

**IN THE COURT OF COMMON PLEAS
SUMMIT COUNTY, OHIO**

THE OPAL LOUNGE HAIR AND NAIL)	CASE NO.
BOUTIQUE)	
2380 S. Arlington Rd.)	
Coventry Township, Ohio 44139)	JUDGE
)	
Plaintiff,)	
)	<u>COMPLAINT</u>
v.)	
)	(JURY DEMAND ENDORSED HEREIN)
WEST BEND MUTUAL INSURANCE)	
COMPANY)	
1900 S. 18 th Ave.)	
West Bend, WI 53095)	
)	
Defendant.)	

Plaintiff The Opal Lounge Hair and Nail Boutique, for its Complaint against Defendant West Bend Mutual Insurance Company states and alleges as follows:

1. Plaintiff is the owner and operator of a hair and nail salon open to the public to providing services for patrons in the area of cosmetic hair, nail, makeup and beauty, and which has been forced, by recent orders by the State of Ohio, to cease its operations entirely – through no fault of its own – as part of the State’s efforts to slow the spread of a global pandemic. The closures mandated by these orders present an existential threat to Plaintiff, and other small, local businesses that employ hundreds of Ohio residents. To protect its business from situations like these, which threaten the livelihoods of its employees and owners, based on factors wholly outside of its control, Plaintiff obtained business interruption insurance from Defendant West Bend Mutual Insurance Company (“West Bend”).

2. Plaintiff now brings this action against West Bend to enforce its obligations under a commercial businessowners insurance policy sold and issued to Plaintiff, which provides

coverage for losses incurred due to a “necessary suspension” of its operations, including when its business is forced to close due to a government order arising from a global pandemic.

3. On March 9, 2020, Governor Mike DeWine issued Executive Order 2020-01D, Declaring a State of Emergency in Ohio as a result of the global pandemic.

4. On March 15, 2020, Ohio Governor Mike DeWine and Amy Acton, M.D., M.P.H., Director of the Ohio Department of Health, issued a Public Health Order, closing all bars and restaurants except sales for carry-out beverage and food, in an effort to address the ongoing pandemic.

5. On March 17, 2020, Governor DeWine and Dr. Acton issued orders closing all polling locations.

6. On March 20, 2020, Governor DeWine and Dr. Acton issued orders to cease business operations at all hair salons, day spas, nail salons, barber shops, tattoo parlors, body piercing locations, tanning facilities and massage therapy locations.

7. On March 22, 2020, Governor DeWine and Dr. Acton issued an order that all persons stay at home unless engaged in essential work or activity.

8. As a result of the Orders identified in Paragraphs 3 and 5-7 (“Closure Orders”), Plaintiff has been forced to shut down all of its business operations.

PARTIES

9. Plaintiff is an Ohio corporation, with its principal place of business in Coventry Township, Ohio.

10. Defendant West Bend is a foreign insurance company engaged in the business of selling insurance contracts to commercial entities such as the Plaintiff in Ohio and elsewhere. West Bend is incorporated in the State of Wisconsin with its principal place of business in West Bend,

Wisconsin. It is licensed to draft policy forms, underwrite insurance policies, and sell insurance in the State of Ohio. It is registered to do business in the State of Ohio with the Ohio Department of Insurance.

JURISDICTION AND VENUE

11. This Court has subject matter jurisdiction because Plaintiff and West Bend entered into a contract for insurance in Summit County, Ohio.

12. This Court has personal jurisdiction of West Bend because it engages in commerce in Summit County, Ohio, takes applications and sells insurance policies in Summit County, Ohio, and entered into a contract of insurance with Plaintiff in Summit County, Ohio, and because West Bend regularly conducts business throughout the State of Ohio and County of Summit, marketing, selling, underwriting, and issuing insurance policies.

13. Venue is proper because some or all of the facts giving rise to the claim for relief occurred in Summit County, Ohio.

FACTUAL ALLEGATIONS

14. Plaintiff incorporates by reference, as if fully set forth herein, the allegations set forth in paragraphs 1-13 above.

15. The Closure Orders were issued because of a global pandemic.

16. The Closure Orders prohibit Plaintiff and the public from having access to Plaintiff's business.

17. In exchange for substantial premiums, West Bend sold Plaintiff its Commercial Lines Business Owners policy, Policy No. A554751-1, having effective dates of February 1, 2020 through February 1, 2021 to Plaintiff ("Policy"). The Policy was a renewal of a previous policy, Policy No. A55475-00, having effective dates of February 1, 2019 through February 1, 2020. An

authentic duplicate of the Policy was not available to the Plaintiff at the time of filing this Complaint; however, upon information and belief, Defendant is in possession of a copy of the Policy.

18. When the Policy was delivered to Plaintiff, West Bend's President and CEO, Kevin A. Steiner, wrote to Plaintiff, representing that for "nearly 125 years, West Bend associates have worked hard to deliver their best when our customers needed us most. Today that philosophy is the basis of the Silver Lining®, which is exemplified by empathy, excellent service, compassion, value and respect. . . . You have my pledge we'll do our best to provide you with the products and services you deserve."

19. West Bend also provided an explanation as to why Plaintiff should choose it for its business insurance, claiming *inter alia* that

- a. "West Bend's Specialty Lines division is staffed with experienced claims professionals who have handled the most difficult situations facing business";
- b. "There are so many great reasons to choose West Bend to protect your valuable business . . . experienced claim professionals who will protect your specialized business!";
- c. . . . "the experts at West Bend have the knowledge, experience, and resources to handle these 'crisis response' claims";

20. The Policy is an all-risk policy that provides coverage unless clearly, unambiguously and specifically excluded.

21. The Policy does not exclude for losses of business income as a result of a global pandemic.

22. The Policy does not exclude for losses of business income as a result of government orders shutting down Plaintiff's business as a result of a global pandemic.

23. The Policy does not exclude for losses of business income as a result of compliance with government orders as a result of a global pandemic.

24. The Policy does not exclude for losses of business income as a result of pandemics.

25. The Policy, an all-risk policy purchased by Plaintiff, covers losses caused by the global pandemic.

26. West Bend agreed to "pay for the actual loss of Business Income" sustained by Plaintiff "due to the necessary suspension" of Plaintiff's operations during the period of business interruption caused "by direct physical loss of or damage to property" at the Plaintiff's premises.

27. West Bend also expressly promised to pay "necessary Extra Expense" incurred during the interruption period that Plaintiff "would not have incurred if there had been no direct physical loss or physical damage to property at" Plaintiff's premises.

28. West Bend also promised to pay for Business Income Loss and Extra Expense under the "Communicable Disease Business Income and Extra Expense Coverage", which covers Plaintiff as a result of being temporarily shut down or suspended by state board of health due to an outbreak of a communicable disease at the insured premises.

29. The pandemic caused direct physical loss to Plaintiff's property.

30. The pandemic is a communicable disease.

31. In response to the pandemic and property damage to public places such as Plaintiff's business which damage contributes to the spread of the pandemic, Governor DeWine and Dr. Acton issued the Closure Orders.

32. The Closure Orders apply to Plaintiff's scheduled premises under the Policy.

33. The Closure Orders issued by Governor DeWine and Dr. Acton were issued in response to the dangerous physical conditions at Plaintiff's property caused by a communicable disease, prohibit access to Plaintiff's premises, thereby causing the necessary suspension of Plaintiff's business operations and triggering the Civil Authority coverage under the Policy and Communicable Disease Business Income and Extra Expense Coverage.

34. As a result of the Closure Orders, Plaintiff has suffered substantial Business Income loss and incurred Extra Expense. The covered losses incurred by Plaintiff and owed under the Policy are increasing daily.

35. Plaintiff submitted a claim under the Policy for business interruption losses.

36. West Bend denied the claim despite that the Policy does not exclude losses as a result of pandemics.

37. West Bend denied the claim despite acknowledging the Communicable Disease Business Income and Extra Expense Coverage provision of the Policy.

38. There is no reasonable justification for West Bend's denial of Plaintiff's claim.

39. West Bend performed little to no investigation of Plaintiff's claim.

40. West Bend's denial is contrary to the terms, conditions, agreements and promises made by West Bend, for which Plaintiff paid substantial premiums.

41. West Bend's conduct in failing to undertake any meaningful investigation and then wrongfully denying Plaintiff's claim is contrary to the representations made by West Bend and by its President & CEO Kevin A. Steiner, who claimed West Bend philosophy is exemplified by "empathy, excellent service, compassion value and respect."

42. On March 18, 2020, eighteen (18) members of the United States Congress issued a letter to the Presidents and CEO's of the American Property Casualty Insurance Association,

National Association of Mutual Insurance Companies, Independent Insurance Agents & Brokers of America, and Council of Insurance Agents and Brokers, and advised that business interruption insurance is intended to protect business against income losses as a result of disruption to their operations and recognizing income losses due to the pandemic, and that coverage under the such policies will help sustain America's business through "these turbulent times, keep their doors open, and retain employees on the payroll." They concluded that during "times of crisis, we must all work together. We urge you to work with your member companies and brokers to recognize financial loss due to the [pandemic] as part of policyholders' business interruption coverage."

43. At all times, Plaintiff has satisfied all of its obligations under the Policy.

COUNT I: DECLARATORY JUDGMENT

44. Plaintiff incorporates by reference, as if fully set forth herein, the facts and allegations set forth in paragraphs 1-43 above.

45. The Policy is an insurance contract under which Plaintiff paid West Bend premiums for West Bend's promise to pay Plaintiff's losses for claims covered by the Policy, such as business losses incurred as a result of the Closure Orders and pandemic forcing it to close its business.

46. Plaintiff has complied with all applicable provisions of the Policy, including payment of the premiums in exchange for coverage under the Policy.

47. An actual case or controversy exists regarding Plaintiff's rights and West Bend's obligations under the Policy to reimburse Plaintiff for the full amount of losses incurred by Plaintiff in connection with the Closure Orders and the necessary interruption of its business stemming from the pandemic.

48. In accordance with Rule 57 of the Ohio Rules of Civil Procedure, and R.C. 2721.01 to 2721.15, inclusive, Plaintiff seeks a declaratory judgment from this Court declaring the following:

- (a) Plaintiff's losses incurred in connection with the Closure Orders and the and the necessary interruption of its businesses stemming from the pandemic are insured losses under the Policies;
- (b) West Bend has waived any right that it may have had to assert defenses to coverage or otherwise seek to bar or limit coverage for Plaintiff's losses by issuing a form denial without conducting any meaningful claim investigation as required under Ohio law;
- (c) Plaintiff's losses and claim are not barred by an exclusion under the Policy;
- (d) To the extent West Bend relies on an exclusion, the exclusion is ambiguous, conflicts with other promises contained in the Policy, requires a strained interpretation of the Policy, and results in illusory coverage;
- (e) Plaintiff has coverage for any future orders issued by the Governor and/or the Ohio Department of Health; and,
- (f) West Bend is obligated to pay Plaintiff for the full amount of the losses incurred and to be incurred in connection with the covered business losses related to the Closure Orders and the necessary interruption of its businesses stemming from the pandemic.

COUNT II: BREACH OF CONTRACT

49. Plaintiff incorporates by reference, as if fully set forth herein, the facts and allegations set forth in paragraphs 1-48 above.

50. The Policy is a contract under which Plaintiff paid West Bend premiums in exchange for West Bend's promise to pay Plaintiff's losses for claims covered under the Policy, including the business losses incurred as a result of the pandemic, due to the direct physical damage to the premises forcing Plaintiff to close its business operations, due to orders by the State of Ohio to close its business as a result of property damage, and due to communicable diseases.

51. Plaintiff has complied with all applicable provisions and obligations of the Policy, including payment of premiums in exchange for coverage under the Policy, and yet West Bend has failed to comply with its obligations under the Policy's clear and unambiguous terms.

52. In the event any of the terms and conditions of the Policy are ambiguous, those terms and conditions must be interpreted in favor of Plaintiff and in favor of coverage, since West Bend drafted the Policy and presented it to Plaintiff as a form contract without any ability of Plaintiff to modify any portions of it.

53. West Bend communicated to Plaintiff that it would not pay claims under the Policy for business interruption losses.

54. West Bend's denial of the claim is in breach of the terms and provision of the Policy.

55. As a proximate result of West Bend's breach of the Policy, Plaintiff has sustained and continues to sustain damages for which Defendants are liable, in an amount to be established at trial.

COUNT III: BREACH OF THE DUTY OF GOOD FAITH AND FAIR DEALING

56. Plaintiff incorporates by reference, as if fully set forth herein, the facts and allegations set forth in paragraphs 1-55 above.

57. Every insurance policy contains an implied covenant of good faith and fair dealing.

58. West Bend breached the implied covenant of good faith and fair dealing by wrongfully, and without reasonable justification and no reasonable investigation, denying coverage to the Plaintiff under the Policy. The breach of the implied covenant of good faith and fair dealing is ongoing as Plaintiff reserves the right to amend this Complaint as new facts are discovered and/or developed.

59. Plaintiff is informed and believes, and therefore alleges, that West Bend has intentionally and maliciously, as part of a preconceived design, acted so as to deny Plaintiff the rightful benefits under the Policy.

60. Plaintiff is informed and believes, and therefore alleges, that West Bend failed to conduct any reasonable investigation of the claim under the Policy, and instead issued a denial not based on reasonable justification, but rather in order to establish an industry-wide trend in response to the potential mammoth economic exposure that Defendant, and other similarly situated insurers face as a result of the global pandemic that claims for business losses under its policies will not be covered and to thwart other similarly situated business from seeking such benefits under their policies.

61. As a direct and proximate result of the breach of the implied covenant of good faith and fair dealing by West Bend, Plaintiff has suffered, and will continue to suffer damages. Plaintiff has been forced to cease its business operations and yet is forced to continue to pay the expense associated with it, such as those related to occupancy, insurance, license fees, equipment, etc., all in a climate where nearly 16 million people have filed for unemployment benefits, while West Bend reaped the benefit of huge premium dollars and promised policyholders, like Plaintiff, that business interruption claims would be paid.

WHEREFORE, Plaintiff respectfully prays that the Court:

1. Enter a declaratory judgment on Count I of the Complaint in favor of the Plaintiff and against West Bend, declaring as follows:
 - (a) Plaintiff's losses incurred in connection with the Closure Orders and the and the necessary interruption of its businesses stemming from the pandemic are insured losses under the Policies;
 - (b) West Bend has waived any right that it may have had to assert defenses to coverage or otherwise seek to bar or limit

- coverage for Plaintiff's losses by issuing a form denial without conducting any meaningful claim investigation as required under Ohio law;
- (c) Plaintiff's losses and claim are not barred by an exclusion under the Policy;
 - (d) To the extent West Bend relies on an exclusion, the exclusion is ambiguous, conflicts with other promises contained in the Policy, requires a strained interpretation of the Policy, and results in illusory coverage;
 - (e) Plaintiff has coverage for any future orders issued by the Governor and/or the Ohio Department of Health; and,
 - (f) West Bend is obligated to pay Plaintiff for the full amount of the losses incurred and to be incurred in connection with the covered business losses related to the Closure Orders and the necessary interruption of its businesses stemming from the pandemic.
2. Enter a judgment on Count II of the Complaint in favor of Plaintiff and against West Bend and award damages for breach of contract in an amount to be proven at trial;
 3. Enter a judgment on Count III of the Complaint in favor of Plaintiff and against West Bend for all compensatory damages in an amount in excess of Twenty-Five Thousand Dollars (\$25,000.00), plus attorneys' fees, costs, and punitive damages;
 4. Enter a judgment in favor of Plaintiff and against West Bend in an amount equal to all attorneys' fees and related costs incurred for the prosecution of this coverage action, which amount to be established at the conclusion of this action;
 5. Award to Plaintiff and against West Bend prejudgment interest, to be calculated according to law, to compensate Plaintiff for the loss of use of funds caused by West Bend's breach of the Policy; and,
 6. Award Plaintiffs such other, further, and additional relief as this Court deems just and appropriate.

Respectfully submitted,

/s/ William J. Novak

WILLIAM J. NOVAK (0014029)

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Attorneys for Plaintiff

JURY DEMAND

A trial by jury is hereby requested on all matters herein.

Respectfully submitted,

/s/ William J. Novak

WILLIAM J. NOVAK (0014029)

One of the Attorneys for Plaintiff

TO THE CLERK

Please serve the summons and a copy of this Complaint upon the Defendant via certified mail, return receipt requested, at the addresses set forth in the caption of the Complaint.

/s/ William J. Novak

WILLIAM J. NOVAK (0014029)

One of the Attorneys for Plaintiff