

**COMMONWEALTH OF KENTUCKY
McCRACKEN CIRCUIT COURT
DIVISION ____
CASE NO. _____**

**YIDDLE MISTER BILL D/B/A
CYNTHIA'S RISTORANTE,**
125 Market House Square
Paducah, KY 42001

Plaintiff,

v.

**THE CINCINNATI INSURANCE
COMPANY,**

Serve: Steve Corbly
Registered Agent
Cincinnati, OH 45250-5496

**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 a claim for the loss of business income which was sustained by a restaurant 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. Plaintiff’s insurance company, the Defendant, The Cincinnati Insurance Company (CIC or the insurance company), denied the claim. See Exhibit 1.

II. PARTIES

3. The Plaintiff, Yiddle Mister Bill d/b/a Cynthia’s Ristorante, operates a restaurant in Paducah, Kentucky.

4. The Defendant, The Cincinnati Insurance Company (CIC or the insurance company), is an insurer based in Cincinnati, Ohio. It issued business insurance policies throughout the Commonwealth of Kentucky through appointed agents who regularly sell policies in 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 effect and the legal interpretation of their order is sought in this action. The Defendant CIC claims that when the Kentucky Defendants entered the order, Exhibit 2 attached, there was “no evidence that the order was entered because of direct damage to property at

other locations or dangerous physical conditions at other locations”. 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 Paducah, McCracken County, Kentucky. 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 INSURANCE POLICY

6. 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 CIC. This declaratory judgment action may have wide-ranging implications with respect to a large number of insureds in the Commonwealth of Kentucky.

7. The policy provides coverage for loss of business income arising from an interruption of the Plaintiff’s business caused by an order from a civil authority. The precise language is as follows:

We will pay for the actual loss of “Business Income” you sustain and “Extra Expense” you incur caused by action of civil authority that prohibits access to the “premises” due to direct physical “loss” to property, other than at the “premises”, caused by or resulting from any Covered Cause of Loss.

This coverage will apply for a period of up to 30 consecutive days from the date of that action.

8. Additionally, the policy provides separate civil authority coverage:

We will pay for the actual loss of Business Income you sustain and necessary Extra Expenses caused by action of civil authority that

prohibits access to the “premises” due to direct physical “loss” to property, other than at the “premises”, caused by or resulting from any Covered Cause of Loss.

This coverage for Extra Expense will begin immediately after the tie of that action and will end:

- (1) 30 consecutive days after the time of that action; or
- (2) When your Business Income coverage ends;

whichever is later.

9. CIC denied coverage under the terms of the policy for several reasons including the fact that the policy had a “pollution exclusion”. CIC’s reliance on the pollution exclusion is evidence of bad faith on the part of CIC because CIC knew and understood at the time it relied on the pollution exclusion that was not a virus exclusion. CIC knew that because it has included a specific virus exclusion in other policies but did not include a specific virus exclusion in the Plaintiff’s policy.

10. Further CIC denied coverage claiming that “there is no evidence that the order was entered because of direct damage to property at other locations or dangerous physical conditions at other locations”. At the time CIC denied coverage for this reason CIC was fully aware that the COVID-19 virus was an airborne virus that existed in the atmosphere and settled on surfaces throughout the United States and throughout the Commonwealth of Kentucky, and that such virus was capable of causing dangerous physical conditions, including death. CIC further knew that there were a large number of legal authorities (also known as case law) which held that property damage need not be visible, physical destruction of property. Additionally, at the time CIC denied coverage it knew of the existence of the order entered by the Kentucky Defendants on March 16, 2020, and knew that order was based upon substantial evidence of the widespread

presence of the virus throughout the Commonwealth of Kentucky and that the virus constituted a dangerous physical condition and, in some cases, a deadly condition.

11. In summary, at the time CIC denied coverage CIC was well 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;
- There was evidence of a widespread presence of the virus throughout the Commonwealth of Kentucky and in Paducah, Kentucky, and there was evidence that the presence of the virus constituted a dangerous physical condition; and
- CIC has placed virus exclusions in other policies but there was no virus exclusion in the Plaintiff’s policy.

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

12. 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, including no less than 63 cases in McCracken County, Kentucky.

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

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

V. DECLARATORY JUDGMENT – THE ISSUES

15. 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.

16. 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;
- 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;
- Whether the insurance company can rely upon a "pollution exclusion" to exclude coverage for an airborne virus, when a specific "virus exclusion" that appears in other CIC policies does NOT appear as an exclusion in the Plaintiff's policy.

17. 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.

VI. DAMAGES

18. 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.

19. The policy issued by the Defendant CIC 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.

20. 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 CIC, 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 8th day of May 2020.

Respectfully submitted,

/s/ Mark P. Bryant

Mark P. Bryant
BRYANT LAW CENTER
601 Washington Street
Paducah, KY 42003
Tel: 270-442-1422
Fax: 270-443-8788
Email: *mark.bryant@bryantpsc.com*

Ronald R. Parry (53750)
STRAUSS TROY
150 East Fourth Street, 4th Floor
Cincinnati, OH 45202
Tel: (513) 621-2120
Fax: (513) 241-8259
rrparry@strausstroy.com

Subject to pro hac vice admission:

Calvin Fayard
FAYARD & HONEYCUTT
519 Florida Ave. SW
Denham Springs, LA 70726
Tel: 225-664-0304
Fax: 225-664-2010
Email: *calvinfayard@fayardlaw.com*

Attorneys for Plaintiff