

**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION**

STATE AUTO PROPERTY AND
CASUALTY INSURANCE CO.

Plaintiff.

v.

No. 1:20-cv-04434

CLASSIC DINING GROUP LLC; RT REAL ESTATE OF SOUTHERN WISCONSIN LLC; RT RESTAURANTS OF SOUTHERN WISCONSIN LLC; CLASSIC DINING CASTLETON INC; CLASSIC DINING CRAWFORDSVILLE INC; CLASSIC DINING OF GREENWOOD INC; CLASSIC DINING KENTUCKY AVE INC; CLASSIC DINING KEYSTONE INC; CLASSIC DINING MICHIGAN ROAD INC; CLASSIC DINING OF BLOOMINGTON INC; CLASSIC DINING GREENWOOD MALL INC; CLASSIC DINING OF LAFAYETTE INC; CLASSIC DINING OF LEBANON INC; CLASSIC DINING OF PORTAGE INC; CLASSIC DINING OF ROCKFORD INC; CLASSIC DINING OF SHELBYVILLE INC; CLASSIC DINING POST ROAD INC; PFC OF AURORA INC; PFC OF GURNEE INC; PFC OF MICHIGAN CITY INC; PFC OF SPRING HILL INC; CLASSIC DINING MANAGEMENT COMPANY INC; P.F.C. MANAGEMENT COMPANY INC; CLASSIC RESTAURANT GROUP LLC BELOIT; CLASSIC RESTAURANT GROUP LLC, HEBRON; CLASSIC RESTAURANT GROUP LLC WHITELAND; CLASSIC RESTAURANT GROUP LLC LASALLE; CLASSIC RESTAURANT GROUP LLC SPICELAND; CLASSIC RESTAURANTS LLC BATAVIA; P.F.C. RESTAURANT GROUP LLC; DENNY'S INC; CLASSIC RESTAURANT GROUP LLC; CLASSIC RESTAURANTS LLC; CLASSIC RESTAURANTS LLC ELGIN; CLASSIC RESTAURANTS LLC HOFFMAN ESTATES; CLASSIC DINING LLC AVON; RESTAURANTS LLC OAK LAWN; CLASSIC RESTAURANTS LLC AURORA; CLASSIC RESTAURANTS LLC WHITESTOWN,

Defendants.

**STATE AUTO PROPERTY AND CASUALTY INSURANCE COMPANY'S
COMPLAINT FOR DECLARATORY JUDGMENT**

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Plaintiff State Auto Property and Casualty Insurance Company (“State Auto Property”), by and through its counsel, submits this Complaint for Declaratory Judgment against Plaintiffs Classic Dining Group LLC; Classic Dining Castleton Inc., Classic Dining Crawfordsville Inc.; Classic Dining of Greenwood Inc.; Classic Dining Kentucky Ave. Inc.; Classic Dining Keystone Inc.; Classic Dining Michigan Road Inc.; Classic Dining of Bloomington Inc.; Classic Dining Greenwood Mall Inc.; Classic Dining of Lafayette Inc.; Classic Dining of Lebanon Inc.; Classic Dining of Portage Inc.; Classic Dining of Rockford Inc.; Classic Dining of Shelbyville Inc.; Classic Dining Post Road Inc.; PFC of Aurora Inc.; PFC of Gurnee Inc.; PFC of Michigan City Inc.; PFC of Spring Hill Inc.; Classic Dining Management Company Inc.; P.F.C. Management Company Inc.; Classic Restaurant Group LLC Beloit; Classic Restaurant Group LLC, Hebron; Classic Restaurant Group LLC, Whiteland; Classic Restaurant Group LLC Lasalle; Classic Restaurant Group LLC, Spiceland; Classic Restaurants LLC, Batavia; P.F.C. Restaurant Group LLC; Classic Restaurant Group LLC; Classic Restaurants LLC; Classic Restaurants LLC Elgin; Classic Restaurants LLC Hoffman Estates; Classic Dining LLC Avon; Classic Restaurants LLC Oak Lawn; Classic Restaurants LLC Aurora; Classic Restaurants LLC Whitestown (the “Classic Dining Defendants”); and RT Restaurants of Southern Wisconsin LLC; RT Real Estate of Southern Wisconsin LLC (“RT Defendants”) (collectively, “Defendants”), stating as follows:

I. NATURE OF THE ACTION

1. The core issue in this declaratory judgment action is whether State Auto Property is contractually obligated to provide business interruption coverage for Defendants’ claimed losses due to public health orders from Illinois, Indiana and Wisconsin that restricted public gatherings across their states in order to slow the spread of the COVID-19 global pandemic.

2. The contagiousness of the COVID-19 virus caused international health organizations to promulgate world-wide guidelines that restrict interactions between people. Countries followed with interpersonal restrictions, as did states and municipalities, all aimed at containing a global health crisis.

3. State Auto Property insured the Classic Dining Defendants and RT Defendants under two separate commercial property policies (collectively, the “State Auto Property Policies”), both of which were issued to the Defendants at the same Illinois address through the same Illinois broker and which potentially provide commercial property coverage at thirty-one (31) separate restaurant locations in Illinois, Indiana, and Wisconsin.

4. Although State Auto Property acknowledges that the COVID-19 pandemic has impacted Defendants’ restaurants, among many other businesses, in extraordinary ways, the insurance contracts at issue simply were not designed to cover the economic fallout from a global pandemic. State Auto Property’s coverage is rooted in a much narrower risk, which requires a suspension of the insureds’ business operations due to “direct physical loss of or damage to property” at, or in the immediate vicinity of, each of the 31 separate insured restaurants.

5. Here, the alleged slowdown of Defendants’ business operations was a direct consequence of broad public health orders that restricted social gatherings, none of which were issued in response to direct physical loss of or damage to property at any one of the insureds’ restaurants.

6. Moreover, the presence, or suspected presence, of COVID-19 in the general public community does not constitute direct physical loss of or damage to property at the insured premises, as necessary to satisfy the insuring agreements of the State Auto Property Policies.

7. Although this insurance coverage dispute involves two Illinois insurance policies, the application of Illinois substantive contract law, Illinois governmental orders, and Illinois insured properties, Defendants filed a competing declaratory judgment action in Ohio state court seeking coverage under the same State Auto Property Policies for the same claims. Because this Court is a more appropriate forum for this litigation to proceed, State Auto Property has filed a Motion to Dismiss based upon *forum non conveniens* in the Ohio state court action.

II. THE PARTIES

8. State Auto Property is an insurance company organized and existing under the laws of Iowa, with its principal place of business located in Ohio.

9. Defendants are owners and operators of franchised Denny's and Ruby Tuesday restaurants in Indiana, Illinois, and Wisconsin whose business operations were allegedly restricted by health and safety order issued by the States of Illinois, Indiana, and Wisconsin as part of the State's efforts to slow the spread of the COVID-19 global pandemic.

10. Defendant Classic Dining Group LLC ("Classic Dining") is an Indiana limited liability company with its principal place of business in Algonquin, Illinois. Classic Dining's sole member is Ken Kilberger, who is a citizen of Illinois.

11. Defendant RT Real Estate of Southern Wisconsin LLC ("RT Real Estate") is a Wisconsin limited liability company with its principal place of business in Algonquin, Illinois. RT Real Estate's sole member is Ken Kilberger, who is a citizen of Illinois.

12. Defendant RT Restaurants of Southern Wisconsin, LLC ("RT Restaurants") is a Wisconsin limited liability company with its principal place of business in Greendale, Wisconsin. RT Restaurant's sole member is Ken Kilberger, who is a citizen of Illinois.

13. Defendant Classic Dining Castleton, Inc., is an Indiana corporation with its principal place of business in Indianapolis, Indiana.

14. Defendant Classic Dining Crawfordsville, Inc. is an Indiana corporation with its principal place of business in Indianapolis, Indiana.

15. Defendant Classic Dining of Greenwood, Inc. is an Indiana corporation with its principal place of business in Greenwood, Indiana.

16. Defendant Classic Dining Kentucky Ave. Inc. is an Indiana corporation with its principal place of business in Indianapolis, Indiana.

17. Defendant Classic Dining Keystone, Inc. is an Indiana corporation with its principal place of business in Indianapolis, Indiana.

18. Defendant Classic Dining Michigan Road, Inc. is an Indiana corporation with its principal place of business in Indianapolis, Indiana.

19. Defendant Classic Dining of Bloomington, Inc. is an Indiana corporation with its principal place of business in Bloomington, Indiana.

20. Defendant Classic Dining Greenwood Mall, Inc. is an Indiana corporation with its principal place of business in Indianapolis, Indiana.

21. Defendant Classic Dining of Lafayette, Inc. is an Indiana corporation with its principal place of business in Lafayette, Indiana.

22. Defendant Classic Dining of Lebanon, Inc. is an Indiana corporation with its principal place of business in Lebanon, Indiana.

23. Defendant Classic Dining of Portage, Inc. is an Indiana corporation with its principal place of business in Portage, Indiana.

24. Defendant Classic Dining of Rockford, Inc. is an Illinois corporation with its principal place of business in Rockford, Illinois.

25. Defendant Classic Dining of Shelbyville, Inc. is an Indiana corporation with its principal place of business in Shelbyville, Indiana.

26. Defendant Classic Dining Post Road, Inc. is an Indiana corporation with its principal place of business in Indianapolis, Indiana.

27. Defendant PFC of Aurora, Inc. is a North Dakota corporation with its principal place of business in Aurora, Illinois.

28. Defendant PFC of Gurnee, Inc. is a North Dakota corporation with its principal place of business in Gurnee, Illinois.

29. Defendant PFC of Michigan City, Inc. is an Indiana corporation with its principal place of business in Michigan City, Indiana.

30. Defendant PFC of Spring Hill, Inc. is a North Dakota corporation with its principal place of business in Carpentersville, Illinois.

31. Defendant Classic Dining Management Company, Inc. is an Indiana corporation with its principal place of business in Algonquin, Illinois.

32. Defendant P.F.C. Management Company Inc. is an Illinois corporation with its principal place of business in Algonquin, Illinois.

33. Defendant Classic Restaurant Group, LLC Beloit is an Illinois limited liability company with its principal place of business in South Beloit, Illinois. Classic Restaurant Group, LLC Beloit's sole member is Ken Kilberger, who is a citizen of Illinois.

34. Defendant Classic Restaurant Group, LLC Hebron is an Illinois limited liability company with its principal place of business in Hebron, Indiana. Classic Restaurant Group, LLC Hebron's sole member is Ken Kilberger, who is a citizen of Illinois.

35. Defendant Classic Restaurant Group, LLC Whiteland is an Illinois limited liability company with its principal place of business in Whiteland, Indiana. Classic Restaurant Group, LLC Whiteland's sole member is Ken Kilberger, who is a citizen of Illinois.

36. Defendant Classic Restaurant Group, LLC LaSalle is an Illinois limited liability company with its principal place of business in LaSalle, Illinois. Classic Restaurant Group, LLC LaSalle's sole member is Ken Kilberger, who is a citizen of Illinois.

37. Defendant Classic Restaurant Group, LLC Spiceland is an Illinois limited liability company with its principal place of business in Spiceland, Indiana. Classic Restaurant Group, LLC Spiceland's sole member is Ken Kilberger, who is a citizen of Illinois.

38. Defendant Classic Restaurants, LLC Batavia is an Illinois limited liability company with its principal place of business in Batavia, Illinois. Classic Restaurants, LLC Batavia's sole member is Ken Kilberger, who is a citizen of Illinois.

39. Defendant P.F.C. Restaurant Group, LLC is an Illinois limited liability company with its principal place of business in Algonquin, Illinois. P.F.C. Restaurant Group, LLC's sole member is Ken Kilberger, who is a citizen of Illinois.

40. Defendant Classic Restaurant Group, LLC is an Illinois limited liability company with its principal place of business in Algonquin, Illinois. Classic Restaurant Group, LLC's sole member is Ken Kilberger, who is a citizen of Illinois.

41. Defendant Classic Restaurants, LLC is an Illinois limited liability company with its principal place of business in Algonquin, Illinois. Classic Restaurants, LLC's sole member is Ken Kilberger, who is a citizen of Illinois.

42. Defendant Classic Restaurants, LLC Elgin is an Illinois limited liability company with its principal place of business in Elgin, Illinois. Classic Restaurants, LLC Elgin's sole member is Ken Kilberger, who is a citizen of Illinois.

43. Defendant Classic Restaurants, LLC Hoffman Estates is an Illinois limited liability company with its principal place of business in Hoffman Estates, Illinois. Classic Restaurants, LLC Hoffman Estates' sole member is Ken Kilberger, who is a citizen of Illinois.

44. Defendant Classic Restaurants, LLC Avon is an Illinois limited liability company with its principal place of business in Avon, Indiana. Classic Restaurants, LLC Avon's sole member is Ken Kilberger, who is a citizen of Illinois.

45. Defendant Classic Restaurants, LLC Oak Lawn is an Illinois limited liability company with its principal place of business in Oak Lawn, Illinois. Classic Restaurants, LLC Oak Lawn's sole member is Ken Kilberger, who is a citizen of Illinois.

46. Defendant Classic Restaurants, LLC Aurora is an Illinois limited liability company with its principal place of business in Aurora, Illinois. Classic Restaurants, LLC Aurora's sole member is Ken Kilberger, who is a citizen of Illinois.

47. Defendant Classic Restaurants, LLC Whitestown is an Illinois limited liability company with its principal place of business in Whitestown, Indiana. Classic Restaurants, LLC Whitestown's sole member is Ken Kilberger, who is a citizen of Illinois.

III. JURISDICTION AND VENUE

48. This Court has jurisdiction over this action, pursuant to 28 U.S.C. §§ 2201 and 2202, insofar as State Auto Property seeks a declaration of its rights and duties under the insurance policies at issue. Jurisdiction is also conferred by 28 U.S.C. § 1332(a), as complete

diversity exists between the parties and the amount in controversy exceeds the sum or value of \$75,000, exclusive of interest and costs.

49. Venue is proper in this District, pursuant to 28 U.S.C. § 1391(a)(2), because a substantial part of the events giving rise to the claim herein occurred within this District.

50. There is a genuine dispute and actual controversy, over which this Honorable Court has jurisdiction, between State Auto Property and the Defendants concerning their respective rights, duties and obligations for which State Auto Property requests a declaration of rights and obligations under the State Auto Property Policies. The declaratory judgment sought will settle the controversy between the parties.

IV. THE APPLICABLE GOVERNMENT ORDERS RESPONDING TO THE COVID-19 PANDEMIC

A. The Illinois Executive Orders Are Not Prompted By Loss Or Damage At Any Insured Premises

51. On March 16, 2020, Illinois Governor JB Pritzker entered Executive Order 2020-07 prohibiting on-premises consumption of food or beverages at Illinois restaurants (a true and accurate copy of Illinois Executive Order 2020-07 is attached hereto as Exhibit 1).

52. Illinois Executive Order 2020-07 encouraged restaurants to remain open and permitted customers to enter the premises to retrieve takeout orders, providing: “Such businesses are permitted and encouraged to serve food and beverages so that they may be consumed off-premises, as currently permitted by law, through means such as in-house delivery, third-party delivery, drive-through, and curbside pick-up. In addition, customers may enter the premises to purchase food or beverages for carry-out.” *See* Ex. 1 at SAP000002.

53. Illinois Executive Order 2020-07 recognized the exponential increase of COVID-19 cases in the State of Illinois and concluded that “drastic social distancing measures are

needed” and that “it is necessary and appropriate for the State of Illinois to immediately take measures to protect the public’s health in response to this COVID-19 outbreak.” *Id.*

54. On March 20, 2020, Illinois Governor JB Pritzker entered Executive Order 2020-10 ordering all individuals living in the State of Illinois to stay at home with limited exceptions and ordering the cessation of non-essential businesses and operations (a true and accurate copy of Illinois Executive Order 2020-10 is attached hereto as Exhibit 2).

55. Governor Pritzker stated that he was issuing Executive Order 2020-10 because he found it “necessary to take additional measures consistent with public health guidance to slow and stop the spread of COVID-19” and that the order was necessary “for the preservation of public health and safety throughout the entire State of Illinois, and to ensure that our healthcare delivery system is capable of serving those who are sick.” *Id.* at SAP000004.

56. Illinois Executive Order 2020-10 provided that restaurants for consumption off-premises qualified as essential businesses which were permitted to continue business operations. *See* Ex. 2 at SAP000009.

B. The Indiana Executive Orders Are Not Prompted By Loss Or Damage At Any Insured Premises

57. On March 16, 2020, Indiana Governor Eric J. Holcomb entered Executive Order 20-04 closing Indiana restaurants to in-person patrons through March 31, 2020, but explicitly permitted “drive-thru, take-out and delivery services.” (a true and accurate copy of Indiana Executive Order 20-04 is attached hereto as Exhibit 3).

58. On March 23, 2020, Indiana Governor Eric J. Holcomb entered Executive Order 20-08 ordering all individuals living in the State of Indiana to stay at home with limited exceptions and ordering the cessation of non-essential businesses and operations (a true and accurate copy of Indiana Executive Order 20-08 is attached hereto as Exhibit 4).

59. Indiana Executive Order 20-08 provided that restaurants, for consumption off-premises, qualified as essential businesses and were encouraged to remain open. *Id.* at SAP000022.

60. Through Indiana Executive Order 20-08, Governor Holcomb recognized that “COVID-19 remains a serious threat to the health, safety and welfare of all residents of Indiana,” and stated that the public health directive was intended “to address, control, and reduce the evolving threat posed by COVID-19.” *Id.* at SAP000016.

C. The Wisconsin Emergency Orders Are Not Prompted By Loss Or Damage At Any Insured Premises

61. On March 16, 2020, the Village of Greendale, Wisconsin Health Department entered a Health Officer Order restricting food and beverage sales to carry-out and delivery only (a true and accurate copy of the Health Officer Order is attached hereto as Exhibit 5).

62. The stated goal of the Health Officer Order was “to minimize the in-person interaction which is the primary means of transmission” of COVID-19. *Id.*

63. On March 17, 2020, the Wisconsin Department of Health Services entered Emergency Order #5 prohibiting mass gatherings of ten people or more (a true and accurate copy of Wisconsin Emergency Order #5 is attached hereto as Exhibit 6).

64. Restaurants were excepted from the mass gathering prohibition and were permitted to “remain open for take-out or delivery service.” *Id.* at SAP000029.

65. On March 24, 2020, the Wisconsin Department of Health Services entered Emergency Order #12 ordering all individuals present in the State of Wisconsin to stay at home with limited exceptions and ordering the cessation of non-essential businesses and operations (a true and accurate copy of Wisconsin Emergency Order #12 is attached hereto as Exhibit 7).

66. Wisconsin Emergency Order #12 provided that restaurants for consumption off-premises qualified as essential businesses. *Id.* at SAP000039.

V. THE DEFENDANTS' CLAIMS TO STATE AUTO PROPERTY AND THE PENDING OHIO LITIGATION

A. The Claim Made By The Classic Dining Defendants

67. On March 17, 2020, the Classic Dining Defendants presented a claim for business losses at 30 different restaurants located in Illinois and Indiana due to COVID-19 to State Auto Property (a true and accurate copy of the 3/17/20 Classic Dining Property Loss Notice is attached hereto as Exhibit 8).

68. On April 7, 2020, State Auto Property wrote to the Classic Dining Defendants advising that there did not appear to be coverage for the insureds' business interruption claim, noting that the claim did not satisfy the requirements of any applicable insuring agreement (a true and accurate copy of the 4/7/20 letter is attached hereto as Exhibit 9). State Auto Property's April 7, 2020 letter also offered to review additional information relative to the 30 different locations and reserved its rights to further investigate issues if additional information was presented.

69. On April 21, 2020, State Auto Property issued a revised coverage position letter to the Classic Dining Defendants, which withdrew a previous inaccurate reference to a virus exclusion in the letter two weeks earlier, but again noted that the insureds' business interruption claims at the 30 locations did not appear to satisfy the requirements of the insuring agreements set forth in its April 7, 2020 letter (a true and accurate copy of the 4/21/20 letter is attached hereto as Exhibit 10).

70. On May 8, 2020, counsel for the Classic Dining Defendants wrote to State Auto Property demanding that State Auto Property withdraw its coverage position and provide full

coverage for the Classic Dining Defendants' business interruption claim (a true and accurate copy of the 5/8/20 letter is attached hereto as Exhibit 11).

71. On May 29, 2020, counsel for the Classic Dining Defendants wrote to State Auto Property again demanding that State Auto Property immediately withdraw its coverage position and provide full coverage for the Classic Dining Defendants' business interruption claim (a true and accurate copy of the 5/29/20 letter is attached hereto as Exhibit 12).

72. On June 10, 2020, State Auto Property wrote to the Classic Dining Defendants explaining its coverage analysis and maintaining its coverage position (a true and accurate copy of the 6/10/20 letter is attached hereto as Exhibit 13).

B. The Separate Claim Made By The RT Defendants

73. On March 17, 2020, the RT Defendants presented a claim for loss of business income at a single restaurant located in Wisconsin due to COVID-19 (a true and accurate copy of the 3/17/20 RT Property Loss Notice is attached hereto as Exhibit 14).

74. On April 17, 2020, State Auto Property wrote to the RT Defendants advising that there did not appear to be coverage for the business interruption claim because, based upon the information submitted, the insureds' alleged suspension of operations was not caused by direct physical loss of or damage to property at the insured location (a true and accurate copy of the 4/17/20 letter is attached hereto as Exhibit 15).

C. The Pending Ohio Litigation

75. On June 24, 2020, the Classic Dining Defendants and the RT Defendants filed a declaratory judgment complaint ("Ohio Complaint") against "State Auto Insurance Companies" in the Court of Common Pleas for Franklin County, Ohio, docket no. 20CV004107 (a true and accurate copy of the Ohio Complaint (without exhibits) is attached hereto as Exhibit 16).

76. Contemporaneously with filing this action, State Auto Property filed a Motion to Dismiss the Ohio Complaint based on *forum non conveniens*. In its motion, State Auto Property seeks dismissal of the Ohio litigation in favor of this Illinois action given that the contract dispute centers upon the application of insurance policies that were issued to the Classic Dining and RT Defendants at an Illinois address through an Illinois broker and requires the application of Illinois contract law. By comparison, Ohio has no localized interest in resolving the dispute concerning the application of a foreign contract to business interruption claims presented by restaurants located in foreign states (Indiana, Illinois and Wisconsin) based upon executive orders issued by these foreign states to regulate interpersonal contact of their citizens.

VI. THE STATE AUTO PROPERTY POLICIES

A. The Classic Dining Policy

77. State Auto Property issued to Classic Dining Group LLC Special Account Preferred Business Policy No. SPP 2501221 for the policy period of August 14, 2019 to August 14, 2020 (a true and accurate copy of the Classic Dining Policy is attached hereto as Exhibit 17).

78. The Classic Dining Policy was issued to first named insured Classic Dining Group LLC in Algonquin, Illinois using an Illinois broker.

79. All Classic Dining Defendants are named insureds under the Classic Dining Policy. *Id.* at SAP000149-51, 545.

80. The Classic Dining Policy provides coverage pursuant to the Building and Personal Property Coverage Form CP0010 (10/12) and various endorsements, including Business Income (And Extra Expense) Coverage Form CP0030 (10/12), Premier Property Plus Endorsement SP1007 (10/16) and Causes of Loss – Special Form CP1030 (10/12).

81. The Building and Personal Property Coverage Form of the Classic Dining Policy states, in relevant part, as follows:

A. Coverage

We will pay for direct physical loss of or damage to Covered Property at the premises described in the Declarations caused by or resulting from any Covered Cause of Loss.

1. Covered Property

Covered Property, as used in this Coverage Part, means the type of property described in this section **A.1.**, and limited in **A.2.** Property Not Covered, if a Limit Of Insurance is shown in the Declarations for that type of property.

* * *

Id. at SAP000220.

82. The Business Income (and Extra Expense) Coverage Form of the Classic Dining

Policy states, in relevant part, as follows:

A. Coverage

1. Business Income

* * *

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 property at premises which are described in the Declarations and for which a Business Income Limit Of Insurance is shown in the Declarations. The loss or damage must be caused by or result from a Covered Cause of Loss.***

* * *

2. Extra Expense

* * *

b. Extra Expense means necessary expenses you incur during the "period of restoration" that you would not have incurred if there had been no direct physical loss or damage to property caused by or resulting from a Covered Cause of Loss.

* * *

3. Covered Causes of Loss, Exclusions And Limitations

See applicable Causes of Loss Form as shown in the Declarations

* * *

5. Additional Coverages

a. Civil Authority

In this Additional Coverage, Civil Authority, the described premises are premises to which this Coverage Form applies, as shown in the Declarations.

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.

Civil Authority Coverage for Business Income will begin 72 hours after the time of the first action of civil authority that prohibits access to the described premises and will apply for a period of up to four consecutive weeks from the date on which such coverage began.

Civil Authority Coverage for Extra Expense will begin immediately after the time of the first action of civil authority that prohibits access to the described premises and will end:

- (1) Four consecutive weeks after the date of that action; or
- (2) When your Civil Authority Coverage for Business Income ends; whichever is later.

* * *

Id. at SAP000260-61.

83. The Premier Property Plus Endorsement of the Classic Dining Policy states, in relevant part, as follows:

A. BUILDING AND PERSONAL PROPERTY COVERAGE FORM is amended as shown:

* * *

5. The following changes are made or coverages are added to the Coverage Extension Under Section A.5.

* * *

j. Business Income and Extra Expense. We will pay for the actual loss

of Business Income, including “rental value” you sustain and Extra Expense 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 the premises described in the Declarations. The loss or damage must be caused by or result from a Covered Cause of Loss.***

* * *

k. Business Income from Dependent Properties. 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 not described in the Declarations caused by or resulting from a Covered Cause of Loss.***

* * *

Id. at SAP000286-89.

84. The Causes of Loss – Special Form of the Classic Dining Policy states, in relevant part, as follows:

A. Covered Causes of Loss

When Special is shown in the Declarations, Covered Causes of Loss means direct physical loss unless the loss is excluded or limited in this policy.

B. Exclusions

1. We will not pay for loss or damage caused directly or indirectly by any of the following. Such loss or damage is excluded regardless of any other cause or event that contributes concurrently or in any sequence to the loss.

a. Ordinance Or Law

The enforcement of or compliance with any ordinance or law:

- (1) Regulating the construction, use or repair of any property; or
- (2) Requiring the tearing down of any property, including the cost of removing its debris.

This exclusion, Ordinance Or Law, applies whether the loss results from:

- (a) An ordinance or law that is enforced even if the property has not been damaged; or
- (b) The increased costs incurred to comply with an ordinance or law in the course of construction, repair, renovation, remodeling or demolition of property, or removal of its debris, following a physical loss to that property.

* * *

2. We will not pay for loss or damage caused by or resulting from any of the following:

* * *

b. Delay, loss of use or loss of market.

* * *

3. We will not pay for loss or damage caused by or resulting from any of the following, 3.a. through 3.c. But if an excluded cause of loss that is listed in 3.a. through 3.c. results in a Covered Cause of Loss, we will pay for the loss or damage caused by that Covered Cause of Loss.

* * *

b. Acts or decisions, including the failure to act or decide, of any person, group, organization or governmental body.

* * *

4. Special Exclusions

The following provisions apply only to the specified Coverage Forms:

a. Business Income (And Extra Expense) Coverage Form***

We will not pay for:

* * *

(5) Any other consequential loss.

* * *

Id. at SAP000240-44.

B. The RT Policy

85. State Auto Property issued to RT Real Estate of Southern Wisconsin LLC Businessowners Policy No. BOP 2892817 for the policy period of November 3, 2019 to November 3, 2020 (a true and accurate copy of the RT Policy is attached hereto as Exhibit 18).

86. The RT Policy was issued to first named insured RT Real Estate of Southern Wisconsin LLC in Algonquin, Illinois using an Illinois broker.

87. All RT Defendants are named insureds under the RT Policy. Id. at SAP000650.

88. The RT Policy provides coverage pursuant to form BP00002 (12/99) and various endorsements, including Business Income and Extra Expense – Limited Extension for Food-Borne Illness Endorsement BP 23 06 05 12, Business Income from Dependent Properties

Additional Coverages Endorsement BP 21 07 01 08 and Spoilage Coverage Endorsement BP0415C (01/97).

89. The Insuring Agreement of the Businessowners Special Property Coverage Form in the RT Policy provides, in relevant part, as follows:

A. Coverage

We will pay for direct physical loss of or damage to Covered Property at the premises described in the Declarations caused by or resulting from any Covered Cause of Loss.

1. Covered Property

Covered Property, as used in this policy, means the type of property as described in this section, **A.1.**, and limited in **A.2.**, Property Not Covered, if a Limit of Insurance is shown in the Declarations for that type of property.

* * *

3. Covered Causes of Loss

Risks Of Direct Physical Loss unless the loss is:

- a.** Excluded in Section **B.**, Exclusions; or
 - b.** Limited in Paragraph **A.4.**, Limitations;
- that follow.

* * *

Id. at SAP000689-90.

90. The Additional Coverages of the Businessowners Special Property Coverage Form in the RT Policy provides, in relevant part, as follows:

5. Additional Coverages

* * *

f. Business Income

(1) Business Income

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

* * *

g. Extra Expense

(1) We will pay necessary Extra Expense you incur during the “period of restoration” that would not have incurred if there had been no direct physical loss or damage to property at the described premises. The loss or damage must be caused by or result from a Covered Cause of Loss. ***

* * *

i. Civil Authority

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 due to direct physical loss of or damage to property, other than at the described premises, caused by or resulting from any Covered Cause of Loss.

The coverage for Business Income will begin 72 hours after the time of that action and will apply for a period of up to three consecutive weeks after coverage begins.

The coverage for necessary Extra Expense will begin immediately after the time of that action and ends:

- (1) 3 consecutive weeks after the time of that action; or
- (2) When your Business Income coverage ends;

whichever is later.

* * *

Id. at SAP000692-94.

91. The Business Income and Extra Expense – Limited Extension for Food-Borne Illness Endorsement of the RT Policy provides, in relevant part, as follows:

The following is added to Paragraph **A.5. Additional Coverages:**

Business Income – Limited Extension for Food-Borne Illness

Additional Coverages **f.** Business income and **g.** Extra Expense is amended to include coverage for the following Causes of Loss:

1. The suspension of your “operations” at the described premises due to the order of a civil authority; or adverse public communications or media reports, resulting from the actual or alleged:
 - a. Food or drink poisoning of a guest of the described premises; or
 - b. Exposure of the described premises to a contagious or infectious disease.
2. The “period of restoration” for this Cause of Loss shall not exceed 30 consecutive calendar days from the date of the suspension of your “operations”.

* * *

Id. at SAP000743

92. The Business Income from Dependent Properties Additional Coverages Endorsement of the RT Policy provides, in relevant part, as follows:

The following is added to Paragraph **A.5. Additional Coverages:**

Business Income From Dependent Properties

1. We will pay for the actual loss of Business Income you sustain due to physical loss or damage at the premises of a dependent property caused by or resulting from any Covered Cause of Loss.

The most we will pay under this additional Coverage is the Limit of the insurance indicated in the Declarations.

2. We will reduce the amount of your Business Income Loss, other than Extra Expense, to the extent you can resume “operations”, In whole or in part, by using any other available:
 - a. Source of materials; or
 - b. Outlet for your products.
3. If you do not resume “operations”, or do not resume “operations” as quickly as possible, we will pay based on the length of time it would have taken to resume “operation” as quickly as possible.

4. Dependent property means property owned by others whom you depend on to:
 - a. Deliver materials or services to you, or to others for your account. But services does not mean water, communication or power supply services;
 - b. Accept your products or services;
 - c. Manufacture your products for delivery to your customers under contract for sales; or
 - d. Attract customers to your business.

The dependent property must be locate in the coverage territory of this policy.

* * *

Id. at SAP000732.

93. The Spoilage Coverage Endorsement of the RT Policy provides, in relevant part, as follows:

CAUSES OF LOSS

REFRIGERATION MAINTENANCE AGREEMENT	BREAKDOWN OR CONTAMINATION	POWER OUTAGE
X	X	X

The Businessowners Special Property Coverage Form is extended to insure against direct physical loss of or damage to “perishable stock” indicated in the Schedule, caused by the Covered Cause(s) of Loss, as provided by this endorsement.

* * *

Id. at SAP000663.

94. The Exclusions of the Businessowners Special Property Coverage Form in the RT Policy provides, in relevant part, as follows:

B. Exclusions

1. We will not pay for loss or damage caused directly or indirectly by any of the following. Such loss or damage is excluded regardless of any other cause or event that contributes concurrently or in any sequence to the loss.

a. Ordinance Or Law

The enforcement of any ordinance or law:

- (1) Regulating the construction, use or repair of any property; or
- (2) Requiring the tearing down of any property, including the cost of removing its debris.

This exclusion, Ordinance Or Law, applies whether the loss results from:

- (1) An ordinance or law that is enforced even if the property has not been damaged; or
- (2) The increased costs incurred to comply with an ordinance or law in the course of construction, repair, renovation, remodeling or demolition of property or removal of its debris, following a physical loss to that property.

* * *

- 2. We will not pay for loss or damage caused directly or indirectly by any of the following:

* * *

b. Consequential Losses

Delay, loss of use or loss of market.

* * *

- 3. We will not pay for loss or damage caused by or resulting from any of the following **B.3.a.** through **B.3.c.** But if an excluded cause of loss that is listed in **B.3.a.** through **B.3.c.** results in Covered Cause of Loss, we will pay for the loss or damage caused by that Covered Cause of Loss.

* * *

b. Acts Or Decisions

Acts or decisions, including the failure to act or decide, of any person, group, organization or governmental body.

* * *

4. Business Income And Extra Expense Exclusions

We will not pay for:

* * *

b. Any other consequential loss.

* * *

Id. at SAP000697-700.

COUNT I

Declaration of No Coverage under the Classic Dining Policy

95. State Auto Property re-alleges the foregoing paragraphs as though fully set forth herein.

96. No coverage is available to the Classic Dining Defendants for their claims under the Classic Dining Policy because:

- a. there is no Business Income and Extra Expense Coverage under either the Business Income (And Extra Expense) Coverage Form or the Coverage Extensions under Section A.5 of the Building and Personal Property Coverage Form because there was no direct physical loss of or damage to property at any insured premises caused by a Covered Cause of Loss, and no causal link between any alleged suspension that may have taken place and direct physical loss of or damage to the insured premises;
- b. there is no Business Income from Dependent Properties coverage under the Coverage Extension Section A.5 of the Building and Personal Property Coverage Form because there was no direct physical loss of or damage to “dependent property” at premises not described in the Declarations caused by or resulting from a Covered Cause of Loss;
- c. there is no Civil Authority coverage under the Business Income (And Extra Expense) Coverage Form because the orders did not prohibit access to insured premises but encouraged delivery and pick-up business at those premises. Furthermore, the actions of the civil authority were taken to reduce interpersonal contact, and were not the result of damaged property at any location; and
- d. various exclusions in the policy emphasize the lack of coverage for pure loss of use in the absence of direct physical loss or damage and provide an independent basis for clarify the insuring agreements’ intent that the policy does not cover damages from pure loss of use in the absence of any direct physical loss of or damage to property. These exclusions, include:
 - i. the Ordinance or Law Exclusion 1.a.;
 - ii. the Delay, Loss of Use or Loss of Market Exclusion 2.b.;
 - iii. the Acts or Decisions Exclusion 3.b.; and

- iv. the Consequential Loss Business Income (and Extra Expense) Special Exclusion 4.(a)(5)

COUNT II

Declaration of No Coverage under the RT Policy

- 97. State Auto Property re-alleges paragraphs 1. – 94. as though fully set forth herein.
- 98. No coverage is available to the RT Defendants for their claims under the RT

Policy because:

- a. there is no Business Income or Extra Expense coverage under Section A.5 of the Businessowners Special Property Coverage Form because there was no direct physical loss of or damage to property at the insured premises, no necessary suspension of the insureds’ “operations,” and no causal link between any alleged suspension that may have taken place and direct physical loss of or damage to the premises;
- b. there is no Civil Authority coverage under Section A.5 of the Businessowners Special Property Coverage Form because the applicable orders did not prohibit access to the described premises and were not issued due to direct physical loss of or damage to property other than at the described premises resulting from a Covered Cause of Loss;
- c. there is no direct physical loss of or damage to property at the premises of a dependent property caused by or resulting from any Covered Cause of Loss under the Business Income from Dependent Properties Additional Coverages Endorsement;
- d. there is no actual or alleged food poisoning at any specific insured premises, or any alleged exposure to an infectious disease at any insured premises, which then caused negative publicity or a government order that required the shut-down of the specific premises, as necessary to trigger the Business Income and Extra Expense – Limited Extension for Food-Borne Illness Endorsement;
- e. there is no direct physical loss of or damage to “perishable stock” caused by a Covered Cause of Loss under the Spoilage Coverage Endorsement; and
- f. various exclusions in the policy emphasize the lack of coverage for pure loss of use in the absence of direct physical loss or damage and provide an independent basis for clarify the insuring agreements’ intent that the policy does not cover damages from pure loss of use in the absence of any direct physical loss of or damage to property. These exclusions, include:
 - i. the Ordinance or Law Exclusion 1.a.;

- ii. the Consequential Losses Exclusion 2.b.;
- iii. the Acts or Decisions Exclusion 3.b.; and
- iv. the Consequential Loss Business Income and Extra Expense Exclusion 4.b.

WHEREFORE, State Auto Property respectfully prays that this Court:

1. Declare and adjudicate that the Classic Dining Defendants' claims are not covered by the Classic Dining Policy.
2. Declare and adjudicate that the RT Defendants' claims are not covered by the RT Policy.
3. Grant such other and further relief as shall be just and proper.

Dated: July 29, 2020

Respectfully submitted,

/s/ Adam H. Fleischer

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