

IN THE IOWA DISTRICT COURT FOR POLK COUNTY

<p>LISETTE ENTERPRISES, LTD.,</p> <p>Plaintiff,</p> <p>v.</p> <p>REGENT INSURANCE COMPANY, A MEMBER OF QBE NORTH AMERICA,</p> <p>Defendant.</p>	<p>Case No. _____</p> <p>PETITION AND JURY DEMAND</p>
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COMES NOW the Plaintiff, and for its Petition at Law and Jury Demand states as follows:

PARTIES AND JURISDICTION

1. This Petition is for a civil action in which Plaintiff seeks declaratory relief regarding the coverage provided under Plaintiff's insurance policy and also seeks to recover damages for breach of contract and bad faith caused by the Defendant's denial of business interruption insurance claims.

2. Plaintiff is an Iowa company qualified to do business and doing business in the state of Iowa. The Plaintiff is known as Lucca Restaurant. The Plaintiff is owned by Steve Logsdon.

3. Plaintiff is located at 420 East Locust Street, Des Moines, Polk County, IA 50309.

4. Plaintiff obtained a business owners policy through Holmes Murphy Insurance Agency in Waukee, Iowa, on November 20, 2019, which is still in effect. Holmes Murphy Insurance Agency is an agent for Plaintiff.

5. Upon information and belief, the Defendant is a Wisconsin insurance company authorized to sell property/casualty insurance in Iowa, to include business owner coverages.

6. Upon information and belief, Defendant's business address is PO Box 975, Sun Prairie, WI 53590.

7. The insurance policy issued was purchased in Iowa and primarily to be enforced and interpreted in Polk County, Iowa.

8. The damages giving rise to this Petition are sufficient to meet the jurisdictional requirements for the amount in controversy.

9. Jurisdiction is conferred upon this court pursuant to Iowa Code §602.6101.

10. Venue is conferred pursuant to Iowa Code §616.18.

FACTUAL BACKGROUND

11. Defendant caused to be issued a business interruption and loss of income policy to the Plaintiff. The policy number is BBP000204601. A copy of the Declaration page is attached hereto. See Exhibit A.

12. The policy in question is a business owners property coverage form providing for coverage that would pay for direct physical loss or damage to the premises described in the Declaration. The policy is called an "All Risks Policy."

13. Pursuant to the policy, it covered causes of loss to include risks of direct physical loss unless otherwise excluded or limited by the policy.

14. The policy further provided that Defendant would pay for the actual loss of business income sustained due to the necessary suspension of operations during the

period of restoration. The suspension must be caused by direct physical loss of or damage to the property at the described premises. The loss or damage must be caused by or result from a Covered Cause of Loss.

15. Although the policy contained an exclusion providing that Defendant will not pay for loss and damage caused by or resulting from any virus... that induces, or is capable of inducing, physical distress, illness, or disease, and Defendant has denied coverage based upon the virus exclusion, the Plaintiff did not close or cease its operations because of the coronavirus.

16. On or about March 17, 2020, Governor Kim Reynolds issued a governmental Proclamation and Order that required the closure of bars, restaurants, and food and beverage businesses throughout the state of Iowa.

17. Governor Reynolds' March 17, 2020, Order did cause and continued to cause the necessary suspension of Plaintiff's operation, which in turn has caused Plaintiff to sustain significant losses to its business income. The Plaintiff lost the physical use of its property for its intended purposes and had a direct physical loss.

18. As a result of Governor Reynolds' Proclamation, Plaintiff has been forced to terminate and/or furlough many employees.

19. Plaintiff, in an effort to mitigate its income losses, opened its dining facilities on May 6, 2020 at 50 percent capacity as allowed by the Governor's modification of the March 17 Proclamation. Plaintiff opened back up on May 6 for dinner on Thursday, Friday and Saturday and lunch on Thursday through Friday. Plaintiff did not do any carry-out orders.

20. Plaintiff has incurred a net loss of business income in excess of \$50,000 each month it has been closed, plus additional expenses, and expects to continue to incur significant losses until such time as it is able to completely and fully reopen and re-gain market share of its business prior to the Governor's Proclamation and Order.

21. Plaintiff submitted a claim to Defendant for loss of business income under its business owner's policy as a result of the Governor of the State of Iowa issuing an Order closing all restaurants and food and beverage businesses throughout the state of Iowa.

22. Plaintiff received a letter denying the claim for business income loss based upon the review of the policy. The denial-of-coverage letter dated August 18, 2020 is attached hereto and made a part of the allegations of the Petition. See Exhibit B.

23. Defendant's Business Owner's policy is a form policy drafted by the Insurance Services Office, Inc. ("ISO").

24. The provisions and exclusions are not the product of discussions or negotiations between Defendant and the Plaintiff. Rather, the exclusions in the all-risk policy consist of standardized language and terms that have been developed by the insurance industry through its trade association, the ISO, and are used industry and nationwide.

25. The Business Income provision in the policy requires Defendant to "pay for the actual loss of business income sustained due to the necessary suspension of operations during the 'period of restoration.'" The suspension must be caused by direct

physical loss of or damage to the property at the described premises. The loss or damage must be caused by or result from a Covered Cause of Loss.”

26. The policy does not define the phrase “direct physical loss of or damage to....,” nor does it define “direct,” “physical,” “loss,” or “damage” individually.

27. The use of the disjunctive “or” in the phrase “direct physical loss of or damage to” means that coverage is triggered if either a physical loss of property or damage to property occurs.

28. The policy’s use of the disjunctive “or” between the terms “physical loss” and “physical damage” necessarily means that either a “loss” or “damage” is required, and that “loss” is distinct from “damage.”

29. The policy does not state or otherwise define “loss” to require an actual alteration of property.

30. At the time Plaintiff purchased the policy, courts had held on numerous occasions that any condition making it impossible to use property for its intended use constituted “physical loss or damage to property.”

31. The purported reason for the denial of coverage as set forth in the declination letter was that there is a policy exclusion of loss due to a virus; that the business income loss must be caused by direct physical damage to the premises, and that the Civil Authority provision of the policy was not applicable. Further, that the suspension of business was not caused by direct physical loss of or damage to property.

32. No one on behalf of the Defendant investigated the insured facility in any manner to determine whether the coronavirus or any other virus was present in the facility prior to issuing the declination letter.

33. No one on behalf of Defendant spoke to Plaintiff's owner, Steve Logsdon, at any time prior to declining coverage, as a part of any investigation.

34. Plaintiff has no knowledge of the insured facility being infected with the coronavirus or any other virus, nor is it aware of any employee or customer having contracted the coronavirus or any other virus at the restaurant at any time prior to the Governor's Proclamation and Order, or subsequent to the Governor's Proclamation and Order.

35. An additional purported reason for denial of coverage was that an "Ordinance or Law" exclusion precluded coverage.

COVID 19

36. In December 2019, an outbreak of illness known as Covid-19 caused by a novel coronavirus formally known as SARS-CoV-2 was first identified in Whuan, Hebei Province, China.

37. In an event that has not occurred in more than a century, a pandemic of global proportions then ensued, with the virus quickly spreading to Europe and then to the United States.

38. From the first reported case in the United States in January 2020 to the present, the impact of the virus and the resulting disease has been staggering on life and property.

39. On February 26, 2020, the Centers for Disease Control and Prevention (the "CDC") warned that community transmission of the disease existed in the United States. The virus was spreading with no ability to trace the origins of new infections.¹

40. Moreover, the nature of the virus has made its containment particularly challenging. Numerous scientific studies and articles have concluded the virus spreads when droplets from an infected person land on objects and surfaces and then, after contacting the infected objects and surfaces, other individuals touch their eyes, noses, or mouths.

41. Per the CDC and World Health Organization (the "WHO"), a person may become infected by: (1) coming into close contact (about 6 feet) with a person who has COVID-19; (2) absorbing respiratory droplets when an infected person talks, sneezes, or coughs; or (3) touching surfaces or objects that have the virus on them and then touching his or her mouth, eyes, or nose.²

42. Besides being deadly, the virus is challenging to contain because infected individuals can be asymptomatic-and thus unaware that they might be spreading the virus through the mere touching of objects and surfaces.

¹ CDC Confirms Possible Instance of Community Spread of COVID-19 in U.S., Centers for Disease Control and Prevention, <https://www.cdc.gov/media/releases/2020/s0226-Covid-19-spread.html> (last visited August 15, 2020).

² <https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/prevention.html> (last visited August 15, 2020).

43. Studies have estimated that more than 40% of infected individuals may never develop any symptoms.³

44. Even individuals who appear healthy and present no identifiable symptoms of the disease will still spread the virus by merely breathing, speaking, or touching objects and surfaces.

45. Though droplets carrying the virus are not visible, they are nonetheless physical objects that attach to and cause harm to property.

46. Unlike many other viruses that are unable to survive for long periods of time outside the body, the novel coronavirus is resilient and can survive on surfaces for days and even weeks.⁴

47. On March 11, 2020, the World Health Organization declared Covid-19 a pandemic.⁵

48. On March 13, 2020, the federal government declared a national emergency. Three days later, the CDC and members of the national Coronavirus Task Force issued public guidance, styled as "30 Days to Slow the Spread," that advocated for the first time far-reaching social-distancing measures, such as working from home;

³ Erika Edwards, Asymptomatic COVID-19 Cases May Be More Common Than Suspected, NBC News (May 27, 2020, 12:43 PM), <https://www.nbcnews.com/health/health-news/asymptomatic-covid19-cases-may-be-more-common-suspected-n1215481> (last visited August 15, 2020).

⁴ Public Health Responses to COVID-19 Outbreaks on Cruise Ships-Worldwide, February-March 2020, Centers for Disease Control and Prevention, <https://www.cdc.gov/mmwr/volumes/69/wr/mm6912e3.htm> (last visited August 15, 2020).

⁵ <https://www.who.int/emergencies/diseases/novel-coronavirus-2019/interactive-timeline/#!> (last accessed on August 15, 2020).

avoiding shopping trips and gatherings of more than 10 people; and staying away from bars, restaurants, and food courts.

PLAINTIFF'S CLAIMS FOR INSURANCE BENEFITS

49. On March 17, 2020, Iowa Governor Kim Reynolds issued a proclamation closing all bars and restaurants from dine-in or in-person service.

50. The proclamation did not mandate the closing of or impact other stores and businesses, such as grocery stores, drug stores, gas stations, and golf courses. Other businesses who service the Plaintiff were, however, closed.

51. The action of this Civil Authority resulted in the necessary suspension of Plaintiff's operations as they economically could not operate its business solely on a take-out or delivery basis.

52. The proclamation caused "direct physical loss of or damage to" Plaintiff's covered property under the policy by precluding Plaintiff from conducting its operations, precluding customers from patronizing the business, and otherwise frustrating the intended purposes of Plaintiff's business, all thereby causing the necessary suspension of operations during a period of restoration.

53. Governor Reynolds' March 17, 2020 Order prohibited access to Plaintiff's Covered Property, and the area immediately surrounding the Covered Property, in response to dangerous physical conditions resulting in and from a Covered Cause of Loss.

54. Losses caused by COVID-19 and/or the Governor Reynolds' proclamation triggered the Business Income, Extra Expense, Civil Authority, and Contamination provisions of the Policy

55. As a result of Governor Reynolds' Proclamation, Plaintiff has been forced to terminate several employees.

56. The purported reason for the denial of coverage as set forth in the declination letter was that there is a policy exclusion of loss due to a virus; that the business income loss must be caused by direct physical loss or damage to the premises, and the Civil Authority provisions of the policy were not applicable.

57. No one on behalf of Regent Insurance Company, a member of QBE North America, in any manner investigated the insured facility to determine whether the coronavirus or any other virus was present in the insured facility prior to issuing the declination letter

58. No one on behalf of Regent Insurance Company, a member of QBE North America, spoke to Steve Logsdon at any time prior to declining coverage, as a part of any investigation.

59. Plaintiff has no knowledge of the insured facility being infected with the coronavirus or any other virus, nor is he aware of any employee or customer having contracted the coronavirus or any other virus, nor is he aware of any employee or customer having contracted the coronavirus or any other virus at the facility at any time prior to the Governor's Proclamation and Order, or subsequent to the Governor's Proclamation and Order.

THE VIRUS EXCLUSION

60. Defendant's denial of Plaintiff's claim relied in part on an exclusion contained in the policy regard "Loss Due to Virus or Bacteria" (the "Virus Exclusion").

61. In 2006, the two major insurance industry trade groups, Insurance Services Office, Inc. ("ISO") and the American Association of Insurance Services ("AAIS") represented hundreds of insurers in a national effort to seek approval from state insurance regulators for the adoption of the Virus Exclusion.

62. In their filings with the various state regulators, on behalf of insurers, ISO and AAIS represented that the adoption of the Virus Exclusion was only meant to "clarify" that coverage for "disease-causing agents" has never been in effect and was never intended to be included in property policies.

63. In its "ISO Circular" dated July 6, 2006 entitled "New Endorsements Filed to Address Exclusion of Loss Due to Virus or Bacteria", ISO represented to state regulatory bodies that: "While property policies have not been a source of recovery for losses involving contamination by disease-causing agents, the specter of pandemic or hitherto unorthodox transmission of infectious material raises the concern that insurers employing such policies may face claims in which there are efforts to expand coverage to create sources of recovery for such losses, contrary to policy intent."

<https://www.propertyinsurancecoveragelaw.com/files/2020/03/ISO-Circular-LI-CF-2006-175-Virus.pdf> (last accessed August 16, 2020)

64. Similarly, AAIS, in its "Filing Memorandum" in support of the Virus Exclusion, represented: "Property policies have not been, nor were they intended to be,

a source of recovery for loss, cost or expense caused by disease-causing agents. With the possibility of a pandemic, there is concern that claims may result in efforts to expand coverage to create recovery for loss where no coverage was originally intended....This endorsement clarifies that loss, cost, or expense caused by, resulting from, or relating to any virus, bacterium, or other microorganism that causes disease, illness, or physical distress or that is capable of causing disease, illness, or physical distress is excluded.”

https://www.uphelp.org/sites/default/files/attachments/aais_virus_or_bacteria_filing_memo_ap.pdf (last accessed August 16, 2020).

65. The foregoing representations made by the insurance industry justifying the inclusion of the Virus Exclusion were false.

66. By 2006, the time of the state applications to approve the Virus Exclusion, courts had repeatedly found that property insurance policies covered claims involving disease-causing agents.

67. In securing approval for the adoption of the Virus Exclusion by misrepresenting to the state regulators that the Virus Exclusion would not change the scope of coverage, but rather just clarify existing coverage, the insurance industry effectively narrowed the scope of the insuring agreement without a commensurate reduction in premiums charged.

68. Based upon information and belief, Defendant directly or indirectly participated in the insurance industry’s efforts to effect state Insurance Commissioners,

including the State of Iowa's Insurance Commissioner, to approve the suggested virus exclusion.

69. That Defendant incorporated suggested provisions of the Insurance Services Office, Inc. in the policy issued to Plaintiff, including the definition of covered losses, civic authority, and virus exclusions. See attached policy sample of Plaintiff's policy.

COUNT I
DECLARATORY JUDGMENT AGAINST REGENT INSURANCE
COMPANY, A MEMBER OF QBE NORTH AMERICA
PURSUANT TO IOWA RULE OF CIVIL PROCEDURE 1.1101

70. Plaintiff re-alleges the above paragraphs 1 through 69 as if fully set forth herein.

71. Plaintiff claims damages that are covered under the business interruption and loss of income policy issued to Plaintiff by the Defendant.

72. Defendant has denied coverage under policy number BBP000204601.

73. Plaintiff had reasonable expectations that the loss of business income and additional expenses would be covered by the policy sold to Plaintiff by an agent of Defendant.

74. An actual justiciable controversy exists between the Plaintiff and Defendant with regard to whether the loss claimed by Plaintiff is covered under the policy that has been issued to Plaintiff by Defendant.

75. Defendant's denial erroneously relies on the virus exclusion contained in Plaintiff's policy, which does not operate to exclude coverage under these circumstances.

76. That the virus exclusion relied upon by the Defendant specifically contemplates the virus to be capable of inducing physical distress, illness, or disease.

77. Likewise, the Defendant's denial erroneously concludes that the Plaintiff did not sustain a direct physical loss of the Plaintiff's property.

78. The term "loss of" is not defined in the policy, and by its inclusion and the use of the word "or," necessarily entails a different definition than the term "damage." Otherwise the policy would not distinguish the two terms or utilize the term "or."

79. Defendant did not explain the difference between "physical loss of" or "damage" as stated in the policy, nor is the term defined in the policy. Plaintiff at all times had the reasonable expectations the loss would be covered.

80. Defendant did not specifically exclude a claim for "loss of use" of its property, and a reasonable ordinary person would expect coverage to include "loss of use" as a part of the undefined term "physical loss."

81. Defendant, as an expert in drafting policy, knowingly utilized a disjunctive phrase instead of a conjunctive phrase in stating the policy covered a "physical loss of or damage" to property.

82. The closure of Plaintiff's restaurant is a direct physical loss, including physical loss of access, customers, use, and utilization for its intended purposes and is not due to the presence of Coronavirus/Covid-19 in Plaintiff's facility.

WHEREFORE, Plaintiff respectfully requests that the Court enter judgment in its favor and against the Defendants, including the relief of:

- a. Entering a Declaratory Judgment acknowledging the rights of the Plaintiff and obligation of the Defendant under the policy and declaring that the loss claimed by Plaintiff is covered by the policy, and;
- b. Order payment of loss of income and additional costs as substantiated by the Plaintiff, and for such other and further relief as the Court deems proper, including costs and attorney fees.

COUNT II
BREACH OF CONTRACT

83. Plaintiff re-alleges paragraphs 1 through 82 as fully set forth herein.

84. The necessary suspension of Plaintiff's operations was due to Governor Reynolds' March 17, 2020 Proclamation Order requiring the closure of all restaurants, bars, and food and beverage businesses throughout the state of Iowa.

85. As a result of Governor Reynolds' Proclamation, Plaintiff has sustained and continues to sustain direct physical loss of its property as required by the policy, including physical loss of access, use, and utilization for its intended purposes.

86. That Plaintiff attempted to mitigate its damages by partially opening on May 6, 2020 on a limited 50 percent capacity but has not had any substantial revenue that would reduce the damages being suffered by Plaintiff and has in fact incurred additional losses.

87. The necessary suspension of Plaintiff's restaurant under these circumstances is a covered loss under the policy that is otherwise not excluded.

88. As a result of this covered loss, Plaintiff has sustained and continues to sustain significant financial loss of income and additional expenses on a monthly basis that are covered under the policy.

89. Plaintiff provided timely notice to the Defendant and has otherwise complied with all conditions precedent to the coverage under the policy.

90. Defendant has wrongfully denied coverage of Plaintiff's claim.

91. Defendant failed to investigate in any manner the claim of the Plaintiff, other than speaking to Plaintiff's attorney, and has not determined that there was any coronavirus or any other type of virus in the Plaintiff's facility, nor was there any employee or customer infected with the coronavirus, or any other virus, at the Plaintiff's facility.

92. Defendant failed to properly apply the policy and compensate the Plaintiff for the losses provided for under the policy and as a result, has breached its obligations under the provisions of the policy.

93. As a direct and proximate result of the Defendant's breach of its contractual obligations under the policy issued, the Plaintiff has been damaged in an amount in excess of \$50,000 per month in net income plus additional expenses and will continue to incur significant losses until completely opened, exclusive of interest, costs and attorney fees.

WHEREFORE, the Plaintiff respectfully requests that the Court enter judgment in favor of the Plaintiff and against the Defendant, including the following relief:

- a. An award to the Plaintiff and against the Defendant for the loss of income and extra expenses substantiated by the Plaintiff, and for all other covered damages, and;
- b. Such other and further relief as the Court deems proper, including costs and reasonable attorney fees for having to pursue this matter.

COUNT III
CONDUCT OF BAD FAITH

94. Plaintiff re-alleges paragraphs 1 through 93 as if fully set forth herein.

95. Defendant has a contractual obligation to fully and completely investigate a claim of an insured for policy which they have written and for which they have received commissions.

96. Plaintiff promptly paid all premiums required to effectuate the policy of the Plaintiff for business loss of income under the policy.

97. Defendant denied coverage for Plaintiff's claim based on a virus exclusion contained in the policy.

98. Defendant failed to make any investigation of the claim, other than speaking to Plaintiff's attorney, and did not inquire if the facility that was insured had any evidence of infestation of the coronavirus or any other virus at any time, or if any employee or customer had become infected with the coronavirus or other virus at any time.

99. That there was a failure to investigate Plaintiff's claim in any manner in good faith.

100. Defendant failed to investigate Plaintiff's claim as required by IAC 191-15.41(507B) and Iowa Code §507B.4.

101. That the Defendant acted in bad faith in denying Plaintiff's claim.

102. That as a direct and proximate result of Defendant's bad faith in failing to investigate Plaintiff's claim, Plaintiff has been damaged. The amount is in excess of \$50,000 in March, April and May of 2020, plus additional expenses, and that Plaintiff will continue to lose significant income until completely opened, exclusive of costs and attorney fees.

WHEREFORE, Plaintiff respectfully requests that the Court enter judgment in favor of the Plaintiff and against the Defendant, including the following relief:

- a. An award to the Plaintiff against the Defendant for the loss of income substantiated by Plaintiff, plus additional expenses, plus pre-judgment interest, and;
- b. The award of punitive damages as a result of the Defendant acting in bad faith, and for such other relief as the Court deems proper, including costs and reasonable attorney fees.

JURY DEMAND

The Plaintiff hereby makes a demand for trial by jury on all issues so triable.

Respectfully submitted,

CARNEY & APPLEBY, P.L.C.

/s/ James W. Carney

JAMES W. CARNEY (AT0001327)

/s/ Nicholas J. Mauro

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