

OHIO COURT OF COMMON PLEAS
DELAWARE COUNTY

Sanzo Enterprises, LLC d/b/a Play It Again Sports,)
718 N State St.)
Westerville OH 43082-9084)

Plaintiff,)

v.)

Erie Indemnity Company a/k/a)
Erie Insurance Company,)
100 Erie Insurance Place)
Erie, PA 16530)

Defendant.)
_____)

Civil Action No:

Jury Trial Demanded

COMPLAINT

NOW COMES Sanzo Enterprises, LLC d/b/a Play It Again Sports (“Plaintiff”), and for its Complaint against Defendant Erie Indemnity Company a/k/a Erie Insurance Company (“Defendant” or “Erie”), alleges as follows:

Introduction

1. Plaintiff is a franchisee operating a Play It Again Sports store that sells sports equipment and apparel in Westerville, Ohio.
2. In March 2020, state and local officials in Ohio issued a series of orders closing non-essential businesses, including Plaintiff’s store, and directing consumers to stay at home.
3. These orders prevented Plaintiff’s customers and employees from physically occupying Plaintiff’s premises, prevented Plaintiff’s customers from providing used goods for resale, and prevented Plaintiff from operating its business.
4. Plaintiff suffered a staggering loss of business income as a result of these orders.

5. Plaintiff is insured under an Ultrapack Policy issued by Defendant, which provides for reimbursement of lost business income in the event Plaintiff's business operations are suspended. (A copy of the Ultrapack Policy is attached as Exhibit A.)

6. Plaintiff purchased the policy to protect its livelihood in the event of an unforeseen interruption of its business, and Plaintiff faithfully paid premiums over the years to obtain this protection.

7. The COVID-19 pandemic and ensuing government-mandated shutdown of Plaintiff's store are precisely the sort of unforeseen, economically calamitous events Plaintiff insured itself against when it purchased insurance from Defendant. But when Plaintiff made a claim for coverage as a result of the shutdowns that physically deprived Plaintiff of its business, Defendant summarily denied Plaintiff's claim.

8. Specifically, Defendant denied Plaintiff's claim, without investigation, based on an erroneous reading of the language in Plaintiff's insurance policy. Defendant's denial of Plaintiff's claim was arbitrary, unreasonable, contrary to the language of Plaintiff's insurance policy, contrary to the undisputed facts, and contrary to law.

9. Due to Defendant's wrongful denial of coverage, Plaintiff brings this action for a declaratory judgment establishing that it is entitled to receive the benefit of the insurance coverage it purchased, for indemnification of the business losses and extra expenses it has sustained, and for breach of contract and bad faith.

Parties

10. Plaintiff Sanzo Enterprises, LLC d/b/a Play It Again Sports is an Ohio limited liability company with its principal place of business in Westerville, Ohio.

11. Upon information and belief, Defendant Erie is a Pennsylvania insurance company with a principal place of business in Erie, Pennsylvania.

Jurisdiction and Venue

12. Upon information and belief, Defendant is a licensed insurance company in the State of Ohio and regularly underwrites coverage for and insures risks in this state.

13. Venue is proper in Ohio and specifically in Delaware County because the policy at issue was delivered to Plaintiff here, Plaintiff is headquartered here, and the risks insured under the policy at issue are located this county.

Factual Background

14. In March 2020, officials in Ohio—as in many other states—ordered the closing of all non-essential businesses (including stores) due to the COVID-19 pandemic.

15. On March 9, 2020, Governor DeWine declared a state of emergency by Executive Order 2020-01D.

16. Then, by Order dated March 22, 2020, the Ohio Director of Health directed that “all individuals living within the State of Ohio are ordered to stay at home or at their place of residence except as allowed in this Order” and “[a]ll businesses and operations in the State, except Essential Businesses and Operations . . . are required to cease all activities within the State except Minimum Basic Operations” (The Governor’s and Director of Health’s Orders referenced in paragraphs 15-16 are collectively referred to as the “Executive Orders.”)

17. Under the Executive Orders, Plaintiff was not permitted to open its store to customers for nearly two months.

18. Plaintiff depends, in part, on consumers selling it their used sports equipment for resale. Due to the Executive Orders, consumers were unable to bring their sporting goods to the store, causing inventory of used goods to run low.

19. Three of Plaintiff's four busiest and most profitable months are March, April and May.

20. As a result of the Executive Orders, Plaintiff suffered severe interruption to its business and critical loss of income.

The Policy

21. Plaintiff is insured by Erie Insurance Company Ultrapack Policy No. Q97-1896473 for the period July 31, 2019 to July 31, 2020 (the "Policy," attached as Exhibit A).

22. The Policy insures that Plaintiff will be reimbursed in the event that its business operations are interrupted.

23. Plaintiff faithfully paid all premiums due to Defendant on the Policy.

24. The Policy is an "all-risk" property insurance policy, meaning that it broadly covers risk of loss of or damage to Plaintiff's property, unless a coverage exclusion applies.

25. Under the terms of the Policy, Defendant agreed to "pay for direct physical 'loss' of or damage to Covered Property at the premises described in the 'Declarations' caused by or resulting from a peril insured against." (Ex. A, form PK 00 01, CL-0001, p. 1 of 37.)

26. The "peril[s] insured against" are Covered Causes of Loss defined as "direct physical 'loss', except 'loss' as excluded or limited in this policy." (*Id.* p. 4 of 37.)

27. Under the Policy, Defendant agreed to provide Plaintiff with Income Protection coverage, which is defined as "loss of 'income' . . . you sustain due to partial or total 'interruption of business' resulting directly from 'loss' or damage to property on the premises described in the 'Declarations' from a peril insured against." (*Id.*, p. 3 of 37.)

28. As part of this Income Protection coverage, Defendant also agreed to pay for Extra Expenses incurred "due to partial or total 'interruption of business' resulting directly from

‘loss’ or damage to property on the premises described in the ‘Declarations’ from a peril insured against.” (*Id.*)

29. “Interruption of Business” is defined as “the period of time that your business is partially or totally suspended and it: 1. Begins with the date of direct ‘loss’ to covered property caused by a peril insured against; and 2. Ends on the date when the covered property should be repaired, rebuilt, or replaced with reasonable speed and similar quality.” (*Id.*, p. 36 of 37.)

30. Recognizing the need for money quickly when a business is interrupted, the Policy provides that Erie will “pay up to \$100 a day, for seven days, after your business is suspended to cover loss of ‘income’ . . . sustained by you while you are determining your actual income protection loss. The amount paid will be subtracted from your actual loss of ‘income’” (*Id.* p. 4 of 37.)

31. In summary, under the Policy, when a peril insured against—such as a global health crisis and governmental shutdown of Plaintiff’s business—causes “direct physical loss of or damage to” Plaintiff’s property, Defendant is obligated to pay Plaintiff for its loss of income, and the extra expense it incurs, during the time its business operations are interrupted.

32. The Policy also provides for these coverages when a peril insured against occurs at property other than Plaintiff’s property, causing Plaintiff to be denied access to its property.

33. In particular, the Policy contains a “Civil Authority” provision, which provides that Defendant will pay Plaintiff’s lost business income when a “civil authority” takes action that prohibits access to Plaintiff’s premises, where that action is taken as the result of a peril insured against occurring somewhere other than Plaintiff’s premises. Specifically, the Policy provides as follows:

When a peril insured against causes damage to property other than property at the premises described in the ‘Declarations’, we will pay for the actual

loss of ‘income’ and/or ‘rental income’ you sustain and necessary ‘extra expense’ caused by action of civil authority that prohibits access to the premises described in the ‘Declarations’ provided that both of the following apply:

- a. Access to the area immediately surrounding the damaged property is prohibited by civil authority as a result of the damage, and the premises described in the ‘Declarations’ are within that area but are not more than one mile from the damaged property; and
- b. The action of civil authority is taken in response to dangerous physical conditions resulting from the damage or continuation of the peril insured against 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 ‘income’ and/or ‘rental income’ will begin 72 hours after the time of the first action of civil authority that prohibits access to the premises described in the ‘Declarations’ and will apply for a period of up to four consecutive weeks from the date on which such coverage began.

Civil Authority coverage for ‘extra expense’ will begin immediately after the time of the first action of civil authority that prohibits access to the premises described in the ‘Declarations’ and will end:

- a. Four consecutive weeks after the date of that action; or
- b. When your Civil Authority coverage for ‘income’ and/or ‘rental income’ ends; whichever is later.

(Id., p. 4 of 37.)

34. In addition to providing the above coverages during the period Plaintiff’s business was interrupted, the Policy further provides for Income Protection pending Full Resumption of Operations as follows: “We will also pay your actual loss of ‘income’ . . . for an additional 60 days if your ‘income’ . . . after operations are resumed is less than your ‘income’ and/or ‘rental income’ before the loss.” *(Id., p. 4 of 37.)*

35. To date, Erie has not made any payments to Plaintiff since the Executive Orders shut down its business.

Plaintiff's Claim and Defendant's Denial

36. On April 15, 2020, Plaintiff made a claim under the Policy for losses suffered as a result of the Executive Orders relating to the COVID-19 global pandemic (the "Claim").

37. Defendant responded by denying coverage for Plaintiff's Claim on April 21, 2020. (A copy of Defendant's denial letter is attached as Exhibit B.)

38. In its denial, Defendant claimed that there was no coverage available because there was "no direct physical loss to [Plaintiff's] building or business personal property." (Exhibit B, p. 1 of 4.)

39. Defendant's denial misstated the terms of the Policy. The Policy requires "direct physical loss of" or damage to, Plaintiff's property. "Direct physical loss of" property is a legally distinct concept from "direct physical loss to" property, as Defendant is undoubtedly aware.

40. Under the terms of the Policy, Plaintiff has suffered both "direct physical loss of" and "damage to" its property as a result of the Executive Orders.

41. The Policy defines "loss" as "direct and accidental loss of or damage to property." (Ex. A, form PK 00 01, CL-0001, p. 36 of 37.) This circular definition leaves open the question of what comprises a "loss." Common dictionary definitions of "loss" include "deprivation" and "the harm or privation resulting from loss or separation." Loss is "accidental" when it occurs unexpectedly.

42. The Policy does not directly define "damage;" therefore, under well-recognized, undisputed rules of construction, the term is to be given its generally understood meaning. Common dictionary definitions of "damage" include the "harm caused to something in such a way as to impair its value, usefulness or normal function."

43. Any ambiguity in these terms should be construed in favor of coverage for Plaintiff and against Defendant, who selected the language for inclusion in its adhesion contracts.

44. The unprecedented and unexpected events described herein have deprived Plaintiff and its customers of access to, and have separated them from, Plaintiff's business, which has greatly reduced Plaintiff's business income. Additionally, these events have impaired the value of the business and prevented it from serving its normal function. Therefore, under commonly accepted English usage, Plaintiff has suffered both "loss of" and "damage to" its Covered Property.

45. Plaintiff's losses and damage are "direct" in that they were directly caused by the Executive Orders; and they are "physical" in that Plaintiff's employees and customers have been unable to be physically present on the property, meaning that Plaintiff has been physically deprived of its property and business. Put simply, the global pandemic and Executive Orders caused Plaintiff to suffer direct physical loss of and damage to its property because the Executive Orders deprived Plaintiff and consumers of access to its building and prohibited Plaintiff from operating its business, causing the function and value of Plaintiff's business property to be nearly eliminated or destroyed.

46. Plaintiff suffered direct physical loss of and damage to its property due to the Executive Orders resulting from the COVID-19 pandemic, the Executive Orders are "perils insured against," and thus Plaintiff is entitled to reimbursement for its losses under the Policy.

47. For these same reasons, Defendant is obligated to provide coverage under the "Civil Authority" provision in the Policy. As set forth above, the COVID-19 pandemic and resulting Executive Orders are perils insured against under the Policy. Moreover, there are numerous establishments in the vicinity of Plaintiff's facility that have similarly suffered

physical loss of and damage to their premises caused by these perils. Accordingly, the Executive Orders that have prohibited access to Plaintiff's premises trigger the "Civil Authority" provision of the Policy.

Exclusions

48. In its denial, Defendant asserted that Plaintiff's claim was precluded due to several coverage exclusions. Defendant stated, without explanation, that the following exclusions apply:

1. Increase of loss resulting from ordinance or law regulating construction or repair of buildings.
2. Consequential damages resulting from the breach of contractual obligations.
4. Loss due to delay or loss of market.
6. "Extra expense" caused by the suspension, lapse, or cancellation of any license, lease, or contract beyond the 'interruption of business'.
7. Increase of loss resulting from ordinance or law regulating the prevention, control, repair, clean-up, or restoration of environmental damage.
8. Income protection specifically insured in whole or in part by this or any other insurance.

(See Exhibit B, p. 4 of 4).

49. None of these exclusions applies to preclude Plaintiff's Claim.

50. First, the ordinance or law exclusion does not apply because the Executive Orders that closed Plaintiff's business are not an "ordinance or law" and they do not regulate "construction or repair." Rather, they are statewide Executive Orders issued to shut down non-essential businesses to prevent the further spread of disease during a global pandemic. Moreover,

the ordinance or law exclusion effectively reads the Civil Authority provision out of the Policy if the exclusion is expanded to include Executive Orders.

51. Second, Plaintiff is not seeking consequential damages resulting from a breach of contract. Plaintiff is seeking coverage for what is promised in the Policy, so the consequential damages exclusion Defendant relies on to exclude coverage is not applicable to Plaintiff's Claim.

52. Third, Plaintiff's Claim does not include damages due to delay or market loss, so that exclusion is also inapplicable.

53. Fourth, Plaintiff is not seeking Extra Expenses related to the cancellation of any license, lease or contract. Instead, Plaintiff seeks Extra Expenses as expressly provided for as part of Plaintiff's Income Protection coverage.

54. Fifth, Plaintiff is not alleging an "increase of loss" due to an ordinance or law regulating environmental damage. As set forth above, the Executive Orders are not an ordinance or law, and they do not regulate environmental damage. Moreover, the Executive Orders did not increase Plaintiff's loss; they are the cause of it. Plaintiff is seeking reimbursement for the covered losses it sustained under the Policy as a result of the Executive Orders.

55. Finally, Plaintiff is not covered by any other insurance for Income Protection, so Defendant cannot avoid coverage on this basis.

56. It is Defendant's burden to prove that Plaintiff's Claim is precluded by any coverage exclusions, and for the reasons set forth above, that burden cannot be met here.

COUNT ONE
BREACH OF CONTRACT: COVERAGE OF PROPERTY DAMAGE CLAIMS

57. Plaintiff repeats and realleges the allegations of paragraphs 1 through 56 as if fully set forth herein.

58. The Policy is an insurance contract under which Plaintiff paid premiums in exchange for Defendant's promise to pay Plaintiff's claims for losses covered by the Policy, such as business losses and extra expenses incurred as a result of Executive Orders impairing Plaintiff's business operations.

59. The Policy requires Defendant to "pay for direct physical 'loss' of or damage to Covered Property at the premises," including any "loss of 'income' . . . sustain[ed] due to partial or total 'interruption of business' resulting directly from 'loss' or damage to property on the premises" as well as extra expenses incurred.

60. Plaintiff has complied with all applicable provisions of the Policy, including payment of premiums in exchange for coverage under the Policy, and yet Defendant has failed to fulfill its insurance coverage obligations under the terms of the Policy.

61. By denying coverage for any losses or damage incurred by Plaintiff in connection with the Executive Orders and the COVID-19 pandemic, Defendant has breached its coverage obligations under the Policy.

62. The damages sustained by Plaintiff are expected to exceed \$100,000.

WHEREFORE, Plaintiff seeks an award of compensatory damages in the amount of its losses, together with costs sustained herein and reasonable attorneys' fees.

COUNT TWO
BREACH OF CONTRACT: COVERAGE OF CIVIL AUTHORITY CLAIMS

63. Plaintiff repeats and realleges the allegations of paragraphs 1 through 62 as if fully set forth herein.

64. The Policy is an insurance contract under which Plaintiff paid premiums in exchange for Defendant's promise to pay Plaintiff's claims for losses covered by the Policy, such as income losses and expenses incurred as a result of government orders impairing Plaintiff's business operations due to the COVID-19 pandemic.

65. The Policy requires Defendant to pay Plaintiff "for the actual loss of 'income' . . . you sustain and necessary 'extra expense'" caused by actions taken by a civil authority that prohibit access to Plaintiff's premises, where those actions were taken in response to a dangerous condition resulting from a peril insured against occurring at property other than Plaintiff's property.

66. The Executive Orders constitute actions of civil authorities prohibiting access to Plaintiff's property due to the COVID-19 pandemic, and Plaintiff's Claim otherwise meets the requirements for coverage under the Civil Authority provision of the Policy.

67. Plaintiff has complied with all applicable provisions of the Policy, including payment of premiums in exchange for coverage under the Policy, and yet Defendant has failed to fulfill its insurance coverage obligations under the terms of the Policy.

68. By denying coverage for any losses or damage incurred by Plaintiff in connection with the Executive Orders and the COVID-19 pandemic, Defendant has breached its coverage obligations under the Policy.

69. The damages sustained by Plaintiff are expected to exceed \$100,000

WHEREFORE, Plaintiff seeks an award of compensatory damages in the amount of its losses, together with costs sustained herein and reasonable attorneys' fees.

COUNT THREE

DECLARATORY JUDGMENT: THE POLICY HAS BEEN TRIGGERED BY DIRECT PHYSICAL LOSS OF AND/OR DAMAGE TO PLAINTIFF'S PROPERTY AND THE PROPERTY OF OTHERS, AND THE POLICY'S EXCLUSIONS DO NOT APPLY

70. Plaintiff repeats and realleges the allegations of paragraphs 1 through 69 as if fully set forth herein.

71. The Policy requires Defendant to pay Plaintiff for its "loss of 'income' . . . sustain[ed] due to partial or total 'interruption of business'" resulting from the Executive Orders.

72. Plaintiff has made a Claim for coverage for its lost business income under the terms of the Policy.

73. Defendant has asserted that Plaintiff is not entitled to its lost business income because it did not suffer direct physical loss of, or damage to, its covered property.

74. Plaintiff suffered both a direct physical loss of its property, and damage to its property, as it was deprived of the normal, full use and value of its property.

75. Similarly, properties surrounding Plaintiff's property experienced direct physical loss or damage.

76. In denying Plaintiff's Claim for coverage, Defendant asserted that Plaintiff's Claim is excluded under the Policy by various exclusions concerning ordinances or laws, additional types of damage or other insurance.

77. Plaintiff's Claim is not based on an ordinance or law, it is not seeking consequential damages or damages due to delay or loss of market. Plaintiff is not seeking Extra

Expenses due to a license, lease or contract (other than the Policy). Plaintiff does not have another Income Protection insurance.

78. As set forth above, a true controversy exists between the parties concerning the parties' rights and obligations under the Policy.

WHEREFORE, Plaintiff seeks a declaratory ruling that the Income Protection and Civil Authority provisions of the Policy have been triggered by direct physical loss of and damage to Plaintiff's property and the surrounding property, and no exclusions apply.

COUNT FOUR
BAD FAITH

79. Plaintiff repeats and realleges the allegations of paragraphs 1 through 78 as if fully set forth herein.

80. The Policy is an insurance contract under which Plaintiff paid premiums in exchange for Defendant's promise to pay Plaintiff's claims for losses covered by the Policy, such as business losses and expenses incurred as a result of government orders impairing Plaintiff's business operations due to the COVID-19 pandemic.

81. The Policy requires Defendant to "pay for direct physical 'loss' of or damage to Covered Property at the premises," including any "loss of 'income' . . . you sustain due to partial or total 'interruption of business'" and for extra expenses incurred.

82. Plaintiff has made a claim for, and is entitled to, coverage for its losses, lost income, and expense incurred due to the shutdown required by the Executive Orders.

83. Defendant denied Plaintiff's Claim on the grounds that (1) there was no physical loss or damage to Plaintiff's property, and (2) Plaintiff's Claim is excluded from coverage due various inapplicable exclusions contained in the Policy. Defendant has thereby distorted the very

language it decided to include in the Policy and thereby implicitly recognized that under the authentic language of the Policy, Plaintiff is entitled to the coverage it seeks.

84. In corresponding with Plaintiff's counsel, Defendant failed to appreciate or investigate the basis for the Claim.

85. Defendant owed a duty to Plaintiff to deal fairly and act in good faith.

86. In its handling of Plaintiff's claim for benefits under the Policy, and as a matter of routine practice in handling similar claims, Defendant breached its duty to deal fairly and in good faith toward Plaintiff in the following respects:

- a. Failing to pay Plaintiff the initial \$100 per day benefits contemplated by the Policy;
- b. Failing to fully pay Plaintiff the benefits to which Plaintiff was entitled under the Policy at a time when Defendant knew Plaintiff was entitled to those benefits;
- c. Withholding payment of benefits knowing that Plaintiff's claim for benefits was valid;
- d. Unreasonably delaying payment of benefits without a reasonable basis;
- e. Intentionally and recklessly misinterpreting and misapplying provisions of the Policy and looking for ways to avoid paying some or all of Plaintiff's Claim;
- f. Failing to adopt and implement reasonable standards for the prompt investigation, evaluation and handling of claims arising under its policies, including Plaintiff's; and
- g. Failing to attempt to act in good faith to effectuate a prompt and fair settlement of Plaintiff's claim.

87. The unreasonable conduct of the Defendant in the handling of Plaintiff's Claim was intentional, willful, wanton, and was committed with a reckless disregard for the rights of Plaintiff.

88. Plaintiff has retained an attorney to prosecute this action and is thus entitled to reasonable attorneys fees as well as the costs expended in pursuit of this litigation.

WHEREFORE, Plaintiff seeks an award of compensatory and punitive damages, as well as costs and attorneys' fees to the full extent recoverable under Ohio law.

JURY DEMAND

Plaintiff demands a trial by jury of all claims in this Complaint so triable.

Dated: July 28, 2020

Respectfully Submitted,

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