

**UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
FORT MYERS DIVISION**

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|------------------------------|---|----------------------------|
| EDWARD A. SCHERDER, DMD, and |) | |
| EDWARD A. SCHERDER, DMD, PA, |) | |
| |) | Case No. 2:20-cv-697 |
| Plaintiffs, |) | |
| |) | |
| v. |) | |
| |) | JURY TRIAL DEMANDED |
| ASPEN AMERICAN INSURANCE |) | |
| COMPANY, |) | |
| |) | |
| Defendant. |) | |

COMPLAINT

Plaintiffs, Edward A. Scherder, DMD and Edward A. Scherder, DMD, PA, by and through their undersigned counsel, hereby sue Defendant, Aspen American Insurance Company (“Aspen”), and allege as follows.

NATURE OF THE ACTION

1. Dr. Scherder, a Doctor of Dental Medicine, owns and operates a family dentistry practice, known as “Edward A. Scherder, DMD, PA,” in Naples, Florida.
2. To protect his business against unforeseen events, Dr. Scherder purchased comprehensive insurance coverage from Aspen, including “civil authority” coverage that is not subject to any virus or communicable disease exclusion. Dr. Scherder had such coverage in place for the Policy Period May 27, 2019 to May 27, 2020.
3. On March 20, 2020, Florida’s Governor ordered Dr. Scherder to suspend his dental practice until May 8, 2020, in response to the COVID-19 pandemic.
4. On April 13, 2020, Dr. Scherder submitted to Aspen a claim for his practice’s income lost due to the mandatory shutdown.

5. Although Aspen promptly acknowledged its receipt of Dr. Scherder's claim and appointed an outside insurance adjuster, Aspen delayed issuing its coverage decision, even in the face of multiple inquiries by Dr. Scherder's attorney.

6. On June 22, 2020, more than 60 days after Dr. Scherder submitted his claim, Aspen, through its outside insurance adjuster, finally informed Dr. Scherder of its coverage position: a complete denial of coverage.

7. Dr. Scherder disagrees with Aspen's position and, through this action, seeks to recover the insurance benefits to which he is entitled.

PARTIES

8. Dr. Scherder resides in and practices dentistry in Naples, Florida. Dr. Scherder's practice is a Florida Professional Association.

9. Aspen is an insurance carrier incorporated and domiciled in Texas, with its principal place of business in Connecticut.

JURISDICTION AND VENUE

10. This Court has subject matter jurisdiction over this action under 28 U.S.C. § 1332(a)(1) because the matter in controversy exceeds the sum or value of \$75,000, exclusive of interest and costs, and the matter in controversy is between citizens of different states.

11. Venue is proper in this District under 28 U.S.C. § 1391(b)(2) because a substantial part of the events giving rise to the claims occurred in this District and because Dr. Scherder's practice, which Aspen insures, is located in this District.

FACTS

A. The Aspen Policy

12. In or around the spring of 2019, in exchange for the payment of a premium, Aspen issued to Dr. Scherder a multi-part liability and property insurance policy. That policy, No. D010781-10, spanned the Policy Period May 27, 2019 to May 27, 2020 (the “Policy”). A copy of the Policy is Exhibit A to this Complaint.

13. Aspen designed the Policy, which bears the registered trademark “Professional Protector Plan[®],” specifically for dental practices.

14. The Policy provides a variety of different coverages under its separate Coverage Parts, including, but not limited to, several different coverages provided for in the Policy’s “Building, Blanket Dental Practice Personal Property and Income Coverage Part” (the “Income Coverage Part”).

15. The Income Coverage Part includes, among others, the following coverage grant:

Civil Authority

We will pay for the actual loss of **practice income** ... **you** sustain caused by action of civil authority that prohibits access to the described premises due to the direct physical **damage** to property, other than at the described premises, caused by or resulting from any **covered cause of loss**. This coverage will apply for a period of up to 30 consecutive days from the time of that action.

16. The described premises is 1001 10th Avenue S, Suite 218 in Naples, Florida, which is the address at which Dr. Scherder operates his dental practice.

17. For purposes of the Income Coverage Part, the Policy defines “**practice income**” to mean the:

- A. net income, meaning net profit or loss before income taxes, that would have been earned or incurred; and
- B. continuing normal operating expenses, including payroll.

18. For purposes of the Income Coverage Part, the Policy defines “**damage**” to mean “partial or total loss of or damage to **your** covered property.”

19. For purposes of the Income Coverage Part, the terms “**you**” and “**your**” refer to Dr. Scherder and his practice.

20. For purposes of the Income Coverage Part, “**Covered Cause of Loss**” means, among other enumerated items, “ALL RISK OF DIRECT PHYSICAL LOSS except as excluded or limited in Section II. of this Coverage Part.”

21. Section II. of the Income Coverage Part lists numerous “**Exclusions**,” “**Special Exclusions**,” and “**Limitations**,” but Section II. of the Income Coverage Part sets forth no exclusions or limitations for losses caused by viruses or communicable diseases.

22. COVID-19 is, thus, a “**covered Cause of Loss**” for purposes of the Income Coverage Part.

B. Dr. Scherder’s Claim

23. In the early months of 2020, the presence of the novel coronavirus and the associated spread of COVID-19 prompted civil authorities throughout the country to issue orders mandating the suspension of businesses offering “non-essential” services, including elective dental procedures.

24. On March 1, 2020, the State of Florida declared a public health emergency as a result of COVID-19.

25. On March 20, 2020, Florida’s Governor, Ron DeSantis, issued his Executive Order Number 20-72 (the “Executive Order”). A copy of the Executive Order is Exhibit B to this Complaint.

26. The Executive Order's stated purposes included slowing the spread of COVID-19 and preserving medical resources necessary to fighting the disease, including personal protective equipment that doctors, dentists and other medical providers use in their practices.

27. Toward those ends, the Executive Order mandated the following:

All hospitals, ambulatory surgical centers, office surgery centers, dental, orthodontic and endodontic offices, and other health care practitioners' offices in the State of Florida are prohibited from providing any medically unnecessary, non-urgent or non-emergency procedure or surgery, which, if delayed, does not place a patient's immediate health, safety, or well-being at risk, or will, if delayed, not contribute to the worsening of a serious or life-threatening medical condition. Accordingly, all health care practitioners licensed in the State of Florida, including dentists, shall immediately cease performing these elective services.

28. Dr. Scherder complied with the Executive Order by shutting down his practice on March 20, 2020. Dr. Scherder did not reopen his practice until May 8, 2020.

29. Over the 30-day period beginning on March 20, 2020, because the Executive Order prohibited access to his office, Dr. Scherder lost over \$700,000 in "**practice income.**"

30. On April 13, 2020, Dr. Scherder, through his counsel, submitted to Aspen a claim for his practice's lost income sustained as a result of the Executive Order. Dr. Scherder's counsel noted that the Executive Order had prohibited patients' access to Dr. Scherder's practice due to the COVID-19 outbreak.

31. Shortly after receiving Dr. Scherder's notice of claim, Aspen appointed a third-party claims management firm, American Claims Management ("ACM"), to handle the claim.

32. Over the next several weeks, Dr. Scherder's counsel followed up by email with ACM on April 20, 2020, April 28, 2020, May 14, 2020, June 12, 2020, and June 22, 2020, only to be put off each time.

33. Dr. Scherder did not receive Aspen's coverage position until June 29, 2020. On that date, Dr. Scherder received by Certified U.S. Mail, a declination of coverage letter dated June 22, 2020, and issued by ACM on Aspen's behalf.

34. The declination letter refers to a purported "investigation" but provides no explanation of the steps Aspen or ACM took to "investigate" the claim. Nor does the letter offer any excuse or explanation for Aspen's more than 60-day delay in informing Dr. Scherder of its coverage decision.

35. In the declination letter, ACM posited that Dr. Scherder is not entitled to coverage because "Practice Income arising out of action by a civil authority must ... be the result of direct physical damage to property from a covered cause of loss." ACM continued:

Our investigation indicates that neither Dr. Scherder's building nor practice personal property sustained direct physical damage. Instead, the inability to continue his practice, in whole or in part, is due to a directive or guideline from the above-referenced sources [i.e., the Executive Order and recommendations from the American Dental Association and the Florida Dental Association]. Even if there were direct physical loss or damage, the claim would not be covered because the Policy specifically excludes damage caused by the enforcement of any ordinance or law regulating the use of property, or loss of use or loss of market.

COUNT I
BREACH OF CONTRACT

36. Plaintiffs re-allege and incorporate herein by reference all of the allegations in the preceding paragraphs of this Complaint.

37. The Policy is a valid and enforceable contract.

38. Plaintiffs satisfied all of their obligations under and all conditions imposed by the Policy, including the payment of the premium, the provision of timely notice of the claim, and the timely commencement of the instant legal action.

39. The Executive Order, which resulted from the presence of the coronavirus and COVID-19 on property other than Dr. Scherder's office, prohibited access to Dr. Scherder's office. The presence of the coronavirus and COVID-19, a "**covered cause of loss**," caused direct physical loss of or damage to such other property and prompted Governor Desantis to issue the Executive Order.

40. The Executive Order is not an ordinance or law regulating the use of property, and the Policy's loss of use or loss of market exclusion does not apply to Dr. Scherder's lost "**practice income**."

41. Thus, under the "Civil Authority" coverage grant appearing in the Policy's Income Coverage Part, Aspen has a contractual duty to cover, and Plaintiffs have a contractual right to receive, the "**practice income**" lost during the 30-day period immediately following the issuance of the Executive Order on March 20, 2020.

42. Aspen's declination of coverage for Dr. Scherder's claim is a breach of the Policy.

43. As a result of Aspen's breach, Dr. Scherder and his practice have suffered at least \$700,000 in monetary damages.

COUNT II **DECLARATORY JUDGMENT**

44. Plaintiffs re-allege and incorporate herein by reference all of the allegations in the preceding paragraphs of this Complaint.

45. This Count seeks a declaratory judgment under the Declaratory Judgment Act, codified at 28 U.S.C. § 2201.

46. An actual controversy exists between the parties, as Aspen has denied coverage for Dr. Scherder's claim under the Policy's "Civil Authority" coverage.

47. The Executive Order, which resulted from the presence of the coronavirus and COVID-19 on property other than Dr. Scherder's office, prohibited access to Dr. Scherder's office. The presence of the coronavirus and COVID-19, a "**covered cause of loss**," caused direct physical loss of or damage to such other property and prompted Governor Desantis to issue the Executive Order.

48. The Executive Order is not an ordinance or law regulating the use of property, and the Policy's loss of use or loss of market exclusion does not apply to Dr. Scherder's lost "**practice income**."

49. Thus, under the "Civil Authority" coverage grant appearing in the Policy's Income Coverage Part, Aspen has a contractual duty to cover, and Dr. Scherder has a contractual right to receive, the "**practice income**" lost during the 30-day period immediately following the issuance of the Executive Order on March 20, 2020.

50. Plaintiffs, therefore, seek a judgment declaring (1) that the Policy covers the lost "**practice income**" sustained as a result of the Executive Order, which prohibited access to Dr. Scherder's office for more than 30 consecutive days, and (2) that the Policy obligates Aspen to pay the full amount of the lost "**practice income**" sustained during that period of time.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs respectfully request the Court to enter judgment in their favor and against Aspen and to issue an Order:

- A. on Count I, awarding Plaintiffs monetary damages for Aspen's breach of contract;
- B. on Count II, declaring (i) that the Policy covers Plaintiffs' lost "**practice income**" sustained as a result of the Executive Order and (ii) that the Policy obligates Aspen to pay Plaintiffs the full amount of the lost "**practice income**" sustained during the 30 consecutive days following the issuance of the Executive Order; and
- C. awarding such other and further relief as the Court may deem just and proper.

Dated: September 9, 2020

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