

**UNITED STATES DISTRICT COURT FOR THE
MIDDLE DISTRICT OF TENNESSEE AT NASHVILLE**

EYE CENTERS OF AMERICA, LLC D/B/A
RETINA CENTER OF NEW JERSEY, LLC,

Plaintiff,

v.

SERIES PROTECTED CELL 1, A SERIES OF
OXFORD INSURANCE COMPANY TN, LLC,

Defendant.

Case No.

COMPLAINT AND JURY DEMAND

COMPLAINT

Plaintiff, Eye Centers of America, LLC d/b/a Retina Center of New Jersey, LLC (“Retina Center”), by and through counsel, by way of Complaint, alleges as follows:

VENUE AND JURISDICTION

1. This Court has subject matter jurisdiction over this action pursuant to 28 U.S.C. § 1332. *et seq.*, because Plaintiff and Defendant are citizens of different states, the amount in controversy exceeds \$75,000, exclusive of interest and costs, and the matter presents a case of actual controversy between the parties.

2. Venue is proper in this Court because the insurance policy that is the subject of this action requires that any suit brought to enforce the terms of the policy be brought within the United States District Court for the Middle District of Tennessee.

PARTIES

3. Retina Center is a New Jersey corporation with its principal place of business at 1255 Broad St., Bloomfield, New Jersey, 07003.

4. Upon information and belief, Series Protected Cell 1, A Series of Oxford Insurance Company TN, LLC (“Oxford”) conducts business in the State of Tennessee.

FACTUAL BACKGROUND

The Policy

5. Oxford issued an Actual Net Loss Insurance Policy to Retina Center for a policy period of December 31, 2019 thru December 31, 2020, with policy number 168-B-19 (the “Policy”). See Policy at Exhibit A.

6. The Policy provides coverage for Scheduled Events that occur, and are reported, during the policy period.

7. A “Scheduled Event” is defined in the Policy as “An incident specified within the Declarations of this Policy which cause a loss to an Insured.”

8. The Policy identifies Loss of Referrals as a Scheduled Event.

9. The policy limit for a Loss of Referrals claim is \$1,000,000.

10. Loss of Referrals are defined by the Policy, in pertinent part, as follows:

b. the termination or cancellation of all or any material part of a business relationship between Insured and a Key Referral Source as a result of:

i. the cessation or suspension of the business operations of such Key Referral Source for a period no less than 60 days; ...

j. the adoption or promulgation of federal, state or local laws, regulations or ordinances, by any legislative body, executive authority or agency, affecting such Key Referral Source’s business and resulting in increased costs or operating expenses, reduction in the Key Referral Source’s business production capacity, or the Key Referral Source’s withdrawal of a product or service from the market.

11. Key Referral Source is defined by the Policy as “A third party that regularly directs business to an Insured, which business:

1. represents 10% or more of an Insured’s annual gross revenue and is reported to Company during the underwriting of this Policy; or
2. is specified on a schedule to this Policy.”

12. Retina Center’s referral sources were provided to Oxford via a schedule of Key Referral Sources during the underwriting process.

13. Retina Center’s Key Referral Sources (“Plaintiff’s Key Referral Sources”) are:

- a) Braunstein, Steven W.
- b) Estevez, Joselyn
- c) Fasano, Armand
- d) Newman, David
- e) Patel, Nimali
- f) Pomerantz, Scott

14. The Policy defines an “Actual Net Loss” in connection with a Loss of Referrals as follows:

Income Loss and Extra Expenses, including costs of cover, costs of advertising and marketing for new referral sources, travel, lodging, meal and entertainment expenses incurred in selection of a replacement Key Referral Source, and miscellaneous extra costs incurred in finding, meeting and negotiating with new referral sources including costs to verify the background and references of prospective new referral sources, and overtime pay and legal expenses incurred to draw up referral contracts.

15. Income Loss is defined by the Policy as “Loss of net profit (before taxes) that would have been earned by Insured during the Period of Restoration in the absence of the Scheduled Event, taking into account the actual experience of Insured’s business

before the Scheduled Event and the probable experience Insured would have had without the Scheduled Event.”

16. Extra Expenses is defined by the Policy as “Reasonable costs, fees and expenditures actually paid by Insured during the Period of Restoration for the sole purpose of avoiding, mitigating or otherwise minimizing Income Loss.”

17. Period of Restoration is defined by the Policy as:

The time frame beginning on the date of the Scheduled Event and ending on the earlier of:

1. the date that Insured is able to produce goods and provide services at the same level, efficiency, and speed as before the Scheduled Event; and
2. twelve months from the date that the Scheduled Event first occurs.

The Covered Claim

18. On March 21, 2020, the Governor of New Jersey instituted Executive Order 107 (“Executive Order 107”) suspending all non-emergency medical procedures in response to the COVID-19 global pandemic. See, Executive Order 107, Exhibit B.

19. Plaintiff’s Key Referral Sources provide non-emergency medical care and procedures.

20. Accordingly, Executive Order 107 mandated the shutdown of Plaintiff’s Key Referral Sources.

21. On May 26, 2020, 66 days later, the Governor of New Jersey instituted Executive Order 145 (“Executive Order 145”) permitting non-emergency medical procedures to resume. See, Executive Order 145, Exhibit C.

22. Plaintiff's Key Referral Sources were permitted to resume operations upon the issuance of Executive Order 145.

23. Upon information and belief, Plaintiff's Key Referral Sources did not re-open on May 26, 2020 because Executive Order 145 required Plaintiff's Key Referral Sources to adopt policies and procedures to comply with new safety mandates.

24. Upon information and belief, Plaintiff's Key Referral Sources that have reopened did so sometime after May 26, 2020.

25. The material part of the business relationship between Retina Center and Plaintiff's Key Referral Sources was cancelled due to the cessation and/or suspension of Plaintiff's Key Referral Sources' business operations for a period exceeding 60 days.

26. Retina Center suffered an Actual Net Loss as a result of a Loss of Referrals event in excess of the \$1,000,000 policy limit (the "Claim").

27. Retina Center has sustained an Income Loss resulting from a loss of net profits.

28. Retina Center incurred Extra Expenses because, in order to remain open and minimize its Income Loss, it was required to purchase safety equipment to comply with the heightened safety mandates instituted by various executive orders New Jersey Governor Phil Murphy instituted in response to the COVID-19 pandemic.

29. On or about July 8, 2020, Retina Center put Oxford on notice of the subject claim.

30. On July 13, 2020, a claims adjuster from Creative Risk Solutions, the Independent Third-Party Claims Administrator for Oxford ("TPA"), confirmed receipt of the Claim and requested additional information.

31. On July 28, 2020, Retina Center provided the requested information to Creative Risk Solutions.

32. On August 28, 2020, Creative Risk Solutions requested additional information to continue processing the Claim.

33. On October 23, 2020, Retina Center provided additional information to Creative Risk Solutions, which included: (a) the financial records substantiating Retina Center's loss; (2) the closure of Plaintiff's Key Referral Sources and the resultant Income Loss; and (3) proof of the Extra Expense incurred by Retina Center.

Oxford's Denial of Coverage

34. On December 1, 2020, Oxford verbally denied the Claim on a recorded telephone conference.

35. Oxford concluded that there was no coverage for this claim based upon its determination that the termination or cancellation of all, or the material part of, the business relationship between Retina Center and its Key Referral Sources was not "permanent."

36. The Policy does not contain the term "permanent" in connection with cancellation or termination "of all or a material part of a business relationship."

37. Oxford acknowledged that the term "permanent" is not present in the Policy language.

38. Oxford conceded that the Policy does not provide a definition for cancellation.

39. Oxford was unable to provide Retina Center with the definition of "cancellation" it used to support the denial of the Claim.

40. During the telephonic discussion regarding the definition of “cancellation,” Oxford affirmatively acknowledged that reasonable minds may differ on the interpretation of the policy language.

41. Oxford further admitted that it did not perform any independent investigation of the claim, and in fact, did not speak to Retina Center in connection with its investigation.

42. On December 1, 2020, Oxford sent a denial letter memorializing the coverage position outlined in the telephone call (“Denial Letter”).

43. The Denial Letter provided: “the temporary suspension of the business operations of the referral sources did not result in the termination or cancellation of all or any material part of a business relationship between the Insured and any Key Referral Source.” See, Denial Letter, Exhibit D.

44. On February 19, 2021, pursuant to Tenn. Code Ann. §56-7-105, Retina Center made a formal demand to Oxford for full payment of the Claim, and informed Oxford of its intent to file this action, which includes a claim for statutory bad faith. See, Statutory Letter, Exhibit E.

FIRST CAUSE OF ACTION
DECLARATORY JUDGMENT

45. Retina Center hereby incorporates Paragraph 1 through 44 as though fully set forth herein.

46. A dispute has arisen between Retina Center and Oxford regarding whether Oxford is obligated to provide coverage for the Claim.

47. An actual case and justiciable controversy exist regarding Oxford’s obligations under the Policy with respect to the coverage provided for the Claim.

48. Pursuant to 28 U.S.C. §2201, a declaratory judgment is necessary and appropriate to determine the rights and duties of Retina Center and Oxford with respect to the Policy.

WHEREFORE, the Plaintiff demands a judicial declaration pursuant to 28 U.S.C. §2201 that:

1. Coverage is provided under the Policy for the Claim; and
2. That the Claim submitted by Retina Center is a result of the cessation or cancelation of Retina Center's Key Referral Sources.

SECOND CAUSE OF ACTION
BREACH OF CONTRACT AND THE
COVENANT OF GOOD FAITH AND FAIR DEALING

49. Retina Center hereby incorporates Paragraphs 1 through 48 as though fully set forth herein.

50. In consideration of premiums paid by Retina Center to Oxford, Oxford duly executed and delivered the Policy to Retina Center, as the Named Insured on the Policy.

51. Oxford's issuance of the Policy to Retina Center created a contractual relationship between Retina Center and Oxford.

52. The Claim is covered by the Policy.

53. Retina Center gave timely notice to Oxford of the Claim in accordance with the provisions governing such notice in the Policy.

54. Retina Center is, and at all relevant times was, in compliance with all conditions precedent for coverage under the Policy.

55. Oxford is obligated, pursuant to the terms of the Policy, to pay the full policy limit of \$1,000,000 for the Claim as the total amount sustained by Retina Center is in excess of the limit.

56. Despite proper notice, Retina Center providing all requested documentation, and a conversation between Retina Center and Oxford regarding the coverage provided by the Policy, Oxford has refused to provide any coverage for the Claim.

57. Oxford has failed and refused to pay for the claim pursuant to the Policy and is in breach of its contractual obligations to Retina Center.

58. Oxford's refusal to cover the Claim constitutes a breach of the contract.

59. Oxford's contractual relationship with Retina Center is also subject to the implied duty to act fairly and in good faith in connection with administering claims under the Policy.

60. Oxford has not acted in good faith to effectuate prompt, fair, and equitable payment of the Claim, even though coverage for the Claim under the Policy has become clear.

61. Oxford's refusal to pay the Claim is wrongful, without just cause, and in violation of the terms and conditions of the Policy.

62. Oxford's conduct in intentionally refusing to pay Retina Center for the Claim was malicious, fraudulent, oppressive, and otherwise reflected a conscious disregard for Retina Center's rights under the Policy.

63. Oxford breached the covenant of good faith and fair dealing by denying the Claim without conducting an independent investigation.

64. Oxford breached the covenant of good faith and fair dealing by denying the Claim without merit and misrepresenting the provisions of the Policy.

65. Oxford breached the covenant of good faith and fair dealing by inserting policy terms that are not present within the Policy.

66. Specifically, Oxford denied the Claim because it determined that the cancellation of Plaintiff's Key Referral Sources business relationships was not "permanent," while simultaneously acknowledging that the term "permanent" is not a prerequisite to coverage in the Policy.

67. Oxford wrongfully denied the claim while conceding that the Policy terms were ambiguous, which runs afoul of Tennessee law.

68. By reason of the aforesaid wrongful actions by Oxford, Retina Center has been forced to retain counsel and commence this action and will be forced to undertake such other and further steps as necessary to protect its interests fully and adequately.

69. By reason of the foregoing, Retina Center has suffered, and continues to suffer, damages, including but not limited to, the total amount of the Claim, reasonable attorney's fees, and increased damages by reason of the conduct of Oxford with respect to the Claim.

WHEREFORE, the Plaintiff demands:

1. Monetary Damages;
2. Attorney's Fees;
3. Pre- and post-judgment Interest;
4. Costs; and
5. Such other relief as the Court deems appropriate.

THIRD CAUSE OF ACTION
STATUTORY BAD FAITH

70. Plaintiff hereby realleges and incorporates Paragraphs 1 through 69 as fully set forth herein.

71. Defendant misrepresented the terms of the Policy by inserting conditions to coverage (i.e., permanency) that are absent from the Policy language.

72. Defendant denied the claim despite its concessions that: (1) the term “permanency” or “permanent” is not present in the relevant Policy provisions; and (2) the term “cancellation” is undefined in the Policy.

73. Defendant denied the claim despite acknowledging that its interpretation of the Policy, which required permanency, is inconsistent with Policy language providing coverage for a cancellation of a *material part of* a business relationship.

74. Defendant denied coverage while expressly admitting that the Policy language is ambiguous, which requires that the Policy be construed in favor of coverage.

75. Defendant failed to perform any independent investigation of the Claim and failed to even contact the Retina Center to discuss the claim prior to rendering its coverage decision.

For the reasons delineated above, Defendant violated Tenn. Code Ann. § 56-7-105.

WHEREFORE, the Plaintiff demands:

1. Monetary Damages pursuant to Tennessee Code Annotated §56-7-105;
2. Attorney’s fees;
3. Pre- and post-judgment interest;
4. Costs; and
5. Such other relief as the Court deems appropriate.

Jury Demand

Retina Center hereby demands a trial by jury on all issues so triable.

PLAINTIFF,
EYE CENTERS OF AMERICA, LLC D/B/A
RETINA CENTER OF NEW JERSEY, LLC

/s/ J. Wallace Irvin

J. Wallace Irvin (TN Bar #26393)
Lewis Thomason
424 Church Street
Suite 2500
Nashville, TN 37219
(615) 259-1366
(615) 259-1389
wirvin@lewisthomason.com

and

Stacy M. Manobianca (PHV)
Anna M. Perry (PHV)
Saxe Doernberger & Vita, P.C.
35 Nutmeg Drive
Trumbull, CT 06611
(203) 287-2100
(203) 287-8847
smanobianca@sdvlaw.com
aperry@sdvlaw.com