

**COMMONWEALTH OF KENTUCKY
 FAYETTE CIRCUIT COURT
 CIVIL DIVISION
 DIVISION _____
 CIVIL ACTION NO. _____**

PLASTIC SURGEONS OF
 LEXINGTON, PLLC

Plaintiff,

v.

LIBERTY MUTUAL INSURANCE and
 OHIO SECURITY INSURANCE COMPANY

Defendants.

Serve:

Liberty Mutual Insurance Company
 Corporation Service Company, Registered Agent
 84 State St.
 Boston, MA 02109

Serve:

Ohio Security Insurance Company
 Corporation Service Company, Registered Agent
 10 Ferry St.
 S313
 Concord, NH 03301

COMPLAINT AND PETITION FOR DECLARATION OF RIGHTS

Comes the Plaintiff, Plastic Surgeons of Lexington, PLLC (“Plastic Surgeons” or “Plaintiff”), by counsel, and for its Complaint against Liberty Mutual Insurance (“Liberty Mutual”) and Ohio Security Insurance Company (“Ohio Security” collectively with Liberty Mutual the “Defendants”) states as follows:

NATURE OF ACTION

1. This is an action for Declaratory Judgment pursuant to Kentucky Revised Statutes (KRS) 418.040 to determine questions of insurance coverage under a Commercial Insurance Policy issued by the Defendant to Plaintiff.

2. This is also an action for Breach of Contract, Violation of Kentucky's Unfair Claims Settlement Practices Act, KRS 304.12-130, *et seq.*, for Defendant's failure to pay insurance policy proceeds that are due and owing under the Commercial Insurance Policy issued by Defendants to Plaintiff.

PARTIES, JURISDICTION, AND VENUE

3. Plaintiff is a Kentucky limited liability company with its principal place of business located at 1401 Harrodsburg Rd., Suite B75, in Lexington, Kentucky 40504, operating as a plastic surgeon physician's office.

4. Defendant Liberty Mutual, is and at all times relevant was a Massachusetts corporation with a principal place of business at 175 Berkeley St., Boston, Massachusetts 02109, and who may be served through its Registered Agent, Corporation Service Company, Registered Agent, 84 State St., Boston, MA 02109

5. Defendant Ohio Security is, and at all times relevant was, a New Hampshire insurance company with a principal place of business at 62 Maple Ave, Keene, New Hampshire, 03431. Upon information and belief, Defendant Ohio Security is a subsidiary of, or shares common ownership with Liberty Mutual. Ohio Security may be served through its Registered Agent Corporation Service Company, Registered Agent, 10 Ferry St., S313, Concord, NH 03301

6. At all times relevant, Defendants were licensed and authorized to underwrite and issue policies of insurance in the Commonwealth of Kentucky.

7. This Court has jurisdiction over this matter as the policy was issued in Kentucky and the dispute arises from actions by the Defendants related to their coverage of Plaintiffs' business in Fayette County, Kentucky.

8. Venue is proper in this Court because Plaintiff's principal place of business is in Fayette County, Kentucky, the Policy was entered into, issued and covers the Plaintiff's business in Fayette County, Kentucky, and the allegations and causes of action that are the subject matter of this litigation arose out of actions in Fayette County, Kentucky.

FACTUAL ALLEGATIONS

The Insurance Policy and its Coverage

9. Defendants issued a Commercial Insurance Policy naming Plaintiff as the insured, Policy Number BZS (20) 52 26 27 50 (the "Policy") effective June 29, 2019 to June 29, 2020. See attached **Exhibit A**, the Policy.

10. At all times material the Policy was in full force and effect and provided coverage to the Plaintiff.

11. The Policy defines what property is covered under Section 1:

A. Coverage

We 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.

Exhibit A, p. 36.

12. Section 3 defines Covered Causes Of Loss as "Direct physical loss unless the loss is excluded or limited under Section I - Property."

13. Included in the Business Owners Coverage Form is a section for additional coverages which provides the following under Section 1.A.5. Additional Coverages:

f. Business Income**(1) Business Income**

(a) We will pay for the actual loss of Business Income you sustain due to the necessary suspension of your "operations" during the "period of restoration". The suspension must be caused by direct physical loss of or damage to property at the described premises. The loss or damage must be caused by or result from a Covered Cause of Loss. With respect to loss of or damage to personal property in the open or personal property in a vehicle, the described premises include the area within 100 feet of such premises.

...

(b) We will only pay for loss of Business Income that you sustain during the "period of restoration" and that occurs within 12 consecutive months after the date of direct physical loss or damage.

We will only pay for ordinary payroll expenses for 60 days following the date of direct physical loss or damage, unless a greater number of days is shown in the Declarations.

(c) Business Income means the:

(i) Net Income (Net Profit or Loss before income taxes) that would have been earned or incurred if no physical loss or damage had occurred, but not including any Net Income that would likely have been earned as a result of an increase in the volume of business due to favorable business conditions caused by the impact of the Covered Cause of Loss on customers or on other businesses; and

(ii) Continuing normal operating expenses incurred, including payroll.

Exhibit A, p. 42

14. The Policy's Limitations are listed under subsection 4 of Section 1.A. and Exclusions are listed in Section B, pages 37 and 55 of Exhibit A.

15. In relevant part, the Exclusions in the Policy provide:

B. Exclusions

1. We will not pay for loss or damage caused directly or indirectly by any of the following. Such loss or damage is excluded regardless of any other cause or event that contributes concurrently or in any sequence to the loss. These exclusions apply whether or not the loss event results in widespread damage or affects a substantial area.

...

j. Virus Or Bacteria

(1) Any virus, bacterium or other microorganism that induces or is capable of inducing physical distress, illness or disease.

(2) However, the exclusion in Paragraph (1) does not apply to loss or damage caused by or resulting from "fungi", wet rot or dry rot. Such loss or damage is addressed in Exclusion i.

(3) With respect to any loss or damage subject to the exclusion in Paragraph (1), such exclusion supersedes any exclusion relating to "pollutants".

2. We will not pay for loss or damage caused by or resulting from any of the following:

...

b. Consequential Losses

Delay, loss of use or loss of market.

Exhibit A, p. 55-58.

14. The Policy also includes an Additional Coverages section with a provision related to actions by civil authorities:

i. Civil Authority

When a Covered Cause of Loss causes damage to property other than property at the described premises, we will pay for the actual loss of Business Income you sustain and necessary Extra Expense caused by action of civil authority that prohibits access to the described premises, provided that both of the following apply:

(1) Access to the area immediately surrounding the damaged property is prohibited by civil authority as a result of the damage, and the described premises are within that area but are not more than one mile from the damaged property; and

(2) The action of civil authority is taken in response to dangerous physical conditions resulting from the damage or continuation of the Covered Cause of Loss that caused the damage, or the action is taken to enable a civil authority to have unimpeded access to the damaged property.

Civil Authority Coverage for Business Income will begin 72 hours after the time of the first action of civil authority that prohibits access to the described premises and will apply for a period of up to four consecutive weeks from the date on which such coverage began.

Id. p. 45.

16. Additionally, the Business Income coverage in the Policy provides for dependent property coverage:

m. Business Income From Dependent Properties

...

(4) Dependent property means property owned by others whom you depend on to:

- (a) Deliver materials or services to you, or to others for your account. But services does not mean water supply services, wastewater removal services, communication supply services or power supply services;
 - (b) Accept your products or services;
 - (c) Manufacture your products for delivery to your customers under contract for sale;
 - or
 - (d) Attract customers to your business. The dependent property must be located in the coverage territory of this policy
- (5) Secondary dependent property means an entity which is not owned or operated by a dependent property and which;
- (a) Delivers materials or services to a dependent property, which in turn are used by the dependent property in providing materials or services to you; or
 - (b) Accepts materials or services from a dependent property, which in turn accepts your materials or services.

Id. p. 47.

COVID-19 Pandemic and Civil Authority Actions

17. The United States is currently affected by the Coronavirus Disease 2019 (COVID-19) which is an easily, rapidly, and highly contagious communicable disease.

18. Due to the threat of COVID-19, Governor Andy Beshear declared a state of emergency in Kentucky by Executive Order 2020-215 on March 6, 2020.

19. On March 11, 2020, the World Health Organization declared that COVID-19 be characterized as global a pandemic.

20. Following this state of emergency, On March 14, 2020 Governor Beshear recommended that Kentucky hospitals cease performing elective procedures effective March 18, 2020.

21. On March 23, 2020 the Cabinet for Health and Family Services issued an Order on March 16, 2020 (collectively with the Executive Orders, the “Civil Authority Actions”), providing that “ALL non-emergent, non-urgent in-person medical, surgical, dental, and any other

healthcare practice or procedure must have immediately ceased effective close of business on March 18, 2020.”

22. As a result of the COVID-19 Pandemic, the Civil Authority Actions, and people staying at home, Plaintiff suffered a business income loss, extra expenses, and other losses.

23. The operations of the Plaintiff have been closed as the majority of its business is elective surgeries which are now prohibited.

Plaintiff’s Claim and Denial by Defendants

24. Due to the losses described above, Plaintiff filed a claim with the Defendant pursuant to its coverage in the Policy, including but not limited to, Business Income and Additional Coverages, identified as Claim Number 300-82115-2020 (the “Claim”).

25. On March 25, 2020, Defendants issued a letter denying the Claim (the “Denial”).

26. In denying Plaintiff’s Claim, Defendants cited certain policy provisions and provided the following explanation:

The policy provides Business Income coverage when there is a suspension of your operations at the described premises and results from a covered cause of loss. The closure of the office for elective surgeries has resulted in a loss of income is not related to any direct physical damage to the business personal property or the building. The Civil Authority is only applicable when access to the described premises is prohibited when there is direct physical damage to other property, not on the described premises, from a covered cause of loss. The issuing of a State of Emergency and National Emergency was not due to physical loss or damage nor did it prohibit access to the described premises. It was issued to limit the spread of Coronavirus (COVID-19). The policy specifically excludes losses caused by or resulting from a virus and from contamination. The endorsement for the Business Income changes the period of restoration to begin after 24 hours and the Civil Authority will apply for three weeks.

27. The Plaintiff’s claim was denied despite having purchased coverage for Business Income losses and additional Civil Authority Coverage.

28. The Civil Authority Actions have denied the Plaintiff access to the property.

29. The Plaintiff's loss of use of the property and property's inability to function as intended by Plaintiff is a direct physical loss.

COUNT I

DECLARATORY JUDGMENT

30. Plaintiff adopts and reiterates each and every allegation above and below as if set out fully in this paragraph and incorporates them by reference.

31. Plaintiff believes the Policy provides coverage for its injuries, damages, and losses described above.

32. Plaintiff files this action seeking a determination whether the Policy provides coverage to Plaintiff for those injuries, damages and losses.

33. WHEREFORE Plaintiff respectfully requests that this Court grant Declaratory Judgment for Plaintiff, declaring:

A. Plaintiff has sustained direct physical loss.

B. Plaintiff's loss is a covered loss which is not excluded or limited under the Policy.

C. Plaintiff's loss is a covered loss resulting from an act or decision of a person or governmental body, and is therefore a covered ensuing loss.

D. Plaintiff's loss is a covered loss under the dependent property coverage

E. Plaintiff's loss is a covered loss under the Civil Authority Additional coverage.

F. Plaintiff has sustained loss of Business Income due to the necessary suspension of its operations during the period of restoration.

G. The suspension of operations was caused by direct physical loss to property at the insured premises.

H. Plaintiff incurred extra expense to avoid or minimize the suspension of business and to continue operations.

COUNT II

BREACH OF CONTRACT: INSURANCE POLICY

34. Plaintiff adopts and reiterates each and every allegation above and below as if set out fully in this paragraph and incorporates them by reference.

35. During the Policy period Plaintiff suffered direct physical loss to the covered Property from at least one covered cause of loss.

36. Plaintiff's loss is also covered under the dependent property coverage and Civil Authority Additional Coverage.

37. Plaintiff additionally sustained a covered cause of loss resulting from an act or decision of a person or governmental body, and Plaintiff's loss is therefore a covered ensuing loss.

38. Plaintiff also suffered loss of business income and extra expense, in addition to other losses and damages.

39. Plaintiff notified Defendants of its losses.

40. Plaintiff complied with all conditions precedent to entitle Plaintiff to recover under the Policy, or Defendants waived compliance with such conditions.

41. Defendants have failed to provide the coverages for Plaintiff's losses, and have failed to pay for all of Plaintiff's losses.

42. Defendants have denied all coverage for Plaintiff's claim. A copy of Defendants' denial letter is attached as Exhibit B.

43. Defendants' failure to pay for Plaintiff's covered losses is a material breach of contract.

44. As a result of Defendants' material breach of contract, it has become necessary for Plaintiff to retain the services of the undersigned attorney.

45. WHEREFORE Plaintiff demands judgment against Defendants for all covered losses with interest on any overdue payments, any incidental and foreseeable consequential damages caused by Defendants' breach of contract, and costs of litigation.

COUNT III

VIOLATION OF KENTUCKY'S UNFAIR CLAIMS SETTLEMENT PRACTICES ACT

KRS 304.12-130, *ET SEQ.*

46. Plaintiff adopts and reiterates each and every allegation above and below as if set out fully in this paragraph and incorporates them by reference.

47. Defendants have a duty to investigate claims in good faith and promptly pay valid claims.

48. Upon information and belief, Defendants conducted no investigation at all.

49. Defendants have a duty to act in good faith and to deal fairly with Plaintiff, and to attempt to effectuate a fair and reasonable settlement of Plaintiff's claim.

50. Defendants lack a good faith basis to deny the claim.

51. Defendants' actions are outrageous, intentional wrongdoing, and in reckless disregard to Plaintiff's rights.

52. Defendants violated the Unfair Claims Settlement Practices Act as set forth in KRS 304.12-230(2-6) by:

(2) “Failing to acknowledge and act reasonably promptly upon communications with respect to claims arising under insurance policies;

(3) Failing to adopt and implement reasonable standards for the prompt investigation of claims arising under insurance policies;

(4) Refusing to pay claims without conducting a reasonable investigation based upon all available information;

(5) Failing to affirm or deny coverage of claims within a reasonable time after proof of loss statements have been completed; [and]

(6) Not attempting in good faith to effectuate prompt, fair and equitable settlements of claims in which liability has become reasonably clear...”

53. Plaintiff has suffered financial loss due to Defendants’ bad faith denial of its claim.

54. Plaintiff is entitled to punitive damages for Defendants’ violations of the Unfair Claims Settlement Practices Act.

55. WHEREFORE Plaintiff demands judgment against Defendants losses with interest on any overdue payments, any incidental and foreseeable consequential damages caused by Defendants’ violation of the Unfair Claims Settlement Practices Act, plus attorney's fees and costs of litigation.

COUNT IV

COMMON LAW BAD FAITH

56. Plaintiff adopts and reiterates each and every allegation above and below as if set out fully in this paragraph and incorporates them by reference.

57. Defendants have a duty to investigate claims in good faith and promptly pay valid claims.

58. Upon information and belief, Defendants conducted no investigation at all.

59. Defendants have a duty to act in good faith and to deal fairly with Plaintiff, and to attempt to effectuate a fair and reasonable settlement of Plaintiff's claim.

60. Defendants lack a good faith basis to deny the claim.

61. Defendants' actions are outrageous, intentional wrongdoing, and in reckless disregard to Plaintiff's rights.

62. Plaintiff has suffered financial loss due to Defendants' bad faith denial of its claim.

63. Plaintiff is entitled to punitive damages for Defendants' bad faith.

64. WHEREFORE Plaintiff demands judgment against Defendants for all losses with interest on any overdue payments, any incidental and foreseeable consequential damages caused by Defendants' bad faith, plus attorney's fees and costs of litigation.

COUNT V

VIOLATION OF KRS 304.12-235

65. Plaintiff adopts and reiterates each and every allegation above and below as if set out fully in this paragraph and incorporates them by reference.

66. Defendants failed to make a good faith attempt to settle Plaintiff's claim within thirty days of being provided notice of its claim.

67. Defendants' denial is without reasonable foundation.

68. Plaintiff is entitled to recover its attorneys' fees and costs incurred in obtaining a claim settlement or verdict, and pre-claim payment of statutory interest at 12% from thirty days after the proof of claim was made to Defendants until the claim is paid.

69. WHEREFORE Plaintiff demands judgment against Defendants for all losses with interest on any overdue payments, any incidental and foreseeable consequential damages caused by Defendants' violation of KRS §304.12-235, plus attorney's fees and costs of litigation.

COUNT VI

VIOLATION OF KENTUCKY'S CONSUMER PROTECTION ACT

KRS 367.110 ET SEQ

70. Plaintiff adopts and reiterates each and every allegation above and below as if set out fully in this paragraph and incorporates them by reference.

71. The insurance coverage purchased by Plaintiff qualifies as a "service" intended to be protected by Kentucky's Consumer Protection Act, KRS §367.110 through KRS §367.360.

72. Defendants violated the Consumer Protection Act by denying the claim in bad faith and failing to reasonably investigate the claim.

73. Plaintiff is entitled to damages as set forth above and for recovery of his attorneys' fees and cost and punitive damages for violations of the Consumer Protection Act.

74. WHEREFORE Plaintiff demands judgment against Defendants for all losses with interest on any overdue payments, any incidental and foreseeable consequential damages caused by Defendants' violation of the Consumer Protection Act, plus attorney's fees and costs of litigation.

COUNT VII

PUNITIVE DAMAGES

75. Plaintiff adopts and reiterates each and every allegation above and below as if set out fully in this paragraph and incorporates them by reference.

76. Defendants' actions as set forth above constitute such gross negligence, malice, and reckless disregard for Plaintiff's rights so as to warrant punitive damages.

77. The imposition of punitive damages is necessary to serve as a deterrent effect to Defendants and all others similarly situated.

WHEREFORE, Plaintiff Plastic Surgeons of Lexington respectfully demands as follows:

1. Trial by Jury of any issue triable of right by a jury;
2. Judgment for inconvenience and financial pain and suffering and interest against Defendants on all counts;
3. Compensatory and punitive damages in a fair and reasonable amount that exceeds the jurisdictional limits of this Court;
4. Attorney fees;
5. Pre-judgment interest;
6. Post-judgment interest;
7. Cost and expenses expended in this litigation; and
8. Any and all other relief to which Plaintiff may be entitled.

JURY DEMAND

Plaintiff demands a trial by jury of any issue triable of right by a jury.

Respectfully submitted,

/s/ Andre F. Regard
Andre F. Regard (KBA # 88254)
Ivey L. Workman (KBA #98206)
Regard Law Group, PLLC

234 N. Limestone
Lexington, Kentucky 40507
(859) 281-1318 office
(859) 281-1319 fax
aregard@regardlaw.com
iworkman@regardlaw.com
Counsel for Plaintiff