

**IN THE CIRCUIT COURT
THIRD JUDICIAL CIRCUIT
MADISON COUNTY, ILLINOIS**

SHOPONE CENTERS REIT INC.)	
)	
Plaintiff,)	2021L 000408
)	
v.)	Case No.: 21-L-_____
)	
ZURICH AMERICAN)	JURY TRIAL DEMANDED
INSURANCE COMPANY and)	
AMERICAN GUARANTEE & LIABILITY)	
COMPANY)	
)	
Defendants.)	

COMPLAINT

Plaintiff ShopOne Centers REIT Inc. (“ShopOne” and/or “Plaintiff”), for its Complaint against Zurich American Insurance Company (“Zurich”) and American Guarantee and Liability Insurance Company (“American”), states as follows:

PARTIES

1. ShopOne is a Maryland corporation doing business in Ohio, Michigan, Florida, Georgia, California, New Jersey, Maryland, New York, Pennsylvania, and Nevada.
2. Zurich is a New York property and casualty stock company with its principal place of business in Illinois.
3. American is a New York property and casualty stock company with its principal place of business in Illinois. American is a wholly owned subsidiary of Zurich. American and Zurich are collectively referred to herein as “Defendants.”

JURISDICTION AND VENUE

4. This Court has personal jurisdiction over Defendants because Defendants have their principal place of business in Illinois and are, therefore, citizens of Illinois.

5. Defendants conduct their usual and customary business within Madison County, including by soliciting business in Madison County to Madison County residents, selling their products through agents at multiple office locations in Madison County, and servicing customers in Madison County. Accordingly, venue is proper in this district because Defendants are doing business in and, are therefore, residents of, Madison County, Illinois.

FACTUAL ALLEGATIONS

A. The Global COVID-19 Pandemic

6. According to the World Health Organization (“WHO”), COVID-19 is an infectious disease for which, until very recently, there are no vaccines or treatments.¹ It spreads easily from person-to-person.²

7. When an infected person coughs, sneezes, or even just talks, droplets with the infectious agent fly into the air from the person’s nose or mouth and can thereby infect others. This can occur even if the person is asymptomatic.³ As WebMD states, “Some people who don’t know they’ve been infected can give it to others. This is called asymptomatic spread. You can also pass it on before you notice any signs of infection, called presymptomatic spread.”⁴

8. Thus, there is no way to know whether a person with whom one comes into contact might be spreading the disease.

9. The coronavirus can live in the air for up to three hours, be breathed in by others, and get into their lungs, where it can infect them.⁵

¹ https://www.who.int/health-topics/coronavirus#tab=tab_1 (accessed 11/3/2020).

² <https://www.cdc.gov/coronavirus/2019-ncov/cases-updates/summary.html#:~:text=On%20March%2011%2C%20the.of%20new%20influenza%20viruses.> (accessed 11/3/2020).

³ <https://www.webmd.com/lung/coronavirus-transmission-overview#1> (accessed 11/3/2020).

⁴ *Id.*

⁵ *Id.*

10. The coronavirus can also infect people who touch surfaces, such as countertops, furniture, doorknobs and other surfaces in a business that contain the virus. It can live on plastic and stainless steel for up to three days.⁶

11. According to the Centers for Disease Control, COVID-19 can cause mild to severe symptoms, such as cough, shortness of breath or difficulty breathing, fever, chills, muscle pain, sore throat and loss of taste or smell.⁷

12. COVID-19 is a new disease. The first known outbreak was a cluster of cases of pneumonia in Wuhan, Hubei Province in China in December 2019.⁸ The disease did not even have an official name when WHO declared a “Public Health Emergency of International Concern” on January 30, 2020.⁹ The disease was given its name by WHO on February 11, 2020, short for “coronavirus disease 2019.”¹⁰

13. After it was discovered, COVID-19 spread rapidly. On March 11, 2020, “[d]eeply concerned both by the alarming levels of spread and severity, and by the alarming levels of inaction, WHO made the assessment that COVID-19 can be characterized as a pandemic.”¹¹

14. A pandemic is “an outbreak of a disease that occurs over a wide geographic area and affects an exceptionally high proportion of the population.”¹² To be classified as a pandemic, WHO requires “the worldwide spread of a new disease.”¹³

⁶ *Id.*

⁷ <https://www.cdc.gov/coronavirus/2019-ncov/symptoms-testing/symptoms.html> (accessed 11/3/2020).

⁸ <https://www.who.int/news-room/detail/27-04-2020-who-timeline---covid-19> (accessed 11/3/2020).

⁹ <https://www.who.int/emergencies/diseases/novel-coronavirus-2019/events-as-they-happen> (accessed 11/3/2020).

¹⁰ https://www.who.int/docs/default-source/coronaviruse/situation-reports/20200211-sitrep-22-ncov.pdf?sfvrsn=fb6d49b1_2 (accessed 11/3/2020).

¹¹ <https://www.who.int/news-room/detail/27-04-2020-who-timeline---covid-19> (accessed 11/3/2020).

¹² <https://www.merriam-webster.com/dictionary/pandemic> (accessed 11/3/2020).

¹³ https://www.who.int/csr/disease/swineflu/frequently_asked_questions/pandemic/en/ (accessed 11/3/2020).

15. At the point that WHO called COVID-19 a pandemic on March 11, the number of cases outside China in just the past two weeks had increased by 13-fold to 118,000 in 114 countries; more than 4,000 people had lost their lives, and as the Director-General of WHO stated, “[t]housands more [were] fighting for their lives in hospitals.”¹⁴

16. According to the COVID Tracking Project, by that same date (March 11), 2,873 patients had tested positive in the United States, and 43 patients had died. From that date on, the number of cases and deaths increased exponentially. By March 19, the number of cases nationwide had increased nearly seven times to 19,770, and the number of deaths had increased nearly five times to 199.¹⁵

17. By November 2, 2020, according to the New York Times, 9.3 million Americans had tested positive, and 231,182 had died.¹⁶ That was more than any other country in the world and the 14th and 13th highest on a per capita basis, respectively.¹⁷

18. As of March 24, 2021, according to Johns Hopkins University, 29,922,392 Americans had tested positive, and 543,843 had died from COVID-19.¹⁸

B. Steps Taken by Authorities to Control the Pandemic

19. On March 13, 2020, the White House issued a proclamation declaring “that the COVID-19 outbreak in the United States constitutes a national emergency”; it specified that the emergency had actually begun March 1, 2020.¹⁹

20. States likewise declared states of emergency.

¹⁴ <https://www.who.int/dg/speeches/detail/who-director-general-s-opening-remarks-at-the-media-briefing-on-covid-19---11-march-2020> (accessed 11/3/2020).

¹⁵ <https://covidtracking.com/data/us-daily> (accessed 11/3/2020).

¹⁶ <https://www.nytimes.com/interactive/2020/world/coronavirus-maps.html> (accessed 11/02/2020).

¹⁷ *Id.*

¹⁸ <https://coronavirus.jhu.edu/data/new-cases> (accessed 3/24/2021).

¹⁹ <https://www.whitehouse.gov/presidential-actions/proclamation-declaring-national-emergency-concerning-novel-coronavirus-disease-covid-19-outbreak/> (accessed 11/3/2020).

Ohio

21. On March 14, 2020, Governor Mike DeWine issued Executive Order 2020-01D, declaring a State of Emergency for the entire State of Ohio.²⁰

22. On March 15, 2020, the Ohio Department of Health issued an order restricting food and beverage sales to carry-out and delivery only, with no onsite consumption permitted.²¹

23. On March 22, 2020, the Ohio Department of Health issued a stay at home order, restricting the public's movement and activities and closing all non-essential businesses and operations.²²

24. From March 22, 2020 to the present, civil authorities in Ohio have issued various executive orders that continue to prohibit and/or restrict the public's access to and the operation of non-essential businesses, including personal services, restaurants, bars, retail businesses, and gyms/fitness centers.

Michigan

25. On March 10, 2020, Governor Gretchen Whitmer issued Executive Order 2020-4, declaring a State of Emergency for the entire State of Michigan.²³

26. On March 23, 2020, Governor Whitmer issued Executive Order 2020-21, directing Michigan residents to stay at home.²⁴

²⁰ <https://coronavirus.ohio.gov/static/publicorders/Executive-Order-2020-01D.pdf> (accessed 3/30/2021).

²¹ https://coronavirus.ohio.gov/wps/wcm/connect/gov/aa5aa123-c6c9-4e95-8a0d-bc77409c7296/Health+Director+Order+Limit+Food%2C+Alcohol+Sales+to+Carry+Out+Delivery+Only.pdf?MOD=AJPERES&CONVERT_TO=url&CACHEID=ROOTWORKSPACE.Z18_MIHGGIK0N0JO00QO9DDDDM300-aa5aa123-c6c9-4e95-8a0d-bc77409c7296-n6XNQLo (accessed 3/30/2021).

²² <https://coronavirus.ohio.gov/static/publicorders/DirectorsOrderStayAtHome.pdf> (accessed 3/30/2021).

²³ [https://www.michigan.gov/whitmer/0,9309,7-387-90499_90705-521576--00.html#:~:text=Executive%20Order%202020%2D04%3A%20Declaration%20of%20State%20of%20Emergency%20%2D%20RESCINDED,-EXECUTIVE%20ORDER&text=The%20novel%20coronavirus%20\(COVID%2D19,spread%20from%20person%20to%20person](https://www.michigan.gov/whitmer/0,9309,7-387-90499_90705-521576--00.html#:~:text=Executive%20Order%202020%2D04%3A%20Declaration%20of%20State%20of%20Emergency%20%2D%20RESCINDED,-EXECUTIVE%20ORDER&text=The%20novel%20coronavirus%20(COVID%2D19,spread%20from%20person%20to%20person) (accessed 3/30/2021).

²⁴ https://www.michigan.gov/whitmer/0,9309,7-387-90499_90705-522626--00.html (accessed 3/30/2021).

27. From March 23, 2020 to the present, civil authorities in Michigan have issued various executive orders that continue to prohibit and/or restrict the public's access to and the operation of non-essential businesses, including personal services, restaurants, bars, retail businesses, and gyms/fitness centers.

Florida

28. On March 9, 2020, Governor Ron DeSantis issued Executive Order 20-52, declaring a State of Emergency for the entire State of Florida.²⁵

29. On April 1, 2020, Governor DeSantis issued Executive Order 20-91, directing Florida residents to limit their movements and personal interactions outside of their homes to only those necessary to obtain or provide essential services or conduct essential activities.²⁶

30. Since April 1, 2020, civil authorities in Florida have continued to restrict the public's access to and the operation of non-essential businesses.

Tennessee

31. On March 12, 2020, Governor Bill Lee issued Executive Order 14, declaring a State of Emergency for the entire State of Tennessee.²⁷

32. On March 22, 2020, Governor Lee issued Executive Order 17, restricting restaurants and bars to carry-out or delivery services and closing many businesses including gyms and fitness/exercise centers.²⁸

²⁵ https://www.flgov.com/wp-content/uploads/orders/2020/EO_20-52.pdf (accessed 3/30/2021).

²⁶ https://www.flgov.com/wp-content/uploads/orders/2020/EO_20-91-compressed.pdf (accessed 3/30/2021).

²⁷ <https://publications.tnsosfiles.com/pub/execorders/exec-orders-lee14.pdf> (accessed 3/31/2021).

²⁸ <https://publications.tnsosfiles.com/pub/execorders/exec-orders-lee17.pdf> (accessed 3/31/2021).

33. On March 30, 2020, Governor Lee issued Executive Order 22, directing Tennessee residents to stay at home, except for when engaging in essential activity or essential services and ordering the closure of all non-essential businesses.²⁹

34. Since March 30, 2020, civil authorities in Tennessee continued to prohibit and/or restrict the public's access to and the operation of non-essential businesses, including personal services, restaurants, bars, retail businesses, and gyms/fitness centers.

Georgia

35. On March 14, 2020, Governor Brian Kemp issued an Executive Order declaring a Public Health State of Emergency for the entire State of Georgia.³⁰

36. On March 23, 2020, Governor Kemp issued an Executive Order closing bars and nightclubs and limiting the occupancy of other businesses.³¹

37. On April 23, 2020, Governor Kemp issued an Executive Order providing specific guidance for various types of businesses in the State, including restaurants.³²

38. Since April 23, 2020, civil authorities in Georgia continued to restrict the public's access to and the operation of non-essential businesses, including personal services, restaurants, bars, retail businesses, and gyms/fitness centers.

California

39. On March 4, 2020, Governor Gavin Newsom declared a State of Emergency for the entire State of California.³³

²⁹ <https://publications.tnsosfiles.com/pub/execorders/exec-orders-lee22.pdf> (accessed 3/31/2021).

³⁰ <https://gov.georgia.gov/executive-action/executive-orders/2020-executive-orders> (accessed 3/30/2021).

³¹ *Id.*

³² *Id.*

³³ <https://www.gov.ca.gov/2020/03/04/governor-newsom-declares-state-of-emergency-to-help-state-prepare-for-broader-spread-of-covid-19/> (accessed 3/30/2021).

40. On March 19, 2020, Governor Newsom issued Executive Order N-33-20 directing all California residents to stay home except to go to an essential workplace or to shop for essential needs, closing non-essential businesses throughout the state.³⁴

41. From March 19, 2020 to the present, civil authorities in California have issued various executive orders that continue to prohibit and/or restrict the public's access to and the operation of non-essential businesses, including personal services, restaurants, bars, retail businesses, and gyms/fitness centers.

New Jersey

42. On March 9, 2020, Governor Philip Murphy issued Executive Order 103, declaring a State of Emergency for the entire State of New Jersey.³⁵

43. On March 21, 2020, Governor Murphy issued Executive Order 107, directing all New Jersey residents to stay at home until further notice was provided and closing all non-essential businesses to the public.³⁶

44. From March 21, 2020 to the present, civil authorities in New Jersey have issued various executive orders that continue to prohibit and/or restrict the public's access to and the operation of non-essential businesses, including personal services, restaurants, bars, retail businesses, and gyms/fitness centers.

Maryland

45. On March 5, 2020, Governor Lawrence Hogan declared a State of Emergency for the entire State of Maryland.³⁷

³⁴ <https://www.gov.ca.gov/wp-content/uploads/2020/03/3.19.20-attested-EO-N-33-20-COVID-19-HEALTH-ORDER.pdf> (accessed 3/30/2021).

³⁵ <https://www.gov.ca.gov/wp-content/uploads/2020/03/3.19.20-attested-EO-N-33-20-COVID-19-HEALTH-ORDER.pdf> (accessed 3/30/2021).

³⁶ <https://nj.gov/infobank/eo/056murphy/pdf/EO-107.pdf> (accessed 3/30/2021).

³⁷ <https://governor.maryland.gov/wp-content/uploads/2020/03/Proclamation-COVID-19.pdf> (accessed 3/30/2021).

46. On March 16, 2020, Governor Hogan issued an Executive Order closing bars, restaurants, fitness centers, and theaters.³⁸

47. On March 23, 2020, Governor Hogan issued an Executive Order closing all non-essential businesses in the State of Maryland.³⁹

48. On March 30, 2020, Governor Hogan issued an Executive Order requiring all Maryland residents to stay in their homes except to conduct or participate in essential activities.⁴⁰

49. From March 30, 2020 to March 12, 2021, civil authorities in Maryland issued various executive orders that continued to prohibit and/or restrict the public's access to and the operation of non-essential businesses, including personal services, restaurants, bars, retail businesses, and gyms/fitness centers.

New York

50. On March 7, 2020, Governor Andrew Cuomo issued Executive Order 202, declaring a Disaster Emergency for the entire State of New York.⁴¹

51. On March 18, 2020, Governor Cuomo announced a statewide mandate that all non-essential businesses reduce their on-site workforces by 50%.

52. On March 20, 2020, Governor Cuomo announced that he was signing the "New York State on PAUSE" executive order, which included a directive that all non-essential businesses statewide close all in-office personnel functions no later than March 22, 2020 at 8:00 p.m.⁴²

³⁸ <https://governor.maryland.gov/wp-content/uploads/2020/03/Executive-Order-Amending-Large-Gatherings.pdf> (accessed 3/30/2021).

³⁹ <https://governor.maryland.gov/wp-content/uploads/2020/03/Gatherings-THIRD-AMENDED-3.23.20.pdf> (accessed 3/30/2021).

⁴⁰ <https://governor.maryland.gov/wp-content/uploads/2020/03/Gatherings-FOURTH-AMENDED-3.30.20.pdf> (accessed 3/30/2021).

⁴¹ <https://www.governor.ny.gov/news/no-202-declaring-disaster-emergency-state-new-york> (accessed 3/30/2021).

⁴² <https://www.governor.ny.gov/news/governor-cuomo-issues-guidance-essential-services-under-new-york-state-pause-executive-order> (accessed 3/30/2021).

53. From March 20, 2020 to the present, civil authorities in New York have issued various executive orders that continue to prohibit and/or restrict the public's access to and the operation of non-essential businesses, including personal services, restaurants, bars, retail businesses, and gyms/fitness centers.

Pennsylvania

54. On March 6, 2020, Governor Tom Wolf declared a Disaster Emergency for the entire State of Pennsylvania.⁴³

55. On March 19, 2020, Governor Wolf issued an Executive Order requiring all “non-life sustaining businesses” to close to the public.⁴⁴

56. From March 19, 2020 to the present, civil authorities in Pennsylvania have issued various executive orders that continue to prohibit and/or restrict the public's access to and the operation of “non-life sustaining businesses,” including personal services, restaurants, bars, retail businesses, and gyms/fitness centers.

Nevada

57. On March 12, 2020, Governor Steve Sisolak declared a State of Emergency for the entire State of Nevada.⁴⁵

58. On March 20, 2020, Governor Sisolak issued a directive closing all non-essential businesses that promote extended periods of public interaction (including fitness establishments,

⁴³ <https://www.governor.pa.gov/wp-content/uploads/2020/03/20200306-COVID19-Digital-Proclamation.pdf> (accessed 3/30/2021).

⁴⁴ <https://www.scribd.com/document/452416027/20200319-TWW-COVID-19-Business-Closure-Order> (accessed 3/30/2021).

⁴⁵ https://gov.nv.gov/News/Emergency_Orders/2020/2020-03-12_-_COVID-19_Declaration_of_Emergency/ (accessed 3/30/2021).

personal service businesses, and any other such non-essential businesses) and closing restaurants for on-site, in-person dining.⁴⁶

59. Since March 20, 2020, civil authorities in Nevada have issued various executive orders that continue to prohibit and/or restrict the public's access to and the operation of non-essential businesses, including personal services, restaurants, bars, retail businesses, and gyms/fitness centers.

60. Across the Country, eventually, restrictions were reduced, and businesses were allowed to have more patrons in their premises.

C. The Damaging Impact of the COVID-19 Pandemic on Plaintiff

61. The COVID-19 pandemic, along with the restrictions described above, have had a devastating impact on Plaintiff's business.

62. Plaintiff buys, sells, owns, and operates commercial real estate, including shopping centers with, among other things, salons, restaurants, bars, education operators, medical operators, dry cleaners, retail, logistical companies and gyms/fitness centers in Ohio, Michigan, Florida, Tennessee, Georgia, California, New Jersey, Maryland, New York, Pennsylvania, and Nevada.

63. Access to all of Plaintiff's shopping centers was prohibited, restricted, and/or limited at certain points during the pandemic.

64. Additionally, certain locations became untenable.

65. To Plaintiff's knowledge, its shopping centers were not closed and did not become untenable because of the actual presence of the virus that causes COVID-19.

66. Plaintiff experienced a slowdown and/or cessation of its business activities.

⁴⁶ [https://gov.nv.gov/News/Emergency_Orders/2020/2020-03-20_-_COVID-19_Declaration_of_Emergency_Directive_003_\(Attachments\)/](https://gov.nv.gov/News/Emergency_Orders/2020/2020-03-20_-_COVID-19_Declaration_of_Emergency_Directive_003_(Attachments)/) (accessed 3/30/2021).

67. When centers were closed or their access was limited, tenants were not paying rent as they typically had, and ShopOne was forced to either accept reduced rent or no rent at all from its tenants.

68. The slowdown and/or cessation of business activities caused additional problems for ShopOne, including the need to borrow on a line of credit and restructure certain deals.

69. Further, ShopOne suffered damages including but not limited to induced payments for renewals, reductions in management fees, interest payments, canceled leasing deals, legal fees, office rent, reduced rent payments from tenants, and reduced sales prices of assets.

70. Plaintiff has incurred extra expenses during the pandemic that were necessary to resume and continue as nearly as practicable its normal business activities that otherwise would be necessarily suspended due to the loss of its properties caused by COVID-19/the pandemic.

71. Since reopening, Plaintiff's business has continued to be adversely affected because of the pandemic in the ways described above.

D. Plaintiff's Policy with Defendants

72. Zurich marketed its EDGE Policy—the same one Plaintiff purchased—as offering “broader coverage and greater flexibility.”⁴⁷

73. In exchange for premiums paid by Plaintiff to Defendants, Plaintiff obtained a Zurich Edge insurance policy under Policy Number ERP3288379-00, issued to Shopone Center Reit Inc., 10100 Waterville St., Whitehouse, OH 43571, covering a Policy Period from December 31, 2019 to December 31, 2020. A copy of this policy is attached and incorporated by reference as **Exhibit 1**.

⁴⁷ https://zsl.zurichna.com/zus/zna_config.nsf/pages/9123da88864cd81485257433006ed710!OpenDocument&Click= (accessed 3/30/21)

74. The Policy was renewed for another year. The terms remained substantially the same. A copy of this policy is attached and incorporated by reference as **Exhibit 2**. Unless otherwise noted, the December 2019-2020 policy and the December 2020-2021 policy are collectively referred to as the “Policy.”

75. In exchange for an annual premium of \$543,500.00, fully paid by ShopOne, Defendants guaranteed coverage of \$300,000,000.00 for the December 2019-2020 policy. Ex. 1, pp. 10, 12. In exchange for an annual premium of \$466,630.00, fully paid by ShopOne, Defendants guaranteed coverage of \$300,000,000.00 for the December 2020-2021 policy. Ex. 2, pp. 10.

76. The Policy covered losses caused by covered causes at the insured locations:

This Policy Insures against direct physical loss of or damage caused by a **Covered Cause of Loss** to Covered Property, at an Insured Location described in Section II-2.01, all subject to the terms, conditions and exclusions stated in this Policy.

Ex. 1, p. 11 (page numbers reference PDF page number with 1 being the first page after the exhibit cover page).

77. The Policy covered business interruption under Section IV, titled “Time Element.” Ex. 1, p. 23.

78. Defendants agreed to:

...pay for the actual Time Element loss the Insured sustains, as provided in the Time Element Coverages, during the Period of Liability. The Time Element loss must result from the necessary **Suspension** of the Insured’s business activities at an Insured Location. The **Suspension** must be due to direct physical loss of or damage to Property (of the type insurable under this Policy other than **Finished Stock**) caused by a **Covered Cause of Loss** at the **Location**, or as provided in Off Premises Storage for Property Under Construction Coverages.

The Company will also pay for the actual Time Element loss sustained by the Insured, during the Period of Liability at other Insured Locations. The Time Element loss must result from the necessary **Suspension** of the Insured’s business activities at the other Insured Locations. Such other

Location must depend on the continuation of business activities at the **Location** that sustained direct physical loss or damage caused by a **Covered Cause of Loss**.

Ex. 1, p. 23.

79. The Policy defines **Covered Cause of Loss** as “all risks of direct physical loss of or damage from any cause unless excluded.” Ex. 1, p. 57.

80. It defines **Suspension** as “the slowdown or cessation of the Insured’s business activities: or [a]s respects rental incomes that a part or all of the Insured Location is rendered untenable.” Ex. 1, p. 62.

81. The Policy does not define “direct physical loss of or damage to Property” nor does it define “direct physical loss or damage.” It does not further define “all risks of direct physical loss of or damage from *any cause* unless excluded” found in the Covered Cause of Loss definition.

82. Some Zurich policies (not the Policy issued to Plaintiff) limit coverage only to “property damage” and define “property damage” as “physical injury to tangible property.” *See, e.g., Zurich American Ins. Co. v. Public Storage*, 743 F. Supp. 2d 525, 533 (E.D. Virginia 2010).

83. Other Zurich policies (not the Policy issued to Plaintiff) limit coverage to “property damage,” but define “property damage” to include (1) physical injury to or destruction of tangible property; or (2) loss of use of tangible property which has not been physically injured or destroyed. *See, e.g., Snug Harbor, Ltd. V. Zurich Ins.*, 968 F.2d 538 (5th Cir. 1992).

84. Unlike these other Zurich policies, ShopOne’s Policy does not limit coverage to “property damage”; does not restrict coverage to “physical injury to or destruction of tangible property”; and does not define the terms “direct” “physical” “loss” or “damage.”

85. By December 1, 2020, there were over 1,400 cases against insurance companies filed across the country involving business interruption claims related to COVID-19.⁴⁸ American or Zurich was a party to some of these cases. By December 2020, courts across the country had ruled both in favor of and against insurance companies in these cases based on their interpretations of “direct” “physical” “loss” and/or “damage.”

86. In Plaintiff’s renewed Policy, effective December 2020, Defendants still provided coverage for the suspensions due to “direct physical loss of or damage to Property” and did not define “direct” “physical” “loss” or “damage.”

87. The Policy sets out a formula to determine the amount Defendants must pay ShopOne for covered losses under the Time Element Coverage. Ex. 1, pp. 23-24. It also extends the period of liability for covered losses. Ex. 1, pp. 24-25.

88. Defendants provided additional coverages to ShopOne:

EXTRA EXPENSE

The Company will pay for the reasonable and necessary Extra Expenses incurred by the Insured, during the Period of Liability, to resume and continue as nearly as practicable the Insured's normal business activities that otherwise would be necessarily suspended, due to direct physical loss of or damage caused by a **Covered Cause of Loss** to Property of the type insurable under this policy at a **Location**.

The Company will reduce the amount payable as Extra Expense by the fair market value remaining at the end of the Period of Liability for property obtained in connection with the above.

Extra Expenses mean that amount spent to continue the Insured's business activities over and above the expenses the Insured would have normally incurred had there been no direct physical loss of or damage caused by a **Covered Cause of Loss** to Property of the type insurable under this policy at a **Location**. Extra Expense does not include any Gross Earnings loss, the cost of permanent repair or replacement of property that has suffered

⁴⁸ <https://cclt.law.upenn.edu/>

direct physical loss or damage, or expenses otherwise payable elsewhere in the Policy.

LEASEHOLD INTEREST

The Company will pay for the actual Leasehold Interest loss incurred by the Insured (as lessee) resulting from direct physical loss of or damage caused by a **Covered Cause of Loss** to a building (or structure) which is leased and not owned by the Insured, as follows:

If the building (or structure) becomes wholly untenable or unusable and the lease agreement requires continuation of the rent, the Company will pay the Insured the present value of the actual rent payable for the unexpired term of the lease, not including any options;

If the building (or structure) becomes partially untenable or unusable and the lease agreement requires continuation of the rent, the Company will pay the Insured for the present value of the proportionate amount of the actual rent payable for the unexpired term of the lease, not including any options;
or

If the lease is cancelled by the lessor pursuant to the terms of the lease agreement or by operation of law, this Policy will pay the Insured for their **Lease Interest** for the first three (3) months following the loss or damage and for their **Net Lease Interest** for the remaining unexpired term of the lease.

The Insured must use any suitable property or service owned, controlled, or obtainable from any source to reduce the loss.

In addition to the exclusions elsewhere in this Policy, the Leasehold Interest Coverage excludes:

Any increase in the Leasehold Interest loss resulting from the suspension, lapse or cancellation of any lease;

Any loss from the Insured exercising an option to cancel the lease; or

Any loss from an act or omission by the Insured that constitutes default under the lease.

Ex. 1, pp. 25-26.

CIVIL OR MILITARY AUTHORITY

The Company will pay for the actual Time Element loss sustained by the Insured, as provided by this Policy, resulting from the necessary **Suspension** of the Insured's business activities at an Insured Location if the **Suspension** is caused by order of civil or military authority that prohibits access to the **Location**. That order must result from a civil authority's response to direct physical loss of or damage caused by a **Covered Cause of Loss** to property not owned, occupied, leased or rented by the Insured or insured under this Policy and located within the distance of the Insured's Location as stated in the Declarations. The Company will pay for the actual Time Element loss sustained, subject to the deductible provisions that would have applied had the physical loss or damage occurred at the Insured Location, during the time the order remains in effect, but not to exceed the number of consecutive days following such order as stated in the Declarations up to the limit applying to this Coverage.

Ex. 1, pp. 29-30.

E. Defendants' Denial of Plaintiff's Claim

89. COVID-19, the coronavirus, and/or the pandemic are each "covered cause[s] of loss" under the Policy because they present "risks of direct physical loss of or damage" and are not excluded by the Policy.

90. The COVID-19 pandemic and the related shutdown orders imposed limitations on the use of all or much of Plaintiff's physical space, thereby constituting a "direct physical loss of . . . property" under the Policy that was caused by a Covered Cause of Loss.

91. Plaintiff's direct physical loss of property resulted in a "Suspension" because Plaintiff experienced a slowdown or cessation of business activities or, as respects rental incomes, part or all of the Insured Locations were rendered untenable.

92. As set forth above, Plaintiff also incurred extra expenses covered by the Extra Expenses coverage, namely expenses that were necessary to resume and continue as nearly as practicable its normal business activities that otherwise would be necessarily suspended due to the loss of its properties caused by COVID-19/the pandemic.

93. The conditions of civil authority coverage are also met here: (1) a Covered Cause of Loss (risk of COVID-19/the pandemic) caused a civil authority's response to direct physical loss of or damage (COVID-19/coronavirus) to property not owned, occupied, leased or rented by Plaintiff; (2) the civil authority's response related to other properties prohibited access to Plaintiff's locations; and (3) Plaintiff suffered loss from the necessary Suspension of its business activities as a result of civil authority's action.

94. The conditions for a Leasehold Interest loss are also satisfied because Plaintiff suffered a Leasehold Interest loss incurred (as lessee) resulting from direct physical loss of or damage caused by a Covered Cause of Loss to a building (or structure) which is leased by Plaintiff.

95. ShopOne made a claim, through counsel on or about September 15, 2020.

96. Defendants initially sent Plaintiff a reservation of rights letter.

97. On March 4, 2021, Defendants denied ShopOne's claim. A copy of the denial letter is attached and incorporated as **Exhibit 3**.

98. Defendants stated in the denial letter that "the COVID-19 virus does not constitute 'direct physical loss or damage' to property." Ex. 1, p. 2.

99. Similarly, Defendants denied Civil or Military Authority coverage, because, according to Defendants, "[t]he presence of COVID-19 virus does not constitute 'direct physical loss or damage' to property." Ex. 2, p. 3.

100. Defendants further contended that “any damage to property would be excluded” under the “Contamination” exclusion set forth in Section 3.03 of the Policy. It cited the law and ordinance exclusion as well. Ex. 2, pp. 3-4.

101. The Contamination exclusion provides as follows:

3.03. EXCLUSIONS

The following exclusions apply unless specifically stated elsewhere in this Policy:

3.03.01. This Policy excludes the following unless it results from direct physical loss or damage not excluded by this Policy.

3.03.01.01. **Contamination**, and any cost due to **Contamination** including the inability to use or occupy property or any cost of making property safe or suitable for use or occupancy, except as provided by the Radioactive Contamination Coverage of this Policy.

Ex. 1, p. 20.

102. The Policy defines “Contamination” to require the “actual presence” of a virus:

7.09. **Contamination (Contaminated)** - Any condition of property due to the actual presence of any foreign substance, impurity, pollutant, hazardous material, poison, toxin, pathogen or pathogenic organism, bacteria, virus, disease causing or illness causing agent, **Fungus**, mold or mildew.

Ex. 1, p. 57.

103. Here, the Contamination exclusion is not applicable because, to Plaintiff’s knowledge, the suspension and direct physical loss of property was not caused by the actual presence of the virus that causes COVID-19 in any of its insured locations.

104. Moreover, the Policy includes an endorsement that amended the Contamination exclusion. Ex. 1, p. 110-112. The endorsement states: “**THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.**” *Id.* p. 110. The endorsement deleted the above-referenced definition of “Contamination(Contaminated)” and replaced it with one that no longer includes “virus”:

11. The following is deleted from SECTION VII - DEFINITIONS

Contamination(Contaminated) - Any condition of property due to the actual presence of any foreign substance, impurity, pollutant, hazardous material, poison, toxin, pathogen or pathogenic organism, bacteria, virus, disease causing or illness causing agent, **Fungus**, mold or mildew.

and replaced by the following:

Contamination(Contaminated) - Any condition of property due to the actual presence of any **Contaminant(s)**.

12. The following is deleted from SECTION VII – DEFINITIONS:

Contaminant(s) - Any solid, liquid, gaseous, thermal or other irritant, pollutant or contaminant, including but not limited to smoke, vapor, soot, fumes, acids, alkalis, chemicals, waste (including materials to be recycled, reconditioned or reclaimed), asbestos, ammonia, other hazardous substances, **Fungus** or **Spores**.

And replaced with the following:

Contaminant(s) - Any solid, liquid, gaseous, thermal or other irritant, including but not limited to smoke, vapor, soot, fumes, acids, alkalis, chemicals, waste (including materials to be recycled, reconditioned or reclaimed), other hazardous substances, **Fungus** or **Spores**.

Ex. 1, p. 112.

105. The title of the endorsement says “Amendatory Endorsement – Louisiana,” however, nothing in the actual language of the endorsement restricts the amendment to insureds in Louisiana. Moreover, the Policy expressly states that the titles of endorsements “shall not” have any effect on the provisions to which they relate:

6.20. TITLES

The *titles of the various* paragraphs and *endorsements* are solely for reference and *shall not in any way affect the provisions to which they relate*.

Ex. 1, p. 53 (emphasis added).

106. Unlike the endorsement removing “virus” from the Contamination exclusion, other endorsements in the Policy did specify when the modification was limited to a specific

state. *See, e.g.*, Ex. 1, p. 87 (“THIS ENDORSEMENT CHANGES THE POLICY AND APPLIES TO THOSE RISKS IN CONNECTICUT.”) (emphasis added).

107. Thus, even if Plaintiff’s suspension and/or loss was caused by the actual presence of the virus, the Contamination exclusion is inapplicable.

108. In fact, only when Plaintiff renewed the policy, effective December 2020, did the Louisiana Endorsement state that it applies only to locations in Louisiana. *See* Ex. 2, p. 110.

109. Thus, even if the Contamination exclusion covered viruses anywhere (rather than the “actual presence” of viruses in the premises) and was applicable to the losses of Plaintiff, it would not preclude Plaintiff’s pre-December 2020 losses.

110. Furthermore, even if the Contamination exclusion covered viruses anywhere (rather than the “actual presence” of viruses in the premises) and was applicable to the losses of Plaintiff, under the principles of regulatory estoppel and general public policy, Defendants should be estopped from enforcing it or deemed to have waived reliance on it because its enforcement would be unjust, inequitable, and unconscionable.

111. Specifically, in 2006, two insurance industry trade groups, the 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.

112. In filings with state regulators, ISO and AAIS, on behalf of insurers, 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 the property policies.

113. In a July 6, 2006, "ISO Circular" entitled "New Endorsements Filed to Address Exclusion of Loss Due to Virus or Bacteria," ISO represented to the state regulatory bodies:

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.

114. 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...

115. These representations made by the insurance industry were false.

116. 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, and had held on numerous occasions that any condition making it impossible to use property for its intended use constituted "physical loss or damage to such property."

117. Upon information and belief, the state insurance departments relied on the industry's and Defendants' representation in approving the Virus Exclusion for inclusion in standard comprehensive policies without a reduction in premiums to balance a reduction in coverage.

118. The assertions made by the insurance industry and Defendants to obtain regulatory approval of the Virus Exclusion were misrepresentations and for this reason, among

other public policy concerns, Defendants should be estopped from enforcing the Virus Exclusion to avoid coverage of claims related to the COVID-19 pandemic.

119. 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, Defendants effectively narrowed the scope of the insuring agreement without a commensurate reduction in premiums charged.

120. Under the doctrine of estoppel and or waiver, the Court should not permit Defendants to benefit from this type of duplicitous conduct before the state regulators.

COUNT I
BREACH OF CONTRACT

121. Plaintiff realleges and incorporates by reference the allegations contained in all prior paragraphs of this Complaint, as though fully set forth herein and, to the extent necessary, pleads this cause of action in the alternative.

122. Plaintiff purchased an insurance contract under which Defendants were paid premiums in exchange for promises to pay Plaintiff's losses for claims covered by the Policy.

123. In the Policy, as set forth above, Defendants expressly agreed to pay for ShopOne's losses incurred as a result of causes not excluded under the Policy, including losses caused by the COVID-19 pandemic sustained as a result of a business suspension.

124. A covered loss has resulted in business suspensions, which caused Plaintiff to suffer a loss in Gross Earnings, as defined by The Policy.

125. The business suspensions and losses triggered the Time Element, Civil or Military Authority, Leasehold Interest and/or Extra Expense coverages under the Policy.

126. Plaintiff complied with all applicable provisions of the Policy, including payment of premiums.

127. Defendants, without justification, refused performance under the Policy by denying coverage for these losses. Accordingly, Defendants are in breach of the Policy.

128. Due to Defendants' breach of the Policy, Plaintiff suffered and continues to suffer actual and substantial damages for which Defendants are liable, in an amount to be proved at trial.

WHEREFORE, Plaintiff ShopOne Centers REIT Inc., prays for the relief requested in the prayer for relief below.

COUNT II
DAMAGES PURSUANT TO 255 ILCS 5/155

129. Plaintiff realleges and incorporates by reference the allegations contained in all prior paragraphs of this Complaint, as though fully set forth herein and, to the extent necessary, pleads this cause of action in the alternative.

130. Pursuant to Section 155 of the Illinois Insurance Code, 215 ILCS 5/155, in an action against an insurance company over coverage of insurance policies or amounts payable thereunder, the insured is entitled to recover costs, attorneys' fees, and an additional allowance specified by statute if the action or delay on the part of the insurance company is vexatious and unreasonable.

131. As set forth above, Defendants' actions and delay in denying Plaintiff coverage under the applicable policy has been vexatious and unreasonable, in one or more of the following respects:

- a. By failing to provide insurance coverage at the time Defendants knew or reasonably should have known Plaintiff was entitled to such insurance coverage;
- b. By failing to objectively evaluate the claim of Plaintiff;
- c. By interpreting the provisions of the insurance policy in an unreasonable manner;

- d. By interpreting the factual circumstances in an unreasonable manner;
- e. By interpreting the policy provisions and factual circumstances so as to resolve ambiguities and uncertainties against Plaintiff and in favor of their own interest;
- f. By misrepresenting policy provisions;
- g. By failing to provide a reasonable explanation of the basis for denial of coverage for Plaintiff;
- h. By unreasonably failing to conduct a prompt, fair, balanced and thorough investigation of all of the bases of Plaintiff's claims;
- i. By unreasonably failing to diligently search for and consider evidence that supports coverage of Plaintiff's claims;
- j. By unreasonably failing to conduct an investigation to determine the efficient proximate cause (predominant cause) of Plaintiff's losses;
- k. By unreasonably failing to give at least as much consideration to the interests of Plaintiff as they give to their own interests; and/or
- l. By forcing Plaintiff to file suit to obtain the benefits under the Policy.

132. As a result of Defendant's vexatious and unreasonable conduct, Plaintiff is entitled to the relief provided in Section 155 of the Illinois Insurance Code, including penalties, reasonable attorneys' fees, and costs, and for such further relief as the Court deems just and proper.

WHEREFORE, Plaintiff ShopOne Centers REIT Inc., prays for the relief requested in the prayer for relief below.

COUNT III
DECLARATORY RELIEF

133. Plaintiff realleges and incorporates by reference the allegations contained in all prior paragraphs of this Complaint, as though fully set forth herein and, to the extent necessary, pleads this cause of action in the alternative.

134. Plaintiff seeks a declaratory judgment pursuant to 735 ILCS 5/2-701.

135. Plaintiff's Policy is an insurance contract under which Defendants were paid premiums in exchange for promises to pay Plaintiff's losses for claims covered by the Policy.

136. In the Policy, Defendants expressly agreed to provide Time Element, Extra Expense, Leasehold Interest, and Civil or Military Authority coverage incurred as a result of the causes not excluded under the Policy.

137. Plaintiff contends it has suffered losses covered by the Time Element, Extra Expense, Leasehold Interest, and/or Civil or Military Authority coverages under the Policy.

138. Defendants contend they have no obligations to cover Plaintiff's losses under the Policy.

139. There is an actual controversy between Plaintiff and Defendants as to Defendants' obligations under the Policy.

140. Plaintiff seeks a judicial determination of whether the Policy provides coverage for Plaintiff's losses.

WHEREFORE, Plaintiff ShopOne Centers REIT Inc., prays for the relief requested in the prayer for relief below.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff respectfully requests that the Court enter judgment against Defendants, as follows:

1. Entering a judicial declaration as to the meaning of the provisions concerning the coverages described herein;
2. Awarding damages to Plaintiff in an amount to be determined at trial;
3. Awarding Plaintiff pre- and post-judgment interest;
4. Awarding Plaintiff the amounts provided by 215 ILCS 5/155;
5. Awarding Plaintiff its costs and attorneys' fees, as allowed by law; and
6. Providing such other or further relief as may be appropriate.

JURY DEMAND

Plaintiff demands a trial by jury on all claims so triable.

Dated: March 31, 2021

Respectfully submitted,

**GOLDENBERG HELLER
& ANTOGNOLI, P.C.**

/s/ Kevin P. Green

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