

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF WAYNE

THREE WON THREE, CORP,
EIGHTY ATE, LLC, &
ATE ATE, LLC,

Plaintiffs,

Case No. 20- -CK

v

HON. _____

PROPERTY-OWNERS
INSURANCE COMPANY,

Defendant.

Matthew J. Heos (P73786)
THE NICHOLS LAW FIRM, PLLC
Attorney for Plaintiff
3452 E. Lake Lansing Road
East Lansing, MI 48823
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mheos@nicholslaw.net

There are no other pending or resolved civil action arising
out of the transaction or occurrence alleged in the complaint

COMPLAINT

NOW COMES Plaintiffs THREE WON THREE, CORP, EIGHTY ATE, LLC, and ATE
ATE, LLC, by and through their attorneys, The Nichols Law Firm, PLLC, and states the
following for their Complaint:

1. Plaintiff Three Won Three, Corp, d/b/a Ima Noodles, which is located at 4870 Cass
Avenue, Detroit, Michigan, does business in the County of Wayne, State of Michigan.



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2. Plaintiff Eighty Ate, LLC, d/b/a Ima Restaurant, which is located at 2015 Michigan Avenue, Detroit, Michigan, and does business in the County of Wayne, State of Michigan.
3. Plaintiff Ate Ate, LLC, d/b/a Ima Madison Heights, which is located at 32203 John R Rd, Madison Heights, Michigan, does business in the County of Wayne, State of Michigan.
4. Defendant Property-Owners Insurance Company is a Michigan corporation doing business in the County of Wayne, State of Michigan.
5. At all relevant times stated herein, Plaintiff Three Won Three, LLC was insured by an insurance policy (bearing Policy Number 194611-04131493-19) from Defendant which includes, inter alia, business interruption coverage. The aforesaid commercial insurance policy ("Policy") is incorporated here by reference as though fully stated herein and is attached as Exhibit 1.
6. At all relevant times stated herein, Plaintiff Eighty Ate, LLC was insured by an insurance policy (bearing Policy Number 184611-04990347-19) from Defendant which includes, inter alia, business interruption coverage. The aforesaid commercial insurance policy ("Policy") is incorporated here by reference as though fully stated herein and is attached as Exhibit 2.
7. At all relevant times stated herein, Plaintiff Ate Ate, LLC was insured by an insurance policy (bearing Policy Number 184611-04952515-19) from Defendant which includes, inter alia, business interruption coverage. The aforesaid commercial insurance policy



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("Policy") is incorporated here by reference as though fully stated herein and is attached as Exhibit 3.¹

8. The amount in controversy exceeds \$25,000.00.
9. Venue is proper in the Circuit Court for the County of Wayne, State of Michigan.

GENERAL ALLEGATIONS

10. Plaintiffs incorporates the preceding paragraphs by reference as through fully stated herein.
11. In December 2019, Wuhan, China, a city in central China with a population around 11 million people, experienced an outbreak of an infectious disease known as SARS-CoV-2 (aka Covid-19 and Coronavirus, hereinafter "Covid-19").
12. Asymptomatic individuals may spread Covid-19 without knowing they carry the virus which means that they can shed the virus onto others and the surfaces of real and personal property.
13. Covid-19 spread from Wuhan to Europe and North America and throughout the world within weeks.
14. Hospital systems in Wuhan, northern Italy, and New York City were overwhelmed with patients with Covid-19.
15. Governments around the world issued national emergencies, with the United States issuing a national state of emergency on March 13, 2020.
16. Governors in 42 of 50 states issued executive orders compelling people to stay at home to prevent the spread of Covid-19.



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¹ The insurance policies attached as Exhibits 1, 2, and 3 are hereinafter referred to as "Policies."

17. On or about March 3, 2020, the Michigan Department of Health and Human Services identified the first two presumptive positive Covid-19 cases in Michigan.
18. Michigan Governor Gretchen Whitmer issued the first Covid-19 related executive order (“EO”) on or about March 10, 2020, same being EO 2020-4.
19. On March 23, 2020, Governor Whitmer issued EO 2020-21 prohibiting in-person business, and ordered all nonessential workers to “stay home, stay safe.”
20. On April 2, 2020, Governor Whitmer officially suspended in-person learning for schools in Michigan for the rest of the 2019/2020 school year.
21. On April 9, 2020, Governor Whitmer signed EO 2020-42 extending EO 2020-21 through April 20, 2020.
22. On April 24, 2020, Governor Whitmer signed EO 2020-59 which loosened some restrictions, but extended the balance of EO 2020-42 through May 15, 2020.
23. The aforesaid EOs were issued by Governor Whitmer to protect public health and welfare from the imminent threat to human beings posed by the spread of Covid-19.
24. No approved treatment or vaccine for Covid-19 exists, and social distancing appears to be the only verifiably effective method of preventing its spread.
25. Covid-19 can attach itself physically surfaces in buildings, objects, animals, and humans.
26. Covid-19 that is physically on buildings and property constitutes a loss or damage to property. The insurance industry has represented to states that a virus can cause loss or damage to property.
27. Symptoms range from mild to moderate in some, to extreme illness and death in others.
28. Economic activity in the County of Wayne, State of Michigan dropped dramatically thereafter.



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29. Restaurants, including Plaintiffs', were deemed essential pursuant to EO 2020-21 and could remain open for carryout service and delivery only.
30. The EOs were issued to protect public health and welfare, and the issuance thereof is proof that Covid-19 is present on the surfaces of property as well as in humans.
31. Individuals were ordered to stay at home except for exercise and to shop for food and medical supplies. Specifically, customers who wanted to dine at Plaintiffs' restaurants could not because to do so would have been a potential health risk to themselves and others, and a criminal act.
32. Plaintiffs' business is dependent upon customers who can dine in the restaurant.
33. The aforesaid EOs prevented customers from entering Plaintiffs' covered properties for the purpose of dine-in service. That is a tangible and physical change to Plaintiffs' covered properties.
34. The aforesaid EOs prevented Plaintiffs from seating customers in the dining area of their covered properties.
35. The aforesaid EOs suspended Plaintiffs' dine-in services which required Plaintiffs to renovate and restore the covered properties to prevent possible transmission and infection of Covid-19 on covered properties. The period of renovation and restoration is continuing and will continue so long as the threat of Covid-19 persists.
36. Plaintiffs must restore their properties by cleaning and disinfecting surfaces in the property on a regular basis to ensure that Covid-19 does not accumulate on surfaces and infect patrons and staff.
37. Upon information and belief, Covid-19 is present in persons and property within one mile of Plaintiffs' covered properties.



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38. Upon information and belief, Covid-19 probably was present on Plaintiffs' covered properties from time to time causing loss or damage. However, that loss or damage did not cause most of the business interruption losses or damages because Plaintiffs acted to disinfect and restore the covered properties to mitigate the loss or damage thereto.
39. The effect of the EOs caused most of Plaintiffs' business interruption losses and damage by prohibiting and/or limiting dine-in services at Plaintiffs' restaurants.
40. The loss or damage to Plaintiffs' properties that is attributable to the presence of Covid-19 on the covered properties are restricted to the cost of cleaning surfaces on the property.
41. Most of the loss or damage to Plaintiffs' covered properties was caused by the restrictions imposed by the EOs by prohibiting dine-in service, limiting the number of people who can dine-in, and by destroying the demand for dine-in service.
42. Plaintiffs renovated their covered properties during the period of suspension to comply with the EOs and added outdoor seating to adapt to the restrictive conditions.
43. The aforesaid EOs were not issued specifically because of the presence of Covid-19 in persons and property within one mile of Plaintiff's restaurant, but to protect humans from the imminent threat to public health and welfare throughout the State of Michigan.

COUNT 1 – DECLARATORY ACTION

44. Plaintiffs incorporates the preceding paragraphs by reference as though fully stated herein.
45. Plaintiffs purchased the Policies from Defendant which set forth insurance coverage for business interruption losses and damages among other things. Exhibits 1, 2, and 3.
46. Plaintiffs paid each premium timely and the Policies were in effect at all relevant times stated herein.



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47. Plaintiffs suspended dine-in business operations on or about March 17, 2020 because EO 2020-42 was issued to protect human beings from the possible imminent threat to public health and welfare throughout the State of Michigan.
48. Access to Plaintiffs' covered properties were restricted and/or prohibited for potential dine-in customers who could be charged with a crime if they disobeyed the EOs by dining in at Plaintiffs' restaurants. This is a direct physical loss of or damage to Plaintiffs' covered properties.
49. Plaintiffs' business income dropped precipitously causing business interruptions losses and damages by action of a civil authority.
50. The imminent threat of Covid-19 contamination, transmission, and infection in public places and businesses prompted the Governor Whitmer to issue the aforesaid EOs.
51. Loss of business income is a direct physical loss of or damage to Plaintiffs' covered properties.
52. The potential imminent threat of Covid-19 contamination of Plaintiffs' covered properties constitutes a direct physical loss of or damage to covered property because the EOs were issued to protect public health from the imminent threat of infection and/or death.
53. The EOs were an action of a civil authority that restricts and/or prohibits access to Plaintiffs' covered properties is a direct physical loss of or damage to those covered properties because it was taken to prevent the imminent threat of Covid-19 contamination, transmission, infection, and death.
54. Plaintiffs' business has been suspended because of an action of a civil authority that was taken to combat the possible imminent threat of Covid-19 contamination, transmission, infection, and death.



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55. There has been a direct physical loss of or damage to covered property because Plaintiffs cannot use their covered properties for its intended purposes to combat the imminent threat of Covid-19 contamination, transmission, and infection. That loss is physical and tangible because dining at Plaintiffs' restaurants was a crime, and still is if Plaintiffs exceeds the mandated capacity restrictions.
56. There has been a direct physical loss of or damage to Plaintiffs' covered properties because of the action of a civil authority.
57. There has been a direct physical loss of or damage to Plaintiffs' business income.
58. Business income interruption is a covered cause loss pursuant to the Policy.
59. An action of a civil authority is a covered cause of loss pursuant to the Policy.
60. Plaintiffs cannot use their covered properties for its intended purposes pursuant to the action of a civil authority. This is a direct physical loss of or damage to Plaintiffs' covered properties and a jury should decide this issue.
61. Plaintiffs cannot use their covered properties for the intended purposes because Covid-19 caused direct physical loss of or damage to property within one mile of Plaintiffs' covered properties such that Governor Whitmer issued the EOs to protect public health and welfare restricting access to the aforesaid covered properties.
62. Plaintiffs' customers could not leave their homes to go out to dinner pursuant to the action of a civil authority depriving Plaintiffs of customers and business income.
63. Defendant, and the insurance industry generally, have recognized that a virus can cause loss or damage to property since 2006.
64. Defendant's denial of Plaintiffs' claims relied in part on an exclusion contained in the policies regard "Loss Due to Virus or Bacteria" (the "Virus Exclusion").



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65. 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.
66. 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.
67. 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).
68. 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



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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_me_mo_ap.pdf (last accessed August 16, 2020).

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

70. 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.

71. 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.

72. 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.

73. 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.

74. Plaintiffs always understood the Virus Exclusion in the Policies to apply only in cases where its’ customers were infected with a virus while on covered property.

75. The Virus Exclusion does not apply to pandemics or executive orders issued to protect public health and welfare.



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76. The Virus Exclusion states that Defendant will not pay for loss or damage to covered property caused by a virus, however, the loss or damage caused by Covid-19 to Plaintiffs' properties is minimal compared with the loss or damage caused by the EOs issued to prevent the spread of Covid-19.

77. Defendant's breached its promise to pay Plaintiff for business income losses pursuant to the Policy when it denied Plaintiff's claim for coverage.

78. Plaintiff has incurred contractual damages in excess of \$25,000.00 as a direct and proximate cause of Defendant's breach of the Policy.

WHEREFORE Plaintiff, by and through its attorneys, The Nichols Law Firm, PLLC, seeks a declaratory judgment pursuant to MCR 2.605 which says that the Policy covers Plaintiff's business income claim and any other relief they may be entitled to and any other relief deemed necessary in the interests of justice.

COUNT 2 – BREACH OF CONTRACT

79. Plaintiffs incorporates the preceding paragraphs by reference as though fully stated herein.

80. Plaintiffs purchased the Policies from Defendant which set forth insurance coverage for business interruption losses and damages among other things. Exhibits 1, 2, and 3.

81. Plaintiffs paid each premium timely and the Policies were in effect at all relevant times stated herein.

82. Plaintiffs suspended dine-in business operations on or about March 17, 2020 because EO 2020-42 was issued to protect human beings from the possible imminent threat to public health and welfare throughout the State of Michigan.

83. Access to Plaintiffs' covered properties were restricted and/or prohibited for potential dine-in customers who could be charged with a crime if they disobeyed the EOs by dining



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in at Plaintiffs' restaurants. This is a direct physical loss of or damage to Plaintiffs' covered properties.

84. Plaintiffs' business income dropped precipitously causing business interruptions losses and damages by action of a civil authority.

85. The imminent threat of Covid-19 contamination, transmission, and infection in public places and businesses prompted the Governor Whitmer to issue the aforesaid EOs.

86. Loss of business income is a direct physical loss of or damage to Plaintiffs' covered properties.

87. The potential imminent threat of Covid-19 contamination of Plaintiffs' covered properties constitutes a direct physical loss of or damage to covered property because the EOs were issued to protect public health from the imminent threat of infection and/or death.

88. The EOs were an action of a civil authority that restricts and/or prohibits access to Plaintiffs' covered properties is a direct physical loss of or damage to those covered properties because it was taken to prevent the imminent threat of Covid-19 contamination, transmission, infection, and death.

89. Plaintiffs' business has been suspended because of an action of a civil authority that was taken to combat the possible imminent threat of Covid-19 contamination, transmission, infection, and death.

90. There has been a direct physical loss of or damage to covered property because Plaintiffs cannot use their covered properties for its intended purposes to combat the imminent threat of Covid-19 contamination, transmission, and infection. That loss is physical and tangible because dining at Plaintiffs' restaurants was a crime, and still is if Plaintiffs exceeds the mandated capacity restrictions.



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91. There has been a direct physical loss of or damage to Plaintiffs' covered properties because of the action of a civil authority.
92. There has been a direct physical loss of or damage to Plaintiffs' business income.
93. Business income interruption is a covered cause loss pursuant to the Policy.
94. An action of a civil authority is a covered cause of loss pursuant to the Policy.
95. Plaintiffs cannot use their covered properties for its intended purposes pursuant to the action of a civil authority. This is a direct physical loss of or damage to Plaintiffs' covered properties and a jury should decide this issue.
96. Plaintiffs cannot use their covered properties for the intended purposes because Covid-19 caused direct physical loss of or damage to property within one mile of Plaintiffs' covered properties such that Governor Whitmer issued the EOs to protect public health and welfare restricting access to the aforesaid covered properties.
97. Plaintiffs' customers could not leave their homes to go out to dinner pursuant to the action of a civil authority depriving Plaintiffs of customers and business income.
98. Defendant, and the insurance industry generally, have recognized that a virus can cause loss or damage to property since 2006.
99. Defendant's denial of Plaintiffs' claims relied in part on an exclusion contained in the policies regard "Loss Due to Virus or Bacteria" (the "Virus Exclusion").
100. 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.
101. 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"



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that coverage for “disease-causing agents” has never been in effect and was never intended to be included in property policies.

102. 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).

103. 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).

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



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105. 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.
106. 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.
107. 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.
108. 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.
109. Plaintiffs always understood the Virus Exclusion in the Policies to apply only in cases where its' customers were infected with a virus while on covered property.
110. The Virus Exclusion does not apply to pandemics or executive orders issued to protect public health and welfare.
111. The Virus Exclusion states that Defendant will not pay for loss or damage to covered property caused by a virus, however, the loss or damage caused by Covid-19 to Plaintiffs' properties is minimal compared with the loss or damage caused by the EOs issued to prevent the spread of Covid-19.
112. Defendant's breached its promise to pay Plaintiff for business income losses pursuant to the Policy when it denied Plaintiff's claim for coverage.



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113. Plaintiff has incurred contractual damages in excess of \$25,000.00 as a direct and proximate cause of Defendant's breach of the Policy.

WHEREFORE Plaintiff, by and through its attorneys, The Nichols Law Firm, PLLC, demands satisfaction for any and all damages, costs and attorney's fees they may be entitled to in excess of \$25,000.00, and any other relief deemed necessary in the interests of justice.

Respectfully submitted,

Dated: September 9, 2020

By: /s/ Matthew J. Heos
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Attorney for Plaintiffs



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