

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
WESTERN DIVISION

WAGNER SHOES, LLC,)	
)	
Plaintiff,)	
)	
v.)	
)	CIVIL ACTION NO.
AUTO-OWNERS INSURANCE)	7:20-cv-00465-GMB
COMPANY,)	
)	
Defendant.)	
)	

FIRST AMENDED COMPLAINT

**I
PARTIES**

1. Plaintiff, **WAGNER SHOE, LLC**, is an Alabama limited liability corporation authorized to and doing business in the state of Alabama at all times material to the Complaint.

2. Defendant, **AUTO-OWNERS INSURANCE COMPANY**, is a foreign insurance corporation headquartered in the state of Michigan and doing business in the state of Alabama at all times material to the Complaint.

II FACTUAL BACKGROUND

A. COVID-19

3. Plaintiff incorporates by reference all paragraphs of the Complaint as if fully set forth herein.

4. This case arises during the 2020 COVID-19 Pandemic.

5. COVID-19 was first detected in Wuhan City, Hubei Province, China. Although the first infections were linked to a live animal market, the same continues to spread unabated from person to person contact. The agent that causes COVID-19 spreads easily and sustainably in the community (community spread).¹ One may also contract COVID-19 by touching a surface or object that has the infectious agent on it and then touching their own mouth, nose, or possibly their eyes.

6. A study published in the October 2018 International Journal of Environmental Research and Public Health (sourced from the National Center for Biotechnology Information [NCBI]), states, “High-touch surfaces are recognized as a possible reservoir of infectious agents and their contamination can pose a risk also for the spread of multi-resistant organisms, hence they are recommended to be cleaned and disinfected on a more frequent schedule than minimal touch surfaces.” It is undisputed that

¹

This term was first used in 1945. The Merriam-Webster Dictionary defines the same as “the spread of a contagious disease to individuals in a particular geographic location who have no known contact with other infected individuals or who have not recently traveled to an area where the disease has any documented cases.”

COVID-19 can and will reside on everyday surfaces including those characterized as high-touch (tables, doorknobs, light switches, countertops, handles, desks, telephones, keyboards, toilets, faucets, sinks – anywhere on any surface on which a fingerprint may be left).

7. “Cleaning is the necessary first step of any sterilization or disinfection process (for high-touch surfaces). Cleaning is a form of decontamination that renders the environmental surface safe to handle or use” by removing organic matter and agents that interfere with microbial inactivation. To then disinfect, the Centers for Disease Control and Prevention (CDC) recommends the use of a disinfectant registered with the Environmental Protection Agency (EPA). The National Pesticide Information Center (NPIC) is linked to and referenced by the EPA in respect to using disinfectants to control COVID-19. The NPIC published and updated the following table on March 5, 2020 (Sourced from the EPA, CDC, and NPIC.)²

Using products effectively:

- **To kill the virus, the surface must stay wet for the entire time on the label. Look for “contact time” or “dwell time”.**
- Surface wipes can dry out during use. They must remain wet to be effective.
- Each product has only been shown to work where the label says it can be used. Look for “**use sites**” on the label.
- Disinfectants may not work on all surfaces. Follow the label carefully. Examples of surface types are listed in Table 1 below.
- “Cleaning” wipes do not kill viruses. They do not make claims to disinfect and are not registered by the U.S. EPA.

Table 1. Porosity of common household materials ^{1,2,3,4}				
Porous		Semi-porous		Non-porous
Carpeting	Upholstered furniture	Wood	Hardwood floor	Some tiles
Clothing and fabrics	Leather	Drywall	Linoleum	Some sealed countertops
Bedding and pillows	Wall insulation	Tile grout	Concrete	Glass
Mattresses	Ceiling tile			Metal

2

Remediation for COVID-19 is a two-step process. “Cleaning” does not necessarily kill the COVID-19 agent. The process lowers the number of individual agents but does not permanently removed them. “Disinfecting,” on the other hand, kills the COVID-19 agent and by doing so lowers its numbers and risk of spreading.

8. The survivability of the COVID-19 infectious agent on surfaces of different permeability depends on the surface in question and the environmental conditions (all of which will determine how long the property is affected). Trade organizations in the professional cleaning and supply industry are establishing protocols for the COVID-19 agent including the Global Risk Advisory Council (GBAC, a division of ISSA) which recommends the use of personal protective equipment (PPE), tools, and equipment in the cleaning and disinfection process.

9. While researchers have been trying to determine whether the COVID-19 agent can travel through the air, it is undisputed that evidence pointing to airborne transmission — in which the disease spreads in the much smaller particles from exhaled air, known as aerosols — is occurring, and precautions, such as increasing ventilation indoors, are recommended to reduce the risk of infection. According to the New England Journal of Medicine, COVID-19 aerosols can survive in the air for several hours without remediation (“remediation” being the action of reversing or stopping environmental damage).

10. It is undisputed that research supported by the Intramural Research Program of the National Institute of Allergy and Infectious Diseases, National Institutes of Health, published in the New England Journal of Medicine on March 17, 2020, indicates that aerosol and fomite (materials that are likely to carry infection such as clothes and furniture,

for example) transmissions of COVID-19 are credible, since the agent remains viable and infectious in aerosols for hours and on surfaces for days.

B.
BUSINESS CLOSURES

11. It is undisputed that governments across the globe are imposing strict limitations and lockdowns on businesses and all forms of societal functions and interactions deemed non-essential in order to slow the community and aerosol spreads of COVID-19. From the macro perspective of limitations and lockdowns imposed by nations and states to the micro perspective of cities and communities, nothing in society or commerce has been left untouched.

12. The following apply in this case:

(A) March 19: Social distancing, school closings, and food service restricted by order of the State Health Officer, Dr. Scott Harris.

(B) March 20: Amendment of the March 19 statewide order by to clarify and enforce social distancing measures for employers.

(C) March 25: Executive order of Mayor Walt Maddox, city of Tuscaloosa, ordering a public safety curfew between 10 pm and 5 am, seven days a week.

(D) March 26: Executive order of Mayor Maddox, extending the curfew to 24 hours per day. All “non-essential businesses and services” were, without exception, ordered to close.

(E) March 27: Amendment of the statewide orders of March 19 and 20 by the state health officer closing all non-essential businesses.

13. It is undisputed that **WAGNER SHOE, LLC**, owns and operates the retail store, Wagner's Shoes for Kids. Same was ordered closed by Mayor Maddox on March 26, 2020, and the State of Alabama on March 27, 2020. As a retail business, Plaintiff sells athletic, dress, and casual shoes to end users, the public, through brands such as Asics, Michael Kors, and Under Armour. As a retailer, Wagner's very economic survival is dependent on engaging and selling to local customers physically present in its store. The ongoing financial damage caused to small retail businesses similar to the Plaintiff is illustrated by the creation of the "Small Business Relief Fund" by the Chamber of Commerce of West Alabama.

C. INSURANCE POLICY

14. It is undisputed that at all times material to this Complaint, **WAGNER SHOE** possessed a Businessowners Policy (BP) contract of insurance (Policy Number 49-585-800-01) and a Commercial Umbrella Insurance Policy contract of insurance with **AUTO-OWNERS**.

15. Coverage A, "Businessowners Special Property Coverage Form (BP 00 02 01 87)," states Auto-Owners "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." Coverage A further states that "Covered Causes of Loss" includes "RISKS OF DIRECT PHYSICAL LOSS" unless excluded. Same includes "Business Income" and "Extra Expense" coverage.

16. It is undisputed that Wagner's Shoes for Kids is "covered property" at the premises described in the policy and that "covered property" includes the buildings and structures as well as "permanently installed fixtures" and "personal property used to maintain or service the building." It is undisputed that Coverage A further states that "business personal property" located in or on the premises including property owned by the insured and used in its business is "covered property."

17. It is undisputed the contract of insurance is an "All-Risk" policy. When a property insurance policy, including that between Plaintiff and Defendant, is written on an all-risk basis (with or without the word "all"), the insured only has the burden to show (a) the existence of the policy and (b) a loss to covered property. The insured is not required to establish the cause of loss. Rather, the burden of proof as to causation shifts to the insurer, even though the policy may not say so.

18. Once the insured, in this case **WAGNER SHOE**, fulfills these minimal requirements, the insurer, in this case **AUTO-OWNERS**, if it chooses to deny coverage, must then prove that the claim is excluded from coverage. (Sourced from "Insurance Contract Analysis," Wiening and Malecki, American Institute for Chartered Property Casualty Underwriters [CPCU], 1992. See, also, "Legal Concepts of Insurance," Lustig (2010): In the case of all risk insurance, the burden of proof is generally held to be favorable to the insured to establish some casualty. The burden then shifts to the insurer to prove that the loss fell within some excepted cause.)

19. It is undisputed that **WAGNER SHOE** communicated with its Tuscaloosa insurance broker (Fitts Agency, Inc.) on March 27, 2020, and extended a claim for contractual property, business interruption, and other damages due to the civil authority action taken by the City of Tuscaloosa and ongoing property damage caused by the COVID-19 agent. Plaintiff was informed there was no coverage for the same, but that it could pursue the matter. It is undisputed that **AUTO-OWNERS** sent a proof of loss form to **WAGNER** dated March 27, 2020, that was received by the same on April 6, 2020. It is undisputed that on April 6, 2020, **AUTO-OWNERS** denied **WAGNER'S** claim before it ever allowed him to complete and return the proof of loss. It is undisputed that **AUTO-OWNERS** never undertook to investigate and adjust the insurance claim before it denied the same.

COUNT I DECLARATORY JUDGMENT

20. Plaintiff incorporates all previous paragraphs by reference.

21. There is a justiciable controversy which exists between the parties to the Complaint in that Defendant, **AUTO-OWNERS**, denies that there is any coverage for the factual matters alleged herein. Plaintiff, **WAGNER SHOE**, maintains there is coverage for the same.

22. An actual case or controversy exists regarding the rights and obligations under the policy of insurance at issue to reimburse Plaintiff for the full amount of losses directly caused by the COVID-19 agent and the business interruption caused by the closure

orders. Thus, **WAGNER SHOE** requests that a declaratory judgment be entered as follows:

A. By incorporating the Complaint's factual allegations by reference and as if fully set out in this paragraph, a declaration that **WAGNER SHOE** has proven the existence of an insurance policy between the same and Defendant and has proven a loss to covered property.

B. By incorporating the Complaint's factual allegations by reference and as if fully set out in this paragraph, a declaration that all losses incurred by **WAGNER SHOE** related to the COVID-19 agent and business interruption caused by current and ongoing closure orders are insured losses under Plaintiff's policy of insurance.

C. By incorporating the Complaint's factual allegations by reference and as if fully set out in this paragraph, a declaration that **AUTO-OWNERS** is obligated to pay Plaintiff for the full amount of losses incurred and to be incurred in connection with its covered business losses and expenses related to the COVID-19 agent and current and ongoing closure orders.

COUNT II
BREACH OF CONTRACT

23. Plaintiff incorporates all previous paragraphs by reference.
24. Defendant issued the insurance contract at issue to Plaintiff.
25. Plaintiff complied with its contractual obligations.

26. Defendant refused and failed to comply with its contractual obligations by denying and refusing coverage for Plaintiff's loss and failed to adjust the claim in accordance with common industry practices, thus constituting a breach of the insurance contract.

27. As a direct and proximate result of said breach, Plaintiff has been damaged.

WHEREFORE THESE PREMISES CONSIDERED, Plaintiff seeks judgment against Defendant in an amount to be determined by a jury.

**COUNT III
BAD FAITH**

28. Plaintiff incorporates all previous paragraphs by reference.

29. Defendant denied Plaintiff's claim for insurance coverage.

30. The denial of Plaintiff's insurance claim was made in bad faith by Defendant in that (a) it refused to pay Plaintiff's claim; (b) it had no reasonably debatable, legitimate, or arguable reason for doing so; (c) it had actual knowledge of the absence of a reasonably debatable, legitimate, or arguable reason for its refusal during the decisional process; and (d) it intentionally failed and refused to even investigate the claim; and (e) knew that it would deny the claim before the proof of loss.

31. As a direct and proximate result of Defendant's bad faith, Plaintiff has been damaged.

WHEREFORE THESE PREMISES CONSIDERED, Plaintiff seeks judgment against Defendant in an amount to be determined by a jury.

**COUNT IV
INSTITUTIONAL BAD FAITH**

32. Plaintiff incorporates all previous paragraphs by reference.

33. Defendant denied Plaintiff's claim for insurance coverage.

34. Based upon its conduct in this case, Defendant adopted a general business practice to deny insurance claims arising from the COVID-19 pandemic and is employing strategies to deprive policyholders, including but not limited to the Plaintiff, the benefits of their insurance contracts.

35. Based upon its conduct in this case, Defendant has intentionally disregarded its own programs or procedures for handling claims, and its handling of the Plaintiff's insurance claim is in conformity with a deliberate business practice to deny claims arising from the COVID-19 pandemic.

36. Based upon its conduct in this case, Defendant has committed a series of wrongful separate and discrete acts, orally and in writing, illustrating its new business practice to deny claims arising from the COVID-19 pandemic without regard for accepted industry standards for claim investigation.

37. Based upon its conduct in this case, Defendant has directed its claim adjusters both in Alabama and nationwide, to deny claims arising from the COVID-19 pandemic without regard for accepted industry standards for claim investigations and in a manner inconsistent with ethical responsibilities to their insureds.

38. Based upon its conduct in this case, Defendant has acted in bad faith on an institutional level thereby creating a causal connection between its conduct and Plaintiff's damages and the damages of hundreds of insureds in a position same or similar to the Plaintiff in this case.

WHEREFORE THESE PREMISES CONSIDERED, Plaintiff seeks judgment against Defendant in an amount to be determined by a jury.

**COUNT V
NEGLIGENCE/WANTONNESS**

39. Plaintiff incorporates all previous paragraphs by reference.

40. Defendant denied Plaintiff's claim for insurance coverage.

41. Defendant had a duty to properly and reasonably investigate and adjust Plaintiff's insurance claim.

42. Defendant negligently failed to investigate or adjust Plaintiff's insurance claim.

43. Defendant intentionally failed to investigate or adjust Plaintiff's insurance claim.

44. As a direct and proximate result of Defendant's negligence and wantonness, Plaintiff has been damaged.

WHEREFORE THESE PREMISES CONSIDERED, Plaintiff seeks judgment against Defendant in an amount to be determined by a jury.

PLAINTIFF DEMANDS TRIAL BY JURY ON COUNTS II THROUGH V

Respectfully submitted,

/s/ R. Matt Glover (asb-7828-a43g)

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CERTIFICATE OF SERVICE

I hereby certify that on this the 14th day of April, 2020, a copy of the foregoing was served on all counsel of record in this cause by CM-ECF electronic filing.

/s/ P. Ted Colquett

OF COUNSEL