

CAUSE NO. D-1-GN-20-002659

TERRY BLACK’S BARBECUE, LLC	§	IN THE DISTRICT COURT
and TERRY BLACK’S BARBECUE	§	
DALLAS, LLC,	§	
<i>Plaintiffs,</i>	§	
	§	
v.	§	250TH
	§	_____ JUDICIAL DISTRICT
	§	
STATE AUTOMOBILE MUTUAL	§	
INSURANCE COMPANY and	§	
RUCKER-OHLENDORF INSURANCE,	§	
<i>Defendants.</i>	§	TRAVIS COUNTY, TEXAS

PLAINTIFFS’ ORIGINAL PETITION

Plaintiffs Terry Black’s Barbecue, LLC (“TB Austin”) and Terry Black’s Barbecue Dallas, LLC (“TB Dallas”) file this Original Petition complaining of Defendants State Automobile Mutual Insurance Company (the “Insurance Company” or “State Auto”) and Rucker-Ohlendorf Insurance (“ROI”) and for causes of action, show as follows:

DISCOVERY CONTROL PLAN AND STATEMENT OF AMOUNT OF CLAIM

Plaintiffs plead that discovery should be conducted in accordance with Level 3 of TEX. R. CIV. P. 190.3. Plaintiffs affirmatively plead that they seek monetary relief aggregating more than \$1,000,000.00.

PARTIES

1. Plaintiff Terry Black’s Barbecue, LLC is a Texas limited liability company that owns and operates a dine-in restaurant in Austin, Texas known as Terry Black’s Barbecue, located at 1003 Barton Springs Rd., Austin, Texas 78704.

2. Plaintiff Terry Black’s Barbecue Dallas, LLC is a Texas limited liability company that owns and operates a dine-in restaurant in Dallas, Texas, known as Terry Black’s Barbecue, located at 3025 Main Street, Dallas, Texas 75226.

3. Defendant State Automobile Mutual Insurance Company is an Ohio corporation domiciled in Ohio that is authorized to transact insurance business in Texas, who sold Plaintiffs separate policies of insurance covering their respective business locations. Defendant State Automobile Mutual Insurance Company may be served with process by serving its registered agent for service, Corporation Service Company, 211 East 7th Street, Suite 620, Austin, Texas 78701-3218.

4. Defendant Rucker-Ohlendorf Insurance is a Texas proprietorship and domiciliary, that acts as an insurance brokerage or agency, who sold to Plaintiffs the insurance policies which are the subject of this lawsuit, and who may be served with citation by delivering the same to Carl Ohlendorf at 115 S. Main Street, Lockhart, Texas. 78644.

JURISDICTION AND VENUE

5. This Court has subject matter jurisdiction over this Cause because the amount in controversy and subject matter are within the jurisdictional limits of this Court.

6. Venue is proper pursuant to §§15.002(a)(1), 15.003 and/or 15.032, Tex. Civ. Prac. & Rem. Code, and §17.56, Tex. Bus. & Com. Code.

7. The Court has jurisdiction to grant declaratory relief under Chapter 37, Tex. Civ. Prac. & Rem. Code because an actual controversy exists between the parties concerning their respective rights and obligations under the subject insurance policies; and in this regard, Defendant ROI is joined as a necessary party pursuant to §37.006(a), Tex. Civ. Prac. & Rem. Code, in addition to being sued for its independent tortious acts.

FACTS

8. Plaintiffs own and operate restaurants in Austin and Dallas that, pursuant to Civil Authority orders and mandates, have been forced to cease their full service operations because of

a physical injury to their properties that includes but is not limited to the physical curtailment of access to, and prohibition against the use of portions of their properties by patrons, customers and members of the public, to avoid human contact with a physical contagion known to affix to and survive upon property surfaces, where it can be transmitted to humans who come into contact with it.

9. In exchange for substantial premiums, Defendants sold to Plaintiffs, respectively, policies of commercial property insurance providing indemnity benefits for losses sustained by Plaintiffs for business interruption income losses, and certain related expenses. In fact, of the substantial sums of premiums paid by Plaintiffs for commercial property coverages, TB Austin paid \$10,742.00 out of \$19,779.00 in commercial property coverage premiums specifically for Business Income Losses coverage, and TB Dallas paid \$4,140.00 out of \$12,369.00 total commercial property coverage premium. TB Austin also paid \$5,800.00 and TB Dallas paid \$2,400.00, in premiums charged for additional coverage amounts in the form of umbrella insurance coverage.

10. When Plaintiffs purchased their policies from Defendants, they expected and were promised broad form Business Income Loss coverage, meeting their business economic needs in the event of a loss event, commensurate with Defendant State Auto's top of the line insurance product, which included what this Defendant calls its "Premier Property Plus Endorsement." Plaintiff TB Austin is insured under State Auto Policy No. PBP2840306. Plaintiff TB Dallas is insured under State Auto Policy No. PBP2883510. Both policies include additional coverages in the form of umbrella insurance. Defendant ROI assured Plaintiffs that they had purchased from State Auto, sufficient business interruption coverage both in terms of scope of potential losses, and amounts, to meet their business needs and to protect them from reasonably contemplated loss

amounts, in the event of an interruption event.

11. On March 11, 2020 World Health Organization Director General Tedros Adhanom Ghebreyesus declared the COVID-19 outbreak a worldwide pandemic: “WHO has been assessing this outbreak around the clock and we are deeply concerned both by the alarming levels of spread and severity, and by the alarming levels of inaction. We have therefore made the assessment that COVID-19 can be characterized as a pandemic.”¹

12. On March 16, 2020, the Centers for Disease Control and Prevention, and members of the national Coronavirus Task Force issued to the American public guidance, styled as “30 Days to Slow the Spread” for stopping the spread of COVID-19. This guidance advised individuals to adopt far-reaching social distancing measures, such as working from home, avoiding shopping trips and gatherings of more than 10 people, and staying away from bars, restaurants, and food courts.

13. Following this advisory for individuals to adopt far-reaching social distancing measures, many state and local government administrations across the nation recognized the need to take steps to protect the health and safety of their residents from the human to human and surface to human spread of COVID-19. As a result, many governmental entities entered a series of similar and similarly reasoned Civil Authority orders suspending or severely curtailing, if not closing, business operations of non-essential businesses that interact with the public and provide gathering places for the individuals, and preventing use and access of business premises to prevent human to human, or surface to human transmission of COVID-19 under the theories that everyone should be presumed to be a carrier and source of transmission, and all surfaces in proximity to human touch, use or normal human activity (such as breathing, talking, sneezing and coughing) should be

¹ See <https://www.who.int/dg/speeches/detail/who-director-general-s-opening-remarks-at-the-media-briefing-on-COVID-19-11-march-2020>

presumed to be a transmission source.

14. The Texas, Austin and Dallas governmental/Civil Authority actions included:
 - a. On March 6th and 12th respectively, the Mayors of Austin and Dallas declared local states of disaster prohibiting gatherings in their cities, of more than limited numbers of people.
 - b. Texas Governor Abbott issued a Declaration of State of Disaster on or about March 12, 2020 to prepare for, respond to and mitigate the spread of the Coronavirus outbreak declared by the WHO to be an international pandemic.
 - c. As Austin, Travis County, Dallas and Dallas County officials continued to order a reduction in gatherings, and limiting gathering locations, on March 19, 2020, Governor Abbott ordered a prohibition of gatherings in groups of ten or more people, and the Commissioner of the Texas Department of Health and Human Services proclaimed that everyone in Texas “shall act responsibly to prevent and control communicable diseases;” via an order which limited outings from the home to essential activities, and prohibited all dine-in options at restaurants.
 - d. Further limitations on gathering numbers and locations, and shelter in place orders followed allowing only essential businesses to continue to operate, in order to curtail to spread the contagion known as Coronavirus and to curtail or limit the physical property damage the virus or threat of its presence was causing due to its proclivity to attach to surfaces for prolonged periods of time.
 - e. While some business re-openings are gradually being allowed in Texas, and the State of Texas is prohibiting curtailment orders more restrictive than those issued by Governor Abbott, Plaintiffs’ business operations remain subject to curtailment and limitations on the numbers of people who may gather in and at their business locations, where people may gather in and at the business locations, and how much business can be done.

15. Notably, on or about March 31, 2020, Dallas County Judge Clay Jenkins observed in one of his Civil Authority orders that in addition to be highly contagious via human to human transmission, the COVID 19 virus causes property loss or damage due to its ability to attach to surfaces for prolonged periods of time. Plaintiffs have complied with all applicable Civil Authority orders, and they have curtailed and suspended their usual and customary business operations, confining their operations to the very limited extent that is both safe and possible given the ordered

restrictions.

16. In mid-March, upon realizing they had suffered business interruption and a loss of business income all as a result of the Civil Authority orders they were required to comply with and the impact upon the same, Plaintiffs provided notice of their claims for insurance benefits to State Auto, through ROI -- who indicated its belief that insurance benefits were available given the language of the policies, to cover and reimburse Plaintiffs' business income losses.

17. The Business Income (And Extra Expense) Coverage Form, Commercial Property form CP 00 30 10 12 in the Plaintiffs' policies with State Auto include the following:

We will pay for the actual loss of Business Income including "rental value" you sustain and Extra Expenses you incur due to the necessary "suspension" of your "operations" during the "period of restoration". The "suspension" must be caused by direct physical loss of or damage to property at premises which are described in the Declarations. The loss or damage must be caused by or result from a Covered cause of Loss.

The form goes on to provide:

We will pay for the actual loss of Business Income you sustain due to the necessary "suspension" of your "operations" during the "period of restoration." The "suspension" must be caused by direct physical loss of or damage to "dependent property" at premises described in the Declarations caused by or resulting from a Covered Cause of Loss"

Plaintiffs' Policies clearly provide business interruption and loss of income coverage caused by injuries or damages to other properties, and that do not involve a direct physical injury or damage to Plaintiffs' actual premises. "Dependent Properties are those owned or operated by others whom you depend on to deliver materials or services to you or to others on your account, those that accept your services or those that attract customers to your business.

18. Form SI 10 02 06 14 of Plaintiffs' Policies -- a Restaurant Extension Endorsement -- provides even broader coverage, and states with regard to Business Income (and Extra Expense) Coverage or Business Income (without Extra Expenses) coverages, the following additional provisions apply:

The Causes of Loss applicable to the Business Income Form attached to this policy shall include . . . the “suspension of your “operations at the described premises due to the order of a civil authority . . . resulting from the actual or alleged exposure of the described premises to a contagious or infectious diseases.

Additional Coverages, Civil Authority -- form CP0030 of both Policies provides:

When a Covered Cause of Loss causes damage to property other than property at the described premises, we will pay for the actual loss of Business Income you sustain and necessary Extra Expense caused by action of civil authority that prohibits access to the described premises, provided that both of the following apply:

- (1) Access to the area immediately surrounding the damaged property is prohibited by civil authority as a result of the damage, and the described premises are within that area but are not more than one mile from the damaged property; and
- (2) The action of civil authority is taken in response to dangerous physical conditions resulting from the damage or continuation of the Covered Cause of Loss that caused the damage, or the action is taken to enable a civil authority to have unimpeded access to the damaged property.

19. Notwithstanding the foregoing, on April 8th State Auto notified Plaintiffs that there would be no coverage provided, for their respective claims, for reasons that would be articulated in later correspondence. That later correspondence confirmed the denial of coverage, offering baseless reasons for not providing the required coverage, and revealed that State Auto had made a generic corporate-wide decision to deny all business interruption or business income loss claims arising because of the COVID-19 situation, and find a reason or reason to justify the denial of coverage on an individual claim basis.

20. Plaintiffs are entitled to Business Income Loss and Extra Expense coverage under one or more of the provisions of their respective Policies and are entitled to a monetary recovery up to the limits prescribed in each of the Policies’ primary, additional and umbrellas coverage provisions.

CAUSES OF ACTION

Count 1: Declaratory Judgment

21. Plaintiffs' Policies are contracts under which Defendant State Auto was paid premiums in exchange for its promise to pay Plaintiffs' losses for claims covered by the Policy.

22. Plaintiffs have complied with all applicable provisions of the Policies and/or those provisions have been waived by Defendant State Auto, or Defendant State Auto is estopped from asserting them, and yet Defendant State Auto has abrogated its insurance coverage obligations pursuant to the Policies' clear and unambiguous terms and has wrongfully and illegally refused to provide coverage to which Plaintiffs are entitled.

23. An actual case or controversy exists regarding Plaintiffs' rights and Defendant State Auto's obligations under the Policies to reimburse Plaintiffs for the full amount of Business Income losses incurred by Plaintiffs in connection with the suspension of their businesses activities and operations, stemming from civil authority orders the physically prevented access and use of physical areas of Plaintiffs' premises, to mitigate the COVID-19 pandemic by preventing human to human and surface to human transmission of the contagion, in locations where it was presumed to exist on a contagious basis, and where it was presumed to be transmittable in either manner.

24. Pursuant to the Texas Uniform Declaratory Judgment Act, Plaintiffs seek a declaratory judgment from this Court declaring the following:

- i. Plaintiffs have enforceable policies of insurance with Defendant State Auto that provide Business Income loss coverage and benefits for covered losses, and they both have suffered a physical loss of use of their business properties.
- ii. Plaintiffs have suffered, and made a timely claim under their Policies, for payment of the actual loss of Business Income including "rental value" they have sustained, and Extra Expenses they have incurred, due to the necessary "suspension" of their "operations" caused by Civil Authority orders.
- iii. Plaintiffs have suffered, and made a timely claim under their Policies,

for payment of the actual loss of Business Income they sustained due to the necessary “suspension” of their “operations” at their respective business premises caused by direct physical loss of or damage to “dependent property.”

- iv. Plaintiffs have suffered, and made a timely claim under their Policies, for payment of the actual loss of Business Income they sustained due to the suspension of their “operations due to the order of a civil authority . . . resulting from the actual or alleged exposure of their described premises to a contagious or infectious disease.
- v. Plaintiffs have suffered the actual loss of Business Income and necessary Extra Expense caused by action of civil authority that prohibits access to their described premises, where 1) access to the area immediately surrounding their damaged property is prohibited by civil authority as a result of the damage, and the described premises are within that area but are not more than one mile from the damaged property; and, 2) the action of the civil authority was taken in response to dangerous physical conditions resulting from the damage or continuation of the Covered Cause of Loss that caused the damage, or the action is taken to enable a civil authority to have unimpeded access to the damaged property.
- vi. Plaintiffs are not required to have suffered a direct physical damage or loss at their Property, to be entitled to coverage under their Policies for Business Income Losses suffered as a result of orders of Civil Authorities that curtailed or prohibited physical access to their properties and/or the use of the same, thereby suspending business operations.
- vii. Orders of Civil Authorities that curtailed or prohibited physical access to Plaintiffs’ properties and/or the use of the same, thereby suspending business operations, constitute a direct physical damage or loss to the Plaintiffs’ properties.
- viii. Actual or alleged exposure of Plaintiffs’ premises to a contagious or infectious disease such as COVID-19 resulting in the issuance of Civil Authority orders suspending business operations, is a direct physical loss or injury to the properties affected by the suspension orders.
- ix. State Auto’s conclusion that direct physical damage or loss triggering Business Income Loss coverage requires a structural loss or damage to Property is neither supported by the Policies or the facts.
- x. The Business Income Losses and Extra Expenses suffered by Plaintiffs forming the basis of their claims for coverage under their Policies are

not losses or damages that are expressly excluded by the Policies.

- xi. Subject to the limits of coverage prescribed by the Policies, Defendant State Auto is obligated to pay Plaintiffs for the full amount of Plaintiffs' Business Income losses and Extra Expenses incurred and to be incurred in connection as a result of the forced suspension of their operations in response to Civil Authority Orders.

25. Had State Auto wanted and intended to exclude from coverage, losses arising from Civil Authority orders in response to a pandemic – designed to prevent physical damage to insured properties, insureds' dependent properties, and properties surrounding the insured properties – all of which have been equally exposed to a common contagion and infectious disease capable of human to human and surface to human transmission – it could have included a clear and specific exclusion. This Defendant did not do so, and instead, collected substantial premiums from insureds, issuing insurance policies which directly contemplate coverage of precisely the losses that Plaintiffs have incurred, under the precise circumstances where those losses have arisen.

26. Forcing insureds to expend their already limited financial resources -- better spent on operating their struggling businesses -- to obtain judicial relief to enforce obviously enforceable insurance policy obligations, especially in circumstances where the need for the insurance benefits withheld by Defendant is literally an existential need, should never be tolerated by the courts called upon to expend their judicial resources in such a manner. Accordingly, in addition to the declarations prayed for above, Plaintiffs should be awarded their attorneys' fees and costs, as authorized by Section 37.009, Tex. Civ. Prac. & Rem. Code.

Count 2: Breach of Contract

27. Plaintiffs and State Auto have valid agreements of insurance. Plaintiffs have performed all of their obligations as specified by the policies, including payments of all premiums due.

28. The policies provide that State Auto will pay Plaintiffs for their actual loss of business income due to the necessary suspension of operations, and for any necessary expenses that Plaintiffs incur that they would not have incurred had there been no loss or damages of the nature suffered by Plaintiffs.

29. Plaintiffs' commercial insurance policies provide for coverage for suspension of business operations due to closures caused by the action of Civil Authorities.

30. As stated above, Plaintiffs were forced to close a portion of their premises to the public and cease or substantially reduce their operations due to the measures put in place by Civil Authorities to stop the spread of COVID-19 through human to human and surface to human transmission.

31. State Auto refuses to perform under the policies. Specifically, State Auto has denied and refused to provide coverage for loss of property, business income losses or extra expenses incurred due to the measures put in place by Civil Authorities to stop the spread of COVID-19 through human to human and surface to human transmission.

32. As a result of State Auto's repudiation, anticipatory breaches, and/or actual breaches of the insurance policies, Plaintiffs have suffered actual damages, and seek to recover the same, plus attorney's fees and costs.

Count 3: Breach of Good Faith and Fair Dealing

33. State Auto's conduct constitutes a breach of the common-law duty of good faith and fair dealing owed to insureds in insurance contracts.

34. "Good faith and fair dealing" is defined as the degree and diligence which a man of ordinary care and prudence would exercise in the management of one's own business.

35. This tort arises from Texas law, which recognizes that a special relationship exists

as a result of the unequal bargaining power between Plaintiffs (the policyholders) and State Auto (the insurer).

36. Part of this unequal bargaining power results from the fact that State Auto like other insurers, controls entirely the evaluation, processing, and denial of claims.

37. By immediately refuting coverage and finding a justifying explanation after-the-fact of denying the Plaintiffs' claims outright, State Auto is attempting to vary the terms of loss.

Count 4: Violation of the Texas Insurance Code

38. Chapter 541 of the Texas Insurance sets out Unfair Methods of Competition, Unfair or Deceptive Acts or Practices that insurance companies should not engage in, as well as Unfair Settlement Practices, which include things like: misrepresenting a material fact or policy provision; failing to attempt in good faith to effect a prompt, fair and equitable settlement where the insurer's liability has become reasonably clear; failing to provide a policyholder with a reasonable explanation of why a claim was denied or offer of compromise; and refusing to pay a claim without conducting a reasonable investigation.

39. State Auto has failed and continues to fail and refuse to meet its obligations under the Texas Insurance Code regarding the fair and equitable settled of Plaintiffs' claims, providing reasonable explanation of why the claims have been denied and refusing to pay the claims. State Auto has misrepresented material facts or policy provisions and otherwise engaged in the bad faith handling of Plaintiffs' claims, as described above.

40. State Auto's conduct constitutes a violation of the Texas Insurance Code §§541.051, 541.060, 542.003, and/or 542.057-58. Its actions and statutory violations have damaged Plaintiffs in excess of the jurisdictional limits of this Court. Plaintiffs are entitled to recover and seek to recover from State Auto, actual damages, the loss of the benefits of that should

have been paid pursuant to the Policies but for the wrongful denial of Plaintiffs' claims and wrongful withholding of payment, consequential damages not covered by the Policies, attorney's fees and costs. And given the knowing and intentional actions of State Auto that will be proven in this Cause, Plaintiffs are entitled to recover and seek to recover treble damages as authorized by Tex. Ins. Code Section 541.152 and punitive or exemplary damages as authorized by Chapter 41 of the Texas Civil Practice and Remedies Code and/or Section 542.060, Tex. Ins. Code.

Count 5: Violation of the Texas Prompt Payment Act

41. Defendant State Auto has failed to timely and promptly pay Plaintiffs' claims as required under Tex. Ins. Code Sections 542.055-542.059, and it should be ordered to pay Plaintiffs "in addition to the amount of claims, interest on the amount of the claims at the rate of 18 percent a year as damages, together with reasonable and necessary attorney's fees.

Count 6: Negligence

42. Plaintiffs retained the services of Defendant ROI to provide professional insurance consulting services which included evaluating their specific insurance needs, recommending suitable coverages protections required of their business needs and their specific business operations in the event of an insurable loss event, and procuring such coverages from reputable insurers.

43. When Plaintiffs agreed to renew and purchase Policies with State Auto, Defendant ROI knew and understood the nature of Plaintiffs' businesses, their income streams and anticipated income streams, and their susceptibility to casualty losses that would materially curtail or interrupt their business income. Accordingly, Defendant ROI could have and should have ensured that Plaintiffs purchased insurance coverage that indeed covered them for the circumstances and losses that have occurred, as described in this Petition, in an amount of coverage that was commensurate

with Plaintiffs' predictable business income losses.

44. Plaintiffs reasonably believed and expected that the insurance coverage they purchased through ROI, and for which they paid substantial premiums – a portion of which was used to pay ROI commissions – would indeed cover them for the circumstances and losses that have occurred, as described in this Petition, in an amount of coverage that was commensurate with Plaintiffs' predictable business income losses. If Business Income loss coverage is found not to exist under the facts and circumstances of this Cause, Defendant ROI was negligent in failing to procure such coverage for Plaintiffs.

45. Defendant ROI also negligently failed to evaluate the sufficiency of the coverage limits it was recommending and selling to Plaintiffs and it was negligent in failing to recommend, and to procure for Plaintiffs, Business Income loss coverage with limits in greater amounts that would be sufficient to cover all or a significant portion of their predictable losses in the event of a covered business interruption event.

46. Plaintiffs have been damaged as a direct and proximate result of Defendant ROI's negligence and seek to recover such damages of and from Defendant ROI.

CONDITIONS PRECEDENT

All conditions precedent to Plaintiffs' right to bring this suit and to recover the relief requested herein have been performed, have occurred, and/or have been waived.

REQUEST FOR EMERGENCY SCHEDULING

Plaintiffs' losses and injuries and described herein are urgent and ongoing. As indicated above, the need for the insurance proceeds they are entitled to is an existential need. Absent a prompt, accelerated adjudication of their claims and causes of action, Plaintiffs' ability to continue their business operations may be in jeopardy. In this regard, any requirement for the delivery of

any putatively required pre-suit notices to Defendants should be waived in this Cause. The claim denial at issue is part of a systemic, industry-wide practice of denying such claims and forcing insureds to enforce their rights in Court. The purposes of pre-suit notice requirements, if any, would be frustrated, as the same will not encourage an early settlement of the claims at issue. In fact, delivery of such notices would be futile, and would only serve to delay.

WHEREFORE, Plaintiffs request that Defendants be cited to appear and answer, and that upon final trial, they be awarded a judgment against the Defendants as follows:

- (1) Issuing a Declaratory Judgment declaring the Parties' rights and obligations under the insurance policies as requested above;
- (2) Awarding Plaintiffs actual, compensatory and/or statutory, and punitive or exemplary damages along with prejudgment interest at the maximum rate allowable by law;
- (3) Awarding Plaintiffs reasonable and necessary attorney's fees and costs of court; and,
- (4) Awarding Plaintiffs such other and further relief the Court deems just, proper, and equitable.

Respectfully submitted,

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