

**DISTRICT COURT, PITKIN COUNTY**

**STATE OF COLORADO**

506 E. Main, Suite 103  
Aspen, CO 81611  
(970) 925-7635

DATE FILED: March 15, 2021 6:32 PM  
FILING ID: EC33B100C7457  
CASE NUMBER: 2021CV30030

**Plaintiff:** EATEN PATH, LLC D/B/A BOSQ

v.

**Defendant:** NATIONWIDE MUTUAL INSURANCE COMPANY and ALLIED INSURANCE COMPANY OF AMERICA

*Attorneys for Plaintiff:*

Bradley A. Levin, No. 13095  
Susan S. Minamizono, No. 48984

**LEVIN SITCOFF PC**

1512 Larimer Street, Suite 650  
Denver, Colorado 80202  
Phone Number: 303-575-9390  
Fax Number: 303-575-9385

[bal@levinsitcoff.com](mailto:bal@levinsitcoff.com)  
[ssm@levinsitcoff.com](mailto:ssm@levinsitcoff.com)

**▲ COURT USE ONLY ▲**

Case Number:

Div.:

**COMPLAINT AND JURY DEMAND**

Plaintiff, Eaten Path, LLC d/b/a Bosq, by and through its counsel, LEVIN SITCOFF PC, states and alleges as follows for its Complaint and Jury Demand:

**PARTIES, JURISDICTION, AND VENUE**

1. Plaintiff, Eaten Path, LLC d/b/a Bosq (“Bosq”), is and was, at all times pertinent, a Colorado limited liability company with its principal place of business in Aspen, Colorado.
2. Upon information and belief, Defendant, Nationwide Mutual Insurance Company, is incorporated under the laws of the State of Ohio with its principal place of business in Columbus, Ohio, and is authorized to do business and is doing business in the State of Colorado.
3. Upon information and belief, Defendant, Allied Insurance Company of America (“Allied”), is incorporated under the laws of the State of Ohio with its principal place of business in Columbus, Ohio, and is authorized to do business and is doing business in the State of Colorado.

4. Upon information and belief, Allied and Nationwide Mutual Insurance Company merged. Hereinafter, Defendants are referred collectively as “Nationwide.”

5. At all times pertinent hereto, Nationwide was conducting the business of insurance in Colorado by, *inter alia*, insuring the real property and business operations of Bosq.

6. This Court has personal jurisdiction over Defendant pursuant to C.R.S. § 13-1-124(1)(a) and (b), and it has subject matter jurisdiction over the claims asserted herein.

7. Venue is proper in this district pursuant to C.R.C.P. 98(c), which Plaintiff designates as the place of trial of this action.

### **THE COVID-19 PANDEMIC**

8. COVID-19 is a communicable disease that is highly infectious.

9. On March 11, 2020, the World Health Organization declared that COVID-19 constituted a global pandemic.

10. When a person infected with COVID-19 coughs or sneezes, droplets containing the virus can be dispersed into and remain in the air and/or deposited on surfaces.

11. A recent research article published in Virology Journal concluded that COVID-19 can survive on nonporous surfaces for at least 28 days at 20 degrees Celsius (68 degrees Fahrenheit) and 50% humidity.

12. The results of a study published in The New England Journal of Medicine suggests that individuals could get COVID-19 through indirect contact with surfaces or objects used by an infected person, whether or not they were symptomatic.

13. Further, a research article published in the Journal of the American Medical Association “suggest[ ] small, virus-laden droplets may be displaced by airflows and deposited on equipment such as vents.”

14. This makes property exposed to COVID-19 unsafe and dangerous.

15. The secondary exposure of surfaces to humans is particularly concerning in places where people gather to eat, drink, and socialize, such as restaurants.

16. According to a report by the Centers for Disease Control and Prevention, adults with positive COVID-19 test results were approximately twice as likely to have reported dining at a restaurant than were those with negative test results.

17. Any person who touches a surface containing the COVID-19 virus—who then touches his or her face—can become infected with the virus and spread it to other people.
18. The average person touches his or her face approximately 2,000 times a day.
19. The clinical features of COVID-19 vary from asymptomatic forms to fatal conditions of severe respiratory failure that requires ventilation and support in an intensive care unit.
20. Pneumonia has been the most frequent severe manifestation of COVID-19, with symptoms of fever, cough, dyspnea, and bilateral infiltrates on chest imaging.
21. An effective vaccine for COVID-19 has not yet been distributed to the general public.
22. Scientists have discovered that COVID-19 has several modes of transmission.
23. Pursuant to a “Situation Report” issued by the World Health Organization, the virus can be transmitted through symptomatic transmission, pre-symptomatic transmission, or asymptomatic transmission.
24. Symptomatic transmission refers to transmission by an individual who is experiencing symptoms associated with the virus who then transfers COVID-19 to another person, object, or surface.
25. The incubation period for COVID-19, which is the time between exposure to the virus (becoming infected) and symptom onset, averages 5-6 days, however, it can be up to 14 days.
26. During this period, also known as the “pre-symptomatic period,” some infected persons can be contagious.
27. For this reason, transmission of COVID-19 from a pre-symptomatic person can occur before symptom onset.
28. An individual who does not develop symptoms, an asymptomatic case of COVID-19, can still transmit the disease to another.
29. Restaurant operations have been recognized as posing a greater risk than the average risk of spread.
30. As the number of infected persons rises, the number of people killed by the disease rises.

31. As of the date of this filing, there have been more than 29.3 million confirmed cases of COVID-19 in the United States—more than any other country.

32. An estimated 532,355 of those Americans have died from the disease.

33. As of the date of this filing, 446,000 people have been infected with COVID-19 in Colorado.

34. 6,118 of those Coloradans have died from the disease.

### **PROPERTY DAMAGE AND LOSS ARISING FROM COVID-19**

35. In 2006, Insurance Standards Office (“ISO”), the insurance industry’s advisory organization, issued a circular which advised state insurance commissioners that “[d]isease-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.”

36. On March 10, 2020, Colorado Governor Jared Polis verbally declared a state of disaster emergency in Colorado due to the presence of COVID-19 within the State.

37. On March 11, 2020, Governor Polis memorialized this state of disaster emergency in Executive Order D 2020 003.

38. Executive Order D 2020 003 explained that Colorado defines a “disaster” as “the occurrence or imminent threat of widespread or severe damage, injury, or loss of life or property resulting from any natural cause or cause of human origin, including but not limited to...epidemic.”

39. On March 13, 2020, the President of the United States declared a National Emergency due to COVID-19.

40. On March 16, 2020, following Executive Order D 2020 003, the Executive Director of the Colorado Department of Public Health and Environment (“CDPHE”) issued Public Health Order 20-22.

41. Public Health Order 20-22 was implemented to stop the spread of COVID-19.

42. In Public Health Order 20-22, the Executive Director of the CDPHE made a finding that COVID-19 is a respiratory illness that is transmitted through person-to-person contact “or by contact with surfaces contaminated with the virus.”

43. Public Health Order 20-22 in part “close[d] bars, restaurants, gyms, theaters, casinos, nonessential personal services facilities and horse track and off-track betting facilities to slow the spread of the COVID-19 virus.”

44. Public Health Order 20-22 was issued pursuant to the CDPHE’s authority “to exercise such physical control over property and the persons of the people within this state as the department may find necessary for the protection of public health.” (Emphasis added.)

45. On March 27, 2020, the Executive Director of the CDPHE issued its second updated Public Health Order 20-24 in response to the existence of hundreds of confirmed and presumptive cases of COVID-19 and related deaths across the State of Colorado.

46. Public Health Order 20-24 stated that “COVID-19 also physically contributes to property loss, contamination, and damage due to its propensity to attach to surfaces for prolonged periods of time.” (Emphasis added.)

47. By imposing social distancing requirements on all persons in the State of Colorado and prohibiting gatherings outside a residence, Public Health Order 20-24 stated that it “helps reduce the property damage caused by COVID-19 and preserves the welfare of our residents by reducing the spread of the disease in our communities and our workplaces....” (Emphasis added.)

48. Indeed, the expressed intent of Public Health Order 20-24 “is to minimize contact between residents and to the greatest extent possible minimize the exposure of the public to contaminated public surfaces.” (Emphasis added.)

49. Restaurants expose their employees and the public to surfaces contaminated by COVID-19, which can survive on nonporous surfaces for weeks.

50. On April 1, 2020, Governor Polis issued Executive Order D 2020 024.

51. Like Public Health Order 20-24, Executive Order D 2020 024 stated that “COVID-19 also physically contributes to property loss, contamination, and damage due to its propensity to attach to surfaces for prolonged periods of time.” (Emphasis added.)

52. Executive Order D 2020 032 issued by Governor Polis on April 8, 2020, again stated that COVID-19 physically contributes to property loss, contamination, and damage due to its propensity to attach to surfaces for prolonged periods of time.

53. Recently, on November 20, 2020, the Executive Director of the CDPHE issued the Second Amended Public Health Order 20 -36.

54. Second Amended Public Health Order 20 -36 requires the sanitation of restaurant and bar premises, including measures to “[m]inimize or eliminate high touch surfaces and multi-use objects.”

55. On November 28, 2020, Governor Polis issued Executive Order D 2020 265.
56. Executive Order D 2020 265 stated that the virus causing COVID-19 “can also be spread through contact with contaminated surfaces.”
57. COVID-19 is ubiquitous in certain areas such as Aspen, where Bosq is located.
58. As of December 14, 2020, all travelers arriving in Aspen and Pitkin County must complete an online travel affidavit prior to arrival, must receive a negative COVID-19 test result within 72 hours of arrival, and have been symptom-free for 10 days prior to travel.
59. COVID-19 has been present on Bosq’s premises, as at least two patrons and three employees have tested positive for the virus.
60. COVID-19 has also been present on the premises of other businesses in the area immediately surrounding Bosq, forcing the businesses to close.
61. Bosq undertook some repairs and alterations on the premises in order to partially reopen its business
62. As stated by the 2006 ISO circular and the recent executive and public health orders, COVID-19 physically contributes to property loss, contamination, and damage.

### **THE POLICIES**

63. Nationwide issued policies of property insurance to Bosq, Policy No. ACP BPFL 3037687162 for the policy period of April 15, 2019, until April 15, 2020, and Policy No. ACP BPFL 3047687162 for the policy period of April 15, 2020, until April 15, 2021 (the “Policies”).
64. Nationwide is handling Bosq’s claim under the 2019-20 Policy, Claim No. 340174-GK.
65. The Policies state: “We will pay for direct physical loss of or damage to Covered Property at the described premises in the Declarations caused by or resulting from any Covered Cause of Loss.”
66. The Policies do not define “direct physical loss of” or “damage.” defines “loss” as “accidental physical loss or accidental physical damage.”
67. The Policies define “Covered Property” as “Buildings as described under paragraph a. below....”
68. The address for Bosq is listed as “Covered Property” in the Policies.

69. The Policies provide Business Income with Extra Expense coverage for up to 12 months of “Actual Loss Sustained.”

70. Bosq ceased its business operations on March 16, 2020, pursuant to the applicable Executive and Public Health Orders.

71. Although Bosq reopened on May 5, 2020, it resumed with only limited curbside pickup, in accordance with the applicable Executive and Public Health Orders.

72. More recently, restaurants in Pitkin County, such as Bosq, has been ordered to operate indoor dining at only 25% capacity or allow 50 people, whichever is fewer.

73. Bosq incurred, and continues to incur, business interruption losses as a result of the suspension of its operations caused by direct loss of property at its premises due to the presence of COVID-19.

74. The Policies also insure actual loss of business income and necessary Extra Expense caused by action of civil authority.

75. Public access to Bosq was prohibited during various time frames since March 16, 2020 by action of civil authority.

76. Public access to other businesses immediately surrounding Bsoq was likewise prohibited by civil authority to prevent the spread of COVID-19.

77. Bosq incurred, and continues to incur, business interruption losses due to civil orders prohibiting or restricting access to the restaurant and other nearby businesses.

78. Bsoq’s operations have not yet resumed to the level which would generate the business income amount that existed prior to March 16, 2020.

#### **NATIONWIDE’S FAILURE TO INVESTIGATE AND REJECTION OF CLAIM**

79. Bosq tendered notice of loss under the 2019-20 Policy immediately after it closed down its business in March 2020. Bosq tendered notice of loss under the 2019-20 Policy for the damages it sustained due to the COVID-19 pandemic and the government-mandated closure of its business.

80. Bosq’s notice was timely.

81. The timing of Bosq’s notice resulted in no prejudice to Nationwide.

82. On March 27, 2020, Nationwide sent a letter to Bosq, informing its insured that “there was no direct physical loss or damage to Covered Property at the described premises...as a result of the business closure.”

83. Nationwide did not perform any investigation with respect to Bosq’s claim, including regarding the presence and impact of COVID-19 on the premises.

84. Bosq has complied with all conditions precedent to coverage under the Policies and/or such conditions have been waived, released, prevented, or excused by Nationwide’s unreasonable conduct and/or breach of the Policies.

**FIRST CLAIM FOR RELIEF**  
**(Breach of Contract)**

85. Bosq incorporates all allegations of this Complaint as if fully set forth herein.

86. The Policies are valid and enforceable contracts of insurance.

87. Nationwide’s acts and omissions as described herein constitute a breach of the Policies, including, but not limited to, its failure to pay benefits owed to Bosq under the Policies’ Actual Loss Sustained Business Income, Extra Expense, and Civil Authority Coverage provisions.

88. As a direct and proximate result of Nationwide’s breaches of the Policies, Bosq has suffered and is entitled to damages in amounts to be proved at trial, including without limitation the amount of the benefits owed and/or wrongfully withheld under the Policy.

**SECOND CLAIM FOR RELIEF**  
**(Bad Faith Breach of Insurance Contract)**

89. Bosq incorporates all allegations of this Complaint as if fully set forth herein.

90. Under the Policies’ implied covenant of good faith and fair dealing, Nationwide covenanted that it would deal with Bosq fairly and honestly, and do nothing to impair, hinder, or injure Bosq’s rights to benefits under the Policies.

91. Through the acts and omissions described above, Nationwide breached that covenant. Nationwide’s conduct fell below the applicable common law and industry standards of care, violated the duties of good faith and fair dealing, and constituted the tort of bad faith breach of insurance contract.

92. Nationwide’s acts and omissions were unreasonable and Nationwide knew so, and/or Nationwide acted with reckless disregard for Bosq’s rights and interests.

93. Nationwide's acts and omissions were committed in disregard of Bosq's reasonable expectations as an insured under the Policy.

94. Nationwide breached its duty of good faith and fair dealing through the following unreasonable acts, among others:

- a. Depriving Bosq of the benefits and protections of the Policies;
- b. Placing its own interests above those of Bosq;
- c. Failing to timely pay benefits owed under the Policies;
- d. Misrepresenting facts concerning the Policies' coverage;
- e. Failing to conduct a reasonable and impartial investigation of the loss based upon all available information;
- f. Forcing Bosq to bring a lawsuit to recover benefits owed and protections guaranteed under the Policies;
- g. Violating the Unfair Claims Settlement Practices Act; and
- h. Other conduct to be discovered in the course of these proceedings.

95. As a direct and proximate result of Nationwide's bad faith breach of the Policies, Bosq has suffered and is entitled to damages in amounts to be proved at trial.

**THIRD CLAIM FOR RELIEF**  
**(Violation of C.R.S. § 10-3-1115 and Relief Under § 10-3-1116)**

96. Bosq incorporates all allegations of this Complaint as if fully set forth herein.

97. Sections 10-3-1115(1) and (2), C.R.S., forbid insurers such as Nationwide from unreasonably delaying or denying payment of a claim for benefits owed to or on behalf of a first-party claimant.

98. Bosq is a first-party claimant as that term is used under C.R.S. § 10-3-1115(1)(A)(I).

99. Nationwide is an entity engaged in the business of insurance.

100. Nationwide delayed and/or denied payment of first-party benefits owed to Bosq and did so without a reasonable basis within the meaning of C.R.S. § 10-3-1115(2) for the reasons set forth above.

101. Section 10-3-1116, C.R.S., provides that a first-party claimant whose claim has been unreasonably delayed or denied by an insurer may bring an action to recover reasonable attorneys' fees and court costs and two times the covered benefit that was unreasonably delayed or denied.

102. As described herein, Nationwide's acts and omissions violated C.R.S. § 10-3-1115(2).

103. Bosq therefore brings this claim to recover damages awardable under C.R.S. § 10-3-1116, separate from and in addition to those remedies and damages available under any other applicable claims for relief.

**FOURTH CLAIM FOR RELIEF**  
**(Declaratory Judgment)**

104. Bosq incorporates all allegations of this Complaint as if fully set forth herein.

105. The Policies are contracts under which Bosq paid Nationwide substantial premiums in exchange for Nationwide's promise to pay Bosq's claims for losses covered by the Policies.

106. Bosq has complied with all applicable provisions of the Policies and/or those provisions have been waived by Nationwide, but Nationwide has vitiated its obligations toward Bosq pursuant to the Policies' terms.

107. An actual case or controversy exists regarding Bosq's rights and Nationwide's obligations under the Policies to provide benefits and coverage for the losses incurred by Bosq in connection with the COVID-19 pandemic and the government-mandated closure of Bosq's property.

108. Pursuant to C.R.C.P. 57, Bosq seeks a declaratory judgment from the Court declaring the following:

- a. That Bosq's losses incurred due to the COVID-19 pandemic and government-mandated closure of its property are insured losses under the Policies; and
- b. Nationwide is obligated to pay Bosq for the full amount of the losses it has incurred in connection with the COVID-19 pandemic and government-mandated closure of Bosq's property.

**WHEREFORE**, Plaintiff, Eaten Path, LLC d/b/a Bosq, requests that the Court enter judgment in its favor and against Defendants, Nationwide Mutual Insurance Company and Allied Insurance Company of America, and award damages as follows:

- a. For all benefits due under the Policies for covered losses;
- b. For other compensatory economic damages in amounts to be proved at trial;
- c. For two-times the covered benefit as permitted by C.R.S. § 10-3-1116(1);
- d. For reasonable attorneys' fees, costs, and expenses incurred herein;
- e. For all pre- and post-judgment interest, statutory and moratory, as permitted by law;
- f. For a declaratory judgment as set forth above; and
- g. For such other and further relief as the law permits and this Court deems just and proper.

**PLAINTIFF DEMANDS A TRIAL BY JURY ON ALL ISSUES SO TRIABLE.**

DATED this 15th day of March 2021.

Respectfully submitted,

**LEVIN SITCOFF PC**

*s/ Susan S. Minamizono* \_\_\_\_\_

Bradley A. Levin

Susan S. Minamizono

*Attorneys for Plaintiff*

**Plaintiff's Address:**

312 S. Mill St.  
Aspen, CO 81611