

FILED
04-28-2020
CIRCUIT COURT
DANE COUNTY, WI
2020CV000957
Honorable Richard G
Niess
Branch 9

STATE OF WISCONSIN

DANE COUNTY BRANCH

CIRCUIT COURT

BADGER CROSSING, INC., d/b/a Badger Crossing Pub & Eatery, individually and on behalf of all others similarly situated,

Plaintiff,

Case No.

v.

SOCIETY INSURANCE, INC., a Wisconsin corporation,

Defendant.

CLASS ACTION COMPLAINT AND DEMAND FOR JURY TRIAL

Plaintiff Badger Crossing, Inc., d/b/a Badger Crossing Pub & Eatery (“Badger Crossing” or “Plaintiff”), brings this Class Action Complaint and Demand for Jury Trial against Defendant Society Insurance, Inc. (“Defendant” or “Society Insurance”) for wrongfully denying its claim for Business Income and Extra Expense coverage resulting from losses sustained due to the ongoing COVID-19 pandemic. Plaintiff alleges as follows upon personal knowledge as to itself and its own acts and experiences and, as to all other matters, upon information and belief, including investigation conducted by its attorneys:

NATURE OF THE ACTION

1. Plaintiff Badger Crossing has operated a bar and restaurant located in Cashton, Wisconsin since 2005. Unfortunately, due to the COVID-19 pandemic and recent executive

orders issued by the Governor of the State of Wisconsin (the “Closure Orders,” defined below),¹ Badger Crossing has been forced to close its bar and restaurant—through no fault of its own—as part of the State’s efforts to address the spread of the COVID-19 global pandemic. The Closure Orders have required Badger Crossing to cease 100% of its business operations, which has resulted in a total loss of actual business income and significant extra expense.

2. To protect its business in situations like these, Plaintiff obtained a business interruption insurance policy from Defendant, which includes special property coverage, as set forth in Society Insurance’s Businessowner’s Special Property Coverage Form, Form TBP2 05-15 (the “Special Property Coverage Form”). The Special Property Coverage Form provides, *inter alia*, “Business Income” coverage, “Extra Expense” coverage, “Civil Authority” coverage, and “Contamination” coverage, in the event Plaintiff incurred losses and extra expenses due to an involuntary business interruption.

3. However, in blatant breach of the insurance obligations that Defendant voluntarily undertook in exchange for Plaintiff’s premium payments, Defendant has issued a blanket denial to Plaintiff for any business income losses or other covered expenses related to COVID-19 or the Closure Orders, without first conducting a meaningful coverage investigation.

4. As a result of Defendant’s wrongful denial of coverage, Plaintiff brings this action, on behalf of itself and all those similarly situated, for declaratory judgment establishing that the COVID-19 pandemic and corresponding response by civil authorities trigger coverage under the Special Property Coverage Form; and for breach of Defendant’s contractual obligation

¹ See Wis. Executive Order 72 (March 12, 2020), Wis. Emergency Order 4 (March 16, 2020), Wis. Emergency Order 5 (March 17, 2020), Wis. Emergency Order 8 (March 20, 2020), Wis. Emergency Order 12 (March 24, 2020), & Wis. Emergency Order 28 (April 16, 2020) (hereinafter, the “Closure Orders”). The Closure Orders are attached as Exhibits A through F.

under the Special Property Coverage Form to indemnify Plaintiff and others similarly situated for business income losses and extra expenses.

PARTIES

5. Plaintiff Badger Crossing, Inc., d/b/a Badger Crossing Pub & Eatery, is a corporation incorporated and existing under the laws of the State of Wisconsin with its principal place of business located at 909 Front Street, Cashton, Wisconsin 54619.

6. Defendant Society Insurance, Inc. is a corporation incorporated and existing under the laws of the State of Wisconsin with its principal place of business in Fond du Lac, Wisconsin. Defendant is an insurance company engaged in the business of selling insurance contracts to commercial entities such as Plaintiff in Wisconsin, and otherwise conducts substantial business throughout the State of Wisconsin and in this County.

JURISDICTION AND VENUE

7. This Court has personal jurisdiction over Defendant pursuant to Wis. Stat. § 801.05, because Defendant is a domestic corporation incorporated and existing under the laws of the State of Wisconsin. In addition, Defendant exercises substantial, systematic and continuous contacts with Wisconsin by doing business in Wisconsin, serving insureds in Wisconsin, and seeking additional business in Wisconsin.

8. This Court has jurisdiction to grant declaratory relief under Wis. Stat. § 806.04 because an actual controversy exists between the parties as to their respective rights and obligations under the Policy with respect to the loss of Business Income and Extra Expense arising from the events detailed herein.

9. Venue is proper in this County pursuant to Wis. Stat. § 801.50(2)(c), because Defendant does substantial business in this County, including by issuing insurance policies to

insureds located in this County, serving insureds in this County, employing Society Insurance agents in this County, and otherwise conducting business in this County.

FACTUAL BACKGROUND

I. The Society Insurance All-Risk Policy.

10. In exchange for substantial premiums, Defendant issued to Badger Crossing Policy No. TRM 474222-11.

11. As part of that policy, Defendant sold Plaintiff the Special Property Coverage Form, which includes several additional coverages, including “Business Income,” “Extra Expense,” “Civil Authority,” and “Contamination” coverages. Plaintiff’s Special Property Coverage Form is included within the policy attached as Exhibit G (the “Policy”).

12. The Policy was issued to Plaintiff and covers its premises located at 909 Front Street, Cashton, Wisconsin 54619.

13. Plaintiff has performed all of its obligations under the Policy, including the payment of premiums.

14. The Policy is an “all-risk” policy, meaning that the Policy covers any loss unless the Policy contains a provision expressly excluding the loss from coverage.

15. The Policy does not exclude losses from viruses or pandemics. Thus, the Policy purchased by Plaintiff covers property damage and business losses caused by viruses, such as COVID-19.

16. Under the Special Property Coverage Form, Defendant agreed to “pay for the actual loss of Business Income” sustained by Plaintiff “due to the necessary suspension” of Plaintiff’s operations during the period of business interruption caused “by direct physical loss of or damage to covered property” at Plaintiff’s premises. (*See* Special Property Coverage Form, §

A.5.g.) “Suspension” under the Business Income coverage means: (1) “the partial slowdown or complete cessation of your business activities;” or (2) “that a part or all of the described premises is rendered untenable if coverage for Business Income applies.” (*See id.*, § A.5.g.(3).)

“Business Income” is defined in relevant part as “Net Income (Net Profit or Loss before income taxes) that would have been earned or incurred if no physical loss or damage had occurred” plus “[c]ontinuing necessary operating expenses incurred.” (*See id.*, § A.5.g.(1)(c).)

17. Under the Special Property Coverage Form, Society Insurance also promised to “pay necessary Extra Expense” Plaintiff incurs during the period of interruption that it “would not have incurred if there had been no direct physical loss or damage to covered property at the described premises.” (*See id.*, § A.5.h.) “Extra Expense” is defined in relevant part as any expense incurred (i) “[t]o avoid or minimize the suspension of business and to continue operations at the described premises”; (ii) “[t]o minimize the suspension of business if [Plaintiff] cannot continue operations”; or (iii) “to [r]epair or replace any property[.]” (*See id.*, § A.5.h.(2).)

18. The Special Property Coverage Form also provides “Civil Authority” coverage, pursuant to which Society Insurance promised to pay for Plaintiff’s loss of Business Income and Extra Expense “caused by action of civil authority that prohibits access” to the insured premises. (*See id.*, § A.5.k.) This Civil Authority coverage is triggered when any non-excluded cause results in “damage to property other than property” at Plaintiff’s insured premises, and is intended to cover losses resulting from governmental actions “taken in response to dangerous physical conditions.” (*See id.*, § A.5.k.(2).)

19. The Special Property Coverage Form also provides “Contamination” coverage, pursuant to which Society Insurance promised to pay for Plaintiff’s (i) “costs to clean and sanitize [Plaintiff’s] premises, machinery and equipment,” and (ii) loss of Business Income and

Extra Expense due to “[c]ontamination.” (*See id.*, § A.5.m.) “Contamination” means “a defect, deficiency, inadequacy or dangerous condition in [Plaintiff’s] products, merchandise or premises.” (*See id.*, § A.5.m.(4)(a).) “Contamination” coverage for Business Income and Extra Expense is triggered in a variety of circumstances, including “an action by a public health or other governmental authority that prohibits access to [Plaintiff’s] premises” and adverse “publicity” resulting from the discovery or suspicion of “contamination.” (*See id.*, § A.5.m.(2).)

20. Damage caused by COVID-19 and the related Closure Orders triggered the Business Income, Extra Expense, Civil Authority, and Contamination coverages provided by the Special Property Coverage Form.

II. The COVID-19 Pandemic.

21. For years, if not decades, the Center for Disease Control and Prevention (“CDC”) along with the World Health Organization (“WHO”) have been warning about the possibility of an airborne virus that could cause a worldwide pandemic.

22. COVID-19 is a highly contagious airborne virus that has rapidly spread and continues to spread across Wisconsin and the United States.

23. COVID-19 is a physical substance and an organic human pathogen that travels through respiratory droplets. The virus physically transforms the air exposed to it and attaches itself to surfaces and structures.

24. The COVID-19 virus spreads primarily by “fomite”—meaning objects, materials, or surfaces that have been physically contaminated or infected by respiratory droplets—and can survive on surfaces for extended periods of time. Recent information on the CDC’s website provides that COVID-19 spreads when people are within six feet of each other or when a person

comes in contact with a surface or object that has the virus on it.²

25. According to a scientific study in *The New England Journal of Medicine*, the coronavirus responsible for the COVID-19 disease—SARS-CoV-2—can physically infect and survive on surfaces for up to 72 hours.³

26. Another scientific study documented in the *Journal of Hospital Infection* found that human coronaviruses, such as COVID-19, can remain infectious on inanimate surfaces at room temperature for up to nine days.⁴

27. To date, thousands of people in Wisconsin have been diagnosed with COVID-19, and it is likely that hundreds of thousands (if not millions) more have been infected by COVID-19 but have not been diagnosed.⁵ As of April 19, 2020, Wisconsin residents had tested positive for COVID-19 in 65 of Wisconsin's 72 counties, including in Monroe County, where Plaintiff's insured premises are located, and in the surrounding counties where Plaintiff's employees and customers reside. (*See id.*) While in some cases asymptomatic, COVID-19 is also known to cause severe and sometimes fatal respiratory failure. This, in addition to the highly contagious nature of COVID-19, renders any property exposed to the contagion unsafe and dangerous.

28. On March 11, 2020, the World Health Organization declared that the emerging

² *How COVID-19 Spreads*, Ctr. for Disease Control and Prevention (April 13, 2020), <https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/how-covid-spreads.html>

³ Neeltje van Doremalen, Ph.D., et al., *Aerosol and Surface Stability of SARS-CoV-2 as Compared with SARS-CoV-1*, *The New England Journal of Medicine* (April 16, 2020), available at <https://www.nejm.org/doi/pdf/10.1056/NEJMc2004973?articleTools=true>.

⁴ *See* G. Kampf, et al. *Persistence of coronavirus on inanimate surfaces and their inactivation with biocidal agents* (February 06, 2020), available at <https://www.journalofhospitalinfection.com/action/showPdf?pii=S0195-6701%2820%2930046-3>

⁵ *See* Wis. Emergency Order 31 (April 20, 2020).

threat of COVID-19 constituted a global pandemic.⁶

29. While some rogue media outlets have downplayed the danger and impact of the COVID-19 pandemic, the scientific community and those personally and professionally affected by the virus recognize COVID-19 as a cause of real physical loss and damage. Recently, the Pennsylvania Supreme Court found that the COVID-19 pandemic constitutes a “natural disaster,” namely because, like other identified natural disasters, it involves “substantial damage to property, hardship, suffering or possible loss of life.” *Friends of DeVito v. Wolf*, No. 68 MM 2020, 2020 WL 1847100, at *10 (Pa. Apr. 13, 2020).

III. The Closure Orders and Other Action by Governmental Authorities.

30. In response to the COVID-19 pandemic, the Governor of Wisconsin, Tony Evers, has issued multiple executive and emergency orders pursuant to the authority vested in him by the Wisconsin Constitution and the laws of Wisconsin.

31. On March 12, 2020, Governor Evers issued Executive Order 72, which declared a public health emergency “in response to the COVID-19 coronavirus.”⁷ In the accompanying press release, Governor Evers reminded people of simple steps to avoid getting sick, including frequent hand washing, covering coughs and sneezes, and staying home when sick.

32. On March 16, 2020, during the term of the Policy issued by Society Insurance to Plaintiff, and pursuant to Wis. Stat. § 252.02(3), Governor Evers issued Emergency Order 4, ordering “a statewide moratorium on mass gatherings of 50 people or more to mitigate the spread

⁶ See *WHO Director-General’s opening remarks at the media briefing on COVID-19*, World Health Organization (March 11, 2020), <https://www.who.int/dg/speeches/detail/who-director-general-s-opening-remarks-at-the-media-briefing-on-covid-19---11-march-2020>.

⁷ Wis. Executive Order 72 (March 12, 2020). A copy of the March 12th Closure Order is attached as Exhibit A.

of COVID-19.”⁸ Under this Closure Order, restaurants and bars were limited to “50 percent of seating capacity or 50 total people, whichever is less,” and were required to maintain “distancing of 6 feet between tables, booths, bar stools, and ordering counters.” (*Id.*)

33. On March 17, 2020, in response to the rapid spread of COVID-19 throughout Wisconsin, and during the term of the Policy, Governor Evers issued Emergency Order 5, ordering that “all bars and restaurants shall close in the State of Wisconsin.”⁹ Under this Closure Order, restaurants were allowed to operate “take-out or delivery service,” but were prohibited from providing seating to any customer or allowing customers to consume food or beverages on the premises. (*Id.*)

34. The March 17th Closure Order was issued in direct response to the COVID-19 outbreak and the physical presence of COVID-19 on property throughout the State of Wisconsin. It specifically stated that the goal was “to mitigate the spread of COVID-19” by restricting in-person interactions and gatherings of “10 [or more] people in a single room or single confined or enclosed space at the same time.” The March 17th Closure Order recognized that the spread of COVID-19 throughout Wisconsin could not be sufficiently abated by cleaning and disinfecting frequently used surfaces in public settings; it mandated that access to such surfaces be suspended altogether.

35. On March 20, 2020, Governor Evers issued Emergency Order 8, titled “Updated

⁸ Wis. Emergency Order 4 (March 16, 2020). A copy of the March 16th Closure Order is attached as Exhibit B.

⁹ Wis. Emergency Order 5 (March 17, 2020). A copy of the March 17th Closure Order is attached as Exhibit C.

Mass Gathering Ban,” which further detailed the limits on bars and restaurants.¹⁰ The order provided, for example, that bars and restaurants may not sell alcoholic beverages via delivery to retail customers unless the customer pays in person, face-to-face. (*Id.*)

36. On March 24, 2020, Governor Evers issued Emergency Order 12, a “Safer At Home Order.”¹¹ In the order, Governor Evers stated, in part: “Despite prior emergency orders banning mass gatherings, the rates of infection continue to drastically increase, necessitating additional measures to slow the rate of infection and save lives.” (*Id.*) Pursuant to this Closure Order, all individuals present within the State of Wisconsin were—and to this day, are—ordered to “stay at home or their place of residence,” with certain limited exceptions. (*Id.*) The March 24th Closure Order also placed tighter restrictions on bars and restaurants selling alcohol, now prohibiting the delivery of alcoholic beverages to retail customers. (*Id.*)

37. On April 16, 2020, Governor Evers extended the March 24th Closure Order until May 26, 2020, reasoning that the first stay-at-home order has slowed the “exponential growth in positive [COVID-19] cases.”¹² While still acknowledging that frequent cleaning would not sufficiently abate the threatened spread of the virus such that all businesses could resume their normal operations, the April 16th Closure Order nevertheless required all businesses to “[i]ncrease standards of facility cleaning and disinfection to limit worker and patron exposure to COVID-19.” (*Id.*)

¹⁰ Wis. Emergency Order 8 (March 20, 2020). A copy of the March 20th Closure Order is attached as Exhibit D.

¹¹ Wis. Emergency Order 12 (March 24, 2020). A copy of the March 24th Closure Order is attached as Exhibit E.

¹² Wis. Emergency Order 28 (April 16, 2020). A copy of the April 16th Closure Order is attached as Exhibit F.

38. The April 16th Closure Order provides that a violation of the Order is punishable by up to 30 days in jail and/or a fine not to exceed \$250.00. (*Id.*)

39. Each of the Closure Orders was issued in direct response to the continued and increasing presence of COVID-19 at property on or around Plaintiff's premises.

40. The Governor of the State of Wisconsin is a civil and/or governmental authority as contemplated by the Policy.

41. At the time the Closure Orders were issued, civil authorities had confirmed that properties and premises throughout Wisconsin contained COVID-19 particles on surfaces and items of property.

42. Other governmental authorities and public health officials around the country have similarly acknowledged that the spread of COVID-19 causes direct physical loss and damage to property. For example:

- a. The State of Colorado issued a public health order indicating that "COVID-19 ... **physically contributes to property loss, contamination, and damage...**" (Emphasis added);
- b. The City of New York issued an emergency executive order in response to COVID-19 and the pandemic, in part "because **the virus physically is causing property loss and damage.**" (Emphasis added);
- c. Broward County, Florida issued an emergency order acknowledging that COVID-19 "**is physically causing property damage.**" (Emphasis added);
- d. The State of Washington issued a stay-at-home proclamation stating the "COVID-19 pandemic and its progression ... remains a public disaster affecting life, health, [and] **property...**" (Emphasis added);
- e. The State of Indiana issued an executive order recognizing that COVID-19 has the "propensity to **physically impact surfaces and personal property.**" (Emphasis added);
- f. The City of New Orleans issued an order stating "there is reason to believe that COVID-19 may spread amongst the population by various means of exposure, including the propensity to attach to surfaces for prolonged

period of time, thereby spreading from surface to person and **causing property loss and damage** in certain circumstances.” (Emphasis added);

- g. The State of New Mexico issued a public health order acknowledging the “threat” COVID-19 “poses” to “**property**.” (Emphasis added);
- h. North Carolina issued a statewide executive order in response to the COVID-19 pandemic not only “to assure adequate protection for lives,” but also to “assure adequate protection of... **property**.” (Emphasis added); and
- i. The City of Los Angeles issued an order in response to COVID-19 “because, among other reasons, the COVID-19 virus can spread easily from person to person and it is **physically causing property loss or damage** due to its tendency to attach to surfaces for prolonged periods of time.” (Emphasis added).

43. As these orders all recognize, the presence of people infected with or carrying COVID-19 particles throughout the state in places, like Plaintiff’s insured premises, where public gatherers typically socialize, eat, drink, or use for entertaining or other recreation renders those places unsafe and unusable. The Closure Orders were issued in direct response to these existing dangerous physical conditions.

IV. Plaintiff’s Losses Due to the COVID-19 Pandemic and Resulting Closure Orders.

44. As a result of the Closure Orders, on March 17, 2020, Badger Crossing was required to cease its business operations completely.

45. The Closure Orders prohibit the public from accessing Plaintiff’s insured premises described in the Policy, thereby causing the necessary suspension of its operations and triggering the Business Income, Extra Expense, Civil Authority, and Contamination coverages under the Policy.

46. Moreover, the continuous presence of COVID-19 on or around Plaintiff’s premises has damaged property by infecting it and has rendered the premises unsafe, uninhabitable, and unfit for its intended use.

47. Upon information and belief, people carrying COVID-19 particles in, on, or about their person, have been physically present at or around Plaintiff's insured premises during the time the Policy was in effect.

48. Upon information and belief, COVID-19 particles have been physically present at or around Plaintiff's insured premises—both airborne and on surfaces and items of property at or around Plaintiff's premises—during the time the Policy was in effect and remained physically present for up to nine days.

49. Plaintiff has sustained direct physical loss and/or damage to items of property located at its premises and direct physical loss and/or damage to its premises described in the Policy as a result of the presence of COVID-19 particles and/or the COVID-19 pandemic. The presence of COVID-19 caused direct physical loss of and/or damage to the premises insured under the Policy by, among other things, damaging the property, denying access to the property, preventing customers from physically occupying the property, causing the property to be physically uninhabitable by customers, causing its function to be nearly eliminated or destroyed, and/or causing a suspension of business operations on the premises.

50. The presence of COVID-19 particles also constitutes a "contamination," as defined by the Policy.

51. Plaintiff has incurred substantial Business Income losses and Extra Expense caused by: (i) the presence of COVID-19 at or around Plaintiff's insured premises, (ii) the Closure Orders which prohibit access to Plaintiff's insured premises or the production of Plaintiff's products, and (iii) publicity resulting from the discovery or suspicion of a COVID-19 contamination.

V. Society Insurance's Denial of Plaintiff's Claim for Coverage.

52. Following the March 16th and March 17th Closure Orders, Plaintiff, like countless other Wisconsin businesses, submitted a timely insurance claim to Society Insurance on March 31, 2020 requesting coverage for its business interruption losses and extra expenses promised under the Policy.

53. Just a day later, on April 1, 2020, Society Insurance denied Badger Crossing's claim in writing. (*See* April 1, 2020 Denial Letter, attached hereto as Exhibit H.)

54. Upon information and belief, Society Insurance has uniformly refused to provide Business Income, Extra Expense, Civil Authority, Contamination, or any other coverage to most, if not all, Wisconsin businesses that have claimed business interruption losses and/or extra expense under the Special Property Coverage Form as a result of COVID-19 and the Closure Orders.

55. Defendant issued its denials without first conducting a meaningful coverage investigation.

56. In fact, on March 16, 2020, before Plaintiff had submitted its claim to Society, the CEO of Society Insurance circulated a memorandum to its "agency partners," acknowledging that states, such as Wisconsin, had "taken steps to limit operations of certain businesses," but prospectively concluding that Society Insurance's policies would likely not provide coverage for losses due to a "governmental imposed shutdown due to COVID-19 (coronavirus)." Upon information and belief, Defendant also instructed insurance brokers to discourage policyholders from filing claims and promulgated the false conclusion that no coverage was available under the Special Property Coverage Form.

57. To the extent Defendant has provided any reason to Plaintiff for its categorical

denial of Plaintiff's claim, it is based on Defendant's general assertions (i) that the "actual or alleged presence of coronavirus," does not constitute "direct physical loss or damage," (ii) that "a civil authority has not prohibited access to [Plaintiff's] business because of a Covered Cause of Loss that caused damage to a premises other than the described premises," and (iii) that "no government authority has prohibited access" to Plaintiff's premises because of a "contamination" as defined by the Policy. (*See* Exhibit H.)

58. However, Defendant provided no basis for its statement that the alleged or actual presence of a substance like COVID-19 does not result in property damage. Moreover, Defendant's assertion regarding the orders of civil authority at issue ignores the Coverage Orders, which specifically respond to damage caused by COVID-19 at property other than Plaintiff's insured premises. Upon information and belief, Defendant uniformly included these statements in denying other policyholders' claims for Civil Authority coverage without investigating the claims or the Closure Orders.

59. Defendant likewise provided no basis for its conclusion that the presence of COVID-19 in or around Plaintiff's premises is not a "contamination" under the Policy, i.e., a "dangerous condition" in Plaintiff's "products, merchandise, or premises." (*See* Exhibit H.)

60. Finally, unlike many commercial property policies available on the market, the "all-risk" Policy that Defendant sold to Plaintiff does not exclude loss caused by a virus. Thus, Plaintiff reasonably expected that the insurance it purchased from Defendant included coverage for property damage and business interruption losses caused by viruses like COVID-19.

61. Defendant could have excluded pandemic-related losses under the Special Property Coverage Form or another endorsement to the Policy, as other insurers regularly do. In 2006, the ISO drafted a new endorsement, CP 01 40 07 06, acknowledging that claims for

business interruption losses would be filed under existing policy language for losses resulting from the presence of disease-causing agents. Endorsement CP 01 40 07 06, which other insurers have since incorporated in policies, provides that the insurer “will not pay for loss or damage caused by or resulting from any virus, bacterium or other microorganism that induces or is capable of inducing physical distress, illness or disease.” Defendant did not include any language to this effect in the Special Property Coverage Form, nor did it include this endorsement in any section of the Policy.

62. Instead, Defendant waited until after it collected Plaintiff’s premiums, and after a pandemic and the resulting Closure Orders caused catastrophic business losses to Plaintiff, to attempt to limit its exposure on the back-end through its erroneous assertion that the presence of COVID-19 is not a “physical loss or damage” or a “contamination” and is therefore not a covered cause of loss under its Policy.

63. That the insurance industry has created and often uses specific exclusions for pandemic-related losses under similar commercial property policies undermines Defendant’s claim that the presence of a virus, like COVID-19, does not cause “physical loss or damage” to property or constitute a “contamination” of the premises. Indeed, if a virus could not result in “physical loss” to property or a “contamination,” such specific exclusions for pandemic or virus-related losses would be unnecessary.

64. Moreover, Defendant’s assertion ignores the coverage provided under the Policy’s “Civil Authority” provision for losses incurred due to governmental actions “taken in response to dangerous physical conditions,” even if those dangerous physical conditions cause damage to property at locations other than those insured under the Policy. (*See* Exhibit H.)

65. Thus, Defendant’s swift and wholesale denial of coverage is arbitrary,

unreasonable, and inconsistent with the facts and plain language of the Policy. Defendant's denials appear to be driven by Defendant's desire to reduce or extinguish its own financial exposure to the economic fallout caused by the COVID-19 crisis, rather than its obligation to initiate, as is its legal duty, a full and fair investigation of the claims and a careful review of the Policy it sold to Plaintiff in exchange for valuable premiums.

CLASS ALLEGATIONS

66. **Class Definition:** Pursuant to Wis. Stat. §§ 803.08(1), 803.08(2)(a), 803.08(2)(b), and 803.08(2)(c), Plaintiff brings this action on behalf of itself and a class of similarly situated individuals defined as follows:

All persons and entities that: (1) have Business Income and Extra Expense coverage to insure property in Wisconsin under Society Insurance policy form number "TBP2 05-15" or any other coverage form with identical language; (2) suffered Business Income and/or Extra Expense losses due to the COVID-19 pandemic; (3) have made a claim for lost Business Income and/or Extra Expense as a result of COVID-19 and the resultant Closure Orders; and (4) have been denied coverage (the "Class").

The following people are excluded from the Class: (1) any Judge presiding over this action and the members of their family; (2) Defendant, Defendant's subsidiaries, parents, successors, predecessors, and any entity in which the Defendant or its parents have a controlling interest and its current or former employees, officers and directors; (3) persons who properly execute and file a timely request for exclusion from the Class; (4) persons whose claims in this matter have been finally adjudicated on the merits or otherwise released; (5) Plaintiff's counsel and Defendant's counsel; and (6) the legal representatives, successors, and assigns of any such excluded persons.

67. **Numerosity:** The exact number of members of the Class is unknown, but individual joinder in this case is impracticable. The Class likely consists of thousands if not hundreds of thousands of members. Members of the Class can be easily identified through

Defendant's records.

68. **Commonality and Predominance:** There are many questions of law and fact common to the claims of Plaintiff and the other members of the Class, and those questions predominate over any questions that may affect individual members of the Class. Common questions for the Class include but are not limited to the following:

- a. Whether Society Insurance issued all-risk insurance policies to Plaintiff and members of the Class in exchange for payment of premiums by Plaintiff and the Class members;
- b. Whether Plaintiff and the Class suffered a covered loss based on the common policies issued to Plaintiff and members of the Class;
- c. Whether Society Insurance wrongfully denied all claims based on COVID-19;
- d. Whether COVID-19 causes "direct physical loss or damage" to property;
- e. Whether Society Insurance's Business Income coverage applies to a suspension of business caused by COVID-19;
- f. Whether the Closure Orders constitute "action[s] of civil authority;"
- g. Whether Society Insurance's Civil Authority coverage applies to a loss of Business Income caused by the Closure Orders requiring the suspension of business as a result of COVID-19;
- h. Whether Society Insurance's Extra Expense coverage applies to efforts to minimize a loss caused by COVID-19;
- i. Whether the presence, or risk of the presence, of COVID-19 constitutes a "contamination" as defined by the Policy;
- j. Whether Society Insurance's Contamination coverage applies to a loss of

Business Income and Extra Expense as a result of COVID-19; and

- k. Whether Society Insurance has breached its contracts of insurance through a blanket denial of all claims based on business interruption, income loss or closures related to COVID-19 and the Closure Orders.

69. **Typicality:** Plaintiff's claims are typical of the claims of the other members of the Class in that Plaintiff and members of the Class purchased identical insurance coverage from Defendant containing identical language regarding business income losses and extra expense, their coverage claims for COVID-19 losses were denied by Defendant, and they have sustained damages arising out of Defendant's wrongful denials.

70. **Adequate Representation:** Plaintiff has and will continue to fairly and adequately represent and protect the interests of the Class and has retained counsel competent and experienced in complex litigation and class actions. Plaintiff has no interests antagonistic to those of the Class, and Defendant has no defenses unique to Plaintiff. Plaintiff and its counsel are committed to vigorously prosecuting this action on behalf of the members of the Class, and they have the resources to do so. Neither Plaintiff nor its counsel has any interest adverse to those of the other members of the Class.

71. **Inconsistent or Varying Adjudications and the Risk of Impediments to Other Class Members' Interests:** Plaintiff seeks class-wide adjudication as to the interpretation, and resultant scope, of the Special Property Coverage Form. The prosecution of separate actions by individual members of the Class would create an immediate risk of inconsistent or varying adjudications on this issue, which would establish incompatible standards of conduct for Defendant in evaluating future claims. Moreover, the adjudications sought by Plaintiff could, as a practical matter, substantially impair or impede the ability of other Class members, who are not

parties to this action, to protect their interests.

72. **Declaratory and Injunctive Relief:** Defendant acted or refused to act on grounds generally applicable to Plaintiff and the other members of the Class, thereby making appropriate final injunctive relief and declaratory relief, as described below, with respect to the members of the Class.

73. **Superiority:** This class action is appropriate for certification because class proceedings are superior to all other available methods for the fair and efficient adjudication of this controversy and joinder of all members of the Class is impracticable. The prosecution of separate actions by individual members of the Class would impose heavy burdens upon the courts and would create a risk of inconsistent or varying adjudications of the questions of law and fact common to the Class. By contrast, a class action presents far fewer management difficulties and provides the benefits of single adjudication, economy of scale, and comprehensive supervision by a single court. Economies of time, effort, and expense will be fostered, and uniformity of decisions will be ensured.

FIRST CAUSE OF ACTION
Declaratory Relief
(On behalf of Plaintiff and the Class)

74. Plaintiff incorporates the foregoing allegations as if fully set forth herein.

75. Plaintiff's Policy, as well as those of other members of the Class, are insurance contracts under which Defendant was paid premiums in exchange for its promise to pay Plaintiff's and the Class's losses for claims covered by the Policy.

76. Plaintiff and other members of the Class have complied with all applicable provisions of the Policy and/or those provisions have been waived by Society Insurance, or Society Insurance is estopped from asserting them.

77. Defendant has arbitrarily and without justification refused to reimburse Plaintiff and members of the Class for any losses incurred by them in connection with the covered business losses and extra expenses related to the Closure Orders and the necessary interruption of their businesses stemming from COVID-19.

78. Society Insurance has denied claims related to COVID-19 on a uniform and class-wide basis, without individual bases or investigations, such that the Court can render declaratory judgment.

79. An actual case or controversy exists regarding Plaintiff's and the Class's rights and Defendant's obligations under the Policy to reimburse Plaintiff and the Class for the full amount of losses incurred by Plaintiff and the Class in connection with the Closure Orders and the suspension of their businesses stemming from COVID-19.

80. Pursuant to Wis. Stat. § 806.04, Plaintiff and the Class seek a declaratory judgment from this Court declaring the following:

- a. Plaintiff's and the Class's losses incurred in connection with the Closure Orders and the necessary interruption of their businesses stemming from the COVID-19 pandemic are insured losses under the Special Property Coverage Form; and
- b. Society Insurance is obligated to pay Plaintiff and the Class for the full amount of the losses incurred and to be incurred in connection with the covered business losses related to the Closure Orders during the period of restoration and the necessary interruption of their businesses stemming from the COVID-19 pandemic.

SECOND CAUSE OF ACTION
Breach of Contract
(On behalf of Plaintiff and the Class)

81. Plaintiff incorporates the foregoing allegations as if fully set forth herein.

82. Plaintiff's Policy, as well as those of other members of the Class, are insurance contracts under which Defendant was paid premiums in exchange for its promise to pay Plaintiff's and the Class's losses for claims covered by the Policy.

83. Plaintiff and the Class have complied with all applicable provisions of the Policy and/or those provisions have been waived by Society Insurance, or Society Insurance is estopped from asserting them, yet Defendant has abrogated its insurance coverage obligations pursuant to the Policy's clear and unambiguous terms.

84. By denying coverage for any business losses and extra expense incurred by Plaintiff and the Class in connection with the Closure Orders and the COVID-19 pandemic, Society Insurance has breached its coverage obligations under the Policy.

85. As a result of Defendant's breaches of the policies, Plaintiff and the Class have sustained, and continue to sustain, substantial damages for which Defendant is liable, in an amount to be established at trial.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff, individually and on behalf of the other members of the Class, respectfully requests that the Court:

1. Enter an order certifying the proposed Class as defined above, designating Plaintiff Badger Crossing, Inc. as representative of the Class, and appointing Plaintiff's undersigned attorneys as Class Counsel;
2. Enter a declaratory judgment in favor of Plaintiff and the Class, and against

Defendant, declaring as follows:

- a. Plaintiff's and the Class's losses incurred in connection with the Closure Orders and the necessary interruption of their businesses stemming from the COVID-19 pandemic are insured losses under the Policy; and
 - b. Society Insurance is obligated to pay Plaintiff and the Class for the full amount of the losses incurred, and to be incurred, in connection with the covered business losses related to the Closure Orders during the period of restoration and the necessary interruption of their businesses stemming from the COVID-19 pandemic;
3. Enter a judgment on the Second Cause of Action in favor of Plaintiff and the Class, and against Defendant, and award damages for breach of contract in an amount to be established at trial;
 4. Award to Plaintiff and the Class pre- and post- judgment interest, to the extent allowable.
 5. Award to Plaintiff such other and further relief as may be just and proper.

DEMAND FOR JURY TRIAL

Plaintiff demands a jury trial for all issues so triable.

Respectfully submitted,

BADGER CROSSING, INC., d/b/a Badger Crossing Pub & Eatery, individually and on behalf of all others similarly situated,

Dated: April 28, 2020

By: /s/ Daniel Schneider
One of Plaintiff's Attorneys

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**Pro hac vice* admission to be sought