

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF ILLINOIS EASTERN DIVISION

Steven A. Udesky OD and Associates	)	
P.C. d/b/a Northbrook Family Eye Care	)	Case No.
	)	
Plaintiff,	)	
	)	<b>JURY TRIAL DEMANDED</b>
v.	)	
	)	
Erie Insurance Property & Casualty	)	
Company	)	
	)	
Defendant.	)	

**COMPLAINT AT LAW**

Plaintiff, Steven A. Udesky OD and Associates P.C. d/b/a Northbrook Family Eye Care (“NF Eye Care”), through its attorneys, David B. Goodman and Kalli Nies, Goodman Law Group | Chicago *of counsel*, brings this Complaint against Defendant Erie Insurance Property & Casualty Company (“Erie”), and states as follows:

**NATURE OF THE CASE**

1. NF Eye Care is an Illinois professional corporation which provides optometry services including eye exams, medical services, and eyewear services at commercial property it leases at 2750 Dundee Road, Suite 2, Northbrook, Illinois (the “Covered Property”).

2. NF Eye Care also provided optometric services to people at more than twenty nursing homes in the Chicago metropolitan area pursuant to the terms of its contract with its client, SeniorWell. SeniorWell is a provider of on-site healthcare services to older adults residing in senior living communities. Through its contract with SeniorWell, NF Eye Care agreed to provide optometry to SeniorWell’s clients in the residential settings where they reside.

3. During the period from June 24, 2019 through June 24, 2020, NF Eye Care was insured under a property and casualty insurance contract that was underwritten by Defendant

Erie, Policy Number Q970042710 (the “Policy”). The insurance coverage afforded under the Policy includes coverage for business interruption losses at the Covered Property and at “client offices” such as the facilities at which NF Eye Care provided services to SeniorWell’s clients pursuant to its contract with SeniorWell.

4. Through this complaint, NF Eye care seeks to recover the damages it has incurred resulting from Erie’s breaches of its obligations under the Policy Erie sold to NF Eye Care arising from Erie’s failure to pay for business income losses arising from direct physical loss of or damage to the Covered Property and to its “client’s offices” as well as statutory relief pursuant to 215 ILCS 5/155.

#### **PARTIES**

5. NF Eye Care is an Illinois professional corporation with its principal place of business in Illinois. As such, NF Eye Care is a citizen of Illinois.

6. Erie is a Pennsylvania corporation with its principal place of business in Pennsylvania. As such, Erie is a citizen of the Commonwealth of Pennsylvania.

#### **JURISDICTION AND VENUE**

7. This court has subject matter jurisdiction over this matter pursuant to 28 U.S.C. §1332 as Plaintiff, NF Eye Care, is a citizen of the State of Illinois, Defendant, Erie, is a citizen of the Commonwealth of Pennsylvania, and the losses for which NF Eye Care seeks to recover from Erie through this lawsuit, exceed \$75,000, exclusive of interest and costs.

8. This court has personal jurisdiction over Erie as the present case arises from a contract that Erie made in the State of Illinois to insure property and risk located in the State of Illinois. Additionally, Erie exercised systematic and continuous contacts with the State of Illinois by conducting business in Illinois during the period of time at issue in this complaint.

9. Venue is proper in the Northern District of Illinois pursuant to 28 U.S.C. § 1391(b)(2) as it is the judicial district in which a substantial part of the events or omissions giving rise to the claim occurred. It is the judicial district in which Erie issued the Policy providing insurance coverage for risk found exclusively within this judicial district.

### **FACTS COMMON TO ALL COUNTS**

#### **A. The Policy**

10. Erie sold the Policy to NF Eye Care in consideration of premiums paid to it by or on behalf of NF Eye Care.

11. The Policy is a commercial property insurance policy, and the policy period encompassed by it is June 24, 2019 to June 24, 2020 (the “Policy Period”).

12. NF Eye Care paid the premiums due for the Policy.

13. The Policy was in full force and effect during the Policy Period from June 24, 2019 to June 24, 2020 and provided coverage to NF Eye Care for losses covered by the Policy.

14. The Policy is an “all risk” insurance policy that provides insurance coverage for property and casualty losses except for those not expressly excluded from coverage.

15. The Policy provides that Erie “will 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.

16. NF Eye Care currently conducts its business at the Covered Property. NF Eye Care conducted its business at the Covered Property throughout the Policy Period except during the periods of loss that are the subject of NF Eye Care’s claim at issue in this lawsuit.

17. The Policy includes the “Offices Enhancement Endorsement” broadening the insurance coverage that Erie sold to NF Eye Care.

18. Through the Offices Enhancement Endorsement, Erie obligated itself to pay up to \$25,000 for NF Eye Care's loss of income and extra expense NF Eye Care sustained due to a partial or total interruption of its business activities "at a 'client'" resulting directly from loss or damage to property at a "client or virtual office premises."

19. The Policy defines "client or virtual office premises" to include a client's business location.

20. The Policy provides coverage for actual loss of business income sustained by NF Eye Care and for the necessary extra expenses incurred by it as a consequence of a direct physical loss of or damage to the Covered Property.

21. The Policy provides income protection coverage and defines the "Income Protection" coverage as:

loss of "income" and/or "rental 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. "Loss" or damage also includes covered property in the open, or in a vehicle, on the premises described in "Declarations" or within 1,500 feet thereof.

22. The Policy provides insurance coverage for "Extra Expense" defined as:

expenses you incur 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. "Loss" or damage also includes property in the open, or in a vehicle, on the premises described in the "Declarations" or within 1,500 feet thereof.

Pursuant to the Policy, Erie agreed to pay necessary actual and necessary "extra expenses" (other than the expense to repair or replace property) sustained by you to:

1. Avoid or minimize the "interruption of business" and to continue your business operations:
  - a. At the premises described in the "Declarations"; or
  - b. At replacement premises or at temporary locations; including:
    1. Relocation expenses; and
    2. Costs to equip and operate the replacement or temporary locations

2. Minimize the “interruption of business” if you cannot continue your business operations to the extent it reduces the amount of loss that would have been payable under loss of “income” and/or “rental income.”

26. “Interruption of business” is defined in the Policy as the period of time in which the insured’s business is partially or totally suspended commencing with the date of the “loss” to covered property and ending when the property is returned to similar quality.

27. The Policy also provides coverage for losses resulting from the actions of civil authorities providing, in pertinent part, that:

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 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.

28. NF Eye Care also purchased the Optometrists Professional Liability Endorsement providing coverage for certain liabilities arising from NF Eye Care’s operations but excluding

coverage for claims for “bodily injury” or “property damage” arising from or caused by willful violations of statutes or ordinances committed by or with the knowledge or consent of the insured.

**B. Government Orders**

29. SARS-coV-2 (“COVID-19”) is spread from person to person through various mechanisms including respiratory droplets produced when an infected person coughs, sneezes, exhales, speaks. The droplets also contaminate the surfaces on which they land providing an additional mechanism for the spread of the virus and causing injury to people.

30. On March 16, 2020, the Illinois Department of Public Health (“IDPH”) issued guidance recommending the cancellation of all elective or non-emergent surgeries and procedures to immediately decompress the health care system during the COVID-19 response.

31. On March 17, 2020, the United States Center For Disease Control (the “CDC”) recommended postponement of all routine eye care based on its assessment that the contamination of COVID-19 was so broadly distributed throughout the United States that routine eye care was likely to result in the spread of the virus.

32. On March 17, 2020, the IDPH issued a statement telling long term health facilities that they should restrict all visitation except for certain compassionate care situations and restrict all volunteers and non-essential health care personnel.

33. On March 20, 2020, the American Optometric Association (“AOA”) issued its guidance to doctors of optometry admonishing optometrists to delay all routine care for all age groups as the “[r]isk of Covid-19 transmission among patients, doctor and staff must be weighed against the benefit of patient care and likelihood of increased morbidity and mortality.”

34. The governmental agencies as well as the relevant healthcare professional services associations recognized that COVID-19 was a pandemic and that the virus should be perceived to have literally spread throughout the United States.

35. Recognizing the likelihood that the virus was or would be spread throughout the State of Illinois, on March 20, 2020, Illinois Governor J.B. Pritzker issued Executive Order No. 2020-10, also known as the “Stay at Home Order,” requiring, with limited exceptions, “all individuals currently living within the State of Illinois are ordered to stay at home or at their place of residence.”

36. The Stay At Home Order was entered in recognition that the virus was to be presumed present in any place in which people gathered. The Stay At Home Order was entered in an effort to prevent the continued spread by keeping people from gathering in public settings except as required in order to provide essential services or to receive essential services.

37. On April 1, 2020, Illinois Governor J.B. Pritzker issued Executive Order No. 18 renewing the Stay at Home Order through April 30, 2020.

38. On April 1, 2020, Illinois Governor J.B. Pritzker also issued Executive Order No. 19, directing health care facilities, such as NF Eye Care, to cancel or postpone elective surgeries and procedures. This Stay At Home Order was entered in an effort to prevent the continued spread by keeping people from gathering in public settings except as required in order to provide essential services or to receive essential services.

39. The IDPH revised its guidance, effective May 11, 2020, to allow health care facilities, including NF Eye Care, the opportunity to perform routine procedures once again.

**C. Claims for Coverage for the Covered Property under the Policy**

40. NF Eye Care, as a healthcare provider of optometry services such as eye exams, medical services, and eyewear, must follow CDC, AOA and the IDPH's guidelines. Failure to comply with those guidelines would expose NF Eye Care to potential regulatory action and liability arising from injuries resulting from such non-compliance.

41. However, the resumption of operations was subject to modifications that increased the expense of operations at health care facilities and reduced the number of people who could patronize NF Eye Care's office due to the restrictions that were imposed. NF Eye Care was required to incur additional expenses and to limit the number of people that it served in order to reopen and stay open.

42. The orders entered by the State of Illinois prevented NF Eye Care from accessing the Covered Property for use to operate its business. The March orders, and those that were entered after March 2020, resulted in a direct physical loss of the use of the Covered Property.

43. The March orders, and those orders that were entered after March 2020, resulted in a direct physical loss of the use of NF Eye Care's "client's offices."

44. On March 17, 2020, NF Eye Care began to suspend its operations to comply with the IDHP's March 16, 2020 and the CDC's March 17, 2020 directives that routine eye care be postponed. The directive precluded the use of the Covered Property by NF Eye Care for its ordinary use. It was also predicated on the finding that COVID-19 had spread so broadly that procedures could not be performed without a substantial risk of further spread.

45. On March 17, 2020, NF Eye Care informed Erie of loss of business resulting from the suspension of business at the Covered Property as a result of the various orders restricting the use of the Covered Property as a health care facility.



46. On March 19, 2020, NF Eye Care learned that the Covered Property was contaminated based on test results of an employee who was working at the Covered Property who tested positive for COVID-19.

47. The NF Eye Care employee who tested positive for COVID-19 had been present at the Covered Property and had used the equipment at the Covered Property, and consequently he contaminated the Covered Property.

48. As a consequence of contamination at the Covered Property, NF Eye Care had to immediately shut down all of its operations at the Covered Property.

49. NF Eye Care suspended its operations at the Covered Property on March 19, 2020 due to the contamination of the Covered Property.

50. On March 24, 2020, another employee of NF Eye Care tested positive for COVID-19.

51. On April 1, 2020, Illinois Governor J.B. Pritzker issued Executive Orders 18 and 19, which extended the March 20, 2020 Stay at Home Order through April 30, 2020 and specifically required Health Care Facilities, including NF Eye Care, to further suspend operations at the Covered Property other than the provision of emergency services.

52. Failure to suspend all but the performance of emergency services at the Covered Property following the orders issued by the state government entities responsible for public health and safety would constitute a willful violation of those orders and would violate the Policy's Optometrists Professional Liability Endorsement.

53. Consequently, NF Eye Care suspended the use of the Covered Property to bring its operations into compliance with the orders entered by the state entities responsible for health and safety regulations.

54. The contamination of the Covered Property precluded NF Eye Care from accessing the Covered Property for its intended use.

55. The Stay At Home Orders also precluded NF Eye Care from accessing the Covered Property for its intended use.

56. NF Eye Care was precluded from use of the Covered Property due to contamination of the Covered Property until April 22, 2020 when it was no longer contaminated.

57. However, from March 17, 2020 through May 11, 2020, NF Eye Care was precluded from using the Covered Property for its intended use due to the orders entered by the state public health officials. During this period of time, NF Eye Care was precluded from providing all but emergency services at the Covered Property by the Stay At Home Orders as well as CDC, AOA and IDPH's guidelines.

58. Suspension of operations at the Covered Property by NF Eye Care due to contamination from COVID-19 was a direct physical loss of the use of the Property.

59. Suspension of operations at the Covered Property by NF Eye Care due to contamination from COVID-19 caused NF Eye Care to sustain business interruption losses.

60. NF Eye Care sustained a direct physical loss of the Covered Property during the period it was contaminated.

61. NF Eye Care sustained a direct physical loss of the Covered Property during the period the Stay At Home Orders were in place.

62. NF Eye Care continues to sustain a direct physical loss of the Covered Property because the restrictions interposed to prevent the spread of COVID-19 limit the number of clients that NF Eye Care can provide its services to as compared to the number of clients it could service prior to the COVID-19 pandemic.

63. The presence of the coronavirus in and around the Covered Property rendered the premises unsafe and unfit for its intended use and resulted in a direct physical loss of Property to NF Eye Care.

**D. Coverage for loss under the SeniorWell Contract**

64. NF Eye Care contracted with SeniorWell for the provision of optometry examinations and treatment to the residents of SeniorWell's client facilities one day per week for compensation equal to thirty percent (30%) of NF Eye Care's collected billings.

65. NF Eye Care's optometric care provided through its contract with SeniorWell was operations of NF Eye Care at a client's office. It was a business operation within the coverage that NF Eye Care purchased from Erie for "Client or virtual office premises."

66. The SeniorWell facilities at which NF Eye Care provided optometric services pursuant to the SeniorWell contract were each the client's business locations.

67. Orders by officials from the State of Illinois, local municipal health officials, and IDHP guidance prohibited nursing facilities like SeniorWell from providing routine eye care, which prevented NF Eye Care from conducting its business operations at the SeniorWell facilities and required NF Eye Care to suspend its services at the SeniorWell business locations.

68. NF Eye care suffered a business interruption loss as a consequence of being barred access to the SeniorWell facilities due to the orders entered by the state officials.

69. NF Eye Care suffered a loss of business income based on its loss of access to the SeniorWell facilities due to contamination and the orders entered by state officials.

**E. Erie's Improper Denial of Claims for Coverage**

70. On March 25, 2020, Erie sent NF Eye Care a letter stating “This letter is in reference to the above captioned claim which was reported to Erie Insurance Exchange on March 17, 2020 seeking coverage under a policy issued to “The Burger Bar, Inc.” See **Exhibit 1**.

71. Erie's March 25, 2020 cut and paste letter to the Burger Bar instead of to NF Eye Care indicates that Erie decided to treat business interruption claims from COVID-19 *en masse* without addressing the particulars of each claim.

72. On March 25, 2020, Erie sent an additional letter to NF Eye Care stating that it was a follow up “to our conversation regarding your claim for business interruption due to the mandatory government shut down of all non-essential business.” See **Exhibit 2**. This letter was also a form letter as NF Eye Care is, per the Executive Orders issued by the Governor of Illinois and other state officials, a health care facility and not a “non-essential business.”

73. Erie provided a form for NF Eye Care to fill out to provide additional information regarding the claim for loss or damage. In response, NF Eye Care informed Erie that on March 19, 2020, after an employee tested positive for COVID-19, NF Eye Care had to immediately shut down and therefore suffered a loss of property due to closure for contamination. See **Exhibit 3**.

74. On May 29, 2020, Erie sent another form letter stating “During the conversation on May 7, 2020, you explained that your business experienced an interruption due to the mandatory government shut down. We regret to inform you that there is no coverage for your loss of income because there is no direct physical loss to your building or business personal property.” See **Exhibit 4**.

75. The letters from Erie dated March 25, 2020 and its denial letter of May 29, 2020, show a total disregard for the information provided to it by NF Eye Care and a lack of

investigation into the direct physical loss of and damage to the Covered Property due to contamination.

76. Erie's denial of coverage was a breach of the Policy and was committed in bad faith.

### **Count I**

#### **Breach of Contract- Business Income Loss to the Covered Property Due to Direct COVID-19 Contamination**

77. NF Eye Care repeats and realleges paragraphs 1 through 76 as the allegations of this paragraph 77.

78. The Policy is an "all risk" insurance policy that provides coverage for physical loss of property except those losses expressly excluded from coverage.

79. The loss of physical use of the Covered Property due to contamination from the Coronavirus was covered under the Policy.

82. The NF Eye Care employee who tested positive for COVID-19 had been present at the Covered Property and had used its equipment. Consequently, in light of the nature of COVID-19 and the mechanisms through which it is spread, the Covered Property was contaminated on and after March 19, and NF Eye Care had to immediately shut down its operations at the Covered Property due to contamination.

83. NF Eye Care suspended its operations at the Covered Property on March 19, 2020 due to the contamination of the Covered Property.

84. Based on CDC and other guidelines, NF Eye Care had to be shut down and cleaned to prevent contamination to others.

85. NF Eye Care was precluded from use of the Covered Property until it received the requisite clearance for that use, and it did not receive that clearance until April 22, 2020.

86. The contamination of the coronavirus in and around the Covered Property from March 19, 2020 through April 22, 2020 rendered NF Eye Care unsafe and unfit for its intended use.

87. The contamination of the coronavirus in and around the Covered Property from March 19, 2020 through April 22, 2020 caused NF Eye to suffer a direct physical loss of the use of the Property.

88. The contamination of the coronavirus in and around the Covered Property from March 19, 2020 through April 22, 2020, caused NF Eye Care to sustain a total interruption of business.

89. The physical contamination of the coronavirus in and around the Covered Property from March 19, 2020 through April 22, 2020, caused physical loss of property or damage to property and constituted loss under the Policy.

90. The requirement that NF Eye Care suspend operations at the Covered Property to comply with the orders entered by the state officials resulted in a direct physical loss of the use of the Covered Property.

92. NF Eye Care's claims for business interruption loss took place within the Policy Period.

93. NF Eye Care complied with all applicable provisions of the Policy, including the payment of premiums in exchange for coverage under the Policy, and yet Erie has abrogated its insurance coverage obligations pursuant to the Policy.

94. Erie failed to investigate NF Eye Care's Claims prior to denying coverage.

95. Erie was aware of actual contamination at the Covered Property.

96. Erie ignored the actual contamination and failed to investigate it prior to denying coverage.

97. NF Eye Care suffered a covered loss of business income due to contamination of the Covered Property.

98. Erie's failure to investigate and denial of coverage was a breach of its coverage obligations under the Policy.

99. NF Eye Care suffered a covered loss of business income due to the Stay At Home Orders

100. NF Eye Care has incurred Extra Expenses to operate and mitigate its loss of business income since resuming its operations following the end of the Stay At Home Orders.

101. NF Eye Care has not been able to resume its operations without restriction similar to its operations prior to the imposition of the Stay At Home Orders.

102. As a direct and proximate result of Erie's breach of the Policy, NF Eye care has sustained damages for which Erie is liable, in an amount to be established at trial.

**WHEREFORE**, Steven A. Udesky OD and Associates P.C. d/b/a Northbrook Family Eye Care respectfully requests that judgment be entered in its favor and against Erie for breach of contract and for any loss and expenses arising from or incurred in connection with this lawsuit and for such other relief as this Court deems just.

## **Count II**

### **Breach of Contract- Extra Expenses Loss Under the SeniorWell Contract Due to COVID-19 Contamination**

103. NF Eye Care repeats and realleges the allegations of paragraphs 1 through 102 as the allegations of this paragraph 103.

104. The Policy also contains an Offices Enhancements Endorsement for Business Income and Extra Expense At Client of Virtual Office Premises, which stated:

We will pay up to \$25,000 for your loss of “income” and “extra expense” you sustain due to partial or total “interruption of business” resulting from the interruption of your business activities at a “client or virtual office premises.” The interruption of business” must result directly from loss or damage to property at a “client or virtual office premises...

105. The Policy provides insurance coverage for “Extra Expense” defined as:

“Extra expense” means necessary expenses you incur 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. “Loss” or damage also includes property in the open, or in a vehicle, on the premises described in the “Declarations” or within 1,500 feet thereof.

We will pay necessary actual and necessary “extra expenses” (other than the expense to repair or replace property) sustained by you to:

Avoid or minimize the “interruption of business” and to continue your business operations:

- a. At the premises described in the “Declarations”; or
- b. At replacement premises or at temporary locations; including:
  - i. Relocation expenses; and
  - ii. Costs to equip and operate the replacement or temporary locations

Minimize the “interruption of business” if you cannot continue your business operations to the extent it reduces the amount of loss that would have been payable under loss of “income” and/or “rental income.”

106. NF Eye Care, as part of its contract with SeniorWell, was required to conduct in-service optometry examinations and treatment to the residents of SeniorWell’s client facilities one day per week for compensation equal to thirty percent (30%) of NF Eye Care’s collected billings.

107. From March 19, 2020 through May 3, 2020, when SeniorWell terminated its contract with NF Eye Care, NF Eye Care directly suffered an interruption of business covered under the Policy. In particular, it was prevented from performing services pursuant to the



SeniorWell contract because it was not permitted access to its client's offices as a consequence of orders entered by public health officials.

108. From March 19, 2020 through May 3, 2020, NF Eye Care suffered a loss of business income stemming from its inability to perform services through its contract with SeniorWell which is an interruption of business activities at a client or virtual office premises.

109. The Policy provides coverage for actual loss of business income sustained by NF Eye Care and for the necessary Extra Expenses incurred when NF Eye Care's operations were suspended due to the physical loss or damage from contamination.

110. NF Eye Care complied with all applicable provisions of the Policy.

111. Erie has breached its obligation to pay for the loss NF Eye Care has incurred in the form of Extra Expenses expended to mitigate its business income interruption losses.

112. Erie has breached its obligations to NF Eye Care by failing to cover the business income loss sustained by NF Eye Care in connection with the suspension of services provided by NF Eye Care under the SeniorWell contract.

113. As a direct and proximate result of Erie's breaches of the Policy, NF Eye Care has sustained damages for which Erie is liable, in an amount to be established at trial.

**WHEREFORE**, Steven A. Udesky OD and Associates P.C. d/b/a Northbrook Family Eye Care respectfully requests that judgment be entered in its favor and against Erie for breach of contract and for any loss and expenses arising from or incurred in connection with this lawsuit and for such other relief as this Court deems just.

**Count III**

**Breach of Contract-Civil Order**

114. NF Eye Care repeats and realleges the allegations of paragraphs 1 through 113 as the allegations of this paragraph 114.

115. Illinois civil authorities, based on the presence of the wide spread of COVID-19, precluded businesses from operating at their properties except subject to substantial limitations.

116. On March 20, 2020, Illinois Governor J.B. Pritzker issued the Stay at Home Order requiring, with limited exceptions, “all individuals currently living within the State of Illinois are ordered to stay at home or at their place of residence.”

117. On April 1, 2020, Illinois Governor J.B. Pritzker issued Executive Order No. 18 which reauthorized the Stay At Home Order for a period of 30 days from April 1, 2020 through April 30, 2020.

118. The Illinois Stay At Home Orders were issued in direct response to the dangerous physical conditions caused by the coronavirus pandemic.

119. As a consequence of the Stay At Home Orders businesses were restricted access to the properties within one mile from the Covered Property except for the performance or receipt of essential services.

120. The Stay At Home Orders prevented NF Eye Care from the Covered Property’s intended use resulting in a direct physical loss of the Covered Property.

121. NF Eye Care complied with all applicable provisions of the Policy, including payment of its premiums in exchange for coverage under the Policy, yet Erie abrogated its insurance coverage obligations.

122. NF Eye Care sustained a covered cause of loss resulting from a decision of a person or governmental body.

123. From March 17, 2020 through May 11, 2020, NF Eye Care suffered a loss of business income as a consequence of the civil authority orders preventing it from use of the Covered Property for its intended use.

124. From March 20, 2020 through May 11, 2020, NF Eye Care suffered loss of business income and extra expense with its loss of income from the SeniorWell Contract.

125. Erie has breached its coverage obligations under the Policy by denying NF Eye Care's claims.

126. As a direct and Proximate result of Erie's breaches of the Policy, NF Eye Care sustained damages for which Erie is liable, in an amount to be established at trial.

**WHEREFORE**, Steven A. Udesky OD and Associates P.C. d/b/a Northbrook Family Eye Care respectfully requests that judgment be entered in its favor and against Erie for breach of contract and for any loss and expenses arising from or incurred in connection with this lawsuit and for such other relief as this Court deems just.

#### **Count IV**

##### **Statutory Penalty for Bad Faith Denial of Insurance Under 215 ILCS 5/155**

127. NF Eye Care repeats and realleges the allegations of paragraphs 1 through 126 as the allegations of paragraph 127.

128. The loss of physical use of the Covered Property due to contamination from the Coronavirus was covered under the Policy.

129. Pursuant to 215 ILCS 5/155, in any action by or against an insurance company in which there is a finding that the insurance company acted in a vexatious and unreasonable

manner in the settlement of the claim, the Court may award a statutory penalty as well as the reasonable attorney's fees and costs incurred by the insured to prosecute its claim against the insurance company.

130. Upon receipt of a claim, Erie was required to conduct a "reasonable investigation based on all available information" as required under Illinois law. See 215 ILCS 5/154.6.

131. NF Eye Care made its initial claim on March 17, 2020, and later informed Erie of contamination of the Covered Property due to an employee's March 19, 2020 COVID-19 diagnosis.

132. On March 25, 2020, Erie sent NF Eye Care a letter stating "This letter is in reference to the above captioned claim which was reported to Erie Insurance Exchange on March 17, 2020 seeking coverage under a policy issued to "The Burger Bar, Inc." See Ex. 1.

133. Erie's March 25, 2020 cut and paste letter to the Burger Bar instead of to NF Eye Care indicates that Erie decided to treat business interruption claims from COVID-19 *en masse* without addressing the particulars of each claim.

134. Erie provided a form for NF Eye Care to fill out to provide additional information regarding the claim for loss or damage. In response, NF Eye Care informed Erie that on March 19, 2020, after an employee tested positive for COVID-19, NF Eye Care had to immediately shut down and therefore suffered a loss of property due to closure for contamination. See Ex. 3. However, the form provided by Erie was a ruse as it did not actually intend to give consideration to the information submitted by its insured nor did it give consideration to the information supplied by its insured.

135. On May 29, 2020, Erie sent another form letter stating "During the conversation on May 7, 2020, you explained that your business experienced an interruption due to the

mandatory government shut down. We regret to inform you that there is no coverage for your loss of income because there is no direct physical loss to your building or business personal property.” *See* Ex. 4.

136. The letters from Erie dated March 25, 2020 and the denial letter issued by Erie on May 29, 2020, reflected a total disregard for the information provided to it by NF Eye Care and a lack of investigation into the direct physical loss of and damage to the Covered Property due to contamination. The actions undertaken by Erie including its request for information were part of a course of conduct undertaken by the insurer to conceal its blanket denials and lack of investigation.

137. Erie’s denial of coverage was a breach of the Policy and was committed in bad faith.

138. Erie’s conduct with respect to NF Eye Care’s claims for coverage was and continues to be unreasonable and vexatious by refusing to reimburse NF Eye Care for covered losses under the Policy without proper justification and without reasonable investigation.

139. Therefore, NF Eye Care requests that the Court enter judgment in favor of NF Eye Care and against Erie in an amount equal to the attorneys’ fees and costs incurred by NF Eye Care for the prosecution of this coverage action against Erie, which amount will be proved at or after trial, pursuant to 215 ILCS 5/155.

**WHEREFORE**, Steven A. Udesky OD and Associates P.C. d/b/a Northbrook Family Eye Care requests, pursuant to 215 ILCS 5/155, that in addition to entering a judgment in favor of it and against Erie for the amount owed under the Policy at the time of judgment, the Court enter a judgment in favor of NF Eye Care and against Erie for an amount equal to the greater of

(1) 60% of the amount which the trier of fact finds that NF Eye Care is entitled to recover under the Policy, exclusive of costs; and (2) \$60,000. See 215 ILCS 5/155.

**JURY TRIAL DEMAND**

Steven A Udesky OD and Associates P.C. d/b/a Northbrook Family Eye Care demands a trial by jury in the above-captioned action pursuant to Federal Rule of Civil Procedure 38(b).

Respectfully submitted,

Northbrook Family Eye Care, Steven A.  
Udesky OD and Associates P.C.

By: /s/ David B. Goodman  
One of the Attorneys for Plaintiff

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