



**AFTAB PUREVAL
HAMILTON COUNTY CLERK OF COURTS**

COMMON PLEAS DIVISION

**ELECTRONICALLY FILED
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AFTAB PUREVAL
Clerk of Courts
Hamilton County, Ohio
CONFIRMATION 965480**

**SCOTTIS ITALIAN
RESTAURANT LLC**

A 2002551

vs.

**GRANGE MUTUAL
CASUALTY INSURANCE CO
AKA GRANGE INS**

**FILING TYPE: INITIAL FILING (IN COUNTY) WITH JURY
DEMAND**

PAGES FILED: 148



VERIFY RECORD

2. Defendant Grange Mutual Casualty Company aka Grange Insurance Company (“Grange” of “Defendant”) is a legal entity organized in Ohio and is authorized by various states, including the State of Ohio to sell insurance policies to residents of those states. Grange is headquartered as 671 South High Street, Columbus, Ohio.

3. Scotti’s submitted a claim seeking coverage under this policy. The same day the claim was submitted, Grange rejected Scotti’s claim for coverage for business loss and business interruption and other claims, contending, among other things, that Scotti’s did not suffer “direct physical damage” to its property, and stating other reasons why Scotti’s purportedly is not entitled to coverage for the losses and damages. Grange’s denial letter completely ignores the actual policy language. Grange also claimed the policy does not cover losses due to an exclusion related to virus or bacteria.

JURISDICTION AND VENUE

4. This court has jurisdiction over this case because one of the parties resides in Hamilton County and both parties conduct business in Hamilton County, Ohio

5. Venue is proper in this Court because defendant resides and/or conducts business in Hamilton County and/or the acts giving rise to the lawsuit occurred in Hamilton County, Ohio.

FACTUAL ALLEGATIONS

A. Plaintiff’s Insurance Coverage

6. In return for the payment of premiums, Grange issued a policy of insurance (“the Policy”) to Plaintiff. The Policy provides insurance coverage for “Covered Property” (a term defined in the Policy) for the periods relevant to this action. A copy of the Policy is attached hereto as Exhibit 1.

7. At all relevant times, Grange issued a policy to Plaintiff to cover business interruption loss from November 27, 2019 to November 27, 2020. The Policy No. is BP 2769601-01. The Policy was and is intended to cover the losses suffered by Plaintiff.

8. The Policy is currently in full effect in providing, among other things, personal property, business income and extra expense, civil authority, ordinance or law, and additional coverage.

9. In many parts of the world, property insurance is sold on a specific peril basis. Such Policy cover a risk of loss if that risk of loss is specifically listed in the policy. Many, if not most property policies sold in the United States, however, including the Policy sold by Grange, are all-risk policies. In contrast to specific peril policies, these types of policies cover all risks of loss except for risks that are expressly and specifically excluded.

10. The insurance Policy Plaintiff purchased from Grange is an all-risk policy.

11. Plaintiff did not participate in the drafting or negotiation of the words used in the Policy.

12. As the insured, Plaintiff had no leverage or bargaining power to alter or negotiate the terms of the Policy.

13. The Policy contains a Businessowner's Coverage Form. In that Coverage Form, Grange contractually agreed to "pay for direct physical loss of or damage to Covered Property at the premises described in the Declarations caused by or resulting from any Covered Cause of Loss."

14. The Policy defines "Covered Cause of Loss" as "[r]isks of direct physical loss unless the loss is" limited or excluded by the Policy.

15. COVID-19 and restrictions resulting therefrom are tantamount to “risks of direct physical loss.”

16. The Policy does not define the term “direct physical loss of or damage to” and does not explain the distinction between “physical loss” and “damage.” The use of the disjunctive “or” in the phrase “direct physical loss of or damage to” means that coverage is triggered if either a physical loss of property or damage to a Covered Property occurs. The concepts are separate and distinct and cannot be conflated.

17. “Loss” and/or “damage” are not synonymous.

18. Physical loss of, or damage to, a property may be reasonably interpreted to occur when a Covered Cause of Loss threatens or renders property unusable or unsuitable for its intended purpose or unsafe for normal human occupancy and/or continued use.

19. The Businessowner’s Coverage Form does not exclude or limit coverage for losses from pandemics.

20. The Businessowner’s Coverage Form includes coverage for “Business Income.” Grange contractually agreed to pay for Plaintiff’s actual loss of Business Income sustained due to the necessary “‘suspension’ of [their] ‘operations’ during the ‘period of restoration’.” “The suspension must be caused by direct physical loss of or damage to property at the described premises.” Grange agreed to pay for loss of Business Income during the “period of restoration” that occurs within 12 consecutive months after the date of direct physical loss or damage.

21. “Business Income” under the Policy means the “Net Income (Net Profit or Loss before income taxes) that would have been earned or incurred” and “Continuing normal operating expenses incurred, including payroll.”

22. Plaintiff has suffered, and continues to suffer, loss of Business Income because of a Covered Cause of Loss under Plaintiff's insurance policy issued by Grange.

23. Plaintiff is entitled to coverage in this matter for Business Income.

24. The Businessowner's Coverage Form contains an additional coverage for Extended Business Income. Grange contractually agreed that "[i]f the necessary suspension of your 'operations' produces a Business Income loss payable under this policy, we will pay for the actual loss of Business Income you incur" until the earlier of "[t]he date you could restore your 'operations,' with reasonable speed, to the level which would generate the Business Income amount that would have existed if no direct physical loss or damage had occurred" or 60 consecutive days after "operations" are resumed. For purposes of Extended Business Income, "suspension" means "[t]he partial slowdown or complete cessation of your business activities; or [t]hat a part or all of the described premises is rendered untenable, if coverage for Business Income applies."

25. Plaintiff is entitled to coverage in this matter for Extended Business Income.

26. This coverage is in addition to, and does not replace, other applicable coverage under the Policy.

27. The Businessowner's Coverage Form contains an additional coverage for Extra Expense. Grange contractually agreed to "pay necessary Extra Expense you incur during the 'period of restoration' that you would not have incurred if there had been no direct physical loss or damage to the property at the described premises." The Policy also provides that "[t]he loss or damage must be caused by or result from a Covered Cause of Loss."

28. Plaintiff is entitled to coverage in this matter for Extra Expense.

29. This coverage is in addition to, and does not replace, other applicable coverage under the Policy.

30. The Businessowner's Coverage Form contains an additional coverage for Civil Authority. Through the additional Civil Authority coverage, Grange contractually agreed that when a Covered Cause of Loss causes damage to property other than property at the described premises, Grange will "pay for the actual loss of Business Income you sustain and necessary Extra Expense caused by action of civil authority that prohibits access to the described premises, provided that both of the following apply: (1) Access to the area immediately surrounding the damaged property is prohibited by civil authority as a result of the damage, and the described premises are within that area but are not more than one mile from the damaged property; and (2) The action of civil authority is taken in response to dangerous physical conditions resulting from the damage or continuation of the Covered Cause of Loss that caused the damage, or the action is taken to enable a civil authority to have unimpeded access to the damaged property."

31. Plaintiff has suffered, and continues to suffer, losses that are covered by the Civil Authority coverage under the Policy, including, but not limited to loss of business income and extra expense.

32. Plaintiff is entitled to coverage in this matter for Civil Authority.

33. This coverage is in addition to, and does not replace, other applicable coverage under the Policy.

34. The Businessowner's Coverage Form contains an additional coverage for Ordinance or Law, and, specifically, Business Income and Extra Expense Optional Coverage. Through the additional Business Income and Extra Expense Optional Coverage, Grange contractually agreed that "[i]f a Covered Cause of Loss occurs to property at the premises

described in the declarations, coverage is extended to include the amount of actual and necessary loss you sustain during the increased period of suspension of your ‘operations’ caused by or resulting from the enforcement of any ordinance or law that...[i]s in force at the time of loss.”

35. Plaintiff is entitled to coverage in this matter for Business Income and Extra Expense Optional Coverage.

36. This coverage is in addition to, and does not replace, other applicable coverage under the Policy.

37. The presence of COVID-19 has caused authorities throughout the United States to issue orders requiring the suspension of business at a wide range of establishments. The authorities that have issued such orders (the “Closure Orders”) include authorities who have claimed jurisdiction to suspend the operations of Plaintiff’s businesses.

38. Throughout the United States, state and local authorities that have issued Closure Orders have recognized that the virus causes physical loss or damage. For example, a Closure Order issued in California explained “[t]his order is given because of the propensity of the virus to spread person-to-person, and also because the virus physically is causing property loss or damage due to its proclivity to stay airborne and to attach to surfaces for prolonged periods of time.” Similarly, a Closure Order issued by the governor of Illinois shut down restaurants “due to the virus’s propensity to physically impact surfaces and personal property.” Likewise, in New York City a Closure Order was issued “because of the propensity of the virus to spread person to person and also because the virus physically is causing property loss and damage.”

39. One Ohio Closure Order stated: “Schools and other entities that provide food services under this exemption shall not permit the food to be eaten at the site where it is provided, or at any other gathering site *due to the virus’s propensity to physically impact surfaces and personal property.*” (Emphasis added).

40. One or more Closure Orders have prohibited access to and the operation of Plaintiff’s Covered Property, and the area immediately surrounding each Covered Property, in response to dangerous physical conditions caused by a Covered Cause of Loss.

41. Losses caused by a pandemic, including losses caused by COVID-19 and/or losses caused by a Closure Order, are a Covered Cause of Loss under the Policy.

42. The presence of virus or disease can constitute physical 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’s drafting arm, Insurance Services Office, Inc. (“ISO”), circulated a statement to state insurance regulators that stated as follows:

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 business 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.

43. The COVID-19 pandemic caused direct physical loss of or damage to the Covered Property under the Policy.

44. The COVID-19 pandemic rendered the Covered Property unsafe, uninhabitable, or otherwise unfit for its intended use, which constitutes direct physical loss.

45. Plaintiff's loss of use of the Covered Property also constitutes direct physical loss.

46. Plaintiff has submitted a claim to Grange under Plaintiff's Policy. Grange has breached its obligations under the Policy, including by refusing to pay the claims and/or failing to properly, adequately, and timely investigate the claims.

47. A declaratory judgment determining that coverage is provided under the Policy will prevent Plaintiff from being left without vital coverage that was obtained for the purpose of protecting Plaintiff's businesses and is now required to ensure the survival of those businesses.

B. The Virus Exclusion

48. The Policy contains a coverage exclusion for viruses, which provides "[w]e will not pay for loss or damage caused directly or indirectly by...[a]ny virus bacterium or other microorganism that induces or is capable of inducing physical distress, illness, or disease." (the "Virus Exclusion").

49. The Virus Exclusion does not preclude coverage for Plaintiff's claim under the Policy. To the extent that the Closure Orders, in and of themselves, constitute direct physical loss of or damage to Plaintiff's Covered Property, and/or preclusion of access to the Covered Property because of Civil Authority order related to damage to nearby properties, the Virus Exclusion simply does not apply.

50. The insurance industry, through the ISO, and including Defendant, understood that the presence of a virus caused damage to property which would trigger coverage under the business income or Civil Authority coverage forms.

51. Nevertheless, through the ISO, the industry represented to the Department of Insurance that there was no coverage for damage caused by viruses under the ISO policies, and therefore, the virus exclusion did not change the policy or reduce coverage. No premium reduction was associated with the addition of the virus exclusion.

52. Plaintiff did not negotiate for the inclusion of the Virus Exclusion.

53. Plaintiff did not receive any premium reduction for the inclusion of the Virus Exclusion.

54. Plaintiff did not receive any benefit or consideration for the inclusion of the Virus Exclusion.

55. Plaintiff did not receive the benefit of any bargain related to the Virus Exclusion.

56. Defendant received the unilateral benefit of excluding coverage for a risk while also receiving the same or even greater premium for the lesser coverage.

57. A business and/or property owner who was even aware of the virus exclusion would conclude that the exclusion related to liability claims against the insured for transmitting the virus, not property damage claims.

58. Defendant should be estopped from enforcing the Virus Exclusion, on principles of regulatory estoppel, as well as general public policy.

59. In 2006, the Insurance Services Office, Inc. (“ISO”) represented hundreds of insurers in a national effort to seek approval from state insurance regulators for the adoption of the Virus Exclusion.

60. In their filings with the various state regulators, on behalf of the insurers, ISO 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.

61. Specifically, in its “ISO Circular” dated July 6, 2006 and entitled “New Endorsements Filed to Address Exclusion of Loss Due to Virus or Bacteria,” ISO represented to the state regulatory bodies that:

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.

62. The foregoing representation made by the insurance industry was false.

63. 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.”

64. Upon information and belief, the Ohio Department of Insurance relied on the industry's and Defendant's representation when the department approved the Virus Exclusion for inclusion in standard comprehensive policies without a reduction in premiums to balance a reduction in coverage.

65. The foregoing assertions by the insurance industry (including Defendant), made to obtain regulatory approval of the Virus Exclusion, were misrepresentations and for this reason, among other public policy concerns, Defendant should now be estopped from enforcing the Virus Exclusion to avoid coverage of claims related to the COVID-19 pandemic.

66. In securing approval for the adoption of the Virus Exclusion by misrepresenting to state regulators that the Virus Exclusion would not change the scope of coverage, Defendant effectively narrowed the scope of the insuring agreement without a commensurate reduction in premiums charged.

67. The Virus Exclusion contained within BP 00 03 01 10 is essentially the same exclusion as the exclusion promoted by ISO.

68. Under the doctrine of regulatory estoppel, the Court should not permit Defendant to benefit from this type of duplicitous conduct before the state regulators.

69. Upon information and belief, Defendant has denied, or will deny, all claims for coverage under their “all-risk” property damage policies issued by Defendant.

70. Defendant’s denial of lost business income claims left Plaintiff and similarly situated business without vital coverage acquired to ensure the survival of their business during the suspension of operations.

71. Meanwhile, Defendant receives the benefit of an exclusion for which Plaintiff and similarly situated insureds received no bargain, reduction of premiums or any benefit whatsoever.

C. COVID-19 Global Pandemic and the State of Ohio's Response

72. In or about January 2020, the Center for Disease Control and Prevention ("CDC") began responding to an outbreak of a respiratory disease that was first detected in China, and which has now been detected in more than 100 locations internationally, including the United States.

73. The virus has been named "SARS-Cov-2," and the disease has been named coronavirus disease 2019 (abbreviated "COVID-19").

74. On January 30, 2020, the World Health Organization ("WHO") declared the outbreak a "public health emergency of international concern."

75. On January 31, 2020, Health and Human Services Secretary Alex M. Azar II declared a public health emergency for the United States to aid the nation's healthcare community in responding to COVID-19.

76. On March 9, 2020, Ohio Governor Mike DeWine issued Executive Order 2020-01 D, "Declaring a State of Emergency," in response to the growing COVID-19 public health crisis.

77. On March 11, 2020, WHO publicly characterized COVID-19 as a global "pandemic" requiring urgent and aggressive action to control the spread of the virus.

78. On March 13, 2020, the Ohio Director of Health, Dr. Amy Acton, issued an Order limiting access to Ohio's nursing homes and similar facilities. In her Order, Dr. Acton stated that the virus "can easily spread" and "individuals can get COVID-19 by touching a surface or object that has the virus on it and then touching their own mouth, nose or eyes."

79. On March 22, 2020, Governor DeWine announced the Ohio Department of Health Director's Stay at Home Order, effective March 23, 2020 at 11:59 p.m., that all Ohioans were to stay-at-home unless engaged in essential work or activity.

80. The CDC has found that the COVID-19 virus can last on surfaces such as those in Plaintiff's restaurant for up to seventeen (17) days, thereby "damaging" – those surfaces in the process.

81. Among other things, the nature and extent of COVID-19, and/or one or more Closure Orders, have rendered Plaintiff's restaurant uninhabitable and unusable and/or have caused direct physical loss of or damage to Plaintiff's Covered Property and business operations.

82. In response to the COVID-19 pandemic, the Closure Orders described above prohibited access to businesses within the relevant geographic area surrounding Plaintiff's restaurant. Specifically, the March 22, 2020 Closure Order provided "[a]ll business and operations in the State, except Essential Businesses and Operations as defined below, are required to cease all activities within the State except Minimum Basic Operations, as defined below." Upon information and belief, business in the relevant geographic area surrounding Plaintiff's restaurant suffered direct physical loss of or damage to their properties because of COVID-19.

83. COVID-19 and/or one or more Closure Orders have caused direct physical loss of or damage to Plaintiff's Covered Property and business operations, requiring suspension of operations at the Covered Properties.

84. Plaintiff's business is highly susceptible to rapid person-to-person and person-to-property transmission of COVID-19 because of the close proximity required to operate a restaurant.

85. COVID-19 is physically impacting Plaintiff. Any effort by Grange to deny the reality that COVID-19 has caused Plaintiff physical loss and damage would constitute a false and potentially fraudulent misrepresentation that could endanger Plaintiff and the public.

86. As a result of the circumstances described above, Plaintiff is entitled to coverage under the Policy.

D. Defendant Grange's Bad Faith Denial of Plaintiff's Claims

87. On May 11, 2020, Plaintiff made a formal claim to Grange pursuant to the Policy and consistent with the terms and conditions of the Policy.

88. Later that same day, a Grange adjuster contacted Plaintiff to discuss the claim. The two spoke for just a few minutes and at the end of the call, the adjuster notified Plaintiff that its claim would be denied.

89. As promised, on May 11, 2020—*just hours after the claim had been filed*—Grange notified Plaintiff that its claim was being denied. A copy of the May 11, 2020 letter is attached hereto as Exhibit 2.

90. In bad faith, and contrary to the clear Policy language, Grange has failed to provide coverage to Plaintiff under the Policy and has failed to pay losses that Plaintiff has suffered and continues to suffer.

91. Plaintiff has performed all conditions precedent on its part, including, but not limited, to paying the required premiums for the contracted coverage and timely filing claims.

92. Grange lacks good faith in handling Plaintiff's claims, and Plaintiff has suffered, and continues to suffer, damages and had no other option but to seek legal counsel, thereby incurring litigation expenses and attorneys' fees.

COUNT I – DECLARATORY JUDGMENT

93. Plaintiff repeats and realleges the preceding allegations.

94. There exists an actual controversy between Plaintiff and Defendant, which is justiciable in nature and involves rights and/or legal relations between the parties, as Defendant is denying coverage to Plaintiff under the Policy as a result of Defendant's unilateral determination to avoid coverage irrespective of the fact that Plaintiff's businesses are entitled to coverage, were non-operational for a period or periods of time beginning in or around March 15, 2020, and has suffered losses covered by the Policy.

95. Plaintiff has suffered, and continues to suffer, damages because of Defendant's decision to deny coverage.

96. Plaintiff seeks a declaratory judgment from this Court declaring that:

- a. Plaintiff is entitled to coverage under the Policy in this matter;
- b. losses it has incurred in connection with the necessary interruption of its business due to the presence of COVID-19 and/or one or more Closure Orders are insured losses under the Policy;
- c. Defendant is obligated to pay Plaintiff for the full amount of the losses it has incurred in connection with the covered losses related to the necessary interruption of their businesses due to the presence of COVID-19 and/or one or more Closure Orders;
- d. the prohibition of access by the Closure Orders has specifically prohibited access as defined in the Policy;
- e. The Closure Orders trigger coverage; and
- f. The Policy provides coverage to Plaintiff for any current and future civil authority closures of business in Ohio due to physical loss of or damage related to COVID-19 under the Civil Authority coverage.

COUNT II – BAD FAITH

97. Plaintiff repeats and realleges the preceding allegations.

98. At all times relevant, Plaintiff was an insured under the Policy.

99. The acts and omissions of Grange as set forth above, and some yet to be discovered, constitute bad faith.

100. Grange has a duty to act in good faith in investigating claims made by, and in making payment to, its insureds, including Plaintiff, when claims are properly asserted, and coverage exists under Grange's Policy.

101. Grange has failed to properly investigate and determine Plaintiff's claims.

102. Upon information and belief, Grange has denied claims related to COVID-19 on a uniform basis, without individual bases or investigations.

103. Grange's failure to properly investigate and determine Plaintiff's claims is not in good faith.

104. Grange has refused to pay Plaintiff's claims even though Plaintiff's claims are covered by the Policy.

105. Grange's refusal to pay Plaintiff's claims, as described above, is not in good faith.

106. Grange's refusal to pay Plaintiff's claims is not predicated upon any circumstances that reasonably justify a denial of Plaintiff's claims.

107. Grange's decision to refuse payment to Plaintiff under the Policy is arbitrary and capricious, not supported by any rational or reasonable determination process, science or medicine, and is done solely in Grange's own interests. In other words, Grange did not have a reasonable justification for denying Plaintiff's claims.

108. As a direct and proximate result of the bad faith exhibited by Grange Plaintiff has been damaged in an amount to be determined at trial. In addition, Plaintiff seeks an award of punitive damages in an amount to be determined at trial and attorneys' fees for prosecuting this action.

109. Because of the bad faith of Grange, Plaintiff has sustained damages, expenses of litigation, and attorneys' fees.

COUNT III – BREACH OF CONTRACT

110. Plaintiff repeats and realleges the preceding paragraphs.

111. Plaintiff and Grange entered into the Policy at issue in this case, and the Policy is a valid contract between Plaintiff and Grange.

112. Plaintiff has complied with all applicable provisions of the Policy and/or has otherwise performed all of its obligations under the Policy, those provisions have been waived by Grange, or Grange is estopped from asserting that Plaintiff has not performed its contractual obligations.

113. Grange has materially breached its contracts with Plaintiff by failing to satisfy its obligations under the Policy as described above, including, but not limited to, by failing to provide coverage and indemnify Plaintiff for the losses suffered as a result of COVID-19 and/or the Closure Orders.

114. COVID-19 and/or the Closure Orders caused direct physical loss and damage to the insured premises, as well as to other premises, such that the loss of business income and extra expense resulting from the suspension of Plaintiff's business operations is covered under the Policy, and Grange is obligated to indemnify Plaintiff for its losses.

115. Plaintiff's loss claims are not subject to any applicable policy exclusion.

116. As a result, Plaintiff has suffered, and will continue to suffer, damages in an amount to be determined at trial.

WHEREFORE, Plaintiff respectfully requests the following relief against Defendant Grange:

- (a) A Declaratory Judgment that:
 - i. Plaintiff is entitled to coverage under the Policy in this matter;
 - ii. losses it has incurred in connection with the necessary interruption of its business due to the presence of COVID-19 and/or one or more Closure Orders are insured losses under the Policy;
 - iii. Defendant is obligated to pay Plaintiff for the full amount of the losses it has incurred in connection with the covered losses related to the necessary interruption of its businesses due to the presence of COVID-19 and/or one or more Closure Orders;
 - iv. the prohibition of access by the Closure Orders has specifically prohibited access as defined in the Policy;
 - v. The Closure Orders trigger coverage; and
 - vi. The Policy provides coverage to Plaintiff for any current and future civil authority closures of business in Ohio due to physical loss of or damage related to COVID-19 under the Civil Authority coverage.
- (b) Damages in an amount to be determined at trial but exceeding \$25,000;
- (c) Punitive damages, attorneys' fees, and costs; and
- (d) Any other relief, whether legal or equitable, as the Court deems just and proper.

Respectfully submitted,

/s/ Jeffrey T. Kenney

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