

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

EYE SPECIALISTS OF DELAWARE)	CASE NO.
200 Banning Street)	
Eden Hill Medical Center)	
Dover, DE 19904)	JUDGE
)	
Plaintiff,)	
)	<u>COMPLAINT</u>
v.)	
)	(JURY DEMAND ENDORSED HEEON)
HARLEYSVILLE WORCESTER)	
INSURANCE COMPANY)	
c/o Its Statutory Agent)	
Corporation Service Company)	
50 West Broad Street, Suite 1330)	
Columbus, Ohio 43215)	
)	
and)	
)	
NATIONWIDE MUTUAL INSURANCE)	
COMPANY)	
One Nationwide Plaza)	
Columbus, Ohio 43215)	
)	
Defendants.)	

Plaintiff Eye Specialists of Delaware, for its Complaint against Defendants Harleysville Worcester Insurance Company and Nationwide Mutual Insurance Company states and alleges as follows:

1. Plaintiff is the owner and operator of eye centers which provides ophthalmologic services and ophthalmologic surgery services in the State of Delaware, City of Dover, which has been forced, by recent orders by the State of Delaware, to cease its operations – through no fault of its own – as part of the State’s efforts to slow the spread of the COVID-19 global pandemic. The closures mandated by these orders present an existential threat to Plaintiff, and other small,

local businesses that employ hundreds of employees. To protect its businesses 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 Harleysville Worcester Insurance Company (“Harleysville”), a subsidiary of Defendant Nationwide Mutual Insurance Company (“Nationwide”). In blatant breach of Defendants’ insurance obligations that it voluntarily undertook in exchange for Plaintiff’s premium payments, Defendants have denied Plaintiff’s claim arising from the State-ordered interruption of its business and the global pandemic.

2. As a result, Plaintiff now brings this action against Defendants for their failure to honor their 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 and global pandemic.

3. On March 11, 2020, the head of the World Health Organization declared COVID-19 a pandemic.

4. On March 12, 2020, Governor John C. Carney issued a Declaration of A State of Emergency for the State of Delaware Due to a Public Health Threat as a result of the global pandemic and its presence in the State of Delaware.

5. On March 16, 2020, Governor John C. Carney issued the First Modification of the Declaration of A State of Emergency for the State of Delaware Due to a Public Health Threat, closing all bars and restaurants except sales for carry-out beverage and food; closing all casinos; and ordering that places of public accommodation limit crowds to no more than 50 people, among other things, due to the presence of the global pandemic in the State of Delaware.

6. On March 17, 2020, the Centers for Disease Control issued a nationwide recommendation to practicing optometrists and to the American Optometric Association to cease engaging in routine eye care, eye exams, and non-essential services as a result of the global pandemic.

7. On March 18, 2020, Governor John C. Carney issued the Second Modification of the Declaration of A State of Emergency for the State of Delaware Due to a Public Health Threat, closing bowling alleys, movie theaters, concert events, sports facilities, fitness centers, and health spas because of the presence of the global pandemic in the State of Delaware.

8. On March 21, 2020, Governor John C. Carney issued the Third Modification of the Declaration of A State of Emergency for the State of Delaware Due to a Public Health Threat, closing all beaches due to the presence of the global pandemic in the State of Delaware.

9. On March 22, 2020, Governor John C. Carney issued the Fourth Modification of the Declaration of A State of Emergency for the State of Delaware Due to a Public Health Threat, designating certain business as “essential” and “non-essential”. Those businesses defined as “essential” were required to follow guidelines for public safety as enumerated by the CDC and Delaware Division of Public Health. Moreover, the CDC and DPH recommended to cease the provision of all non-emergency ophthalmological services.

10. As a result of the Orders identified in Paragraphs 4-9 (“Closure Orders”), Plaintiff has been forced to halt ordinary operations, resulting in substantial lost revenues and forcing the Plaintiff to shut down and/or limit operations, resulting in a loss of business income.

11. But despite Defendants’ express promise in its Policy to cover the Plaintiff’s business interruption losses when the government forces it to close, Defendants have issued a denial for any losses related to the Closure Orders without first conducting any meaningful

coverage investigation, let alone an investigation that would result in any reasonable justification for denial of the claim as is required.

12. Defendants' denial of coverage is without justification and is contrary to the terms, obligations, and provisions of the Policy because as explained by the Closure Orders, the pandemic results in property damage, "direct physical loss of or physical damage" to Plaintiff's insured premises and in the area surrounding the premises, in that it can exist, contaminate, spread, and be contracted from surfaces and objects in, on, and surrounding the premises.

13. Defendants' cursory coverage denial is arbitrary and unreasonable, and inconsistent with the facts and plain language of the Policy at issue. This denial appears to be driven by the insurance industry's and Defendants' desire to preempt its own financial exposure to the economic fallout resulting from the global pandemic, rather than to initiate, as Defendants are obligated to do, a thorough and fair investigation of the claims and a careful review of the Policy sold to Plaintiff in exchange for valuable premiums.

14. As a result of Defendants' wrongful denial of coverage, Plaintiff files this action for a declaratory judgment establishing that it is entitled to receive the benefit of the insurance coverage purchased, for indemnification of the business losses it has sustained, for breach of contract, and for bad faith claims handling.

PARTIES

15. Plaintiff is a Delaware corporation, that owns and operates a business at the following insured premises: 200 Banning Street, Eden Hill Medical Center Dover, DE 19904; 1303 Bridgeville Hwy., Seaford, DE 19973; and 35786 Atlantic Ave., 2nd Floor, Millville, DE 19967 ("Insured Properties").

16. Defendant Harleysville is an insurance company engaged in the business of selling insurance contracts to commercial entities such as the Plaintiff in Delaware and elsewhere. Harleysville is domesticated in the State of Ohio, with its principal place of business in Columbus, Ohio. It is licensed to draft policy forms, underwrite insurance policies, and sell insurance in the State of Ohio, and to sell policies in the State of Delaware. It is registered to do business in the State of Ohio with the Ohio Department of Insurance and with the Delaware Department of Insurance.

17. Upon information and believe, the Policy at issue was drafted, compiled, prepared, and underwritten by persons employed in the State of Ohio, using forms approved by the Ohio Department of Insurance and Delaware Department of Insurance.

18. Defendant Nationwide is incorporated under the laws of the State of Ohio, with its principal place of business in Columbus, Ohio. Harleysville is a wholly owned subsidiary of Nationwide. Nationwide is engaged in the business of investment and insurance operations, the latter of which is performed through subsidiaries such as Harleysville. All claims submitted under policies of insurance issued by Harleysville are serviced, evaluated, adjusted, approved and/or denied, through employees, agents, and/or representatives of Nationwide and/or one of its subsidiaries.

JURISDICTION AND VENUE

19. This Court has subject matter jurisdiction because the Policy at issue herein was drafted, prepared, compiled, and/or underwritten by persons employed in the State of Ohio. Plaintiff's application for the Policy was taken in the State of Ohio.

20. This Court has personal jurisdiction of Defendants because they are domiciled in the State of Ohio, transact business throughout the State of Ohio, including in Cuyahoga County,

Ohio, and market, sell, and issue insurance policies within Cuyahoga County, Ohio, and contract business, employee persons, and conduct other business activities in Cuyahoga County, Ohio.

21. Venue is proper because, upon information and believe, Defendants reside in Cuyahoga County, Ohio, by virtue of maintaining offices and conducting business in the Cuyahoga County, Ohio.

FACTUAL ALLEGATIONS

22. Plaintiff incorporates by reference, as if fully set forth herein, the allegations set forth in paragraphs 1-21 above.

23. In exchange for substantial premiums, Defendants sold Plaintiff its Premier Business Owner's Policy promising to indemnify the Plaintiff for losses resulting from occurrences, including the "necessary suspension" of business operations at any insured location, including the Insured Properties, caused by a government order and/or global pandemic, during the relevant time period.

24. Defendants issued Premier Business Owner's Policy, No. BOP00000061201M, effective 04/02/19 to 04/02/20, to Plaintiff ("Policy"). The Policy was renewal of a previous policy. A complete authentic duplicate of the Policy is unavailable at the time of filing this Complaint; upon information and belief, Defendants are in possession of an authentic duplicate of the Policy.

25. The Policy is an "all risk" or "special perils" policy that provides broad coverage for losses caused by any causes at the Insured Properties unless clearly, unambiguously, and specifically excluded by the express terms of the Policy.

26. Plaintiff entered into the Policy with Defendants, whereby Plaintiff agreed to make payments to Defendants in exchange for Defendants' promise to indemnify Plaintiff for losses including, but not limited to, business income losses at the Insured Properties.

27. The Insured Properties consists of ophthalmologic offices of Plaintiff which employed between 15 and 20 persons. The Insured Properties are owned and/or leased, managed, and/or controlled by Plaintiff.

28. The Policy is currently in full effect, providing property, business personal property, business income and extra expense, and additional coverages.

29. Plaintiff has faithfully paid policy premiums to Defendants, specifically to provide additional coverages for "Business Income and Extra Expense Coverage" in the event of business closures by order of Civil Authority.

30. Under the Policy, insurance is extended to apply to the actual loss of business income sustained and the actual, necessary and reasonable extra expenses incurred when access to the scheduled premises is specifically prohibited by order of Civil Authority as the direct result of a covered cause of loss to property in the immediate area of Plaintiff's scheduled premises. The additional coverage is identified as coverage under "Civil Authority" as part of the Policy's "Section I - Property" section.

31. The Policy is an all-risk policy, in that it provides that a covered cause of loss under the policy means direct physical loss or direct physical damage unless the loss is specifically, clearly and unambiguously excluded or limited by the Policy.

32. The Policy's Civil Authority Coverage Section extends coverage to direct physical loss or damage that results in a covered cause of loss to the Property in the immediate area of the "scheduled premises."

33. Based on information and belief, Defendants have accepted the policy premiums with no intention of providing any coverage under the Policy's Civil Authority Coverage Section due to a loss and shutdown from a pandemic.

34. The global pandemic has physically impacted both public and private property and physical spaces around the world, as well as the right of the general public to gather and utilize business locations. The currently-ranging pandemic has been exacerbated by the fact that it physically infects and remains active on surfaces of objects or materials, "fomites" for up to twenty-eight days. The scientific community in the United States and indeed, across the world, including the World Health Organization, has recognized that the pandemic is a cause of real physical loss and damage.

35. The United States Congress has also recognized this fact. 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."

36. Indeed, a number of countries including China, Italy, France and Spain have required fumigation of public areas prior to allowing them to re-open. A recent scientific study

printed in the New England Journal of Medicine explains that COVID-19 is detectable for up to three hours in aerosols, up to four hours on copper, up to 24 hours on cardboard boxes, and up to three days on plastic and stainless steel. Notably, the most potent form is not airborne but rather present on physical surfaces.

37. The Closure Orders were issued and specifically reference evidence that the pandemic is causing direct physical property damage. In this case, the property that is damaged is in the immediate area of the Insured Properties.

38. As a direct and proximate result of the Closure Orders, access to and business in connection with Plaintiff's Insured Properties has been greatly limited and has suffered immensely.

39. As a further direct and proximate result of the Closure Orders, Plaintiff has been forced to deal with substantial loss in business.

40. Any effort by Defendants to deny the reality that the pandemic causes physical loss and damage would constitute a false and potentially fraudulent misrepresentation that could endanger policyholders, such as the Plaintiff, and the public.

41. A declaratory judgment determining that the coverage provided under the Policy will prevent Plaintiff from being left without vital coverage acquired to ensure the survival of its business due to the unprecedented scale of the shutdown caused by the Closure Orders. As a result of the Closure Orders, Plaintiff has incurred, and continues to incur, a substantial loss of business income and additional expenses covered under the Policy.

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

43. Defendants denied the claim despite that the Policy does not exclude losses as a result of pandemics.

44. There is no reasonable justification for Defendants' denial of Plaintiff's claim.

45. Defendants performed little to no investigation of Plaintiff's claim.

46. Defendants' denial is contrary to the terms, conditions, agreements and promises made by Defendants, for which Plaintiff paid substantial premiums.

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

COUNT I: DECLARATORY JUDGMENT

48. Plaintiff incorporates by reference, as if fully set forth herein, the facts and allegations set forth in paragraphs 1-47 above.

49. The Policy is an insurance contract under which Plaintiff paid Defendants premiums for Defendants' 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 business and/or reduce business activities at its Insured Properties.

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

51. An actual case or controversy exists regarding Plaintiff's rights and Defendants' 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.

52. 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 covered losses under the Policies, that the Closure Orders constitutes a prohibition of access to the Insured Properties by a Civil Authority as defined in the Policy;

- (b) Defendants have 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 by law;
- (c) that the Closure Orders trigger coverage because the Policy does not include an exclusion for a pandemic and actually extends coverage for physical loss or damage to the Insured Properties;
- (d) To the extent Defendants rely 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 related to the pandemic; and,
- (f) Defendants are 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

53. Plaintiff incorporates by reference, as if fully set forth herein, the facts and allegations set forth in paragraphs 1-52 above.

54. The Policy is a contract under which Plaintiff paid Defendants premiums in exchange for Defendants' 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 immediate area of the Insured Properties forcing Plaintiff to close its business operations, and due to the Closure Orders as a result of damage to property within the immediate area of the Insured Properties.

55. 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 Defendants have failed to comply with their obligations under the Policy's clear and unambiguous terms.

56. 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 Defendants drafted the Policy and presented it to Plaintiff as a form contract without any ability of Plaintiff to modify any portions of it.

57. Defendants communicated to Plaintiff that it would not pay claims under the Policy for business interruption losses.

58. Defendants' denial of the claim is in breach of the terms and provision of the Policy.

59. As a proximate result of Defendants' 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

60. Plaintiff incorporates by reference, as if fully set forth herein, the facts and allegations set forth in paragraphs 1-59 above.

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

62. Defendants 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.

63. Plaintiff is informed and believes, and therefore alleges, that Defendants have intentionally and maliciously, as part of a preconceived design, acted so as to deny Plaintiff the rightful benefits under the Policy.

64. Plaintiff is informed and believes, and therefore alleges, that Defendants 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 Defendants, 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.

65. As a direct and proximate result of the breach of the implied covenant of good faith and fair dealing by Defendants, 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 30 million people have filed for unemployment benefits, while Defendants 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 Defendants, 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 covered losses under the Policies, that the Closure Orders constitutes a prohibition of access to the Insured Properties by a Civil Authority as defined in the Policy;

- (b) Defendants have 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 by law;
 - (c) that the Closure Orders trigger coverage because the Policy does not include an exclusion for a pandemic and actually extends coverage for physical loss or damage to the Insured Properties and surrounding area;
 - (d) To the extent Defendants 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,
 - (f) Defendants are 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 Defendants 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 Defendants 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 Defendants 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 Defendants prejudgment interest, to be calculated according to law, to compensate Plaintiff for the loss of use of funds caused by Defendants' 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

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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 Defendants 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