

**ANAPOL WEISS**

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PHILADELPHIA PA 19103

ATTORNEYS FOR PLAINTIFF

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BAKN WEXFORD, LLC

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COURT OF COMMON PLEAS

:

ALLEGHENY COUNTY

PLAINTIFF

:

:

V.

:

CIVIL ACTION NO.:

:

ERIE INSURANCE EXCHANGE

:

:

COMPLAINT

DEFENDANT

:

JURY TRIAL DEMANDED

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### **PLAINTIFF'S COMPLAINT**

Plaintiff, BAKN Wexford, LLC, by way of Complaint, brings this action against Defendant, Erie Insurance Exchange, and alleges as follows:

### **NATURE OF THE CASE**

1. Plaintiff owned and operated BAKN Wexford, LLC, a restaurant in Warrendale, Pennsylvania.

2. To protect the business from property damage and the loss of income in the event of a sudden suspension of operations for reasons outside of its control, Plaintiff purchased commercial multiple peril insurance from Defendant, Erie Insurance, including specialty property coverage. Plaintiff's insurance policy is an "all-risk" policy that provides coverage for all non-excluded business losses. A copy of the policy is attached as Exhibit 1.

3. The policy expressly includes "Business Income" coverage which promises to pay for loss due to the necessary suspension of operations following loss to property and "Civil

Authority” coverage which promises to pay for losses caused by a civil or governmental authority that prohibits access to the covered property.

4. The policy also provides “Extra Expense” coverage which promises to pay for expenses incurred to minimize losses during the suspension of business operations.

5. On or about March 23, 2020, Plaintiff was forced to suspend and/or reduce business operations at their Pennsylvania restaurant following an order from Pennsylvania Governor Tom Wolf mandating the closure of all non-life sustaining businesses in the Commonwealth in an effort to protect the public from the global pandemic caused by COVID-19, a highly contagious respiratory virus that has upended daily life, infected more than 78,600,000 individuals throughout the United States, and caused the death of over 940,000 individuals throughout the United States.

6. Plaintiff continued to suffer daily losses on an ongoing basis continuing through April of 2020.

7. Having faithfully paid the policy premiums, Plaintiff made a claim for business interruption, civil authority and/or extra expense coverage to recoup substantial, ongoing financial losses directly attributed to a series of COVID-19 closure orders.

8. By letter dated May 12, 2021, Defendant wrongfully denied Plaintiff’s claim. The letter is attached as Exhibit 2.

9. Through this action, Plaintiff seeks a declaratory judgment pursuant to 42 PA. Cons. Stat. § 7532 that the subject policy covers Plaintiff’s financial losses. Plaintiff further seeks damages for breach of contract on the basis that Defendant’s denial of coverage runs afoul of the language of the policy and/or the public policy of this state.

### **THE PARTIES**

10. Plaintiff, BAKN Wexford, LLC, is a corporation organized and existing under the laws of Pennsylvania with a physical address and/or principal place of business at 100 Fowler Road, Suite 10 in Warrendale, Pennsylvania, 15086.

11. At all relevant times, Defendant, Erie Insurance Exchange, a Pennsylvania corporation, maintained a principal place of business at 100 Erie Insurance Place in Erie, Pennsylvania, 16530.

### **JURISDICTION**

12. This Court has jurisdiction over this action pursuant to 42 Pa. C.S.A. §5301(a)(2) and is therefore proper in this Court.

13. Venue is proper in this county pursuant to Pa. R.C.P. 1006(a)(1) and Pa. R.C.P. 2179(a)(2) and Pa. R.C.P. 2179(b)(1-2), as Defendant regularly conducts business in this county.

### **FACTUAL BACKGROUND**

#### **A. PLAINTIFF'S INSURANCE COVERAGE**

14. On or about May 25, 2019, Defendant entered into a contract of insurance with the Plaintiff, whereby Plaintiff agreed to make payments to Defendant in exchange for Defendant's promise to indemnify Plaintiff for losses, including, but not limited to, business income losses at the Covered Property, which is owned, managed and/or controlled by Plaintiff. *See Exh. 1.*

15. On or about May 25, 2020, Defendant entered into a contract of insurance with the Plaintiff, whereby Plaintiff agreed to make payments to Defendant in exchange for Defendant's promise to indemnify the Plaintiff for losses, including, but not limited to, business income losses

at the Covered Property which is owned, managed, and/or controlled by the Plaintiff. The 2020-2021 Policy has been attached hereto as Exhibit 3.<sup>1</sup>

16. The Covered Property is insured under Policy number Q971855139, issued by Defendant (hereinafter the “Policy”).

17. Plaintiff did not participate in the drafting or negotiation of the words used in the Policy.

18. As the insured, Plaintiff had no leverage or bargaining power to alter or negotiate the terms of the Policy.

19. The Policy provides (among other things) property, business personal property, business income and extra expense, civil authority order, and additional coverages.

20. Plaintiff faithfully paid the Policy premiums and reasonably expected that the business interruption, extra expense and/or civil authority coverage provided by Defendant would protect against losses in the event of loss of or damage to the Covered Property, including loss or damage related to a pandemic, or if state or local officials ordered the closure of its business due to public safety concerns.

21. At no time had Defendant, or its agents, notified Plaintiff that the coverage that Plaintiff had purchased pursuant to the all-risk policy contained exclusions and provisions that purportedly undermined the very purpose of the coverage: providing benefits in the occurrence of business interruption and incurring extended expenses.

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<sup>1</sup> When Plaintiffs first suffered their loss, the policy attached hereto as Exhibit 1 was in effect as its policy period was May 25, 2019 through May 25, 2020. Attached hereto as Exhibit 3 is the policy that was in effect from May 25, 2020 through May 25, 2021. The policy attached as Exhibit 3 was issued by the same Defendant and is the same in all material respects. The two policies will hereinafter be noted as “policy” throughout this Complaint.

22. “Income Protection means loss of ‘income’...you sustain due to partial or total ‘interruption of business’ resulting directly from ‘loss’ or damage to property on the premises.” Restaurant Enhancement Endorsement, Section E. A., Income Protection Coverage (p. 66 of PDF).

23. Defendant agreed to “pay for the actual loss of ‘income’” that Plaintiff sustains “and necessary ‘extra expense’ caused by action of civil authority that prohibits access to the premises”. Exh. 1, Restaurant Enhancements Endorsement, Section C. 1. (p. 67 of pdf).

24. “Extra expense” means “necessary expenses you incur due to partial or total ‘interruption of business’ resulting directly from ‘loss’ or damage to property on the premises”. Exh. 1, Ultrapack Plus Commercial Property Coverage Part, Income Protection – Coverage 3, Section B (p. 85 of pdf).

25. Within the insurance industry, and unknown to Plaintiffs, the word “loss” and the word “damage” have a customary usage more expansive than “loss” and “damage” as used in Defendant’s denial letter and includes “contamination”.

26. The words “loss” and/or “damage” are not defined in the policy, are used for different purposes within the policy, and have more than one potential meaning.

27. “Loss” and/or “damage” are not synonymous.

28. In this policy “damage” is used with the disjunctive “or” when paired with “loss” and therefore must have a different meaning than “loss”.

29. The Policy’s use of the disjunctive “or” means coverage under the term “loss” provides different and/or additional coverage than coverage provided under “damage.”

30. The Policy does not limit coverage to physical damage.

31. The words “loss” and “damage” are ambiguous as used by Defendant.

32. The word “damage” should be interpreted to have its normal and ordinary meaning-physical harm that impairs the value, usefulness or normal function of something.<sup>2</sup>

33. The COVID-19 virus causes direct physical damage, as well as indirect non-physical damage, as that word is commonly used.

34. The word “loss” should be interpreted to have its normal and ordinary meaning.

35. Loss has been defined as follows:

- a. Loss is the fact of no longer having something or having less of it than before.<sup>3</sup>
- b. Loss is the disadvantage you suffer when a valuable and useful thing is taken away.<sup>4</sup>
- c. Decrease in amount, magnitude or degree.<sup>5</sup>
- d. The amount of an insured’s financial detriment by death or damage that the insurer is liable for.<sup>6</sup>

36. Loss, as that word is commonly used, need neither be direct nor physical.

37. The Business Income, Extra Expense and Civil Authority provisions of the Policy were triggered by damage and loss caused by COVID-19, the related closure orders issued by local, state and federal authorities, and Plaintiffs’ inability to use and/or restricted use of the Covered Property.

## **B. THE COVID-19 PANDEMIC**

38. On March 11, 2020, the World Health Organization officially declared COVID-19 a global pandemic.

39. COVID-19 is a cause of real physical loss and damage to Covered Property.

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<sup>2</sup> <https://www.lexico.com/definition/damage>

<sup>3</sup> <https://www.collinsdictionary.com/us/dictionary/english/loss>

<sup>4</sup> <https://www.collinsdictionary.com/us/dictionary/english/loss>

<sup>5</sup> <https://www.merriam-webster.com/dictionary/loss>

<sup>6</sup> <https://www.merriam-webster.com/dictionary/loss>

40. COVID-19 is a physical substance.

41. During the initial stages of the pandemic, it was understood that the deadly virus had the ability to physically infect and remain on surfaces of objects or materials, i.e., “fomites”, for up to twenty-eight (28) days, which prompted health officials in countries like China, Italy, France, and Spain to disinfect and fumigate public areas before reopening them.<sup>7</sup>

42. To avoid the increased risk of contracting the virus in congregate environments, the U.S. Centers for Disease Control and Prevention (“CDC”) advised against gatherings of more than 10 people.

43. As of the date of this filing, every state has enacted measures to mitigate the spread of COVID-19.

### **C. THE COVERED CAUSE OF LOSS**

#### **1. Physical Loss**

44. Plaintiff suffered direct physical loss of or damage to the Covered Property.

45. The direct physical loss of or physical damage to the Covered Property was the result of a Covered Cause of Loss.

46. Losses due to the COVID-19 pandemic are a Covered Cause of Loss under the Policy.

47. The Policy’s disjunctive use of “or” when pairing “loss” or “damage” means coverage under physical loss does not require physical damage to the Covered Property.

48. Although damage is not required for coverage, the presence of virus or disease can constitute physical damage to property, as the insurance industry has recognized since at least 2006. When preparing so-called “virus” exclusions to be placed in some policies, but not others,

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<sup>7</sup> See e.g. <https://www.nih.gov/news-events/news-releases/new-coronavirus-stable-hours-surfaces> (last accessed May 23, 2020).

the insurance industry's drafting arm, Insurance Services Office, Inc. ("ISO"), circulated a statement to state insurance regulators that stated as follows:

Disease-causing agents may render a product impure (change its quality or substance) or enable the spread of disease by their presence on interior building surfaces or the surfaces of personal property. When disease-causing viral or bacterial contamination occurs, potential claims involve the cost of replacement of property (for example, the milk), cost of decontamination (for example, interior building surfaces), and business interruption (time element) losses. Although building and personal property could arguably become contaminated (often temporarily) by such viruses and bacteria, the nature of the property itself would have a bearing on whether there is actual property damage.

49. The COVID-19 pandemic caused direct physical loss of or damage to the Covered Properties under the policy.

50. The risk of COVID-19 entering the Properties and contaminating the surfaces is direct physical loss of and damage to the Covered Properties.

51. Due to COVID-19, Plaintiff lost full use, or suffered limited use, of the physical space of the Covered Property.

52. COVID-19 imposed a physical limit on Plaintiff's Covered Property.

53. COVID-19 rendered the Covered Properties unsafe, uninhabitable, damaged, and/or otherwise unfit for its intended use as a restaurant.

54. The COVID-19 pandemic caused direct physical loss of or damage to the property within one mile of the Covered Properties.

55. Plaintiff's loss of use of the Covered Property constitutes direct physical loss.

56. Plaintiff's restriction of use of the Covered Property constitutes direct physical loss.

57. The "COVID-19 Effect" also produces physical loss of and damage to the properties.



58. Social anxiety over public health and society's change in perception that indoor establishments are unsafe due to COVID-19 creates "physical loss and damage" for purposes of commercial property coverage.

59. The public's, and Plaintiff's customers', change in perception is the functional equivalent of damage of a material nature or an alteration in physical composition, which renders the Covered Property damaged for their intended use.

60. Plaintiff's business income loss coverage within the Policy was triggered.

## **2. Civil Authority Orders**

61. The presence of COVID-19 has prompted civil authorities throughout the country to issue orders mandating the suspension of non-essential businesses across a wide range of industries, including civil authorities with jurisdiction over Plaintiff's business.

62. On March 6, 2020, Pennsylvania Governor Tom Wolf signed an emergency disaster declaration triggering a public health state of emergency in the Commonwealth due to COVID-19. *See* the Declaration attached as Exhibit 4.

63. On March 19, 2020, Governor Wolf issued an Order requiring all non-life sustaining businesses in the Commonwealth to cease operations and close all physical locations until further notice. Life-sustaining businesses that were permitted to remain open were required to follow "social distancing practices and other mitigation measures defined by the Centers for Disease Control." *See* the Order attached as Exhibit 5.

64. On March 23, 2020, Governor Wolf issued a Stay-at-Home Order for residents of Philadelphia, Allegheny, Bucks, Chester, Delaware, Monroe and Montgomery Counties. *See* the Order attached as Exhibit 6.

65. On April 1, 2020, Governor Wolf extended the Stay-at-Home Order to the entire Commonwealth of Pennsylvania. *See* the Order attached as Exhibit 7.

66. These orders and proclamations (collectively referred to as “Closure Orders”), as they relate to the closure of all “non-essential businesses” evidence an awareness on the part of both state and local governments that COVID-19 causes damage to property. This is particularly true in places such as Plaintiffs’ businesses where the requisite contact and interaction causes a heightened risk of the property becoming contaminated by COVID-19.

67. Plaintiff had a reasonable expectation that the Policy’s business interruption coverage applied where a civil authority forced closure, thereby barring access to the business due to an issue of public safety within one mile of the Covered Property.

68. Plaintiffs’ business income loss was triggered with each restrictive civil authority action and Closure Order which prohibited access to the Covered Properties.

69. COVID-19 caused direct physical loss of or damage to property in the area immediately surrounding and within one (1) mile of the Covered Property.

70. COVID-19 rendered property within one (1) mile of the Covered Property unsafe, uninhabitable, damaged, and/or otherwise unfit for its intended use.

71. The Civil Authority Closure Orders were implemented to prevent the spread of COVID-19 by prohibiting and/or limiting people from entering the Covered Properties because of (a) actual and immediate risk of loss of and damage to the Properties and other property in the immediate vicinity, (b) characteristics of the Covered Properties, and (c) the high probability that further contamination and damage would occur if access to the Properties was not limited.

72. Further, Plaintiff’s Covered Property suffered “direct physical loss or damage” due to the Closure Orders mandating that Plaintiff discontinue their primary use of the Covered

Property. The Governor's Order to cease operations, in and of itself, constitutes a Covered Cause of Loss within the meaning of the Policy.

73. Due to the Closure Orders, Plaintiff lost full use, or suffered limited use, of the physical space of the Covered Property.

74. The Closure Orders imposed a physical limit on Plaintiff's Covered Property.

75. Plaintiff did not have the ability or right to ignore the Governor's Orders (or other Closure Orders) as doing so would expose Plaintiff to fines and sanctions and expose Plaintiff to further loss or damage.

**D. IMPACT ON PLAINTIFF**

76. Beginning on or about March 23, 2020, continuing through April 1, 2020 into the summer of 2020, as a direct result of the COVID-19 pandemic and closure Orders referenced herein, Plaintiff was forced to severely limit and restrict the activities of their Pennsylvania property.

77. Because people — employees, customers, and the public — frequent all areas of Plaintiff's property, the Covered Property is contaminated and would continue to be contaminated if the business remained open to the public.

78. Because business is conducted in an enclosed building, the Covered Property is a contamination zone and sustained physical loss and damage, as respiratory droplets are more likely to remain in the air or infect surfaces within the Covered Property for far longer or with significantly increased frequency as compared to facilities with open-air ventilation.

79. Plaintiff's business is also a contamination zone due to rapid person-to-property transmission of the virus, and vice-versa, because the activities of the employees and the customers require them to interact in close proximity to the property and to one another.

80. The COVID-19 pandemic is physically impacting the Covered Property. Any effort by the Defendant to deny the reality that the pandemic has caused physical loss and damage would constitute a false and potentially fraudulent misrepresentation that could endanger the Plaintiff and the public.

81. The actual or suspected physical presence of COVID-19 prevents Plaintiff's full use or limits use of the Covered Property.

82. The risk of actual or suspected physical presence of COVID-19 constitutes physical loss or damage to Plaintiffs' Covered Property.

83. Alternatively, to the extent the virus was not present on the Covered Property, Plaintiff sustained physical loss or damage as a result of the physical limitations imposed by the Closure Orders themselves.

84. As a direct result of the COVID-19 pandemic and the Closure Orders, Plaintiff has incurred, and continues to incur, among other things, direct physical loss of or damage to property, a substantial loss of business income and additional expenses covered under the Policy.

85. The covered losses incurred by Plaintiff and owed under the Policy increase daily.

86. Plaintiff submitted a claim to Defendant under the Policy due to the presence of COVID-19 and the Closure Orders described herein.

87. On May 12, 2021, Defendant wrongfully denied Plaintiff's claim. Exh. 2.

88. As a result of the prolonged closure required by Pennsylvania Closure Orders and the resultant financial losses, Plaintiff was forced to close the Covered Property permanently in December 2020 when they were no longer able to afford the property's rent.

89. A declaratory judgment that the Policy provides coverage will ensure that Plaintiff's reasonable expectations of coverage are met and prevent Plaintiff from being left without vital coverage acquired.

90. A declaratory judgment that the Policy provides coverage will also further the public policy of this Commonwealth.

## **CAUSES OF ACTION**

### **COUNT I** **DECLARATORY RELIEF**

91. Plaintiff incorporates by reference the preceding paragraphs as if fully set forth herein.

92. The Declaratory Judgment Act, 42 PA. Cons. Stat. § 7532 provides that "Courts of record, within their respective jurisdiction of actual controversy within its jurisdictions, shall have power to declare the rights, status, and other legal relations whether or not further relief is or could be claimed." 42 PA. Cons. Stat. § 7532.

93. Declaratory relief is intended to minimize "the danger of avoidable loss and unnecessary accrual of damages." 10B Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, *Federal Practice and Procedure* § 2751 (3d ed. 1998).

94. Plaintiff requests a Declaratory Judgment to affirm that the Policy provides business income coverage due to losses attributable to civil authority actions, and because the denial violates public policy.

95. Plaintiff's interest in the Policy and the declaratory relief sought is direct, substantial, quantifiable, and immediate.

96. An actual controversy has arisen between Plaintiff and Defendant as to the rights, duties, responsibilities and obligations of the parties under the Policy to reimburse Plaintiff for

their business income loss. Plaintiff contends and, upon information and belief, Defendant disputes and denies that:

- a. The closure orders described herein constitute a prohibition of access to the Covered Property;
- b. The prohibition of access by the closure orders described herein has specifically prohibited access as defined in the Policy;
- c. The Closure Orders described herein trigger coverage;
- d. Plaintiff sustained direct physical loss of or damage to the Covered Property under the Policy;
- e. The Policy provides coverage to Plaintiff for any current and future closures due to physical loss or damage directly or indirectly resulting from COVID-19 pandemic under the Civil Authority Coverage;
- f. The Policy provides business income coverage in the event that COVID-19 has directly or indirectly caused a loss or damage at the insured premises or immediate area of the Covered Property;

97. Resolution of the duties, responsibilities and obligations of the Parties is necessary as no adequate remedy at law exists and a judicial declaration is required to resolve the dispute and controversy.

**COUNT II**  
**BREACH OF CONTRACT - COMPENSATORY RELIEF**

98. Plaintiff incorporates by reference the preceding paragraphs as if fully set forth herein.

99. At all times relevant hereto, Plaintiff was an insured under the Policy with Defendant.

100. Plaintiff purchased, elected, and paid premiums to Defendant for the property, business income and extra expense, civil authority, and additional coverages applicable to the losses claimed in this action.

101. All the information regarding the insured's business and risks thereof was known to the Defendant when the Policy was issued.

102. Plaintiff is entitled to recover all losses caused by COVID-19 pandemic and/or civil authority orders.

103. Defendant was advised of Plaintiff's claims and demand for coverage under the Policy.

104. Plaintiff complied with all requirements of the Policy.

105. Defendant is duty-bound and obligated to act in good faith towards the insured under the Policy to make fair and reasonable efforts and offers to resolve Plaintiff's claim.

106. Defendant breached the terms and provisions of the Policy by denying the claims of Plaintiff for all losses caused by COVID-19 and the civil authority orders.

107. The breach of the indemnification obligations under the Policy by Defendant has caused Plaintiff to suffer loss and harm.

108. Defendant is required to pay Plaintiff all covered losses caused by COVID-19 pandemic and Closure Orders including business income, extra expense, contamination, civil authority and other coverages under the Policy.

### **PRAYER FOR RELIEF**

WHEREFORE, Plaintiff requests that the Court enter judgment against Defendant and declare, as a matter of law, the following:

- a. The Closure Orders prohibit access to Plaintiff's Covered Property;

- b. The civil authority Closure Orders “prohibit access” as defined in the Policy;
- c. The civil authority coverage applies to Plaintiff due to physical loss or damage at the insured premises or other premises in the immediate area of the Covered Property;
- d. The Plaintiff is entitled to coverage for business income loss caused by the referenced Closure Orders;
- e. Plaintiff sustained direct physical loss of or damage to the Covered Property under the Policy;
- f. Plaintiff’s loss of use of the insured premises amounts to a physical loss or damage as defined in the Policy;
- g. Defendant’s denial of coverage for losses caused by the referenced civil authority Closure Orders violates public policy;
- h. Defendant’s denial of coverage for losses caused by the referenced civil authority Closure Orders amounts to a breach of contract;

Plaintiff further seeks an Order requiring Defendant to pay Plaintiff all covered losses caused by loss of access to the Insured Premises including business income, extra expense, contamination, civil authority and other coverages under the Policy; and such other relief as the Court deems appropriate.

**JURY TRIAL DEMANDED**

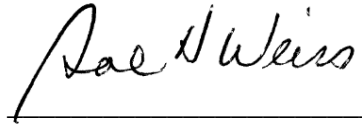
Plaintiffs demand a trial by jury on all issues so triable.



Dated: April 1, 2022

Respectfully submitted,

**ANAPOL WEISS**

A handwritten signature in black ink, reading "Sol H. Weiss", written over a horizontal line.

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