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Interplay of Mitigation and COVID Business Interruption Claims

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On June 15, 2020, Society Insurance ("Society") filed a motion in the United States District Court for the Eastern District of Wisconsin seeking dismissal of a proposed class action lawsuit that seeks insurance coverage for COVID-19-related losses incurred by certain bars and restaurants in Wisconsin, Minnesota, and Tennessee. *Rising Dough, Inc., et al. v. Society Insurance*, Case No. 2:20-cv-00623-JPS (E.D. Wis.). While Society's motion seeks to avoid coverage based on typical arguments that many insurers have pressed regarding COVID-19 property insurance claims, such as a purported lack of physical damage to or contamination of property, Society supports its contentions, in part, by pointing to the fact that the relevant state executive orders allowed restaurants to "continue or even expand their business for take-out and delivery service." Although customers were prevented from dining on the premises, Society argues that because the establishments were open for take-out and delivery orders, the property could not be physically damaged or contaminated and access was not prohibited by civil authority. Society's reliance on the permissibility of these limited operations to support its coverage defenses misses the mark.

Most property insurance policies, and business interruption claims in particular, require a policyholder to mitigate losses. While the extent of actions a policyholder must take to satisfy this obligation is beyond the scope of this discussion, the concept of mitigation is one of common sense and, in theory, benefits both the policyholder and its insurer. Unfortunately, in this instance, Society is using what should be a shield intended for its protection as a sword to bar coverage to its policyholders.

As COVID-19 spread and state and local jurisdictions issued shutdown orders to flatten the curve and reduce loss of life, the restaurant industry faced unprecedented challenges. Many restaurants and bars were unable to withstand the closures and were forced to shut their doors permanently. Others were able to pivot to different business models that focused on take-out or delivery to reduce losses and ride out the storm. That resourceful business owners were able to pivot, or attempted to pivot, in order to mitigate losses and attempt to save their businesses should not support a denial of their insurance rights. Society argues that:

[t]he Orders expressly allowed access, with certain restrictions regarding dine-in services. Employees were allowed to access the premises to prepare food for delivery and carry out orders. Customers were allowed to access the premises to pick up the food. Delivery services were allowed to access the premises to collect the orders that they would then deliver. At no time was access

prohibited.

Society's generalized statement that "at no time was access prohibited" ignores the fundamental fact that significant restrictions on access were imposed and access was prohibited to the general public for any meaningful period of time. Society's argument also ignores the fact that physical damage to a property can occur without complete destruction of a facility. In fact, had these restaurants not sought to mitigate their losses by altering their business model, there is little doubt that insurers such as Society would have sought to bar or limit insurance coverage on the basis that their policyholder did not mitigate damages.

Society's position reminds policyholders to expect insurers to advance all potential arguments to bar coverage. Policyholders should review their policy terms in detail and anticipate creative insurer arguments. The plaintiffs in *Rising Dough* have not yet filed their opposition to Society's motion to dismiss. We will continue to monitor these developments, and other developments in the COVID-19 insurance coverage arena, as courts begin resolving these issues.

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