

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF PENNSYLVANIA

DELAWARE VALLEY
MANAGEMENT, LLC T/A
PRINCETON MEDICAL
MANAGEMENT INNOVATIONS

AND

PRINCETON BRAIN & SPINE CARE,
LLC

AND

DB INTERNAL & SPORTS
MEDICINE, LLC

AND

DELAWARE VALLEY BRAIN &
SPINE

AND

PBSC VENTURES

AND

FLEMINGTON IONM SERVICES,
LLC

AND

DB INTERNAL & SPORTS MEDICINE,
LLC DBA PRINCETON BRAIN, SPINE:
AND SPORTS MEDICINE

AND

CIVIL ACTION No.

2. To protect the business from property damage and the loss of income in the event of a sudden suspension of operations for reasons outside of its control, Plaintiff purchased commercial multiple peril insurance from Defendants, Continental Casualty Company and CNA Financial Corporation, including specialty property coverage. A copy of the policy is attached as Exhibit 1.

3. Plaintiffs' insurance policy is an "all-risk" policy that provides coverage for all non-excluded business losses.

4. The policy expressly includes "Business Income" coverage which promises to pay for loss due to the necessary suspension of operations following loss to property and "Civil Authority" coverage which promises to pay for losses caused by a civil or governmental authority that prohibits access to the covered property.

5. The policy also provides "Extra Expense" coverage which promises to pay for expenses incurred to minimize losses during the suspension of business operations.

6. The policy issued by Defendants does not include and is not subject to any exclusion for losses caused by the spread of viruses or communicable disease.

7. On or about March 27, 2020, Plaintiffs were forced to suspend or reduce business operations in its New Jersey locations following an Order from New Jersey Governor Phil Murphy mandating that only emergency surgeries could be performed in an effort to protect the public from the global pandemic caused by COVID-19, a highly contagious respiratory virus that has upended daily life and infected more than 5,000,000 people throughout the United States.

8. On or about March 19, 2020, Plaintiffs were forced to suspend or reduce business operations in its Pennsylvania locations following an order from Pennsylvania Governor Tom

Wolf mandating that only emergency surgeries could be performed in an effort to protect the public from the global pandemic caused by COVID-19, a highly contagious respiratory virus that has upended daily life and infected more than 5,000,000 people throughout the United States.

9. Having faithfully paid the policy premiums, Plaintiffs made a claim for business interruption, civil authority and/or extra expense coverage to recoup substantial, ongoing financial losses directly attributed to a series of COVID-19 orders.

10. By letter dated July 16, 2020, Defendant wrongfully denied Plaintiffs' claim. Letter attached at Exhibit 2.

11. Through this action, Plaintiffs seek a declaratory judgment pursuant to 28 U.S.C. §2201 that the subject policy covers Plaintiffs' financial losses due to state and/or local orders mandating the closure of or otherwise prohibiting access to its business during the COVID-19 pandemic. Plaintiffs further seek damages for breach of contract on the basis that Defendants' denial of coverage runs afoul of the plain language of the policy and/or the public policy of the Commonwealth of Pennsylvania and the State of New Jersey.

THE PARTIES

12. Plaintiff, Delaware Valley Management, LLC T/A Princeton Medical Management Innovations is a limited liability company organized and existing under the laws of Pennsylvania with a physical address and/or principal place of business at 1203 Langhorne Newtown Road, Suite 138, Langhorne, PA 19047.

13. Plaintiff, Princeton Brain & Spine Care, LLC, is a limited liability company organized and existing under the laws of Pennsylvania with a physical address and/or principal place of business at 1203 Langhorne Newtown Road, Suite 138, Langhorne, PA 19047.

14. Plaintiff, DB Internal & Sports Medicine, LLC, is a limited liability company organized and existing under the laws of Pennsylvania with a physical address and/or principal place of business at 1203 Langhorne Newtown Road, Suite 138, Langhorne, PA 19047.

15. Plaintiff, Delaware Valley Brain and Spine, is a company organized and existing under the laws of Pennsylvania with a physical address and/or principal place of business at 1203 Langhorne Newtown Road, Suite 138, Langhorne, PA 19047.

16. Plaintiff, PBSC Ventures is a limited liability company organized and existing under the laws of New Jersey with a physical address and/or principal place of business at 731 Alexander Road, Suite 200, Princeton, NJ 08540.

17. Plaintiff, Flemington IONM Services, LLC, is a limited liability company organized and existing under the laws of New Jersey with a physical address and/or principal place of business at 731 Alexander Road, Suite 200, Princeton, NJ 08540.

18. Plaintiff, Princeton Brain, Spine and Sports Medicine, is a New Jersey corporation with a physical address and principal place of business at 558 Lawrence Square Blvd., Lawrenceville, NJ 08648.

19. Plaintiff, DB Internal & Sports Medicine, LLC dba Princeton Brain, Spine and Sports Medicine, LLC, is a limited liability company organized and existing under the laws of Pennsylvania with a physical address and/or principal place of business at 1203 Langhorne Newtown Road, Suite 138, Langhorne, PA 19047.²

20. At all relevant times, Defendant, Continental Casualty Company, an Illinois corporation, maintained a principal place of business at 151 N Franklin Street, Chicago, IL 60606.

² The Plaintiffs identified in paragraphs 12-19 are identified as named insureds under the Continental Casualty Company and CNA Financial Corporation insurance policy at issue. Accordingly, and for the avoidance of any doubt, the entities listed in paragraphs 12-20 are Plaintiffs herein and are collectively referred to within this Complaint as "Plaintiffs".

21. At all relevant times, Defendant, CNA Financial Corporation, an Illinois corporation, maintained a principal place of business at 151 N. Franklin Street, Chicago, IL 60606.

22. Defendants are collectively referred to herein as “Defendants.”

JURISDICTION

23. This Court has subject matter jurisdiction over this action pursuant to 28 U.S.C. §1332 because a complete diversity of citizenship exists between Plaintiffs and Defendants and the amount in controversy is greater than \$75,000.

24. Plaintiffs are citizens of Pennsylvania and New Jersey.

25. Each Defendant is a citizen of Illinois.

26. This Court has personal jurisdiction over Defendants because at all relevant times Defendants engaged in substantial business activities in and derived substantial revenue from business activities within the Commonwealth of Pennsylvania, including soliciting, transacting and conducting insurance business (including the subject policy) and administering claims within the Commonwealth. Defendants have purposely availed themselves of the privilege of conducting business in this forum by maintaining continuous and systematic contacts with this forum.

27. Venue is proper in this District pursuant to 28 U.S.C. §1391(b)(2) because a substantial portion of the acts which gave rise to this lawsuit occurred in this District. Venue is also proper pursuant to 28 U.S.C. §1391(b)(3) because Defendants are subject to personal jurisdiction in this District.

FACTUAL BACKGROUND

A. PLAINTIFF’S INSURANCE COVERAGE

28. On or about September 1, 2019, Defendants entered into a contract of insurance with the Plaintiffs, whereby Plaintiffs agreed to make payments to Defendants in exchange for

Defendants' promise to indemnify the Plaintiffs for losses, including, but not limited to, business income losses at its thirteen (13) campus locations throughout Pennsylvania and New Jersey (the "Covered Property"), which is owned, managed, and/or controlled by the Plaintiffs.

29. The Covered Property is insured under Policy number B 6045342994, issued by Defendants (hereinafter the "Policy").

30. Plaintiffs did not participate in the drafting or negotiation of the words used in the Policy.

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

32. The Policy provides (among other things) property, business personal property, business income and extra expense, civil authority order, and additional coverages.

33. Plaintiffs faithfully paid the policy premiums and reasonably expected that the business interruption, extra expense and/or civil authority coverages provided by Defendants would protect against losses in the event that state or local officials ordered the closure, suspension or reduction of its business due to public safety concerns.

34. The Policy is an all-risk policy.

35. Defendants agreed to "pay for direct physical 'loss' of or damage to Covered Property . . . caused by or resulting from any Covered Cause of Loss." Covered Cause of Loss is not defined in the Policy. Exh. 1, Section A, p. 1 of 22.

36. The policy defines Covered Cause of Loss as "risks of direct physical loss unless the loss is" excluded or limited by the policy. Exh. 1, Section A.3, p. 2 of 22.

37. In the Business Income (and Extra Expense) Coverage Form Endorsement, Defendant agreed to pay for Plaintiffs' actual loss of Business Income sustained due to the

necessary suspension of its operations during the “period of restoration” caused by direct physical loss of or damage. Exh. 1, Business Income and Extra Expense Endorsement SB146802, p. 1 of 3. A “slowdown or cessation” of business activities at the Covered Property is a “suspension” under the policy, for which Defendants agreed to pay for loss of Business Income during the “period of restoration” that begins at the time of direct physical loss or damage. Exh. 1, Section G, pgs. 18 and 20 of 22.

38. “Business income” means net income (or loss) before tax that Plaintiffs would have earned if no physical loss or damage had occurred as well as continuing normal operating expenses incurred. Exh. 1, Business Income and Extra Expense Endorsement, p. 1 of 3.

39. In the Business Income (and Extra Expense) Coverage Form, Defendant also agreed to pay necessary Extra Expense that Plaintiffs incurred during the “period of restoration” that the insureds would not have incurred if there had been no direct physical loss or damage to the Covered Property. Id.

40. “Extra expense” includes expenses to avoid or minimize the suspension of business, continue operations, and to repair or replace property. Id.

41. Defendants also agreed to “pay for the actual loss of ‘Business Income’” that Plaintiffs sustain “and any Extra Expense . . . caused by action of civil authority that prohibits access to” the Covered Property. The civil authority action must be due to direct physical loss of or damage to property at locations, other than the Covered Property caused by or resulting from a covered cause of loss.” Exh. 1, Civil Authority Endorsement, p. 79.

42. Within the insurance industry, and unknown to Plaintiffs, the word “loss” and the word “damage” have a customary usage more expansive than “loss” and “damage” as used in policy, and “loss” and “damage” includes “contamination”.

43. The words “loss” and/or “damage” are not defined in the policy, are used for different purposes within the policy, and have more than one potential meaning.

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

45. In this policy “damage” is used with the disjunctive “or” when paired with “loss” and therefore must have a different meaning than “loss”.

46. The words “loss” and “damage” are ambiguous as used by Defendants.

47. The word “damage” should be interpreted to have its normal and ordinary meaning- physical harm that impairs the value, usefulness or normal function of something.³

48. The Covid-19 virus causes direct physical damage, as well as indirect non-physical damage, as that word is commonly used.

49. The word “loss” should be interpreted to have its normal and ordinary meaning.

50. Loss has been defined as follows:

- a. Loss is the fact of no longer having something or having less of it than before.⁴
- b. Loss is the disadvantage you suffer when a valuable and useful thing is taken away.⁵
- c. Decrease in amount, magnitude or degree.⁶
- d. The amount of an insured’s financial detriment by death or damage that the insurer is liable for.⁷

51. Loss, as that word is commonly used, need neither be direct nor physical.

52. The Business Income, Extra Expense and Civil Authority provisions of the Policy were triggered by damage and loss caused by COVID-19, the related closure orders issued by

³ <https://www.lexico.com/definition/damage>

⁴ <https://www.collinsdictionary.com/us/dictionary/english/loss>

⁵ <https://www.collinsdictionary.com/us/dictionary/english/loss>

⁶ <https://www.merriam-webster.com/dictionary/loss>

⁷ <https://www.merriam-webster.com/dictionary/loss>

local, state and federal authorities, and Plaintiffs' inability to use and/or restricted use of the Covered Property.

B. THE COVID-19 PANDEMIC

53. On March 11, 2020, the World Health Organization officially declared COVID-19 a global pandemic.

54. COVID-19 is a cause of real physical loss and damage to Covered Property.

55. COVID-19 is a physical substance.

56. COVID-19 remains stable and transmittable in aerosols for up to three hours, up to 24 hours on cardboard and up to two to three days on plastic and stainless steel.⁸

57. The ability of the deadly virus to physically infect and remain on surfaces of objects or materials, i.e. "fomites," for up to twenty-eight (28) days has prompted health officials in countries like China, Italy, France and Spain to disinfect and fumigate public areas before reopening them.

58. To avoid the increased risk of contracting the virus in congregate environments, the U.S. Centers for Disease Control and Prevention ("CDC") has advised against gatherings of more than 10 people

C. THE COVERED CAUSE OF LOSS

1. Physical Loss

59. Losses due to the COVID-19 pandemic are a Covered Cause of Loss under the Policy.

⁸ See e.g. <https://www.nih.gov/news-events/news-releases/new-coronavirus-stable-hours-surfaces> (last accessed May 23, 2020).

60. 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 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.

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

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

63. Plaintiffs’ loss of use of the Covered Property also constitutes direct physical loss.

64. The “Covid-19 Effect” also produces physical loss of and damage to the property.

65. Social anxiety over public health and society’s change in perception that indoor establishments are unsafe due to COVID-19 creates “physical loss and damage” for purposes of commercial property coverage.

66. The public’s and customers’ change in perception is the functional equivalent of damage of a material nature or an alteration in physical composition.

67. Plaintiffs’ business income loss coverage within the Policy was triggered.

2. Civil Authority Orders

68. The presence of COVID-19 has prompted civil authorities throughout the country to issue orders mandating the suspension of non-essential businesses across a wide range of industries, including civil authorities with jurisdiction over Plaintiff's business.

69. On March 6, 2020, Pennsylvania Governor Tom Wolf signed an emergency disaster declaration triggering a public health state of emergency in the Commonwealth due to COVID-19. *See* the Declaration attached as Exhibit 3.

70. On March 9, 2020, New Jersey Governor Phil Murphy signed Executive Order No. 103 triggering a Public Health Emergency and State of Emergency due to COVID-19. *See* Executive Order No 103 attached hereto as Exhibit 4.

71. On March 16, 2020, New Jersey Governor Phil Murphy issued Executive Order 104 requiring all non-life sustaining businesses in the State of New Jersey, including all public, private, and parochial preschool programs, and elementary, secondary and all institutions of higher education to cease operations. Life-sustaining businesses that were permitted to remain open were required to follow "social distancing practices and other mitigation measures defined by the Centers for Disease Control." *See* the Order attached as Exhibit 5.

72. On March 19, 2020, Pennsylvania Governor Tom Wolf issued an Order requiring all non-life sustaining businesses in the Commonwealth to cease operations and close all physical locations until further notice. Life-sustaining businesses that were permitted to remain open were required to follow "social distancing practices and other mitigation measures defined by the Centers for Disease Control." The Order specifically directed that elective and/or non-emergency surgeries, or procedures were prohibited. *See*, the Order and spreadsheet containing those businesses that were forced to suspend operations attached as Exhibit 6.

73. On March 21, 2020, Governor Phil Murphy issued a Stay-at-Home Order for all residents of New Jersey. *See* the Order attached as Exhibit 7.

74. On March 23, 2020, Governor Murphy ordered the suspension of all elective surgeries and/or invasive procedures, whether medical or dental, and encompassing Plaintiff's practice. Any surgery or invasive procedure that can be delayed without undue risk to the current or future health of the patient was suspended. Plaintiff could remain open, but only for essential surgeries, not elective, therefore, their business was greatly hurt. Order 109 attached as Exhibit 8.

75. On or about March 23, 2020, Governor Tom Wolf and the Pennsylvania Secretary of Health further extended his March 19, 2020 Order and ordered the suspension of all non-life sustaining businesses, emergency, or government service. *See*, Order of the Governor attached as Exhibit 9.

76. On March 23, 2020, Governor Wolf issued a Stay-at-Home Order for residents of Philadelphia, Allegheny, Bucks, Chester, Delaware, Monroe and Montgomery Counties, also extending his March 19, 2020 Order. *See* the Order attached as Exhibit 10.

77. On April 1, 2020, Governor Wolf extended the Stay-At-Home Order to the entire Commonwealth of Pennsylvania. *See* the Order attached as Exhibit 11.

78. These Orders and proclamations, as they relate to the closure of all "non-essential businesses" evidence an awareness on the part of both state and local governments that COVID-19 causes damage to property. This is particularly true in places such as Plaintiff's businesses where the requisite contact and interaction causes a heightened risk of the property becoming contaminated by COVID-19.

79. Plaintiffs' business income loss was triggered with each restrictive civil authority action and/or publication of a restrictive civil authority order which prohibited access to the Covered Property.

80. Further, Plaintiffs' Covered Property suffered "direct physical loss of or damage" due to the Governor of Pennsylvania's and Governor of New Jersey's Orders mandating that Plaintiff discontinue its primary use of the Covered Property. The Governors' Orders, in and of themselves, constitute a Covered Cause of Loss within the meaning of the Policy.

D. IMPACT ON PLAINTIFF

81. On or about March 16, as a direct result of the COVID-19 pandemic and closure Orders referenced herein, Plaintiffs were forced to considerably limit their business.

82. Because people—doctors, patients, and others—frequent all areas of Plaintiffs' property, there is an ever-present risk that the Covered Property is contaminated and would continue to be contaminated if the business remained open to the public.

83. Because surgeries are conducted in enclosed spaces in an enclosed building, the Covered Property is more susceptible to being or becoming contaminated, as respiratory droplets are more likely to remain in the air or infect surfaces within the Covered Property for far longer or with significantly increased frequency as compared to facilities with open-air ventilation.

84. Plaintiffs' business is also highly susceptible to rapid person-to-property transmission of the virus, and vice-versa, because the activities of the doctors and patients necessarily require them to interact in close proximity to the property and to one another.

85. The virus is physically impacting the Covered Property. Any effort by the Defendants to deny the reality that the virus has caused physical loss and damage would constitute

a false and potentially fraudulent misrepresentation that could endanger the Plaintiffs and the public.

86. As a direct result of the COVID-19 pandemic and the Closure Orders, Plaintiffs have incurred, and continue to incur, among other things, a substantial loss of business income and additional expenses covered under the Policy

87. The covered losses incurred by Plaintiffs and owed under the Policy increase daily.

88. Plaintiffs submitted a claim to Defendants under the Policy for Plaintiffs' losses.

89. On July 16, 2020, Defendants wrongfully denied Plaintiffs' claim.

90. A declaratory judgment that the Policy provides coverage will ensure that Plaintiffs' reasonable expectations of coverage are met and prevent Plaintiffs from being left without vital coverage acquired to ensure the survival of the business.

91. A declaratory judgment that the Policy provides coverage will also further the public policy of this Commonwealth.

CAUSES OF ACTION

COUNT I **DECLARATORY RELIEF**

92. Plaintiffs incorporate by reference the preceding paragraphs as if fully set forth herein.

93. The Declaratory Judgment Act, 28 U.S.C. § 2201(a), provides that in "a case of actual controversy within its jurisdiction . . . any court of the United States . . . may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought." 28 U.S.C. § 2201(a).

94. Declaratory relief is intended to minimize “the danger of avoidable loss and unnecessary accrual of damages.” 10B Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, *Federal Practice and Procedure* § 2751 (3d ed. 1998).

95. Plaintiffs request a Declaratory Judgment to affirm that the Policy provides business income coverage because of losses attributable to civil authority actions, and because the denial violates public policy.

96. Plaintiffs’ interest in the Policy and the declaratory relief sought is direct, substantial, quantifiable, and immediate.

97. An actual controversy has arisen between Plaintiffs and Defendants as to the rights, duties, responsibilities and obligations of the parties under the Policy to reimburse Plaintiffs for their business income loss. Plaintiffs contend and, upon information and belief, Defendants dispute and deny that:

- a. Plaintiffs sustained direct physical loss of or damage to the Covered Property under the Policy;
- b. The Plaintiffs are entitled to coverage for business income loss and extra expense;
- c. The Policy provides business income coverage in the event that COVID-19 directly or indirectly caused a loss and/or damage at the Covered Property or immediate area of the Covered Property;
- d. The closure Orders described herein constitute a prohibition of access to the Covered Property;
- e. The prohibition of access by the closure Orders described herein has specifically prohibited access as defined in the Policy;
- f. The closure Orders described herein trigger coverage;
- g. The Policy provides coverage to Plaintiffs for any current and future closures due to physical loss or damage directly or indirectly resulting from COVID-19 under the Civil Authority Coverage.

98. Resolution of the duties, responsibilities and obligations of the Parties is necessary as no adequate remedy at law exists and a judicial declaration is required to resolve the dispute and controversy.

COUNT II
BREACH OF CONTRACT - COMPENSATORY RELIEF

99. Plaintiffs incorporate by reference the preceding paragraphs as if fully set forth herein.

100. At all times relevant hereto, Plaintiffs were an insured under the Policy with Defendants.

101. Plaintiffs purchased, elected and paid premiums to Defendants for the property, business income and extra expense, civil authority and additional coverages applicable to the losses claimed in this action.

102. All the information regarding the insureds' business and risks thereof was known to the Defendants when the Policy was issued.

103. Plaintiffs are entitled to recover all losses caused by COVID-19 and/or civil authority orders.

104. Defendants were advised of Plaintiffs' claims and demand for coverage under the Policy.

105. Plaintiffs complied with all requirements of the Policy.

106. Defendants are duty bound and obligated to act in good faith towards the insured under the Policy to make fair and reasonable efforts and offers to resolve Plaintiffs' claim.

107. Defendants breached the terms and provisions of the Policy by denying the claims of Plaintiffs for all losses caused by COVID-19 and the civil authority orders.

108. The breach of the indemnification obligations under the Policy by Defendants has caused Plaintiffs to suffer loss and harm.

109. Defendants are required to pay Plaintiffs all covered losses caused by COVID-19 and civil authority orders including business income, extra expense, contamination, civil authority and other coverages under the Policy.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs request that the Court enter judgment against the Defendants and declare, as a matter of law, the following:

- a. The civil authority orders prohibit access to Plaintiffs' Covered Property;
- b. The civil authority orders "prohibit access" as defined in the Policy;
- c. The civil authority coverage applies to Plaintiffs due to physical loss or damage at the Covered Property and other locations;
- d. The Plaintiffs are entitled to coverage for business income loss;
- e. Plaintiffs sustained direct physical loss of or damage to the Covered Property under the Policy;
- f. The inability to use the Covered Property amounts to a physical loss or damage as defined in the Policy;
- g. Defendants' denial of coverage for losses caused by the referenced civil authority orders violates public policy; and
- h. Defendants' denial of coverage for losses caused by the referenced civil authority orders amounts to a breach of contract.

Plaintiffs further seek an Order requiring Defendants to pay Plaintiffs all covered losses caused by loss of access to the Insured Premises including business income, extra expense,

contamination, civil authority and other coverages under the Policy; and such other relief as the Court deems appropriate.

JURY TRIAL DEMANDED

Plaintiffs demand a trial by jury on all issues so triable.

Dated:

Respectfully submitted,

ANAPOL WEISS

A handwritten signature in cursive script, reading "Sol H. Weiss", is written over a horizontal line.

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