

MAJOR CASE
ASSESSMENT OF DAMAGES REQUIRED.
JURY TRIAL DEMANDED.

WHEELER, DIULIO & BARNABELI, P.C.

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EBE LLC
1020 Delaware Ave . 1st floor
Philadelphia , Pennsylvania 19125

vs.

THOSE CERTAIN UNDERWRITERS AT
LLOYD'S, LONDON SUBSCRIBING TO
POLICY NO. QS-NMB03008420
500 Mamaroneck Avenue
Suite 320
Harrison, NY 10528

and

HISCOX – SYN 33 – BINDING AND
CLAIMS SUBSCRIBING TO POLICY NO.
QS-NMB03008420
520 Madison Avenue
32nd Floor
New York, NY 10022

COURT OF COMMON PLEAS
PHILADELPHIA COUNTY

DOCKET NO.

COMMERCE PROGRAM

CIVIL ACTION COMPLAINT (1C - Contract)

NOTICE

You have been sued in court. If you wish to defend against the claims set forth in the following pages, you must take action within twenty (20) days after this complaint and notice are served, by entering a written appearance personally or by attorney and filing in writing with the court your defenses or objections to the Claims set forth against you. You are warned that if you fail to do so the case may proceed without you and a judgment may be entered against you by the court without further notice for any money claimed in the complaint or for any other claim or relief requested by the plaintiff. You may lose money or property or other rights important to you.

YOU SHOULD TAKE THIS PAPER TO YOUR LAWYER AT ONCE. IF YOU DO NOT HAVE A LAWYER, GO TO OR TELEPHONE THE OFFICE SET FORTH BELOW TO FIND OUT WHERE YOU CAN GET LEGAL HELP.

PHILADELPHIA BAR ASSOCIATION
Lawyer Referral Service
1101 Market St., 11th Floor
Philadelphia, PA 19107-2911
Telephone: 215-238-6333
Fax: 215-238-1159

AVISO

Le han demandado a usted en la corte. Si usted quiere defenderse de estas demandas expuestas en las paginas siguientes, usted tiene veinte (20) dias de plazo al partir de la fecha de la demanda y la notificacion. Hace falta ascantar una comparencia escrita o en persona o con un abogado y entregar a la corte en forma escrita sus defensas o sus objeciones a las demandas en contra de su persona. Sea avisado que si usted no se defiende, la corte tomara medidas y puede continuar la demanda en contra suya sin previo aviso o notificacion. Ademas, la corte puede decidir a favor del demandante y requiere que usted cumpla con todas las provisiones de esta demanda. Usted puede perder dinero o sus propiedades u otros derechos importantes para usted.

LLEVE ESTA DEMANDA A UN ABOGADO IMMEDIATAMENTE. SI NO TIENE ABOGADO O SI NO TIENE EL DINERO SUFICIENTE DE PAGAR TAL SERVICIO. VAYA EN PERSONA O LLAME POR TELEFONO A LA OFICINA CUYA DIRECCION SE ENCUENTRA ESCRITA ABAJO PARA AVERIGUAR DONDE SE PUEDE CONSEGUIR ASISTENCIA LEGAL.

ASOCIACION DE LICENCIADOS DE FILADELFA
Servicio De Referencia E Informacion Legal
1101 Market Street, 11th Floor
Filadelfia, Pennsylvania 19107
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Case ID: 210201116

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Attorney for Plaintiff(s)

EBE LLC
1020 Delaware Ave . 1st floor
Philadelphia , Pennsylvania 19125

vs.

THOSE CERTAIN UNDERWRITERS AT
LLOYD'S, LONDON SUBSCRIBING TO
POLICY NO. HIX00241519
500 Mamaroneck Avenue
Suite 320
Harrison, NY 10528

and

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CIVIL ACTION COMPLAINT

EBE LLC (hereafter "EBE") by their attorneys, Wheeler, DiUlio & Barnabei, P.C., file this Complaint against the Those Certain Underwriters at Lloyd's, London Subscribing to Policy No. QS-NMB03008420 (hereafter "Lloyds") and Hiscox – Syn 33 – Binding and Claims Subscribing To Policy NO. QS-NMB03008420 (hereinafter "Hiscox") (collectively "Defendants"), as follows:

1. EBE is a limited liability company duly created under and pursuant to the laws of the Commonwealth of Pennsylvania which maintain their principal places of business at the address set forth above.

2. Lloyds is a business entity licensed to issue policies of insurance in the Commonwealth of Pennsylvania and maintains its principal place of business for that purpose at the address set forth above.

3. Hiscox is a business entity licensed to issue policies of insurance in the Commonwealth of Pennsylvania and maintains its principal place of business for that purpose at the address set forth above.

4. Defendants regularly conduct business and issues policies of insurance in the City and County of Philadelphia.

5. Philadelphia Court of Common Pleas is the appropriate Court as the Federal Court would not have Jurisdiction in accordance with Fahy v. Certain Underwriters at Lloyd's, No. 19-cv-03758-JMY, 2019 U.S. Dist. LEXIS 203894, at *7 (E.D. Pa. Nov. 25, 2019), see also Chemical Leaman Tank Lines, Inc. v. Aetna Cas. and Sur. Co., 177 F.3d 210, 221 (3d Cir. 1999), CNX Gas Co., LLC v. Lloyd's of London et al., 2019 WL 5258166, at *6-7 (W.D. Pa. October 17, 2019) (noting that the majority of circuit courts to have considered this issue have found that the citizenship of all underwriter members must be considered); Underwriters at Lloyd's, London v. Osting-Schwinn, 613 F.3d 1079, 1091 (11th Cir. 2010) (“[After all,] it is the underwriters, not Lloyd's, who are the parties to this lawsuit.”).

6. At all times material hereto, Defendants were acting by and through their duly authorized agents, servants, workmen or employees, including, but not limited to Andrew Wells, Jonathan Hoffman, and Laura Hitchens and Capstone ISG.

7. Defendants issued to EBE a written policy of insurance Nos. HIX00241519 (hereafter the “Policy”, copies of the Declaration pages of which are attached hereto as Exhibits

A), which provide coverage for Plaintiff, which remain in full force and effect at all times material hereto.

8. The Policies, issued by Defendants provide property coverage for Plaintiff's Premises under terms and conditions set forth in language copy-written by the Insurance Services Office, Inc. ("ISO") which provides standard forms for insurance companies including Lloyds.

9. The Policy issued by Defendants contain identical language with respect to the property coverages which are at issue in this Civil Action.

10. In consideration for the premium paid, the Policies provide coverage for Business Interruption and Extra Expense in the amount of \$566,800 for Plaintiff's first premises and \$50,000 for Plaintiff's second premises.

11. In consideration for the premium paid, the Policies provide coverage for Plaintiff's buildings and personal property.

12. The Policy contain the ISO form "Building and Personal Property Coverage Form" (CP 00 10 06 95) which states that Lloyds will "...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."

13. The Policy contain the ISO form "Causes of Loss – Special Form" (CP 10 30 06 95) which defines Covered Causes of Loss as "RISKS OF DIRECT PHYSICAL LOSS unless the loss is: 1. Excluded in Section B., Exclusions; or 2. Limited in Section C., Limitations."

14. The commercial policy issued by Defendant provides coverage against the "risk" of Direct Physical Loss.

15. By including the term “risk” in the insuring agreement, the policy does not require actual direct physical loss for coverage to be triggered, simply the risk of direct physical loss.

16. There is no exclusion or limitation in the Policies for loss caused directly or indirectly by virus, pandemic or related perils.

17. A virus, while small, is physical in nature in that it is made up of atoms, genetic material, and proteins, all physical items.

18. By way of comparison, a thought is not physical as it has no physical form.

19. “Accidental”, although not defined in the Policies, is generally understood to mean an event which is neither intended nor expected from the point of view of the insured party.

20. In addition, the policy provides “civil authority” coverage against risk of loss arising from the acts of any “Civil Authority.”

21. The “civil authority” coverage provides benefits for loss of Business Income resulting from the actions of a “Civil Authority” i.e., a state or local government agency.

22. This Civil Authority coverage is not controlled, bound, or otherwise connected to any other insuring agreement or endorsement of the policy which may contain exclusions or limitations not contained in this coverage.

23. Plaintiff’s Policy also includes coverage for loss of Business Income and Extra Expenses incurred as the result of the acts of a “Civil Authority.”

24. Upon renewal of this policy on 8/2/2020, Defendant, for the first time, included an endorsement which modified coverage to include an exclusion for Communicable Disease.

25. The fact that the carrier needed to add in an endorsement to add an exclusion for Communicable Disease is evidence that the policy issued to Plaintiff that was in effect at the time of the loss did, in fact, cover losses caused by Communicable Disease.

26. On March 11, 2020, the World Health Organization declared the COVID-19 health emergency a “Pandemic.”

27. On March 16, 2020, the Center for Disease Control and Prevention issued guidelines to begin social distancing and the closing of businesses.

28. As a result, local and state authorities ordered that non-essential businesses, including Plaintiff’s business, be closed.

29. As of January 15, 2021, there have been at least 102,000 positive COVID-19 Tests within the city of Philadelphia according to Phila.gov.

30. As a result of the worldwide pandemic and the extent of the spread of the virus, there was and continues to be a suspected presence of virus at the property.

31. At the present time, it is known that in March/April of 2020, two 1099 contractors that were present at the location either tested positive for the COVID-19 virus or tested positive with an anti-body test.

32. As a result, the COVID-19 virus was on the premises in March/April 2020 and longer.

33. Given the widespread nature of the virus, and the ability for hosts to remain asymptomatic, Plaintiff believes that the virus was on site in some form during the shutdown.

34. Given the widespread nature of the virus, and the ability for hosts to remain asymptomatic, the law of probability indicates that the virus was on site in some form during the shutdown.

35. As a result of the worldwide pandemic, there was and continues to be a risk of COVID-19 at Plaintiff's property.

36. Beginning on March 20, 2020, the business operation of Plaintiff's business ceased as the result of the act of "Civil Authority" and Plaintiff has suffered, and continues to suffer, a loss of business income and incurred Extra Expenses in maintaining its business location which has caused significant damage and losses.

37. As a result of these closures, Business Income from these locations ceased and EBE has spent and incurred substantial Extra Expenses to maintain these premises to minimize the suspension of operations and continue business when possible. This includes periodic maintenance to disinfect these premises and clean surfaces infected with the virus.

38. Plaintiff reasonably expected this loss to be covered under the insuring provisions of its policy as well as the additional coverages which apply to losses arising from the actions of a civil authority.

39. Notice of this covered loss was given to Defendant in a prompt and timely manner and Plaintiff, at all relevant times, fully complied with all of the terms and conditions required by the Policy.

40. Specifically, Plaintiff gave initial notice of the claim by phone call, followed up by a letter on April 15, 2020 to Defendant Lloyd's advising of Plaintiff's significant losses in support of its claim.

41. Thereafter, on or about April 28, 2020, Plaintiff's representative submitted to an interview requested by Defendant Lloyd's as part of its claim investigation.

42. On or about April 29, 2020, Plaintiff supplied information requested by Defendant Lloyd's relating to the claim.

43. On or about May 4, 2020, Capstone ISG, the designated claims representative for defendants, acknowledged receipt of the claim and represented that it would investigate and analyze the claim and further issued a non-specific blanket reservation of rights on the claim.

44. Thereafter, on or about July 14, 2020, Defendants, through their agent, Capstone ISG, sent a letter to Plaintiff which acknowledged the claim again, gave no claims decision, indicated that “Underwriters are still reviewing your submissions” and sought no additional information from Plaintiff relating to the claim. Defendants invited plaintiff to submit further questions or concerns to them via their claims representative.

45. On or about August 6, 2020 Plaintiff inquired further via email of a response on the claim submitted by it, specifically requesting: “why our claim has not been paid. I cannot tell the basis from your letter. . .”

46. Defendants, through their agent, Capstone ISG, responded via email on August 6, 2020 that: “the coverage for your claim is still under review by your insurance carrier and once a formal determination has been made you will be advised in writing.”

47. On or about September 17, 2020 Plaintiff inquired further of defendants, through their agent, Capstone ISG, via email of a response on the claim submitted by it, specifically requesting:

It has now been more than five months since we presented the claim on behalf of EBE. I have asked many times for a claim decision and I have not received confirmation of coverage or a denial of coverage. We purchased insurance to protect our business against losses and all we have received is a series of letters that don't respond to our requests for a coverage decision in relation to the insurance we purchased.

Can you please give us an answer to our claim?

48. Defendants, through their agent, Capstone ISG, responded via email on September 17, 2020 that: “We are still waiting for Underwriters in London to make a formal decision on the claim.”

49. In response to the Defendants’ invitation of July 14, 2020 for Plaintiff to submit further questions or concerns, on or about September 17, 2020 Plaintiff inquired further of Defendants, through their agent, Capstone ISG, via email of clarification and response on the claim submitted by it, specifically requesting:

Thank you for your quick response, although I have learned no additional information in response to my claim than I had 5 months ago. In all fairness, I feel all I keep getting is the runaround. Have they done this to everyone who had a claim?

A few questions:

- 1) Why do they keep saying that they have not made a decision?
- 2) What more needs to be done by them? (You have already told me that I have provided all of the information necessary to make a claims decision).
- 3) Why is it still undecided if they have: (a) the policy which they provided to me; and (b) the information about my claim, damages and losses? Isn’t this simply a matter of looking at the policy and the money we have lost and damages we sustained and adjusting the claim?
- 4) Why is this taking so long with no answers?
- 5) Who can I contact from Lloyd’s about this?

When I was asked to pay premiums for the insurance I didn’t say to them that I would decide what to do for 5+ months and get back to them; I just paid the premiums and expect coverage that we paid for.

In Pennsylvania, doesn’t an insurance company have an obligation to give me a written decision about our claim, one way or the other?

50. Defendants, through their agent, Capstone ISG, responded via email on September 17, 2020 which stated:

Thank you for your follow up email and I understand your frustrations. At this time the Reservation of Rights letter that has previously been sent to you outlines some of the policy provisions that Underwriters are looking at to determine if coverage exists under this policy. I can assure you that you are not the only one who is having to wait while a decision on coverage is being made by the syndicates are involved in the Lloyds Market about these Covid claims.

I have sent another request to Underwriters today to see if I can get an answer for you, and will keep you informed as soon as I hear anything.

I am sorry I don't have any more information for you at this time.

51. On or about September 17, 2020 Plaintiff inquired further of defendants, through their agent, Capstone ISG, via email of clarification and response on the claim submitted by it, specifically requesting: "Thank you for your response but it's not responsive to the questions I asked. Can you please answer the questions I asked?"

52. Defendants, through their agent, Capstone ISG, responded via email on September 18, 2020 which stated the following:

a. ". . . I have not been told how they will be proceeding with this Covid claim at this time and whether coverage will be afforded for the loss."

b. "We do have all the information Underwriters have requested at this time and we await their coverage decision on this Covid claim."

c. "There has to be a determination of whether there is coverage for the claim due to the policy provisions."

d. They cannot answer why it is taking so long with no answers because "I am not apart [*sic*; a part] of the decision making process."

e. "At this time there is no one you can contact at Lloyd's."

53. On or about November 17, 2020, plaintiff's agent, BHI also contacted the defendants' claims agent, Capstone ISG, via email on the claim stating:

Our Insured [Plaintiff, EBE] contacted the Producer [Defendants] regarding the COVID Claim.

Can you provide an update/status on where this claim is going – to date, I have not see any COVID claim covered by any carrier.

What is Capstone ISG's position on acceptance/denial of these type claims?

54. Defendants, through their agent, Capstone ISG, responded to Plaintiff and its agent via email on November 17, 2020 which stated:

As [*sic*; At] this point we are still waiting on a decision of the syndicate in London as to how they are proceeding with these Covid claims, we have several of them with this syndicate that we are waiting for a decision on at this time. I am sorry I don't have more information but we just have to wait at this point.

55. Despite giving prompt notice of this loss and repeatedly inquiring of Defendants' claims decision, Defendants have failed to comply with its duties under the policy and to date, has failed to provide coverage for this loss.

56. To date, Defendants have failed to issue a coverage letter of any kind, completely ignoring their responsibility under the terms of the policy.

57. Coverage should be afforded under the policy.

58. As drafter of the policy Defendants could have made clear any alternative intentions regarding coverages afforded by the policy.

59. Plaintiff's loss was caused both by the presence of the virus on the property, the suspected presence of the virus on the property, as well as the act of Civil Authority on account of the pandemic as well as the risk of the virus at the property and suspected virus at the property.

60. Claims for Business Income Loss and Extra Expense benefits under the Policies were submitted to Defendant.

61. Thereafter, EBE has done and performed all things required under the terms of the Policies.

62. Plaintiff has contacted Defendant nearly every 30 days since the claims were put in and still no claims determination has been made.

63. Despite EBE's performance in accordance with the contract terms, Lloyds, has forced this litigation because it has failed to comply with its duties under the policy to indemnify the insured or even provide notice of a coverage position.

64. Solely because of Defendants' failure and refusal to pay benefits to Plaintiff as required under the Policy, Plaintiff has suffered loss and damage in an amount in excess of \$50,000.00.

COUNT I
EBE v DEFENDANTS - BREACH OF CONTRACT AND DUTY OF GOOD FAITH AND
FAIR DEALING

65. EBE incorporates by reference herein the averments set forth above, as fully as those same were here set forth at length.

66. The Policy issued by Defendants to EBE is a contract of adhesion and any ambiguity in their terms or doubts with regard to the application of coverage are to be resolved in favor of the policyholder and coverage granted in accordance with the reasonable expectations of the policyholder.

67. EBE reasonably believed and relied on the terms of the Policy to afford coverage and benefits in the event that the businesses were closed as a result of the damage to the premises and acts of civil authority in response to a virus pandemic as occurred here.

68. Defendants breached the contracts of insurance and violated their duty of good faith and fair dealing by denying coverage and benefits through inaction to EBE which are clearly owed under the terms of the Policies.

69. As the direct and foreseeable result of Lloyds' breach of contract and its duty of good faith and fair dealing, EBE has been deprived of the benefit of its bargained for benefits due and owing as a result of its covered loss, including, but not limited to Loss of Business

Income, Extra Expenses and Income from its business operations. In addition, EBE has suffered other consequential damages by reason of damage to its business operations for an amount in excess of the coverage set forth in the Defendants' Policy, including, but not limited to, damage to its business operations, reduction in the value, and profitability of its business operations and assets, a diminution of its cash reserves and credit standing, as well as its ability to exist in a competitive business environment

WHEREFORE, EBE demands judgment against Defendants for an amount in excess of \$50,000.00 together with interest, costs of suit, counsel fees and such other relief as the Court may deem equitable and just.

COUNT II
EBE v DEFENDANTS - BAD FAITH VIOLATION OF 42 Pa C.S.A. § 8371

70. EBE incorporates by reference herein the averments set forth above, as fully as those same were set forth here at length.

71. Defendants have engaged in bad faith conduct toward EBE with respect to its adjustment of Plaintiffs' covered loss, in violation of 42 Pa. C.S.A § 8371 *et seq.*

72. In furtherance of its bad faith and wrongful denial and refusal to pay benefits for EBE's covered loss, Defendants, acting by and through its duly authorized agents, servants, workmen or employees, have engaged in the following conduct:

a. failing to provide Plaintiff any coverage position whatsoever relating to this loss for over 10 months;

b. violating Pennsylvania's Unfair Insurance Practices Act, 40 P.S. §§ 1171.4 *et seq.* for the reasons outlined herein, including specifically the following violations of 40 P.S. § 1171.5:

i. misrepresenting to the Plaintiff pertinent facts or policy or contract provisions relating to coverages at issue, in violation of 40 P.S. § 1171.5(i);

ii. failing to acknowledge and act promptly upon written or oral communications by the Plaintiff with respect to claims arising under insurance policies purchased by the Plaintiff, in violation of 40 P.S. § 1171.5(ii);

iii. failing to adopt and implement reasonable standards for the prompt investigation of claims arising under insurance policies, in violation of 40 P.S. § 1171.5(iii);

iv. refusing to pay claims, including Plaintiff's claim, without conducting a reasonable investigation based upon all available information, in violation of 40 P.S. § 1171.5(iv);

v. failing to affirm or deny coverage of claims, including Plaintiff's claim, within a reasonable time after proof of loss statements have been completed and communicated to the company or its representative, in violation of 40 P.S. § 1171.5(v);

vi. not attempting in good faith to effectuate prompt, fair and equitable settlements of claims, including Plaintiff's claim, in which the company's liability under the policy has become reasonably clear, in violation of 40 P.S. § 1171.5(vi);

vii. compelling persons, including Plaintiff, to institute litigation to recover amounts due under an insurance policy by offering substantially less than the amounts due and ultimately recovered in actions brought by such persons, in violation of 40 P.S. § 1171.5(vii);

viii. failing to promptly provide a reasonable explanation of the basis in the insurance policy in relation to the facts or applicable law for denial of a claim or for the offer of a compromise settlement, in violation of 40 P.S. § 1171.5(xiv); and

ix. refusing payment of Plaintiff's claim without any basis or explanation whatsoever, in violation of 40 P.S. § 1171.5(xv).

c. violating Pennsylvania's and Unfair Claims Settlement Practices Regulations, §§ 146.1 *et seq.* by:

i. misrepresenting policy provisions in violation of § 146.4 of the Unfair Claims Settlement Practices Regulations;

ii. failing to acknowledge pertinent communications in violation of § 146.5 of the Unfair Claims Settlement Practices Regulations;

iii. failing to comply with standards for prompt investigation of claims in violation of § 146.6 of the Unfair Claims Settlement Practices Regulations;

iv. failing to comply with standards for prompt, fair and equitable settlements in violation of § 146.7 of the Unfair Claims Settlement Practices Regulations;

d. forcing litigation to obtain a coverage decision relating to this loss;

e. failing to provide coverage for a loss that is covered under the policy without any reasonable basis;

f. failing to provide coverage for the loss of business and income claim despite the fact that the virus is a physical entity that has caused the damage to the property in the same manner as smoke or similar particle would;

g. failing to complete a prompt and thorough investigation of EBE's claim;

h. failing to pay EBE's covered loss in a prompt and timely manner;

i. failing to objectively and fairly evaluate EBE's claim;

j. unreasonably withholding policy benefits;

k. acting unreasonably and unfairly in response to EBE's claim;

1. unnecessarily and unreasonably compelling EBE to institute this lawsuit to obtain policy benefits for a covered loss, that Lloyds should have paid promptly and without the necessity of litigation.

73. As the direct and proximate result of Defendants' bad faith misconduct, as aforesaid, EBE has been required to retain counsel and incur the costs of this lawsuit.

74. For the reasons set forth above, Defendants' bad faith actions in violation of 42 Pa. C.S.A. § 8371, have rendered Defendants liable for statutory damages including interest from the date the claim was made in an amount equal to the prime rate of interest plus three percent, court costs, attorney's fees, punitive damages, and such other compensatory and/or consequential damages as are permitted by law.

WHEREFORE, EBE demands judgment against Lloyds for an amount in excess of \$50,000.00 together with interest, costs of suit, counsel fees, punitive damages and such other relief as the Court may deem equitable and just.

WHEELER DIULIO & BARNABEL, P.C.

BY: /s/ Anthony DiUlio
ANTHONY DIULIO, ESQUIRE
Attorney for Plaintiff(s)

VERIFICATION

I, Anthony DiUlio, counsel for Plaintiff, verify that the statements contained in the foregoing document are true and correct to the best of my knowledge, information and belief, and are made subject to the penalties of 18 Pa.C.S. § 4904, relating to unsworn falsification to authorities.

WHEELER DIULIO & BARNABELI, P.C.

BY: Anthony DiUlio /s/
ANTHONY DIULIO, ESQUIRE
Attorney for Plaintiff(s)