

**IN THE UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF TENNESSEE
AT NASHVILLE**

MT. HAWLEY INSURANCE COMPANY,

Plaintiff

v.

Docket No.:

WHISKEY ROW NASHVILLE, LLC,

Defendant.

DECLARATORY JUDGMENT COMPLAINT

Comes now Mt. Hawley Insurance Company, by and through counsel of record, pursuant to Rule 57 of the Federal Rules of Civil Procedure, and for its Complaint for Declaratory Judgment states:

1. Mt. Hawley Insurance Company (“Mt. Hawley”) is a corporation organized under the laws of the State of Illinois, with its principal place of business in Peoria, Illinois.
2. Whiskey Row Nashville, LLC (“WRN”) is a limited liability company organized under the laws of the State of Arizona with its principal place of business located at 400 Broadway, Nashville, Tennessee 37203. WRN may be served with process on its registered agent Incorp Services, Inc., 216 Centerview Drive, Suite 317, Brentwood, Tennessee 37027.
3. Plaintiff brings this action for declaratory judgment pursuant to 28 U.S.C. §§ 2201-2202. This Court has jurisdiction to hear this cause pursuant to 28 U.S.C. § 1332 as it is between citizens of different states and the amount in controversy exceeds \$75,000.00 exclusive of interests and costs.

4. This Court is the proper venue for this action pursuant to 28 U.S.C. § 1391, because it is the district in which a substantial part of the events giving rise to the claim occurred and in which the Defendant's principal place of business is located.

5. Mt. Hawley issued policy number MCP0168865 ("the Policy") to Defendant with effective dates of December 14, 2019 to December 14, 2020 covering property located at 400 Broadway, Nashville, Tennessee 37203, subject to all terms, conditions, limitations and exclusions of the Policy, a copy of which is attached hereto as **Exhibit 1**.

6. An actual controversy exists in this matter relative to whether coverage exists under the Policy for Defendant's economic losses due to the COVID-19 pandemic.

7. WRN is a restaurant and bar located in downtown Nashville.

8. On March 22, 2020, the Governor of Tennessee issued Executive Order No. 17 to prevent the spread of COVID-19 among humans, which is attached hereto as **Exhibit 2**.

9. On April 9, 2020, WRN submitted a claim to Mt. Hawley under the Policy for loss of business income associated with COVID-19 based upon Executive Order No. 17.

10. Pursuant to Executive Order No. 17, all restaurants and bars were limited to serving food and alcohol through pick up, drive through or delivery service.

11. Various subsequent Executive Orders, as well as local government orders, extended the time periods that the restrictions on restaurants and bars, among other businesses, were in force.

12. By letter dated May 15, 2020, Mt. Hawley advised WRN that there was no coverage for the claim under the Policy.

13. WRN disagreed with Mt. Hawley's coverage determination.

14. The Policy states in part:

A. Coverage

1. Business Income

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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. With respect to loss of or damage to personal property in the open or personal property in a vehicle, the described premises include the area within 100 feet of the site at which the described premises are located.

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2. Extra Expense

- a. Extra Expense Coverage is provided at the premises described in the Declarations only if the Declarations show that Business Income Coverage applies at that premises.
- 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.

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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.

Where 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 for Business Income ends;

whichever is later.

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F. Definitions

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2. "Operations" means:

- a. Your business activities occurring at the described premises; and

- b. The tenantability of the described premises, if coverage for Business Income Including "Rental Value" or "Rental Value" applies.

3. "Period of restoration" means the period of time that:

- a. Begins:

- (1) 72 hours after the time of direct physical loss or damage for Business Income Coverage;

- (2) Immediately after the time of direct physical loss or damage for Extra Expense Coverage;

caused by or resulting from any Covered Cause of Loss at the described premises; and

- b. Ends on the earlier of:
 - (1) The date when the property at the described premises should be repaired, rebuilt or replaced with reasonable speed and similar quality; or
 - (2) The date when business is resumed at a new permanent location.

“Period of restoration” does not include any increased period required due to the enforcement of any ordinance or law that:

- (1) Regulates the construction, use or repair, or requires the tearing down, of any property; or
- (2) Requires any insured or others to test for, monitor, clean up, remove, contain, treat, detoxify or neutralize, or in any way respond to, or assess the effects of “pollutants”.

The expiration date of this policy will not cut short the “period of restoration”.

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6. “Suspension” means:

- a. The slowdown or cessation of your business activities; or
- b. That part or all of the described premises is rendered untenable, if coverage for Business Income Including “Rental Value” or “Rental Value” applies.

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CAUSES OF LOSS – SPECIAL FORM

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A. Covered Causes Of Loss

When Special is shown in the Declarations, Covered Causes of Loss means Risks Of Direct Physical Loss unless the loss is:

- 1. Excluded in Section B., Exclusions; or
- 2. Limited in Section C. Limitations;

that follow.

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:

- (a) An ordinance or law that is enforced even if the property has not been damaged....

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- 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.

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- 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.

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

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ABSOLUTE POLLUTION EXCLUSION ENDORSEMENT

This endorsement replaces any existing terms and/or exclusions regarding pollution liability within this policy.

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

- A. Property damage arising out of the actual, alleged or threatened discharge, dispersal, release or escape of "pollutants," or contaminants;
 - 1. At or from premises owned, leased, rented or occupied by you,
 - 2. At or from any site or location used by you for you or others for the handling, storage, disposal, processing or treatment of waste,

3. Which are at any time transported, handled, stored, treated, disposed of or processed as waste by you or for you or any person or organization for whom you may be legally responsible, or,
 4. At or from any site or location on which you or any contractors or subcontractors working directly or indirectly on your behalf are performing operations;
 - a. If the “pollutants” are brought on or to the site or location in connection with such operations, or
 - b. If the operations are to test for, monitor, clean up, remove, contain, treat, detoxify or neutralize the “pollutants”.
- B. Any loss, damage, cost or expense arising out of any governmental direction or request that you test for, monitor, clean up, treat, remove, detoxify or neutralize “pollutants” or in any way respond to or assess the effects of “pollutants”.

This includes loss or damage caused by or resulting from contributing to or made worse by actual, alleged or threatened release, discharge, escape or dispersal of contaminants and/or pollutants, all of which are direct or indirect, proximate or remote, or in whole or in part, caused by, contributed to, or aggravated by any damage insured by the policy.

“Pollutants” means any solid, liquid, gaseous or thermal irritant or contaminant, including smoke, vapor, soot, fumes, acids, alkalis, chemicals and waste. In addition to “pollutants” to be disposed of, waste also includes materials to be recycled, reconditioned or reclaimed. It also includes any material which after its release, dispersal or discharge, can cause or threaten damage to human health and/or human welfare, or causes or threatens damage, deteriorations, loss of value, marketability and/or loss of use, to insured property; including, but not limited to bacteria, fungi, virus, or hazardous substances as listed in the Federal Pollution Control Act, Clean Air Act, Resource Conservation and Recovery Act of 1976 and/or Toxic Substances Control Act or as designated by the U.S. Environmental Protection Agency.

15. There is no coverage for Business Income and Extra Expense on the basis that there was no direct physical loss or damage to Defendant’s premises.

16. There is no coverage for Civil Authority on the basis that there was no covered cause of loss that caused damage to other property within one mile of Defendant’s premises that prevented access to the insured property.

17. There is no coverage pursuant to Exclusion 1.a. of the Policy as the various executive orders and other governmental agency orders regulated use of the insured property.

18. There is no coverage pursuant to Exclusion 2.b. of the Policy based upon delay, loss or use or loss of market.

19. There is no coverage pursuant to Exclusion 3.b. of the Policy as Plaintiff's alleged loss is the result of the acts and decisions of governmental bodies.

20. There is no coverage pursuant to the Pollution Exclusion Endorsement of the Policy as the loss at issue allegedly arises out of the Novel Corona Virus.

21. Plaintiff requests that this Court declare the rights of the parties regarding the controversies existing between them and set forth herein and declare that Plaintiff owes no coverage under the policy to Defendant associated with their economic damages as a result of the COVID-19 pandemic.

WHEREFORE, PREMISES CONSIDERED, Plaintiff prays:

1. That process issue and be served upon Defendant requiring it to answer this Complaint;

2. For a declaration of rights, obligations, and legal relations of the Plaintiff and Defendant by reason of the aforesaid policy of insurance;

3. For a declaration that Plaintiff is not obligated under said policy of insurance for any of Defendant's claimed damages;

4. For costs of this cause; and

5. For other such general relief to which Plaintiff may be entitled under the facts and circumstances of this case.

Respectfully submitted,

Rainey, Kizer, Reviere, Bell, PLC

s/Jonathan D. Stewart

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