

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA
CENTRAL DIVISION**

ORAL SURGEONS, P.C.,)	
)	
Plaintiff,)	Case No. <u>4:20-cv-222</u>
)	
v.)	Judge _____
)	
THE CINCINNATI INSURANCE)	
COMPANY,)	
)	
Defendant.)	

NOTICE OF REMOVAL

Defendant THE CINCINNATI INSURANCE COMPANY (“Cincinnati”), pursuant to 28 U.S.C. §1446, hereby removes the above-captioned action, pending in the Iowa District Court for Polk County as Case No. 05771 LACL148059 to the United States District Court for the Southern District of Iowa, Central Division. Removal is based upon 28 U.S.C. § 1332. As grounds for removal, Cincinnati states as follows:

1. Plaintiff ORAL SURGEONS P.C. (“Oral Surgeons”) filed a Petition against Cincinnati in the Iowa District Court for Polk County under Case No. 05771 LACL148059 (the “State Court Case”).

2. Oral Surgeons seeks a declaratory judgment in relation to insurance coverage afforded by Cincinnati policy number ECP 0365736 issued to Oral Surgeons, including relief for “all compensatory damages, including all forms of loss resulting from Cincinnati’s breach of duty, such as additional costs, losses due to nonpayment of the amount Cincinnati owes, and other direct and consequential damages, as well as exemplary damages.” Petition, paragraph 51. A true copy of the State Court Case Petition and proof of service are attached hereto as **Exhibit 1**.

3. The policy contains coverage limits in excess of \$75,000.

4. There is complete diversity of citizenship among the parties.

5. Oral Surgeons is an Iowa professional corporation headquartered in Des Moines, Iowa and, therefore, is a citizen of the State of Iowa for purposes of diversity jurisdiction.

6. Cincinnati is an Ohio corporation headquartered in Fairfield, Ohio and, therefore, is a citizen of the state of Ohio for purposes of diversity jurisdiction.

7. Pursuant to 28 U.S.C. § 1332, the District Courts have jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of \$75,000, exclusive of interest and costs, and is between citizens of different States.

8. This Court possesses removal jurisdiction under 28 U.S.C. §1441, which permits removal of cases to federal court based on diversity of citizenship.

9. Cincinnati accepted service of the State Court Case on June 18, 2020.

10. As such this notice is being filed with the U.S. District Court for the Southern District of Iowa within 30 days of determining that the case was removable to this Court. *See* 28 U.S.C. §1446(b).

11. This Court is situated in the district and division serving the location of the action pursuant to 28 U.S.C. §1446(a).

12. Defendant will also file its “Notice of Removal to Federal Court” with the Iowa District Court for Polk County and then serve a copy upon Plaintiff’s counsel pursuant to 28 U.S.C. §1446(a) and (d).

CERTIFICATE OF COMPLIANCE WITH LOCAL RULE 81

13. Pursuant to Local Rule 81, Cincinnati certifies the following:

- a. Copies of all process, pleadings, and orders filed in the State Court Action are attached hereto as Exhibit 1.

- b. No matters are pending in the State Court Action that will require resolution by this Court, other than the lawsuit that is the subject of this Notice of Removal.
- c. The names of the counsel and the law firm that has appeared for Plaintiff Oral Surgeons in the State Court Action are as follows:

Randy J. Wilharber
Tyler S. Smith
PEDDICORD WHARTON, LLP
6800 Lake Drive, Suite 125
West Des Moines, Iowa 50266
Phone: (515) 243-2132
Email: randy@peddicord.law
Email: tyler@peddicord.law

WHEREFORE, this Action should proceed in the United States District Court for the Southern District of Iowa, Central Division, as an action properly removed thereto.

DATED: July 16, 2020

LANE & WATERMAN LLP

By: /s/ Robert V.P. Waterman, Jr
Robert V.P. Waterman, Jr.
220 North Main Street, Suite 600
Davenport, Iowa 52801
Tel: 563.333.6618
Fax: 563.324.1616
Email: bwaterman@L-WLaw.com
**ATTORNEYS FOR THE
CINCINNATI INSURANCE COMPANY**

CERTIFICATE OF SERVICE

The undersigned certifies under penalty of perjury that on July 16, 2020, the foregoing instrument was served via email upon Plaintiff's counsel of record as follows:

Randy J. Wilharber Email: randy@peddicord.law
Tyler S. Smith Email: tyler@peddicord.law

/s/ Robert V.P. Waterman, Jr.

IN THE IOWA DISTRICT COURT IN AND FOR POLK COUNTY

ORAL SURGEONS, P.C.,	:	
	:	
Plaintiff,	:	Case No.: _____
	:	
vs.	:	PETITION AT LAW and JURY
	:	DEMAND
THE CINCINNATI INSURANCE CO.,	:	
	:	
Defendant.	:	
	:	

COMES NOW, the Plaintiff, Oral Surgeons, P.C., by and through their attorneys, Peddicord Wharton, L.L.P., and for their Petition at Law and Jury Demand, hereby state the following:

PARTIES

1. Plaintiff Oral Surgeons, P.C. (“OSPC”) is an Iowa professional corporation doing business in Polk County, Iowa.
2. Defendant The Cincinnati Insurance Company (“Cincinnati”) is an Ohio Corporation, engaged in the business of insurance in the State of Iowa.

JURISDICTION AND VENUE

3. Jurisdiction is proper in this Court as the requested relief exceeds the jurisdictional limits of small claims, and pursuant to Iowa Code § 602.6101 this Court has general authority to grant declaratory and all relief requested by OSPC.
4. This Court has personal jurisdiction over Cincinnati pursuant to the Iowa long arm statute as Cincinnati has submitted to jurisdiction in this state by transacting business in Iowa, including: (a) making and issuing an insurance contract with OSPC, among others, similar to OSPC; (b) taking or receiving applications for insurance from Iowa residents including OSPC, among others, similar to OSPC.; (c) collecting premium payments from OSPC, among others, similar to OSPC; and (d) issuing contracts of insurance to residents of Iowa, including OSPC.
5. Venue is proper in this Court pursuant to Iowa Code Chapter §616.10, as the insurance policy purchased by O.S.P.C. and underwritten by Cincinnati is to be primarily enforced in Polk County, Iowa.

FACTUAL BACKGROUND PERTAINING TO ALL COUNTS

6. OSPC performs oral and maxillofacial surgery services across the greater Des Moines metropolitan area. OSPC serves the public through four offices locations in Des Moines, Clive and Ankeny.

7. OSPC was forced to cease all “non-emergency” patient services, causing physical damage or loss of property to OSPC, resulting from the emergence of the coronavirus COVID-19 global pandemic.

8. In an effort to slow the spread of the novel coronavirus COVID-19, the State of Iowa issued a Proclamation of Disaster Emergency on or about March 26, 2020 (the “Order”), which in part, restricted dentists, including practitioners of OSPC, from performing any dental procedures other than in emergent cases. The Order remained in effect through May 8, 2020, which thereafter the State of Iowa allowed for the re-opening of dental facilities and practices upon adherence to the *Guidelines for the Safe Transition Back to Practice* as adopted by the Iowa Dental Board. The imposed restrictions were of no-fault on the part of OSPC.

9. The limitations caused by the physical damage or loss of the novel coronavirus COVID-19, as enforced by the Order and subsequent mandates, present an actual threat of harm to OSPC and other small, local businesses that employ Iowa residents.

10. To protect its business from situations like these, which threaten the livelihoods of OSPC personnel due to factors outside of its control, OSPC obtained business interruption insurance from Cincinnati.

11. In substantial and material breach of its coverage obligations it undertook in exchange for premiums paid by OSPC, Cincinnati has indicated OSPC’s claims arising from the interruption of its business resulting from the coronavirus, and the State of Iowa’s response thereto, will be denied.

12. OSPC brings this action to ensure payment of the benefits of the All-Risk Commercial Business Owner’s Policy issued to OSPC, which provides for coverage of losses incurred due to a “necessary suspension” of its operations, which includes the closure of services due to the coronavirus COVID-19 pandemic and resultant Order by the State of Iowa.

13. Cincinnati, in exchange for substantial premiums from OSPC, sold a commercial policy (“Policy”) to OSPC, in which Cincinnati promised to indemnify OSPC against losses resulting from occurrences leading to the suspension of operations at any insured location.

14. The Policy is considered “all risk” in that it provides broad coverage for losses caused by any occurrence not otherwise explicitly excluded.

15. The Policy includes coverage for loss of business income and extra expenses resulting from action of civil authority which serves to prohibit access to the premises due to “loss” to property.

16. OSPC is covered under Cincinnati Policy ECP0365736 with effective dates commencing January 1, 2019 and terminating on January 1, 2022. The Policy was in full force and effect during the relevant period of March 26, 2020 – May 8, 2020.

17. In April 2020, OSPC, through its broker, the Dana Company, provided a notice of claim under the Policy to Cincinnati.

18. That on April 15, 2020, Cincinnati submitted a reservation of rights letter to OSPC, which indicated Cincinnati’s position of no coverage. In the letter, Cincinnati states in part:

At the threshold, there must be direct physical loss or damage to Covered Property caused by a covered cause of loss in order for the claim to be covered. Covered Property generally entails your premises and business personal property direct physical loss or damage generally means a physical effect on Covered Property, such as deformation, permanent change in physical appearance or other manifestation of a physical effect. Your Notice of Claim indicates your claim involves Coronavirus. However, the fact of the pandemic, without more, is not direct physical loss or damage to property at the premises.

19. The above statement from Cincinnati, while not a formal denial of coverage, is clear in intention. Cincinnati does not intend to provide coverage under its Policy to OSPC.

20. At all times relevant hereto, OSPC intended to purchase, and did in fact purchase, an exclusionary policy, intending to cover, among other things, all business interruptions caused by an event other than those specifically excluded in the Policy. The conclusory opinion from Cincinnati that the coronavirus Covid-19 does not constitute direct physical damage, is not supported by the Policy, nor the facts.

21. Direct physical loss may exist without actual structural damage to property. By way of example, the presence of harmful substances at or on a property may constitute property damage or direct physical loss implicating first party property damage. At a minimum, Plaintiff suffered a physical loss of the covered property as a result of the coronavirus Covid-19 and the resultant Order and actions taken by the State of Iowa to limit the impact of the global pandemic.

22. OSPC suffered a loss of use of Covered Property because OSPC was unable to operate and use its facilities for patient services.

23. The Policy sold by Cincinnati does not include an exclusion for loss caused by a virus. The Policy contains rule and exclusions regarding bacteria, however, it is widely known and understood that a virus is not a bacterium.

24. OSPC reasonably believed and expected that the insurance purchased from Cincinnati would include coverage for property damage and business interruption losses caused by viruses like the Coronavirus Covid-19.

25. Had Cincinnati desired to exclude pandemic losses under the Policy, Cincinnati had an affirmative obligation to do so with an express exclusion.

COUNT I
DECLARATORY JUDGMENT
(AS AGAINST THE CINCINNATI INSURANCE COMPANY PURSUANT TO IOWA RULE OF
CIVIL PROCEDURE 1.1101)

26. OSPC restates and re-alleges all of the above paragraphs as though fully set forth herein.

27. OSPC claims damages that are covered under the business interruption and loss of income Policy issued by Cincinnati.

28. OSPC was forced to close its premises or substantially reduce its business due to the Coronavirus Covid-19, and measures put in place by civil authorities to stop the spread of the coronavirus Covid-19, specifically through human to human and surface to human contact.

29. OSPC contends that such measures trigger coverage under the all-risk Policy because the Policy does not include an exclusion for a viral pandemic.

30. OSPC further contends the civil authority order triggers coverage under the all-risk Policy because there was direct loss of property.

31. Upon information and belief, Cincinnati denies and disputes that the standard business income loss and extra expense coverage Policy provides coverage in this instance.

32. OSPC seeks a declaration that the Policy is an all-risk commercial insurance policy and that it provides coverage for business income losses and extra expenses.

33. OSPC further seeks a declaration that the forced closures of its premises due to State and local authority Orders is a prohibition of access to their premises and covered as defined in the Policy.

34. OSPC further seeks a declaration by this Court that OSPC sustained a "direct loss to property" because of the coronavirus Covid-19 and the Order issued by the State of Iowa.

35. OSPC seeks an additional declaration that the lost business income it sustained and continues to sustain is due to the necessary "suspension of operations" following a loss of the premises. The declaration sought by OSPC is of a justiciable nature, does not amount to an advisory decree, and will settle the controversy between the parties.

COUNT II
BREACH OF CONTRACT
(AS AGAINST THE CINCINNATI INSURANCE COMPANY)

36. OSPC restates and re-alleges all of the above paragraphs as though fully set forth herein.

37. OSPC and Cincinnati have a valid and binding agreement. OSPC has an all-risk Commercial Insurance Policy Number ECP0365736 issued by Cincinnati.

38. OSPC has performed all of its obligations as specified by the Policy, including the payments of all premiums when due.

39. The Policy provides for coverage for losses to business income and for extra expenses.

40. The Policy provides that Cincinnati will pay for the actual loss of business income due to the necessary suspension of operations.

41. The Policy provides that Cincinnati will pay for any necessary expenses that OSPC incurs that would have not have occurred had there been no loss of the insured property.

42. OSPC's Policy provides for coverage for suspension of business operations due to closures caused by the action of civil authorities.

43. Upon information and belief, Cincinnati intends to refuse performance under the Policy. Specifically, Cincinnati intends to deny or refuse to provide coverage for loss of property, business income losses or extra expenses incurred due to measures put in place by civil authorities resulting from the coronavirus Covid-19.

44. As a result of Cincinnati's anticipatory breach of the Policy, OSPC has suffered actual damages.

45. OSPC seeks compensatory damages resulting from Cincinnati's repudiation or anticipatory breach of contract, and further seeks relief deemed appropriate by this Court, including attorney's fees and costs.

COUNT III
CONDUCT OF BAD FAITH

46. OSPC restates and re-alleges all of the above paragraphs as though fully set forth herein.

47. Prior to April 15, 2020, Cincinnati failed to make any investigation of the claim presented by OSPC.

48. By immediately refusing coverage via its issued correspondence of April 15, 2020, Cincinnati is attempting to vary the term "loss" by claiming that the coronavirus Covid-19 does not result in direct property loss.

49. Cincinnati's conduct amounts to a "blanket" denial of all pandemic related business interruption claims. Cincinnati's reservation of rights anticipated denial of coverage is unreasonable and reflects a failure to adequately and reasonably investigate OSPC's claim.

50. Cincinnati knew, or should have known by the exercise of reasonable diligence or investigation, that its liability under the Policy was reasonably identifiable and clear under the circumstances.

51. OSPC is entitled, to all compensatory damages, including all forms of loss resulting from Cincinnati's breach of duty, such as additional costs, losses due to nonpayment of the amount Cincinnati owes, and other direct and consequential damages, as well as exemplary damages.

WHEREFORE, the Plaintiff, Oral Surgeons, P.C., respectfully requests the Court enter a judgment in favor of OSPC, and against the Defendant, The Cincinnati Insurance Company, including the following reliefs:

- a. That declaratory judgment be entered in Plaintiff's favor as stated herein;
- b. Judgment for all actual, consequential and special damages, as well as exemplary damages,

c. Attorney's fees, court costs, and all other such relief as the Court deems just and proper.

JURY DEMAND

COMES NOW, the Plaintiff, Oral Surgeons, P.C., and hereby requests trial by jury on all issues within cause of action.

PEDDICORD WHARTON, LLP

/s/ *Randy J. Wilharber*

Randy J. Wilharber AT0008505

Tyler S. Smith AT0013124

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ATTORNEYS FOR PLAINTIFF

PROOF OF SERVICE

The undersigned certifies that the foregoing document was electronically filed with the Court on **June 11, 2020**, using the CM/ECF system and served to the parties listed below by electronic means through the ECF system.

Signed: /s/ Brooke Trimble