

CASE NO.

JEFFERSON CIRCUIT COURT
BUSINESS COURT DOCKET

RENAISSANCE/THE PARK, LLC d/b/a
RENAISSANCE FUN PARK
101 N. 7th Street
Louisville, Kentucky 40202

PLAINTIFF

v.

COMPLAINT

THE CINCINNATI INSURANCE COMPANY
6200 S. Gilmore Road
Fairfield, Ohio 45014

DEFENDANT

Serve: Kentucky Secretary of State

Plaintiff, Renaissance/The Park, LLC, for its claims against Defendant, The Cincinnati Insurance Company ("**Cincinnati**"), states as follows:

I. INTRODUCTION

1. This action arises out of Defendant's failure to provide insurance coverage. The Coronavirus pandemic ("**COVID-19**") and/or the resulting response by state government have caused direct physical loss and/or physical damage to Plaintiff's property and have interrupted Plaintiff's business. Plaintiff is entitled to reimbursement for these losses and/or damages pursuant to the contract of insurance that Plaintiff procured from Defendant.

II. JURISDICTION

2. This Court has jurisdiction over this matter because the amount in controversy exceeds this Court's jurisdictional minimum. Personal jurisdiction is proper pursuant to KRS 454.210(2)(a)(7).

Presiding Judge: HON. CHARLES L. CUNNINGHAM (630297)

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3. Venue is appropriate in Jefferson County because the Plaintiff's business and property are located in Jefferson County.

4. This matter is properly before the Jefferson County Business Court pursuant to BCR 2.1(m).

III. THE PARTIES

5. Renaissance / The Park LLC, d/b/a Renaissance Fun Park, is a Kentucky LLC with its principal place of business at 101 North 7th Street, Louisville, Kentucky 40202.

6. At all times relevant hereto, Plaintiff has owned and operated a recreational facility in the Louisville metropolitan area (the "**Renaissance Fun Park**"). The facility is located at 201 Park Place Drive, Louisville, Kentucky 40243, and it offers to the public-at-large, year-round, Go-Kart, Laser Tag, Mini-Golf, and Arcade activities, along with food and drink service.

7. Defendant is, and at all times relevant hereto has been, an insurance company writing insurance policies and doing business in the State of Kentucky, capable of suing and being sued in the courts of this state. Defendant is a foreign corporation organized, incorporated, and existing under the laws of the State of Ohio, with its principal place of business at 6200 S. Gilmore Road, Fairfield, Ohio 45014.

IV. FACTUAL BACKGROUND

8. To protect its business in the event that it suddenly had to suspend operations for reasons outside of its control, Plaintiff purchased insurance coverage from Defendant as set forth in The Cincinnati Insurance Company's Building and Personal Property Coverage Form (attached hereto as **Exhibit A**) and Business Income Without

Extra Expense Coverage Form (attached hereto as **Exhibit B**) (these two forms, together, constitute the applicable “**Policy**”).

9. In return for the payment of a premium, Cincinnati issued Policy No. EPP0100379 to Plaintiff, for a policy period of July 30, 2018 to July 30, 2021.

10. Plaintiff has performed all of its obligations under Policy No. EPP0100379, including the payment of premiums.

11. The Covered Property, for the purpose of Plaintiff’s instant claim, is the aforementioned recreational facility located at 201 Park Place Drive, Louisville, Kentucky 40243—i.e. the Renaissance Fun Park.

12. The Policy provides up to \$1,000,000 in coverage for the Renaissance Fun Park, 201 Park Place Drive, Louisville, Kentucky 40243.

Policy Terms

13. Generally speaking, at times insurance is sold on a specific peril basis, where coverage is limited to risks of loss that are specifically listed (e.g. hurricane, earthquake, etc.). Many property policies sold in the United States, however, including those sold by Cincinnati, are “all-risk” property damage policies. These types of policies cover all risks of loss except for risks that are expressly and specifically excluded.

14. Under the heading “Covered Causes of Loss,” Defendant agreed to pay for “direct ‘loss’ unless the ‘loss’ is excluded or limited” in the policies.

15. The Policy defines “loss” as “accidental physical loss or accidental physical damage.”

16. In the Policy, under the heading “Business Income” coverage, Cincinnati agreed to pay for its insureds’ actual loss of Business Income sustained due to the

necessary suspension of operations during the “period of restoration” caused by direct “loss” to property at the covered premises.

17. “Suspension” is defined to mean the slowdown or cessation of business activities, such that all or part of the premises is rendered untenable.

18. “Period of restoration” is defined to mean the period of time that begins at the time of direct loss and ends on the date when the property should be repaired with reasonable speed and similar quality.

19. “Business Income” is defined to mean net income (net profit or loss before income taxes) that would have been earned or incurred and continuing normal operating expenses sustained, including payroll.

20. The Policy also provides “Extended Business Income” coverage, which promises to provide temporally extended payments to compensate for actual loss of Business Income due to the necessary suspension of operations caused by accidental loss or accidental physical damage to the covered property.

21. Defendant’s coverage forms also provide “Expenses to Reduce Loss” coverage, which promises to pay necessary expenses sustained in order to avoid further loss of Business Income.

22. Defendant’s coverage forms also provide “Civil Authority” coverage, which promises to pay for loss of Business Income caused by action of civil authority that prohibits, among other things, access to the premises.

Virus or Disease is a Covered Cause of Loss under The Policy

23. The presence of virus or disease can constitute physical loss of or damage to property, as the insurance industry has recognized since at least 2006. When preparing so-called “virus” exclusions to be placed in some policies, but not others, the insurance

industry drafting arm—Insurance Services Office, Inc. or “ISO”—circulated a statement to state insurance regulators that included the following:

Disease-causing agents may render a product impure (change its quality or substance), or enable the spread of disease by their presence on interior building surfaces or the surfaces of personal property. When disease-causing viral or bacterial contamination occurs, potential claims involve the cost of replacement of property (for example, the milk), cost of decontamination (for example, interior building surfaces), and building interruption (time element) losses. Although building and personal property could arguably become contaminated (often temporarily) by such viruses and bacteria, the nature of the property itself would have a bearing on whether there is actual property damage. An allegation of property damage may be a point of disagreement in a particular case.

24. The ISO also created a new “amendatory endorsement” to exclude loss due to virus or bacteria from coverage afforded by certain insurance policies. The ISO amendatory endorsement states that there is “no coverage for loss or damage caused by or resulting from any virus, bacterium or other microorganism that induces or is capable of inducing physical distress, illness or disease” (the “**Virus Exclusion**”).

25. Some insurers added the Virus Exclusion to their policies that provide Business Income (also referred to as “business interruption”) coverage. Cincinnati’s Building and Personal Property Coverage Form and Business Income Without Extra Expense Coverage Form, however, do not include, and are not subject to, any exclusion for losses caused by viruses or communicable diseases.

26. Defendant did not exclude or limit coverage for losses from viruses in the Policy. The Policy did not exclude pandemic coverage, communicable disease coverage, or anything similar.

27. Losses due to COVID-19 are not excluded by the Policy but are, instead, covered losses under the Policy.

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COVID-19: The Covered Cause of Loss

27. COVID-19 is a highly contagious virus that has rapidly spread and continues to spread across the United States. It is a physical substance, human pathogen, and can be present outside the human body in viral fluid particles. According to the CDC, everyone is at risk of getting COVID-19.

28. COVID-19 is spread by a number of methods, including "community spread," meaning that some people have been infected and it is not known how or where they became exposed. Public health authorities, including the CDC, have reported significant ongoing community spread of the virus including instances of community spread in all 50 states.

29. The CDC has reported that a person can become infected with COVID-19 by touching a surface or object (like a table, floor, wall, furniture, desk, countertop, touch screen, or chair) that has the virus on it, and then touching their own mouth, nose or eyes. COVID-19 can and does live on and/or remains capable of being transmitted and active on inert physical surfaces.

30. More specifically, COVID-19 infections are spread through droplets of different sizes which can be deposited on surfaces or objects.

31. In addition, The New England Journal of Medicine reported finding that experimentally-produced aerosols containing the virus remained infectious in tissue-culture assays, with only a slight reduction in infectivity during a 3-hour period of observations. An April 2020 study published in the journal Emerging Infectious Diseases found a wide distribution of COVID-19 on surfaces and in the air about 13 feet from patients in two hospital wards. This means there has been a finding of COVID-19 in the air.

32. COVID-19 has been transmitted by way of human contact with surfaces and items of physical property located at premises in Louisville, Kentucky.

33. COVID-19 has been transmitted by human to human contact and interaction with premises in Louisville, Kentucky.

34. COVID-19 has been transmitted by way of human contact with airborne COVID-19 particles emitted into the air at premises in Louisville, Kentucky.

35. The presence of any COVID-19 particles renders items of physical property unsafe and the premises unsafe.

36. The presence of any COVID-19 particles on physical property impairs its value, usefulness and/or normal function.

37. The presence of any COVID-19 particles causes direct physical harm, direct physical damage, and/or direct physical loss to property.

38. The presence of people infected with or carrying COVID-19 particles renders physical property in their vicinity unsafe and unusable, resulting in direct physical loss and/or physical damage to that property.

39. The presence of people infected with or carrying COVID-19 particles at premises renders the premises—including property located at that premises—unsafe, resulting in direct physical loss and/or physical damage to the premises and property.

40. Plaintiff's premises has likely been infected with COVID-19 and Plaintiff has suffered direct physical loss and/or physical damage at the property. The incubation period for COVID-19 is at least 14 days. Current evidence shows that the first death from COVID-19 occurred as early as February 6, 2020—weeks earlier than previously reported, suggesting that the virus has been circulated in the United States for far longer than previously assumed. It is likely that customers, employees, and/or other visitors to the

Renaissance Fun Park were infected with COVID-19 and thereby infected the premises with COVID-19, resulting in direct physical loss or physical damage.

41. To reduce the spread of the disease, the CDC has recommended that businesses clean and disinfect all surfaces, prioritizing the most frequently touched surfaces.

42. COVID-19 has been declared a pandemic by the World Health Organization.

43. The COVID-19 pandemic is a public health crisis that has profoundly impacted American society, including the public's ability to patronize recreational facilities like the Renaissance Fun Park.

44. The presence of COVID-19 has caused civil authorities throughout the country to issue orders requiring the suspension of business at a wide range of establishments, including civil authorities with jurisdiction over Plaintiff's business (the "Closure Orders").

The Kentucky Closure Orders

45. On March 6, 2020, Kentucky Governor Andy Beshear signed an Executive Order declaring a State of Emergency in response to the COVID-19 pandemic.

46. On March 17, 2020, the Cabinet for Health and Family Services published an Order that required public-facing businesses which encourage public congregation (including recreational facilities), to cease all in-person operations by 5:00 p.m. on March 18, 2020. The March 17, 2020 Order is attached hereto as **Exhibit C**.

47. On March 19, 2020, the Cabinet for Health and Family Services prohibited all mass gatherings. The March 19, 2020 Order is attached hereto as **Exhibit D**.

48. On March 25, 2020, Kentucky Governor Andy Beshear signed an Executive Order mandating the closure of all non-life sustaining businesses effective March 26, 2020, at 8:00 pm. The March 25, 2020 Order is attached hereto as **Exhibit E**.

49. These Orders (collectively, the “**First Closure Orders**”) all applied to the Renaissance Fun Park, and required the suspension of its operations.

50. The First Closure Orders prohibited access to the Renaissance Fun Park.

51. The Renaissance Fun Park ceased operations after close of business on March 17, 2020, in accordance with the March 17, 2020 Order.

52. The Renaissance Fun Park did not resume operations until June 12, 2020—three days after they were legally permitted to re-open.

53. Among other things, the First Closure Orders triggered the Policy’s Civil Authority provisions.

54. As a result of the suspension of operations at the Renaissance Fun Park, Plaintiff has lost substantial Business Income.

55. As a result of the prohibition of access to the Renaissance Fun Park, Plaintiff has lost substantial Business Income.

56. Plaintiff has had to incur substantial expenses in order to reduce further losses of Business Income.

57. On or about November 18, 2020, due to increasing infection rates in and around Kentucky, including Louisville, Governor Beshear signed a new Executive Order mandating that all indoor food and beverage cease. In addition, indoor social gatherings are limited to a maximum of two households and eight people, indoor recreation facilities to 33% of occupancy and six feet of space between people, and indoor venues limited to

25 people. The November 18, 2020 Order is attached as **Exhibit F** (the “**Second Closure Order**”).

58. As a result of such Order, Renaissance Fun Park is unable to offer food and beverages indoor, nor is it able to use its laser tag facility as it requires virtual darkness resulting in an inability of participants to remain six feet apart as required by the Second Closure Order.

59. As a result, substantial portions of Renaissance Fun Park’s business must cease, thereby causing a further substantial loss of Business Income.

**Plaintiff Submitted Notices of Loss to Cincinnati
And was Wrongfully Denied Coverage**

60. Plaintiff submitted notices of loss to Cincinnati under the Policy due to the presence of COVID-19, the First Closure Orders, and the Second Closure Order.

61. On May 29, 2020, Cincinnati sent a denial letter to Plaintiff ostensibly denying coverage for the losses sustained as a result of COVID-19 and the Closure Orders.

62. Upon information and belief, Cincinnati will deny any claim based on the Second Closure Order for the identical basis set forth in the first Denial Letter.

63. Upon information and belief, Cincinnati is using a form denial letter to deny coverage to all its insureds with policies similar to Plaintiffs and is otherwise uniformly refusing to pay insureds under its standard policy for losses related to COVID-19.

V. CLAIMS FOR RELIEF

COUNT I

Declaratory Judgment – Business Income Coverage

64. Plaintiff repeats and realleges Paragraphs 1–63 as if fully set forth herein.

65. Plaintiff petitions this Court to declare the following:

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66. That Plaintiff's Business Income losses, which were incurred in connection with the suspension of its business stemming from the COVID-19 pandemic, are insured losses under the Policy's Business Income Coverage; and

67. That Cincinnati is obligated to pay Plaintiff for the full amount of Business Income losses stemming from the COVID-19 pandemic, incurred during the period of restoration.

COUNT II

Breach of Contract – Business Income Coverage

68. Plaintiff repeats and realleges Paragraphs 1–67 as if fully set forth herein.

69. The Policy is a contract under which Cincinnati was paid premiums in exchange for their promise to pay Plaintiff's losses for claims covered by the Policy.

70. In the Policy, Cincinnati agreed to pay for its insureds' actual loss of Business Income sustained due to the necessary suspension of its operations during the "period of restoration."

71. COVID-19 caused direct physical loss and/or damage to the Renaissance Fun Park, requiring Plaintiff to suspend operations. Such losses caused by COVID-19 triggered the Business Income provision of the Policy.

72. Plaintiff has complied with all applicable provisions of the Policy and/or those provisions have been waived by Defendant, or Defendant is estopped from asserting them, and yet Defendant has abrogated its insurance coverage obligations.

73. By denying coverage for any Business Income losses incurred by Plaintiff in connection with the COVID-19 pandemic, Defendant has breached its Business Income coverage obligations under the Policy.

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74. As a result of Defendant's breach of the Policy, Plaintiff has sustained substantial damages for which Defendant is liable, in an amount to be established at trial.

COUNT III

Declaratory Judgment – Extended Business Income Coverage

75. Plaintiff repeats and realleges Paragraphs 1-74 as if fully set forth herein.

76. Plaintiff petitions this Court to declare the following:

77. That Plaintiff's losses of Business Income are insured losses under the Policy's Extended Business Income Coverage; and

78. That Defendant is obligated to pay Plaintiff for the full amount of Plaintiff's Extended Business Income losses incurred in connection with the COVID-19 pandemic.

COUNT IV

Breach of Contract – Extended Business Income Coverage

79. Plaintiff repeats and realleges Paragraphs 1-78 as if fully set forth herein.

80. The Policy is a contract under which Cincinnati was paid premiums in exchange for their promise to pay Plaintiff's losses for claims covered by the Policy.

81. The Business Income losses suffered by Plaintiff triggered the Extended Business Income provision under the Policy.

82. Plaintiff has complied with all applicable provisions of the Policy and/or those provisions have been waived by Defendant, or Defendant is estopped from asserting them, and yet Defendant has abrogated its insurance coverage obligations.

83. By denying coverage for Extended Business Income, Defendant has breached its coverage obligations under the Policy.

84. As a result of Defendant's breach of the Policy, Plaintiff has sustained substantial damages for which Defendant is liable, in an amount to be established at trial.

COUNT V
Declaratory Judgment – Expenses to Reduce Loss

85. Plaintiff repeats and realleges Paragraphs 1-84 as if fully set forth herein.
86. Plaintiff petitions this Court to declare the following:
87. That expenses incurred by Plaintiff in order to combat COVID-19 and avoid further losses of Business Income are insured losses under the Policy.
88. That Defendant is obligated to pay Plaintiff for the full amount of expenses that Plaintiff incurred in order to reduce loss of Business Income stemming from the COVID-19 pandemic.

COUNT VI
Breach of Contract – Expenses to Reduce Loss

89. Plaintiff repeats and realleges Paragraphs 1-88 as if fully set forth herein.
90. The Policy is a contract under which Cincinnati was paid premiums in exchange for their promise to pay Plaintiff's losses for claims covered by the Policy.
91. Plaintiff has complied with all applicable provisions of the Policy and/or those provisions have been waived by Defendant, or Defendant is estopped from asserting them, and yet Defendant has abrogated its insurance coverage obligations.
92. By denying coverage for expenses incurred by Plaintiff in order to combat COVID-19 and avoid further losses of Business Income, Defendant has breached its coverage obligations under the Policy.
93. As a result of Defendant's breach of the Policy, Plaintiff has sustained substantial damages for which Defendant is liable, in an amount to be established at trial.

COUNT VII
Declaratory Judgment – Civil Authority Coverage

94. Plaintiff repeats and realleges Paragraphs 1-93 as if fully set forth herein.

95. Plaintiff petitions this Court to declare the following:
96. That the Closure Orders triggered the Civil Authority provisions of the Policy.

97. That Plaintiff's Civil Authority losses, which were incurred in connection with the First and Second Closure Orders and the necessary interruption of their business stemming from the COVID-19 pandemic, are insured losses under the Policy.

98. Defendant is obligated to pay Plaintiff for the full amount of the Civil Authority losses incurred and to be incurred in connection with the covered losses related to the Closure Orders and the necessary interruption of its business stemming from the COVID-19 pandemic.

COUNT VIII
Breach of Contract – Civil Authority Coverage

99. Plaintiff repeats and realleges Paragraphs 1–98 as if fully set forth herein.

100. The Policy is a contract under which Cincinnati was paid premiums in exchange for their promise to pay Plaintiff's losses for claims covered by the Policy.

101. Pursuant to the Policy, the Defendant agreed to pay for the actual loss of Business Income sustained, caused by action of Civil Authority that prohibits access to the Covered Property, when a Covered Cause of Loss causes direct damage to property other than the Covered Property, the civil authority prohibits access to the area immediately surrounding the damaged property, and 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.

102. The First and Second Closure Orders triggered the Civil Authority provisions of the Policy.

103. Plaintiff has complied with all applicable provisions of the Policy and/or those provisions have been waived by Defendant, or Defendant is estopped from asserting them, and yet Defendant has abrogated its insurance coverage obligations.

104. By denying coverage for any Business Income losses incurred by Plaintiff in connection with the First and Second Closure Orders and the COVID-19 pandemic, Defendant has breached its coverage obligations under the Policy.

105. As a result of Defendant's breach of the Policy, Plaintiff has sustained substantial damages for which Defendant is liable, in an amount to be established at trial.

REQUEST FOR RELIEF

WHEREFORE, Plaintiff respectfully requests that the Court enter judgment in its favor and against Defendant as follows:

- a. For a judgment against Defendant for the causes of action alleged against it;
- b. For compensatory damages in an amount to be proven at trial;
- c. For a declaration that Defendant's conduct as alleged herein is unlawful and in material breach of the Policy;
- d. For appropriate injunctive relief, enjoining Defendant from continuing to engage in conduct related to the breach of the Policy;
- e. For pre-judgment and post-judgment interest at the maximum rate permitted by law;
- f. For Plaintiffs' attorneys' fees;
- g. For Plaintiff's cost incurred;
- h. For Trial by Jury; and
- i. For such other and further relief as the Court deems just and proper.

Respectfully Submitted

/s/ John D. Cox

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