

COMMONWEALTH OF KENTUCKY
JEFFERSON COUNTY CIRCUIT COURT
DIVISION ____
CASE NO. _____

VARANESE FUSION, LLC,
2106 Frankfort Avenue
Louisville, Kentucky 40206

Plaintiff,

v.

ERIE INSURANCE EXCHANGE,
member Erie Insurance Group,

Serve: Jan R. Van Gorder
Process Agent
100 Erie Insurance Place
Erie, PA 16530

STEVEN J. STACK, MD, Commissioner
of Public Health, Department of Public
Health, Cabinet for Health & Family
Services,
275 East Main Street
Frankfort, KY 40621

ERIC B. FRIEDLANDER, Secretary,
Cabinet for Health & Family Services,
275 East Main Street
Frankfort, KY 40621

KERRY B. HARVEY, Secretary, Public
Protection Cabinet,
500 Mero Street
Frankfort, KY 40601

Defendants.

Electronically Filed

**COMPLAINT FOR
DECLARATORY JUDGMENT
AND JURY DEMAND**

I. INTRODUCTION

1. This is a lawsuit for declaratory judgment filed pursuant to Section 418.005, *et seq.*, of the Kentucky Revised Statutes ("KRS") and pursuant to Kentucky

Civil Rule 57. It arises from claims for the loss of business income sustained by a restaurant in Louisville, Kentucky, as a result of a “shutdown order” issued by the Kentucky Cabinet for Health and Family Services (Kentucky).

2. As described in more detail hereafter, the Plaintiff made a claim for the loss of business income due to its compliance with the Kentucky order. Plaintiffs’ insurance company, the Defendant, Erie Insurance Exchange, a member of the Erie Insurance Group of Erie, Pennsylvania, denied the claim. See Exhibit 1.

II. PARTIES

3. The Plaintiff, Varanese Fusion, LLC, operates a restaurant located in Louisville, Jefferson County, Kentucky.

4. The Defendant, Erie Insurance Exchange (Erie or the insurance company), is an insurer based in Erie, Pennsylvania. It issues business insurance policies throughout the Commonwealth of Kentucky through appointed agents who regularly sell policies in Kentucky and in Jefferson County, Kentucky.

5. The Defendants Steven J. Stack, MD, Commissioner of Public Health, Department of Public Health, Cabinet for Health & Family Services, Eric B. Friedlander, Secretary, Cabinet for Health & Family Services, and Kerry B. Harvey, Secretary, Public Protection Cabinet (the Kentucky Defendants) are all sued in their official capacities. They are made parties herein because of an order that was entered by them on the 16th day of March, 2020. A copy of that order is attached hereto as Exhibit 2. The Kentucky Defendants are made parties herein in their official capacity because the legal affect and the legal interpretation of their order is sought in this action. The Defendant Erie claims, in part, that “civil authority coverage does not apply because a civil authority did not order that the business be closed due to damage to property within one mile of the

[insured] premises...” As set forth below, it is the Plaintiff’s contention that the Kentucky Defendants entered the order because they had evidence of the widespread presence of the very dangerous COVID-19 virus throughout the Commonwealth of Kentucky and in Louisville, Jefferson County, Kentucky. In fact, if the Kentucky Defendants had any evidence that there was NOT COVID-19 virus within one mile of the Plaintiff’s restaurant then the restaurant likely would have been excluded from the Kentucky Defendants’ order. The Kentucky Defendants have a vested interest in the interpretation and enforcement of that order such that they are necessary parties in this action in their official capacities.

III. THE PREVALENCE OF THE COVID-19 VIRUS IN KENTUCKY AND THE RESPONSE OF THE KENTUCKY CIVIL AUTHORITY

6. As of March 6, 2020, the Governor of Kentucky, recognizing the widespread prevalence of the COVID-19 virus in the Commonwealth of Kentucky and the dangerous and deadly nature of that virus, declared a state of emergency. As of May 6, 2020, there were over 5,800 confirmed cases of the COVID-19 virus in the Commonwealth of Kentucky.

7. A statewide order was entered by the Kentucky Defendants due to the presence of the virus in and around Louisville, Kentucky and elsewhere in the Commonwealth of Kentucky. See Exhibit 2 attached.

8. The order of the Kentucky Defendants required that the Plaintiff’s restaurant cease all on-site consumption of food and beverage.

IV. THE INSURANCE POLICY

9. The policy that is at issue in this declaratory judgment action is attached hereto as Exhibit 3. But for a limited amount of information that is placed on declaration

pages in the policy it is otherwise substantially a preprinted form document. Most importantly the sections of the policy that are at issue in this declaratory judgment action are preprinted form language and would apply to all similarly situated Kentucky insureds of Erie. This declaratory judgment action may have wide-ranging implications with respect to a large number of insureds in the Commonwealth of Kentucky.

10. The Plaintiff has a form policy issued by Erie that provides income protection if its business is interrupted. One of the additional coverages under business interruption insurance is called “civil authority” coverage.

11. The civil authority additional coverage does not require that there be damage to the Plaintiff’s premises.

12. The civil authority additional coverage applies when there is “damage to property other than property at the premises” (meaning the insured premises). If that damage to other property causes an action of a civil authority “that prohibits access to the premises described in the declarations” (meaning the insured premises) then coverage applies.

13. The civil authority coverage for loss of income begins 72 hours after the action of the civil authority and applies for a period of up to four consecutive weeks subject to certain maximum limitations in the policy.

V. ERIE DENIES COVERAGE

14. Erie was well aware of the coverages provided in the policy that it issued and it was well aware of the widespread presence of the virus throughout the Commonwealth of Kentucky. Erie was also aware of the case law indicating that an airborne substance, such as the virus, could be considered “property damage” under

the terms of its policy. Nevertheless, Erie denied coverage making the following statement:

Civil Authority coverage does not apply because a Civil Authority did not order that the business be closed due to damage to property within one mile of the premises described in the "Declarations," caused by a peril insured against.

15. To summarize, at the time Erie denied coverage, Erie was aware that:
- Plaintiff had insurance for loss of "business income";
 - There is insurance for loss of "business income" if that loss results from the action of a "civil authority" (a government agency);
 - The action of the civil authority need not be based upon damage to the insured property, but may be based upon "damage to property other than property" at the insured's premises;
 - There was evidence of property damage, as the presence of the virus in the air and on surfaces may constitute property damage; and
 - There was evidence of a widespread presence of the virus throughout the Commonwealth of Kentucky and in Louisville, Kentucky, and there was evidence that the presence of the virus constituted a dangerous physical condition.

VI. DECLARATORY JUDGMENT – THE ISSUES

16. Section 418.040 of the KRS provides that the Court may enter declaratory judgment declaring the rights of the parties herein. Rule 57 of the Kentucky Rules of Civil Procedure provides for a jury trial for any factual issues in a declaratory judgment action.

17. The Plaintiff respectfully submits to the Court that there are several issues raised by the Plaintiff's claim and the insurance company's denial that are appropriate for a declaratory judgment at this time. Those issues are as follows:

- Whether the order of the Kentucky Defendants is a valid and enforceable order of a civil authority requiring that the Plaintiff's restaurant cease all on-site consumption of food and beverage; and
- Whether the airborne presence of the virus and/or the presence of the virus on numerous surfaces and on numerous properties throughout the Commonwealth of Kentucky can, as a matter of law, be considered property damage under the applicable case law and legal authorities.

18. The Plaintiff further submits to the Court that the facts and the case law will support a finding in favor of the Plaintiff on each of the above issues. Thus the Court should render declaratory judgment that the Plaintiff has coverage for the Plaintiff's losses of business income under the terms of the Plaintiff's policy.

VII. DAMAGES

19. Should the Court render declaratory judgment on the coverage issue, in favor of the Plaintiff, the Plaintiff does not seek the Court's determination of damages at this time.

20. The policy issued by the Defendant Erie contains a form "appraisal" clause. That clause permits each party to select an appraiser and then the two appraisers select an umpire. The persons who act as appraisers are normally an adjuster, acting on behalf of the company, and a public adjuster employed by the insured.

21. Should the Court grant declaratory judgment in the Plaintiff's favor on the coverage issue, the Plaintiff will first seek to negotiate, in good faith, with the insurance company in an effort to arrive at a mutually acceptable figure for the loss of business income. If such good faith negotiation does not produce a result then the Plaintiff will invoke the appraisal process to get a damage determination.

WHEREFORE, in consideration of the foregoing, the Plaintiff requests that the Court grant declaratory judgment in favor of the Plaintiff, and order that the Plaintiff has insurance coverage, to be provided by the Defendant Erie, for the Plaintiff's loss of business income arising from the action of a civil authority (the Kentucky Cabinet for Health & Family Services and the Kentucky Protection Cabinet). The Plaintiff further requests all other proper and appropriate relief including costs and, if provided by law, its attorneys' fees.

JURY DEMAND

Pursuant to the provisions of Kentucky Civil Rule 57, the Plaintiff demands trial by jury on any factual issues in this declaratory judgment action.

Dated this the 5th day of June, 2020.

Respectfully submitted,

/s/ Matthew T. Dattilo

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