

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY
LOUISVILLE DIVISION
*To Be Filed Electronically***

WILD EGGS HOLDINGS, INC.; WILD)
EGGS OPERATIONS, LLC; AND WILD)
EGGS FRANCHISING, LLC,)

Plaintiffs,)

v.)

STATE AUTO PROPERTY & CASUALTY)
INSURANCE COMPANY,)
518 Broad Street)
Columbus, Ohio 43215)

Serve: Office of the Secretary of State)
Summons Branch)
700 Capital Avenue, Suite 86)
Frankfort, Kentucky 40601)

Defendant.)

Case No. _____

COMPLAINT

NATURE OF THE CASE

Plaintiffs Wild Eggs Holdings, Inc.; Wild Eggs Operations, LLC; and Wild Eggs Franchising, LLC (collectively “Wild Eggs”) bring this business interruption insurance coverage action against State Auto Property & Casualty Insurance Company (“State Auto”). Wild Eggs seeks money damages and other redress under a commercial property insurance policy (“Policy”) for State Auto’s failure to investigate and pay Wild Eggs’ COVID-19 losses resulting from the closure of multiple Wild Eggs restaurants in Kentucky, Indiana, and Ohio. Exacerbating Wild Eggs’ business crisis during this pandemic, State Auto acted in bad faith by misrepresenting Policy terms and willfully disregarding coverages that clearly apply to this loss, including

“contagious or infectious” disease coverage contained in the Policy’s Restaurant Extension Endorsement. The Restaurant Extension Endorsement expressly adds coverage for a loss of business income due to a government order to suspend operations because of actual or alleged exposure “to a contagious or infectious disease.” The executive orders issued by the governors of Kentucky, Indiana, and Ohio limiting restaurant operations due to the COVID-19 pandemic are *exactly* the type of covered events contemplated by the Policy.

Wild Eggs notified State Auto of its claim for business income and extra expenses losses under the Restaurant Extension Endorsement. Yet State Auto denied the claim without investigation and without acknowledging the existence of the Restaurant Extension Endorsement. Rather, State Auto’s denial strategy appears to be to “cut and paste” lengthy form letters that State Auto deploys to deny on a blanket basis all business interruption claims related to COVID-19. State Auto’s strategy was intended to, and surely did, sow confusion by citing hypothetical reasons for the denial that ignore the Policy that Wild Eggs purchased and invoked, all in an effort to discourage COVID-19 claims by its insureds. State Auto surely must be aware that its insureds in the restaurant industry that purchased the Restaurant Extension Endorsement, like Wild Eggs, are counting on this coverage to mitigate the devastating losses resulting from COVID-19 and the government suspension orders. Nevertheless, State Auto ignored its duty to investigate Wild Eggs’ claim and deliberately failed to act in good faith, prompting this lawsuit.

PARTIES

1. Wild Eggs Holdings, Inc. is a Delaware corporation with its principal office at 825 Northgate Boulevard, Suite 203, in New Albany in Floyd County, Indiana.
2. Wild Eggs Franchising, LLC is a limited liability company with its principal office at 825 Northgate Boulevard, Suite 203, in New Albany in Floyd County, Indiana. Its sole

member is co-plaintiff Wild Eggs Holdings, Inc., which is incorporated in Delaware and has its principal office in Indiana.

3. Wild Eggs Operations, LLC is a limited liability company with its principal office at 825 Northgate Boulevard, Suite 203, in New Albany in Floyd County, Indiana. Its sole member is co-plaintiff Wild Eggs Holdings, Inc., which is incorporated in Delaware and has its principal office in Indiana.

4. State Auto is a foreign insurance company incorporated in Iowa. State Auto's principal place of business is at 518 East Broad Street, Columbus, Ohio.

JURISDICTION AND VENUE

5. This Court has jurisdiction over this action pursuant to 28 U.S.C. § 1332 because the parties are diverse and the amount in controversy exceeds \$75,000.

6. Wild Eggs Holdings, Inc. is incorporated in Delaware and has its principal office in Indiana. Consequently, it is considered a citizen of Delaware and Indiana for jurisdictional purposes.

7. Wild Eggs Operations, LLC and Wild Eggs Franchising, LLC are single-member limited liability companies. Wild Eggs Holdings, Inc. is the only member of both companies. Consequently, both Wild Eggs Operations, LLC and Wild Eggs Franchising, LLC are considered citizens of Delaware and Indiana for jurisdictional purposes.

8. State Auto is incorporated in Iowa and has its principal office in Ohio. Consequently, it is considered a citizen of Iowa and Ohio for jurisdictional purposes.

9. Venue is appropriate in this Court pursuant to 29 U.S.C. § 1132(e)(2) and 28 U.S.C. § 1391 because a substantial portion of the events or omissions giving rise to this action occurred in this District and a substantial part of the insured property is located in this District.

10. State Auto is conducting business in Kentucky and insures risks to property, including property located in Kentucky. This action arises out of and relates to State Auto's purposeful business contacts with the Commonwealth. Upon the Commonwealth's issuance of a certificate of authority to do business in Kentucky, State Auto is deemed to have appointed the Secretary of State as its attorney to receive service of lawful process issued against it in Kentucky. *See* K.R.S. § 304.3-230.¹

11. Wild Eggs operates eleven (11) restaurant franchises in Kentucky, Indiana, and Ohio (the "Locations"), with four of the Locations in Louisville.

12. The Policy lists Wild Eggs' mailing address as 1211 Herr Lane, #290, Louisville, Kentucky. The insurance agent that placed the Policy between Wild Eggs and State Auto also is listed on the Policy as operating out of Louisville, Kentucky. And Wild Eggs paid a Kentucky surcharge on the Policy, as well as surcharges and taxes for Jefferson County and Louisville.

STATEMENT OF FACTS

The State Auto Policy and Restaurant Extension Endorsement

13. State Auto has insured Wild Eggs since 2016. State Auto issued the Policy, No. PBP279307203, effective from April 20, 2019 to April 20, 2020, providing commercial property and general liability coverage at the following Locations: (1) 3985 Dutchmans Lane, Louisville, Kentucky; (2) 1311 Herr Lane, Louisville, Kentucky; (3) 153 South English Station Road, Louisville, Kentucky; (4) 121 S. Floyd Street, Louisville, Kentucky; (5) 310 North Delaware Street, Indianapolis, Indiana; (6) 1438 West Main Street, Carmel, Indiana; (7) 13272 Market Square Drive, Fishers, Indiana; (8) 1415 Veterans Parkway, Jeffersonville, Indiana; (9) 7677

¹ Further, the appointment of the Secretary of State to receive service of lawful process "shall be irrevocable, shall bind any successor in interest or to the assets of liabilities of the insurer [State Auto], and shall remain in effect as long as there is in force in this state or elsewhere a contract that would give rise to a cause of action in this state, made by the insurer, or liabilities or duties arising therefrom." K.R.S. § 304.3-230 (2).

Montgomery Road, Cincinnati, Ohio; (10) 3240 Vandercar, Cincinnati, Ohio; and (11) 301 East 4th Street, Cincinnati, Ohio. The Policy also provides coverage for a Wild Eggs corporate office at 1211 Herr Lane in Louisville, Kentucky.

14. The Policy insures various property risks attendant to the operation of the Locations, including time element extensions such as business income, extra expense, civil authority, and extended business income coverages.

15. Wild Eggs paid the insurance premium for the Policy. The Policy is attached as Exhibit A and incorporated into this complaint.²

16. The Policy's business income coverage insures the loss of business income that Wild Eggs sustained during the suspension of its operations. State Auto agreed to pay Wild Eggs' losses resulting from the suspension of its operations due to physical loss or damage resulting from a Covered Cause of Loss:

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 premises which are described in the Declarations and for which a Business Income Limit Of Insurance is shown in the Declarations. The loss or damage must be caused by or result from a Covered Cause of Loss.

See Exhibit A, Business Income (and Extra Expense) Coverage Form, ¶ A.1.b.³

17. "Suspension" of operations is defined to include not only the full cessation of operations, but also the *slowdown of operations*:

- a. The slowdown or cessation of your business activities; or

² The Policy also lists in the declarations the following additional forms: CP 04 11 10 12; CP 10 40 10 12; CP 10 45 10 12; CP DS 06 10 00; CP DS 65 10 12; and CP 10 65 10 12.

³ The "Period of Restoration" begins 72 hours after the loss for business income (and immediately after the loss for extra expense coverage) and ends the earlier of the date the property is returned to similar quality or the date the business resumes at a new location. See Exhibit A, Business Income (and Extra Expense) Coverage Form, ¶ F.3.

- b. That a part or all of the described premises is rendered untenable, if coverage for Business Income Including “Rental Value” or “Rental Value” applies.

See Exhibit A, Business Income (and Extra Expense) Coverage Form, ¶ F.6.

18. The Policy’s Restaurant Extension Endorsement adds a contagious or infectious Cause of Loss to the Policy’s Business Income (and Extra Expense) Coverage Form for “[t]he ‘suspension’ of your ‘operations’ at the described premises due to the order of a civil authority . . . resulting from the actual or alleged . . . [e]xposure of the described premises to a contagious or infectious disease.” See Exhibit A, Restaurant Extension Endorsement, ¶ C at 2. The coverage begins twenty-four (24) hours after a governmental authority issues a suspension order and continues for thirty (30) days. *Id.*

19. The Policy provides up to \$250,000 in limits for business income and extra expense for each Location under the Restaurant Extension Endorsement. See *id.*; see also Exhibit A, Commercial Property Coverage Part Declarations, Premier Property Plus Endorsement Schedule of Coverages.

20. The Policy also provides additional coverage in the form of “Extended Business Income” for up to an additional ninety (90) days – after operations can be resumed – to restore operations to the pre-loss level of business income. State Auto agreed to pay Wild Eggs’ actual losses beginning when operations resume and continuing until the earlier of the date that Wild Eggs reaches the business income level generated before the loss or 90 days after operations resumed:

If the necessary “suspension” of your “operations” produces a Business Income loss payable under this policy, we will pay for the actual loss of Business Income you incur during the period that:

- (a) Begins on the date property (except “finished stock”) is actually repaired, rebuilt, or replaced and “operations” are resumed; and
- (b) Ends on the earlier of:

- i. The date you could restore your “operations”, with reasonable speed to the level which would generate the business income amount that would have existed if no direct physical loss or damage had occurred; or
- ii. [90] consecutive days after the date determined in (1)(a) above.

See Exhibit A, Business Income (and Extra Expense) Coverage Form, and Premier Property Plus Endorsement at C.2 (page 12 of 12).

The COVID-19 Pandemic and Government-Ordered Restrictions

21. On March 11, 2020, the World Health Organization announced that the outbreak of COVID-19, a contagious and infectious disease, constituted a worldwide pandemic. Shortly thereafter, the Centers for Disease Control and Prevention and other governmental entities and officials admonished and ordered citizens to refrain from gathering in public places, such as restaurants, because COVID-19 is contagious, infectious, and deadly.

22. On March 6, 2020, Kentucky Governor Andy Beshear issued Executive Order 2020-215 declaring a State of Emergency, and subsequently issued additional orders related to COVID-19. The Kentucky Cabinet for Health and Family Services, Department of Public Health, issued an order on March 16, 2020, restricting restaurant service to drive-thru, delivery, and take-out. The Kentucky Orders are attached as collective Exhibit B.

23. On March 6, 2020, Indiana Governor Eric Holcomb issued Executive Order 20-02 declaring a public health emergency, followed by Executive Order 20-04 on March 16, 2020, which authorized food establishments to provide only drive-thru, take-out, and delivery service. The Indiana Orders are attached as collective Exhibit C.

24. On March 9, 2020, Ohio Governor Mike DeWine issued Executive Order 2020-01D declaring a State of Emergency and subsequently issued additional orders related to COVID-19. The Director of the Ohio Department of Health ordered that all restaurants were

restricted to carry-out and delivery only beginning March 15, 2020. The Ohio Orders are attached as collective Exhibit D.

25. The Kentucky, Indiana, and Ohio Orders (among others to be offered as proof at trial) resulting from the physical damage of the 2020 COVID-19 pandemic outbreak forced Wild Eggs to close dine-in operations and rendered its Locations untenable and unsuitable for restaurant operations. Restricting Wild Eggs' premises to curbside pickup and delivery of cuisine substantially reduced Wild Eggs' business income.

*Wild Eggs Notifies State Auto of Its Claim
Under the Restaurant Extension Endorsement*

26. On March 18, 2020, Wild Eggs timely notified State Auto in writing of its claim for loss of business income from suspension of its restaurant operations due to the Kentucky, Indiana, and Ohio Orders resulting from the actual or alleged exposure to COVID-19, a contagious and infectious virus. *See* Property Loss Notice, Exhibit E. The Property Loss Notice specifically seeks insurance coverage under the Policy, including the Restaurant Extension Endorsement. *Id.*

27. In its April 8, 2020 denial letter, without any further substantive communications between the parties, Natalie Thomas of State Auto denied Wild Eggs' claim for coverage under the Policy. *See* Exhibit F.

28. The April 8, 2020 denial letter failed to mention even the existence of insurance coverage provided by the Policy's Restaurant Extension Endorsement. Instead, the denial letter recites a litany of inapplicable coverage provisions and exclusions that have no bearing on the relevant coverages, including the Restaurant Extension Endorsement.

29. For example, the denial letter wrongly and misleadingly cites to an endorsement that excludes loss or damage caused by or resulting from any virus or bacteria that could induce physical distress, illness, or disease. *See* Exhibit F at 11-12. Because a “contagious or infectious disease” most frequently is either viral or bacterial, this “virus or bacteria exclusion” conflicts with the coverage grant in the Restaurant Extension Endorsement for loss due to government orders resulting from alleged exposure to a “contagious or infectious disease.”

30. Application of the virus or bacteria exclusion would render the coverage in the Restaurant Extension Endorsement completely illusory.

31. At a minimum, the addition of the Restaurant Extension Endorsement to the Policy renders the virus or bacteria exclusion ambiguous.

32. Based upon a review of similar denial letters that State Auto sent to other insureds, the State Auto denial letter appears to be a “cut and paste” of a form denial letter designed to improperly discourage any claims for business interruption regardless of the coverage purchased. Indeed, State Auto has issued hasty denials of business income claims related to COVID-19 in lieu of a proper and thorough investigation and without regard to the facts or the relevant coverages. These motivations and actions violate Kentucky common and statutory law governing the adjustment and payment of property insurance claims.

COUNT I – DECLARATORY JUDGMENT

33. Wild Eggs incorporates by reference paragraphs 1-32 as if fully set forth herein.

34. Wild Eggs purchased the Policy to provide comprehensive property insurance coverage for its restaurants, including coverage for loss of business income from suspension of its operations due to a government order resulting from actual or alleged exposure to a contagious or infectious disease.

35. A real and justiciable controversy exists over the extent of coverage provided by the Policy, including but limited to: (1) whether the Policy, which includes the Restaurant Extension Endorsement, provides coverage for business income losses resulting from the COVID-19 pandemic and the related government-ordered restrictions; and (2) the amount of the coverage available under the Policy for Wild Eggs' losses.

36. Wild Eggs complied with all Policy provisions and conditions sufficient to entitle it to bring this action.

37. Wild Eggs is entitled to a declaration by this Court that coverage exists under the terms of the Policy.

COUNT II – BREACH OF CONTRACT

38. Wild Eggs incorporates by reference paragraphs 1-37 as if fully set forth herein.

39. The Policy is a valid contract that Wild Eggs purchased for valuable consideration.

40. At all relevant times, Wild Eggs has complied with all material conditions precedent and reasonable requirements placed upon it under the Policy.

41. Wild Eggs tendered a claim to State Auto for this loss. Wild Eggs complied with all Policy requirements and obligations except those excused as a matter of law.

42. State Auto breached its express and implied duties under the Policy by refusing to cover Wild Eggs for the claim under the Policy for the loss of business income from the COVID-19 pandemic and the government business shut-down orders.

43. As a result of State Auto's breach of its express and implied contractual obligations, Wild Eggs has suffered damages in an amount to be determined at trial.

44. As a direct and proximate result of State Auto's breaches of the Policy, Wild Eggs has been deprived of the benefits of its insurance coverage. Wild Eggs is entitled to a money judgment against State Auto for all coverage under the Policy that may be proven at trial, and to which it is entitled under the Policy.

**COUNT III – BAD FAITH CLAIMS HANDLING
AND BAD FAITH REFUSAL TO PAY**

45. Wild Eggs incorporates by reference paragraphs 1-44 as if fully set forth herein.

46. State Auto owes Wild Eggs a duty of good faith and fair dealing, which is implied in the Policy, and a bad faith claim flows from a breach of that covenant. *See Indiana Ins. Co. v. Demetre*, 527 S.W.2d 12, 26 (Ky. 2017).

47. The Policy requires State Auto to pay Wild Eggs' loss of business income from the COVID-19 pandemic and the government business shut-down orders.

48. Nevertheless, State Auto ignored Wild Eggs' dire need for the coverage Wild Eggs purchased under the Restaurant Extension Endorsement.

49. State Auto's acts and omissions in connection with Wild Eggs' claim breach the covenant of good faith and fair dealing and State Auto's obligations to Wild Eggs under Kentucky's common law, rendering it liable for the tort of bad faith.

50. State Auto's acts and omissions justify extra-contractual damages including, but not limited to, consequential damages, attorneys' fees, and an award of punitive damages in an amount to be proved at trial.

COUNT IV – UNFAIR CLAIM SETTLEMENT PRACTICES

51. Wild Eggs incorporates paragraphs 1-50 as if fully set forth herein.

52. State Auto's conduct upon notification of Wild Eggs' claim for coverage has amounted to unfair claims settlement practices as defined in K.R.S. § 304-12-230.

53. State Auto’s unfair claims settlement practices include, but are not limited to:
- (i) “Failing to acknowledge and act reasonably promptly upon communications with respect to claims arising under insurance policies”;
 - (ii) “Refusing to pay claims without conducting a reasonable investigation based upon all available information”;
 - (iii) “Compelling insureds to institute litigation to recover amounts due under an insurance policy” by offering substantially less than the amounts ultimately recovered in actions brought by such insureds”; and
 - (iv) “Failing to promptly provide a reasonable explanation of the basis in the insurance policy in relation to the facts or applicable law for denial of a claim.” *See* K.R.S. §§ 304-12-230 (2), (4), (7) & (14).

54. Wild Eggs is entitled to seek relief under K.R.S. § 304.12-230 because, when the statute is read in conjunction with K.R.S. § 446.070,⁴ the two “create a statutory bad faith cause of action.” *See Demetre*, 527 S.W.2d at 26 (citing *State Farm Mut. Auto Ins. Co. v. Reeder*, 763 S.W.2d 116, 118 (Ky. 1988)).

COUNT V – DECEPTIVE AND MISLEADING ADVERTISING

55. Wild Eggs incorporates paragraphs 1-54 as if fully set forth herein.

56. K.R.S. § 304.12-020 prohibits any person from making or disseminating any advertisement, information, matter, statement, or thing “[c]ontaining any assertion, representation, or statement with respect to the business of insurance or with respect to any person in the conduct of his insurance business, which is untrue, deceptive, or misleading.”

⁴ K.R.S. § 446.070 provides that “[a] person injured by the violation of any statute may recover from the offender such damages as he sustained by reason of the violation, although a penalty or forfeiture is imposed for such violation.”

57. State Auto offered Wild Eggs the Restaurant Extension Endorsement and accepted an additional premium for the endorsement. Yet, in its April 8, 2020 letter, State Auto did not even acknowledge this coverage, let alone provide the promised coverage; instead, it relied on the virus and bacteria exclusion to deny coverage.

58. State Auto's proffer of the Restaurant Extension Endorsement to its commercial property policy containing the virus and bacteria exclusion amounts to untrue, deceptive, or misleading advertising by State Auto pursuant to K.R.S. § 304.12-020.

59. Wild Eggs is entitled to relief under K.R.S. § 304.12-020 because K.R.S. § 446.070 allows a person injured by a violation of any Kentucky statute to recover damages from the offender.

PRAYER FOR RELIEF

WHEREFORE, Wild Eggs, by counsel, respectfully prays for the following relief from this Court:

1. A declaration that coverage exists for Wild Eggs' losses and that no exclusions bar coverage.
2. Judgment awarding Wild Eggs all amounts owed under the Policy and to be proven at trial;
3. Judgment awarding Wild Eggs damages suffered as a result of State Auto's breach of its obligations and bad faith as outlined above, including consequential and statutory damages for bad faith, attorneys' fees, costs, pre- and post-judgment interest in the maximum amount allowed by law, and punitive damages.
4. For trial by jury on all issues so triable; and

5. Any other relief the Court deems appropriate or to which Wild Eggs may be entitled as a matter of law or equity.

DEMAND FOR JURY TRIAL

Wild Eggs demands a jury trial on all issues so triable.

RESPECTFULLY SUBMITTED, this the 15th day of July, 2020.

/s/ Edmund S. Sauer

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