

STATE OF MINNESOTA

DISTRICT COURT

COUNTY OF HENNEPIN

FOURTH JUDICIAL DISTRICT

Bachman's, Inc.,

CASE TYPE: Contract

Plaintiff,

COURT FILE NO.: _____

Honorable _____

v.

SUMMONS

Florists' Mutual Insurance Company,

Defendant.

THIS SUMMONS IS DIRECTED TO:

Florists' Mutual Insurance Company
c/o CT Corporation System
200 South LaSalle Street, Suite 814
Chicago, IL 60604

1. YOU ARE BEING SUED. The Plaintiffs have started a lawsuit against you. The Plaintiffs' Complaint against you is attached to this Summons. Do not throw these papers away. They are official papers that affect your rights. You must respond to this lawsuit even though it may not yet be filed with the Court and there may be no court file number on this Summons.

2. YOU MUST REPLY WITHIN 20 DAYS TO PROTECT YOUR RIGHTS. You must give or mail to the person who signed this summons a **written response** called an Answer within 20 days of the date on which you received this Summons. You must send a copy of your Answer to the person who signed this Summons located at:

Thomas J. Shroyer
Moss & Barnett, A Professional Association
150 South Fifth Street
Suite 1200
Minneapolis MN 55402

3. YOU MUST RESPOND TO EACH CLAIM. The Answer is your written response to the Plaintiffs' Complaint. In your Answer you must state whether you agree or disagree with each paragraph of the Complaint. If you believe the Plaintiffs should not be given everything asked for in the Complaint, you must say so in your Answer.

4. YOU WILL LOSE YOUR CASE IF YOU DO NOT SEND A WRITTEN RESPONSE TO THE COMPLAINT TO THE PERSON WHO SIGNED THIS SUMMONS. If you do not answer within 20 days, you will lose this case. You will not get to tell your side of the story, and the Court may decide against you and award the Plaintiffs everything asked for in the Complaint. If you do not want to contest the claims stated in the Complaint, you

do not need to respond. A default judgment can then be entered against you for the relief requested in the Complaint.

5. LEGAL ASSISTANCE. You may wish to get legal help from a lawyer. If you do not have a lawyer, the Court Administrator may have information about places where you can get legal assistance. **Even if you cannot get legal help, you must still provide a written Answer to protect your rights or you may lose the case.**

6. ALTERNATIVE DISPUTE RESOLUTION. The parties may agree to or be ordered to participate in an alternative dispute resolution process under Rule 114 of the Minnesota General Rules of Practice. You must still send your written response to the Complaint even if you expect to use alternative means of resolving this dispute.

MOSS & BARNETT
A Professional Associate

Dated: November 6, 2020

By s/Thomas J. Shroyer
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ATTORNEYS FOR PLAINTIFF

6598283v1

STATE OF MINNESOTA
COUNTY OF HENNEPIN

DISTRICT COURT
FOURTH JUDICIAL DISTRICT

CASE TYPE: Contract

Bachman's, Inc.,

Plaintiff,

v.

Florists' Mutual Insurance Company,

Defendant.

COURT FILE NO.: _____
Honorable _____

COMPLAINT

The plaintiff, Bachman's, Inc., states as follows for its claims against the defendant, Florists' Mutual Insurance Company:

I. NATURE OF THE ACTION

1. Plaintiff is a family-owned corporation, domiciled in Minnesota and headquartered in Minneapolis, MN. It sells floral, gift, garden and other products (mostly perishable) at retail stores located throughout the Twin Cities Metropolitan Area, as well as a variety of trees, shrubs, hardscape and other products sold at wholesale from its growing range in Lakeville, Minnesota.

2. Defendant is an insurance company domiciled and with its principal place of business in the State of Illinois; it is admitted to the State of Minnesota to sell insurance.

3. Plaintiff's business cycle is seasonal – sales increase dramatically and spike when springtime weather prompts customers to purchase plaintiff's products for each new, upcoming growing season.

4. To protect its business in case it had to suspend operations for reasons outside of its control, plaintiff paid a valuable premium to purchase an insurance policy from defendant that included "all risk" business interruption coverage ("the Policy"). Plaintiff was sold this enhanced coverage on the basis that it would be fully insured against business interruption losses of any kind

unless from a cause that was *specifically* excluded from coverage by the express terms of the Policy.

5. After the inception of coverage under the Policy, plaintiff suffered a business interruption loss during the spring of 2020 within the meaning of the Policy, during the global pandemic occasioned by the novel coronavirus (SARS-CoV-2). As a result, plaintiff was forced to close its retail stores and limit its wholesale operations just as springtime 2020 sales at those stores and growing range were burgeoning for what promised to be an early growing season – including by the enforcement of Minnesota Statutes Section 12.31, subdivision 2, through Minnesota Emergency Executive Orders 20-01, 20-04 and 20-20.

6. Coverage for plaintiff's business interruption loss is provided for the loss of use of plaintiff's insured retail stores, loss of business income and extra expense; it is not preconditioned on the occurrence of tangible physical damage to plaintiff's insured retail locations.

7. The defendant has denied plaintiff's timely and complete tender of its claim for business interruption loss under the Policy, forcing plaintiff to commence this action to enforce its rights to enjoy the benefit of the "all risk" coverage for which it paid such a valuable premium.

II. FACTUAL BACKGROUND

8. The Policy was issued to plaintiff as Business Package Policy No. BP-00424 and it provides coverage for the twelve months following February 1, 2020. The Policy included "Business Income (and Extra Expense) Coverage" with a payment limit of \$10,000,000.

9. Most significantly, the Policy was issued with coverage for "Special Causes of Loss."

10. The Policy was drafted exclusively by the defendant or its agents. And, since the Policy was issued after the world was aware that the novel corona virus had been transmitted to

humans and was sweeping the globe, the decision not to exclude coverage under the Policy for business interruptions associated with a “virus” was entirely the defendant’s to make.

11. Some insurance policies provide business interruption coverage on a specific perils basis. Such policies cover a risk of loss if that risk of loss is specifically listed (e.g., hurricane, earthquake, etc.). Other insurance policies, including the Policy at issue here, are all-risk policies. This type of policy covers all risks of loss except for risks that are expressly and specifically excluded. Under Minnesota law such policies are deemed to cover all “fortuitous loss” that is not specifically excluded by the insurance policy. *General Mills, Inc. v. Gold Medal Ins. Co.*, 622 N.W.2d 147 (Minn. App. 2001).

12. The Policy provided business income interruption coverage for all “Special Causes of Loss,” which are defined as,

[L]oss directly caused by:

1. The Standard Covered Causes of Loss included in Section A. of **Part II** of this policy.
2. Other risks of direct physical loss unless excluded or limited.

Of utmost significance here is the fact that the definition of a covered loss under the Policy does not require damage *to* “Covered Property” as a condition of coverage – unlike other forms of business interruption loss insurance that would have limited coverage if the plaintiff had not paid extra premium to enhance its coverage to include the extension for “Special Causes of Loss.” In other words, by its own terms the Policy as sold and issued vitiated the prerequisite found in certain other “all-risk” policies which require tangible, physical damage *to* property as a condition for triggering business interruption coverage.

13. What is more, the provision of this broader coverage to plaintiff makes a great deal of practical, good sense in the context of the fact that plaintiff and defendant have a common business focus. Florists’ Mutual is a specialty line insurance company whose customers – like the

plaintiff's – are professional horticulturalists (hence defendant's self-branding as "Hortica"). Accordingly, whereas a typical retailer is limited in its operations to the four corners of a building, a major part of a garden store lies outdoors, impervious to the typical sorts of "physical loss" covered by a conventional "all-risk" policy. Coverage in this business context would be illusory but for the extension of "Special Causes of Loss" to the loss of use of property (instead of limiting coverage to merely damage *to* property).

14. Regardless of this useful context, plaintiff did not incur a "Standard Covered Cause of Loss" under the first leg of the definition cited in paragraph 13, above. Instead, plaintiff suffered a "direct physical loss" of use of its insured retail stores and wholesale operations as a result of an "other risk" that is not specifically "excluded or limited" by the Policy. Coverage is, therefore, provided by the Policy because the business interruption loss was caused by a fortuitous risk that is not specifically excluded from coverage.

15. Starting in March of 2020, governors and civil authorities throughout the country issued orders requiring the suspension of business at a wide range of establishments to control the spread of the novel corona virus.

16. On March 13, 2020, Minnesota's Governor, Timothy Walz, issued Executive Order 20-01 "Declaring a Peacetime Emergency and Coordinating Minnesota's Strategy to Protect Minnesotans from the COVID-19 Pandemic", followed shortly on March 16, 2020, by Executive Order 20-04 Providing for the "Temporary Closure of Bars, Restaurants, and Other Places of Public Accommodation," and on March 25, 2020, by Executive Order 20-20, "Directing Minnesotans to Stay at Home" (collectively, the "Governmental Pandemic Closure Orders").

17. Plaintiff ceased its retail and other sales at the close of business on March 20, 2020 and its stores remained closed until the garden portions of its stores were permitted to re-open on

April 11, 2020 and the floral and gift areas on or around May 21, 2020.

18. As a result of the pandemic and the enforcement of Minnesota law through the Governmental Pandemic Closure Orders, plaintiff lost Business Income (defined by the Policy as “net income . . . and continuing normal operating expenses incurred, including payroll”).

19. As a further consequence of the Governmental Pandemic Closure Orders, plaintiff incurred “Extra Expense” (defined by the Policy as “the necessary and reasonable additional expenses you incur during the ‘period of restoration’ that exceed the normal expenses that you would have incurred”) due to the Special Covered Loss, for which it is entitled to reimbursement under the Policy.

20. On or about April 7, 2020, plaintiff submitted its notice of claim for business interruption coverage to defendant, which denied all coverage under the Policy for that loss on April 27, 2020.

21. None of the exclusions to coverage as a Special Covered Loss preclude plaintiff from recovering its business interruption losses from defendant. The Policy does not exclude from coverage any business interruption associated with a virus, pandemic, epidemic, or the like -- and a special policy endorsement required in Minnesota obviated any exclusion for the enforcement of a “law or ordinance.”

22. The novel corona virus (known by the scientific designation of “SARS-CoV-2”) is not a “pest or disease” within the meaning of the Policy. Viruses are a distinct form of organic material that is said to reside “at the edge of life” and which lack cell structure, metabolism or the ability to reproduce outside of a host cell. Technically speaking, SARS-CoV-2 is a member of the Coronaviridae family, an RNA virus with a crown-like appearance under an electron microscope because of glycoprotein spikes on its envelope. Those spikes, in turn, play a crucial role in the

pathogenicity of the virus as they promote viral assembly and release. That virus, in turn, may cause an illness in host organisms (called COVID-19"). And, while the virus can exacerbate pre-existing diseases, that impact occurs only after the virus attaches to a host cell (or more accurately, attaches to and overwhelms multiple host cells). Odious though COVID-19 is, it does not per se constitute a disease by itself (the common cold is also caused by a corona virus and colds are most certainly not considered to be "diseases").

23. Nor do such viral agents constitute "pests" within the meaning of the Policy. On the contrary, a "pest" is an insect that causes disease in a plant or animal, according to common usage, horticultural standards and governmental regulation. As the specialty insurer of horticulturalists, the defendant is well-aware that the novel corona virus is not a "pest" within the meaning of the Policy.

24. Moreover, the shut-down of plaintiff's sales locations was not just due to the virus itself – but rather was independently caused by the enforcement of Minn. Stat. Section 12.31, as implemented through Minn. Stat. Section 4.035 (in the form of the Governmental Pandemic Closure Orders). While the Policy took a stab at excluding coverage for loss caused by the enforcement of those laws (excluded either as an "act or decision . . . of any . . . governmental body" or "legal process"), those exclusions were trumped by the amendatory endorsement required to be included in the Policy by Minnesota's insurance regulators ("Minnesota Changes"). To comply with Minnesota law, the Policy replaced a purported exclusion for "Ordinance or Law" with a new provision that literally affords coverage in the event of a total loss of use of an insured location, as follows (in relevant part):

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 . . . *But if the loss or damage is solely a result of one*

or more Covered Causes of Loss, we will pay for your compliance with such ordinance or law . . . [.]

(Emphasis supplied).

As previously alleged, the applicable definition of “Covered Cause of Loss” includes any cause not specifically excluded, so that as written this attempted exclusion mirrors back the same business interruption loss coverage for all cause of loss, unless specifically excluded.¹

**COUNT I
BREACH OF CONTRACT**

25. Plaintiff repeats and incorporates by reference the preceding paragraphs as if fully set forth herein.

26. Defendant has refused to honor its contractual duty to plaintiff by denying coverage under the Policy for the losses alleged herein.

27. Defendant, by failing to honor its contractual duties, including by failing to provide coverage to the plaintiff, has breached its contractual duties to plaintiff.

28. Plaintiff has suffered significant damage as a direct result of result of defendant’s breach of the Policy.

**COUNT II
DECLARATION OF RIGHTS**

29. Plaintiffs repeat and incorporate by reference the preceding paragraphs as if fully set forth herein.

¹ Ironically, as the wording of this purported exclusion shows, the exclusion in the Policy would not have even been necessary if the Policy required physical damage *to* property as a coverage trigger, in the first place. Furthermore, the Policy provides for “Business Enhancements” coverage in the Declarations for loss due to “Civil Authority” – a clear extension of coverage for losses occasioned by the Governmental Pandemic Protection Orders.

30. A justiciable controversy exists between plaintiff and defendant concerning defendant's obligations under the Policy within the meaning of Chapter 555 of the Minnesota Statutes and this action is properly brought pursuant to Rule 57 of the Minnesota Rules of Civil Procedure.

31. A judicial declaration is necessary to establish the respective rights and obligations of the parties as to the Policy and under the circumstances herein described.

REQUEST FOR RELIEF

WHEREFORE, Bachman's, Inc. requests judgment as follows:

1. A judicial declaration that defendant's denial of coverage as herein described was and is wrongful and a breach of the defendant's duties under the Policy;
2. A judicial declaration in favor of plaintiff and against defendant, requiring defendant to reimburse plaintiff for all covered losses according to the procedures and terms of the Policy in the amount of all sums insured under the Policy for the covered losses alleged herein;
3. Awarding costs, expenses and reasonable attorneys' fees incurred in prosecuting this action; and
4. Granting such other and further relief as the Court deems just, necessary and proper, including without limitation any applicable penalties and interest.

MOSS & BARNETT
A Professional Associate

Dated: November 6, 2020

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ATTORNEYS FOR PLAINTIFF

ACKNOWLEDGMENT

The undersigned hereby acknowledges that costs, disbursements and reasonable attorney and witness fees may be awarded pursuant to Minn. Stat. § 549.211, subd. 2, to the party against whom the allegations in this pleading are asserted.

MOSS & BARNETT
A Professional Association

Dated: November 6, 2020

By s/Thomas J. Shroyer
Thomas J. Shroyer (#100638)

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