covered Cause of Loss, Defendant is obligated to pay for the loss or damage.

73. Here, the orders issued by Alabama’s State Health Officer and the application of the same to both Ollie Irene and the general public resulted in Ollie Irene’s direct physical loss of or damage to Covered Property.

74. Based on the plain language of the exception to the exclusion of acts or decisions of governmental bodies, the focus of the inquiry is not the basis for or merits of “any act or decision” of any “governmental body.” Rather, the focus of the exception is the loss or damage “caused by or resulting from” any such act or decision.

75. Ollie Irene's direct physical loss of Covered Property was the result of or was caused by an "act or decision" of a "governmental body" and Defendants are obligated to Ollie Irene coverage.

The Virus Exclusion is Wholly Inapplicable

76. Defendants' denial of coverage based upon the Policy's exclusion for loss or damage resulting from a virus was wrongful because it shifted the focus of inquiry from the net effect of the governmental act or decision on Plaintiff's Covered Property to the basis for or merits of said governmental act or decision.

77. The exclusion Defendants cite requires the alleged loss or damage to Covered Property to result from a virus.

78. The orders of Alabama State Health Officer may have been the result of or caused by the threat of a virus, but that is not the agreed upon causation inquiry identified in the policy.

79. Under the virus exception, the plain language of the Policy establishes the agreed upon causation inquiry as: whether the alleged loss or damage was the result of or caused by a virus or bacteria.

80. Ollie Irene's claim for the direct physical loss of or damage to Covered Property is not based on the presence of COVID-19.

81. Ollie Irene's claim for the direct physical loss of or damage to Covered Property is not based on the government's use of its Civil Authority to prohibit access to the Ollie Irene's Premises due to any loss or damage to property other than Ollie Irene's Premises.

82. Under the acts or decisions of government exception to exclusion, the plain language of the Policy establishes the agreed upon causation inquiry as: whether the alleged loss or damage was the result of or caused by an act or decision of a governmental body that is not otherwise limited or excluded.

83. Ollie Irene's claim for the direct physical loss of or damage to Covered Property is based on a series of events that resulted from or was caused by the orders of Alabama's State Health Officer.

84. The plain language of the Policy has created a reasonable expectation of Ollie Irene that coverage is available under the Policy for any direct physical loss of Covered Property resulting from the lawful exercise of the government's police power.

85. Ollie Irene's expectation is bolstered by the fact that the Policy does not provide coverage for every type of loss or damage to Covered Property resulting from an act of the government, but rather only those that result in a Covered Cause of Loss.

86. Defendant could have drafted the Policy to focus the question of causality on the basis of any act or decision of any governmental body, but it elected not to do so.

87. Ollie Irene does not seek any determination of whether the Coronavirus is physically in the insured Premises, the validity or enforceability of the orders of Alabama's State Health Officer, the amount of damages, or any other remedy other than declaratory relief.

88. In light of the severe economic hardship imposed upon Ollie Irene, at no fault of its own, by the orders of Alabama's State Health Officer requests and the Defendants' wrongful denial of coverage, Ollie Irene respectfully requests expedited consideration of

the instant civil action. Ollie Irene further suggests that an expedited consideration of this matter will help other businesses and could help reduce similar litigation.

PRAYER FOR RELIEF

WHEREFORE, Ollie Irene respectfully prays that this Honorable Court grant the following relief:

- A. For a declaration that the orders of the Alabama State Health Officer constitutes a prohibition of access to Ollie Irene's insured Premises and its Covered Property;
- B. For a declaration affirming that the orders of the Alabama State Health Officer deprived Ollie Irene of the value and function of its Covered Property;
- C. For a declaration affirming that Ollie Irene's loss of the value and function of its Covered Property constituted a direct physical loss of or damage to Covered Property under the Policy;
- D. For a declaration affirming that Ollie Irene's direct physical loss of or damage to Covered Property constituted a Covered Cause of Loss;
- E. For a declaration affirming that, as a result of a direct physical loss of or damage to Covered Property, it became necessary for Ollie Irene to suspend normal business operations;
- F. For a declaration affirming that Ollie Irene's direct physical loss of Covered Property triggered coverage because the Policy provides coverage for acts or decisions of governmental bodies that "results in" a Covered Cause of Loss; and
- G. Such other and further relief as the Court deems just and proper.

Dated this 7th day of April, 2020.

/s/ Jason R. Klinowski

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