

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28
29
30
31
32
33
34
35
36
37
38
39
40
41
42
43
44
45

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON AT SEATTLE

HOT YOGA, INC., a Washington
corporation,

Plaintiff,

v.

PHILADELPHIA INDEMNITY
INSURANCE COMPANY, a Pennsylvania
corporation,

Defendant.

NO.

COMPLAINT

JURY DEMAND

I. INTRODUCTION

Plaintiff Hot Yoga, Inc., (“Hot Yoga”) by and through the undersigned attorneys, brings this complaint against Philadelphia Indemnity Insurance Company (“Philadelphia Indemnity”), and alleges as follows:

II. JURISDICTION AND VENUE

1. This Court has subject matter jurisdiction under 28 U.S.C. § 1332. The amount in controversy exceeds \$75,000, exclusive of interest and costs. This action involves citizens of

1 7. Defendant Philadelphia Indemnity is a Pennsylvania corporation authorized to
2
3 write, sell, and issue business insurance policies in Washington.
4

5 8. Philadelphia Indemnity wrote, sold, and issued its insurance to Hot Yoga in King
6
7 County, Washington.
8

9 **IV. NATURE OF THE CASE**

10
11 9. This lawsuit is filed to ensure Hot Yoga receives the insurance benefits to which it
12
13 is entitled and for which it paid.
14

15 10. Philadelphia Indemnity issued a commercial lines policy to Hot Yoga, effective
16
17 December 20, 2019 through December 20, 2020, under Policy Number PHPK2056526, which,
18
19 upon information and belief, has been extended for a new policy period ending December 20,
20
21 2021, under Policy Number PHPK2204079 (the “Policy”).
22

23 11. By this action, Hot Yoga seeks all benefits due and payable under the Policy.
24

25 12. Hot Yoga paid all premiums for the coverage when due.
26

27 13. Philadelphia Indemnity issued the Policy in Washington covering property
28
29 situated in King County and Snohomish County Washington.
30

31 14. The property covered by the Policy is owned and/or leased by Hot Yoga and is
32
33 used for general business purposes; specifically, the practices of yoga and hot yoga along with
34
35 related business activities.
36

37 15. Under the Policy, Philadelphia Indemnity promised to provide coverage for risks
38
39 of both “loss of” and “damage to” “Covered Property”:
40

41 **A. Coverage**

42 We will pay for direct physical loss of or damage to
43 Covered Property at the premises described in the
44 Declarations caused by or resulting from any
45 Covered Cause of Loss.

1 16. The “Covered Property” includes certain real and personal property located on
2
3 Hot Yoga’s premises as provided and identified in the Policy.
4

5 17. The Policy includes a “Business Income (and Extra Expense) Coverage Form,”
6
7 which includes coverage for risks of both “loss of” and “damage to” Hot Yoga’s locations:
8

9 We will pay for the actual loss of Business
10 Income you sustain due to the necessary
11 "suspension" of your "operations" during the
12 "period of restoration". The "suspension" must
13 be caused by direct physical loss of or damage
14 to property at premises which are described in
15 the Declarations and for which a Business
16 Income Limit Of Insurance is shown in the
17 Declarations. The loss or damage must be
18 caused by or result from a Covered Cause of
19 Loss. With respect to loss of or damage to
20 personal property in the open or personal
21 property in a vehicle, the described premises
22 include the area within 100 feet of such
23 premises.

24 18. The “Business Income (and Extra Expense) Coverage Form” includes a promise
25
26 to pay the extra expenses that would not have been incurred had there been no loss and an
27
28 additional coverage for business income and extra expenses under “civil authority.”
29

30 19. The Policy also included a coverage extension, the “Elite Property Enhancement:
31
32 Health & Fitness Clubs,” specifically to extend the coverage afforded “to cover ‘Business
33
34 Income’/‘Extra Expense’ incurred when your covered building or business personal property
35
36 listed on the Declarations is damaged by a Covered Cause of Loss.”
37

38 20. “Business Income” is defined in the Policy as the net income that would have
39
40 been earned or incurred and continuing normal operating expense incurred, including payroll.
41
42
43
44
45

1 21. "Suspension" is defined as (a) "[t]he slowdown or cessation of your business
2 activities;" or (b) "[t]hat part or all of the described premises is rendered untenable, if coverage
3 for Business Income Including 'Rental Value' or 'Rental Value' applies."
4
5

6
7 22. The Policy includes an endorsement entitled "Exclusion of Loss Duty to Virus or
8 Bacteria." This endorsement provides:
9

10
11 COMMERCIAL PROPERTY
12 CP 01 40 07 06

13 THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

14 **EXCLUSION OF LOSS DUE TO VIRUS OR BACTERIA**

15 This endorsement modifies insurance provided under the following:

16
17 COMMERCIAL PROPERTY COVERAGE PART
18 STANDARD PROPERTY POLICY

- 19 A. The exclusion set forth in Paragraph B. applies to all coverage under all forms and endorsements that comprise this Coverage Part or Policy, including but not limited to forms or endorsements that cover property damage to buildings or personal property and forms or endorsements that cover business income, extra expense or action of civil authority.
- 20 B. We will not pay for loss or damage caused by or resulting from any virus, bacterium or other micro-organism that induces or is capable of inducing physical distress, illness or disease.
21 However, this exclusion does not apply to loss or damage caused by or resulting from "fungus", wet rot or dry rot. Such loss or damage is addressed in a separate exclusion in this Coverage Part or Policy.
- 22 C. With respect to any loss or damage subject to the exclusion in Paragraph B., such exclusion supersedes any exclusion relating to "pollutants".
- 23 D. The following provisions in this Coverage Part or Policy are hereby amended to remove reference to bacteria:
 - 24 1. Exclusion of "Fungus", Wet Rot, Dry Rot And Bacteria; and
 - 25 2. Additional Coverage – Limited Coverage for "Fungus", Wet Rot, Dry Rot And Bacteria, including any endorsement increasing the scope or amount of coverage.
- 26 E. The terms of the exclusion in Paragraph B., or the inapplicability of this exclusion to a particular loss, do not serve to create coverage for any loss that would otherwise be excluded under this Coverage Part or Policy.

27
28 23. On or about January 2020, the United States of America saw its first cases of
29 persons infected by COVID-19, which has been designated a worldwide pandemic.
30

31 24. The first confirmed case of COVID-19 in King County, Washington was noted on
32 January 21, 2020.¹
33
34

35
36
37
38
39 ¹ See <https://www.kiro7.com/news/local/coronavirus-washington-state-timeline-outbreak/IM65JK66N5BYTIAPZ3FUZSKMUE/>.

1 25. COVID-19 is a highly contagious virus that rapidly and easily spreads; it
2
3 continues to spread across the United States including in Washington State.
4

5 26. COVID-19 is a novel (new) coronavirus that has not previously been seen in
6
7 humans.
8

9 27. The COVID-19 virus is a physical substance that spreads from person to person
10
11 through respiratory droplets that reach another person and that are produced when an infected
12
13 person breaths, talks, coughs or sneezes. It also spreads when respiratory droplets are exhaled
14
15 and aerosolized, and deposited on a surface or object (e.g., furniture, equipment, instruments,
16
17 tables, door knobs, chairs, touch screens, to name merely a few) and those objects are then
18
19 touched by another person who then touches their own mouth, nose or eyes. COVID-19 remains
20
21 stable and transmittable in aerosols for up to three hours and up to two or three days on certain
22
23 surfaces. Persons infected with COVID-19 can be asymptomatic. COVID-19 is spread by
24
25 breathing, talking, singing, and touching shared or common objects or surfaces.
26

27 28. Guidance issued by the United States Centers for Disease Control and Prevention
28
29 (“CDC”) recommends avoiding indoor activities and generally maintaining social distance of at
30
31 least six feet between people, to slow or stop the spread of COVID-19.²
32

33 29. On February 29, 2020, Washington Governor Jay Inslee issued Proclamation 20-
34
35 05, declaring a State of Emergency for all counties in Washington as the result of the COVID-19
36
37 outbreak. Thereafter, he issued a series of certain proclamations and orders affecting many
38
39
40
41
42

43
44 ² See *Coronavirus Disease 2019 (COVID-19): Personal and Social Activities*, CDC (last visited 1/12/2021),
45 <https://www.cdc.gov/coronavirus/2019-ncov/daily-life-coping/personal-social-activities.html>.

1 persons and businesses in Washington, whether infected with or contaminated by COVID-19 or
2
3 not, requiring certain public health precautions.
4

5 30. On March 11, 2020, Governor Inslee issued Proclamation 20-07, which states that
6
7 “to help preserve and maintain life, health, property or the public peace,” all gatherings of 250
8
9 people or more for social, spiritual and recreational activities, including concerts and similar
10
11 activities, were prohibited.³
12

13 31. On March 16, 2020, Governor Inslee issued Proclamation 20-13. Proclamation
14
15 20-13 states that “the COVID-19 disease has and continues to spread quickly across the state of
16
17 Washington, beyond the original community outbreaks in King, Pierce, and Snohomish
18
19 counties.”⁴
20

21 32. Proclamation 20-13 prohibits “any number of people from gathering” for the
22
23 purposes of, among many other things, “recreation, . . . fitness and other similar activities.”⁵ The
24
25 proclamation further prohibits “the operation of public venues in which people congregate for
26
27 entertainment, social or recreational purposes, including but not limited to . . . gyms, fitness
28
29 centers . . . and other similar venues, which prohibition shall remain in effect until midnight on
30
31 March 31, 2020, unless extended beyond that date”⁶
32

33 33. Proclamation 20-13 states one of the reasons for its restrictions is that “the
34
35 worldwide COVID-19 pandemic and its progression in Washington State continues to threaten
36
37

38
39 ³ Proclamation 20-07 of Washington Gov. Jay Inslee (Mar. 11, 2020) at 2, <https://www.governor.wa.gov/sites/default/files/proclamations/20-07%20Coronavirus%20%28tmp%29.pdf>.

40
41 ⁴ Proclamation 20-13 of Washington Gov. Jay Inslee, *Statewide Limits: Food and Beverage Services, Areas of*
42 *Congregation* at 1 (Mar. 16, 2020), [https://www.governor.wa.gov/sites/default/files/proclamations/20-](https://www.governor.wa.gov/sites/default/files/proclamations/20-13%20Coronavirus%20Restaurants-Bars%20%28tmp%29.pdf)
43 [13%20Coronavirus%20Restaurants-Bars%20%28tmp%29.pdf](https://www.governor.wa.gov/sites/default/files/proclamations/20-13%20Coronavirus%20Restaurants-Bars%20%28tmp%29.pdf).

44 ⁵ *Id.* at 2.

45 ⁶ *Id.* at 3.

1 the life and health of our people as well as the economy of Washington State, and remains a
2
3 public disaster affecting life, health, property, or the public peace”⁷
4

5 34. On information and belief, Proclamation 20-07 and 20-13 refer to property
6
7 damage throughout Washington, including where Plaintiff’s business is located.
8

9 35. On March 23, 2020, Governor Inslee issued Proclamation 20-25, “Stay Home-
10
11 Stay Healthy.” The proclamation, which amends Proclamation 20-05, requires that “[a]ll people
12
13 in Washington State [] immediately cease leaving their home or place of residence except: (1) to
14
15 conduct or participate in essential activities, and/or (2) for employment in essential business
16
17 activities.”⁸ The proclamation prohibits “all non-essential businesses in Washington State from
18
19 conducting business, within the limitations provided herein.”⁹ This proclamation, like others,
20
21 applies to all businesses, whether their property has been contaminated by the COVID-19 virus
22
23 or not.
24

25 36. Hot Yoga suffered business income and other losses covered by the Policy as a
26
27 result of the governmental proclamations and orders.
28

29 37. Hot Yoga suffered these business losses even though its covered property has not
30
31 been contaminated by COVID-19.
32

33 38. Hot Yoga issued a claim to Philadelphia Indemnity seeking coverage for its
34
35 business losses under the Policy.
36
37
38
39
40

41 ⁷ *Id.* at 1.

42 ⁸ Proclamation 20-25 of Washington Gov. Jay Inslee, *Stay Home – Stay Healthy* at 3 (Mar. 23, 2020),
43 [https://www.governor.wa.gov/sites/default/files/proclamations/20-25%20Coronavirus%20Stay%20Safe-
44 Stay%20Healthy%20%28tmp%29%20%28002%29.pdf](https://www.governor.wa.gov/sites/default/files/proclamations/20-25%20Coronavirus%20Stay%20Safe-Stay%20Healthy%20%28tmp%29%20%28002%29.pdf).

45 ⁹ *Id.* at 2.

1 39. On April 2, 2020, Philadelphia Indemnity acknowledged receipt of Hot Yoga's
2 insurance claim.
3

4 40. On April 3, 2020, Philadelphia Indemnity issued a "Notice" to Hot Yoga
5 preemptively denying coverage for any "loss resulting from Coronavirus SARS-COV-2/COVID-
6 19."
7
8

9 41. The April 3, 2020 "Notice" from Philadelphia Indemnity misrepresented language
10 of, and the coverage afforded by, the Policy when it stated the Policy insured "against risks of
11 direct physical loss or damage" rather than the coverage is for "direct physical loss of or damage
12 to Covered Property."
13
14

15 42. The April 3, 2020 "Notice" from Philadelphia further misrepresented the
16 language of, and the coverage afforded by, the Policy when it attempted to add the following
17 language that does not exist in the Policy: "[a] physical alteration to the covered property is
18 required to trigger coverage."
19
20

21 43. The April 3, 2020, "Notice" also relied on the "Exclusion of Loss Due to Virus or
22 Bacteria" endorsement to preemptively deny coverage.
23
24

25 44. On April 20, 2020, Philadelphia Indemnity denied Hot Yoga's claim.
26 Philadelphia Indemnity stated it denied Hot Yoga's claim for two reasons: (1) because "loss
27 resulting from viruses is specifically excluded"; and (2) "because physical damage by a Covered
28 Cause of Loss did not occur to property, the coverage provided under the Civil Authority
29 provision is not triggered."
30
31

32 45. On November 13, 2020, in a case in which a policyholder sought business
33 interruption insurance coverage under a similar insurance policy, the King County Superior
34 Court ruled that, under Washington insurance law, the phrase "loss of" is distinct from "damage
35
36
37
38
39
40
41
42
43
44
45

1 to” property and that a policyholder states a claim for business interruption coverage when the
2
3 policyholder’s “loss of” property is due to being deprived of the ability to use its property for its
4
5 intended purpose.¹⁰
6

7 46. On November 15, 2020, Governor Inslee issued Proclamation 20-25.8, “‘Stay
8
9 Safe—Stay Healthy’ Rollback of County-by-County Phased Reopening Responding to a
10
11 COVID-19 Outbreak Surge.” The proclamation reaffirmed Proclamation 20-25, et seq., and
12
13 reversed, for a period of at least 30 days, the loosening of certain prior restrictions on public
14
15 gatherings and business and social activities. The proclamation closed “fitness facilities and
16
17 gyms” for “indoor operations.”¹¹
18

19 47. On November 23, 2020, in a case in which a policyholder sought business
20
21 interruption insurance coverage under a similar insurance policy, the Spokane County Superior
22
23 Court ruled that: (a) under Washington insurance law, the phrase “loss of” is distinct from
24
25 “damage to” property; (b) “loss of” covered property includes being deprived of the ability to use
26
27 the property for its intended purpose; and therefore (c) a policyholder is entitled to partial
28
29 summary judgment that a claimed loss falls within the grant of insurance coverage for business
30
31 interruption coverage in Washington when the policyholder was deprived from using its covered
32
33 property due to the proclamations and orders issued by Governor Inslee.¹²
34
35
36
37
38
39

40 ¹⁰ See 11/13/20 Order Denying Defendant Mutual of Enumclaw’s Motion to Dismiss, *Hill & Stout PLLC v.*
41 *Mutual of Enumclaw Ins. Co.*, King County Superior Court No. 20-2-07925-1 SEA.

42 ¹¹ Proclamation 20-25.8 of Washington Gov. Jay Inslee, *Stay Safe-Stay Healthy* (Nov. 15, 2020),
43 https://www.governor.wa.gov/sites/default/files/proclamations/proc_20-25.8.pdf.

44 ¹² See 11/23/20 Order Granting Plaintiff’s Motion for Partial Summary Judgment Re: Coverage Grant, *Perry*
45 *Street Brewing Co., LLC v. Mutual of Enumclaw Ins. Co.*, Spokane County Superior Court No. 20-2-02212-32.

1 48. On December 10, 2020, Governor Inslee’s restrictions in Proclamation 20-25.8
2
3 were extended until January 4, 2021.¹³
4

5 49. On December 30, 2020, the restrictions were extended until January 11, 2021.¹⁴
6

7 50. On January 5, 2021, Governor Inslee announced the next phase of restrictions
8
9 under “Healthy Washington-Roadmap to Recovery” to start on January 11, 2021.¹⁵
10

11 51. As of January 11, 2021, there were 265,312 confirmed cases of individuals with
12
13 COVID-19 in Washington; there were another 11,374 people in Washington who were deemed
14
15 “probable cases” because they had a positive antigen test for COVID-19.¹⁶
16

17 52. As of January 11, 2021, at least 3,699 people have died of COVID-19 in
18
19 Washington.¹⁷
20

21 53. No Hot Yoga personnel, employee, or guest has reported contracting COVID-19.
22

23 54. There is no evidence Hot Yoga property has ever been contaminated by COVID-
24
25 19.
26

27 55. Hot Yoga employees have followed all guidelines to prevent the transmission of
28
29 the virus. This includes the necessary suspension of Hot Yoga’s business activities since March
30
31 2020, with the corresponding negative impact on its business income and expenses.
32
33
34

35
36 ¹³ Proclamation 20-25.9 of Washington Gov. Jay Inslee, *Stay Safe-Stay Healthy* (Dec. 10, 2020),
37 [https://www.governor.wa.gov/sites/default/files/proclamations/proc_20-](https://www.governor.wa.gov/sites/default/files/proclamations/proc_20-25.9.pdf?utm_medium=email&utm_source=govdelivery)
38 [25.9.pdf?utm_medium=email&utm_source=govdelivery](https://www.governor.wa.gov/sites/default/files/proclamations/proc_20-25.9.pdf?utm_medium=email&utm_source=govdelivery).

39 ¹⁴ Proclamation 20-25.11 of Washington Gov. Jay Inslee, *Stay Safe-Stay Healthy* (December 30, 2020),
40 [https://www.governor.wa.gov/sites/default/files/20-25.11%20-%20COVID-19%20Stay%20Safe-](https://www.governor.wa.gov/sites/default/files/20-25.11%20-%20COVID-19%20Stay%20Safe-Stay%20Healthy%20%28tmp%29.pdf?utm_medium=email&utm_source=govdelivery)
41 [Stay%20Healthy%20%28tmp%29.pdf?utm_medium=email&utm_source=govdelivery](https://www.governor.wa.gov/sites/default/files/20-25.11%20-%20COVID-19%20Stay%20Safe-Stay%20Healthy%20%28tmp%29.pdf?utm_medium=email&utm_source=govdelivery).

42 ¹⁵ [https://www.governor.wa.gov/news-media/inslee-announces-healthy-washington%E2%80%93roadmap-](https://www.governor.wa.gov/news-media/inslee-announces-healthy-washington%E2%80%93roadmap-recovery)
43 [recovery](https://www.governor.wa.gov/news-media/inslee-announces-healthy-washington%E2%80%93roadmap-recovery).

44 ¹⁶ <https://www.doh.wa.gov/Emergencies/COVID19/DataDashboard>.

45 ¹⁷ *Id.*

1 64. Philadelphia Indemnity issued a “Notice” on April 3, 2020 stating any claim
2 related to COVID-19 would be denied.
3

4
5 65. Philadelphia Indemnity denied Hot Yoga’s claim on April 20, 2020.
6

7 66. Philadelphia Indemnity’s denial of Hot Yoga’s claim is a breach of the insurance
8 contract.
9

10
11 67. Hot Yoga is harmed by Philadelphia Indemnity’s breach of the insurance contract.
12

13 **C. Count Three – Breach of the Duty of Good Faith and Fair Dealing**
14

15 68. In Washington, insurers owe their policyholders duties of good faith and fair
16 dealing.
17

18 69. Philadelphia Indemnity breached that duty by, among other things: (a)
19 unreasonably denying Hot Yoga’s claim; (b) preemptively denying Hot Yoga’s claim without
20 conducting a reasonable investigation; (c) misrepresenting the Policy language in
21 communications with Hot Yoga; and (d) failing to correct its claim denial after courts in
22 Washington have ruled in favor of coverage.
23
24
25
26
27

28 70. As a result of Philadelphia Indemnity’s bad faith, Hot Yoga has been damaged in
29 amount to be proven at trial.
30
31

32
33 **D. Count Five – Violation of the Washington Consumer Protection Act**
34

35 71. In refusing to cover Hot Yoga’s claim, preemptively denying Hot Yoga’s claim,
36 and misrepresenting the Policy language in its communications with Hot Yoga, Philadelphia
37 Indemnity violated least the following Washington Unfair Claims Settlement Practices
38 Regulations, each of which is a *per se* violation of the Washington State Consumer Protection
39 Act, RCW 19.86, *et seq.* (“CPA”):
40
41
42
43
44
45

1 71.1. Misrepresenting insurance policy provisions in violation of WAC 284-30-
2
3 330(1).

4
5 71.2 Refusing to pay claims without conducting a reasonable investigation in
6
7 violation of WAC 284-30-330(4);

8
9 71.3. Failing to promptly provide a reasonable explanation of the basis in the
10
11 insurance policy in relation to the facts or applicable law for denial of a claim in violation
12
13 of WAC 284-30-330(13);

14
15 71.4. Failing to fully and accurately disclose the pertinent benefits and coverage
16
17 afforded under the Policy, in violation of WAC 284-30-350(1).

18
19 72. These violations, and Philadelphia Indemnity’s unreasonable decision to deny
20
21 coverage, violate the CPA and entitle Hot Yoga to treble damages and an award of attorneys’
22
23 fees and costs incurred in prosecuting this action.

24
25 **E. Count Six – Violation of the Washington Insurance Fair Conduct Act**

26
27 73. Philadelphia Indemnity’s conduct described herein violates the Insurance Fair
28
29 Conduct Act, RCW 48.30.015 (“IFCA”). Philadelphia Indemnity violates IFCA by
30
31 unreasonably denying Hot Yoga’s claims.

32
33 74. Philadelphia Indemnity has also violated the following Washington Unfair Claims
34
35 Handling Practices Regulations, each of which is enumerated as a regulation whose violation
36
37 also constitutes a violation of IFCA:

38
39 74.1 Misrepresenting insurance policy provisions in violation of WAC 284-30-
40
41 330(1).

42
43 74.2 Refusing to pay claims without conducting a reasonable investigation in
44
45 violation of WAC 284-30-330(4);

1 DATED this 11th day of February, 2021.
2
3

4 **GORDON TILDEN THOMAS & CORDELL LLP**
5 Attorneys for Plaintiff Hot Yoga, Inc.

6 By s/Mark Wilner
7 Mark Wilner, WSBA #31550
8

9 By s/John D. Cadagan
10 John D. Cadagan, WSBA #47996
11 600 University Street, Suite 2915
12 Seattle, Washington 98101
13 206.467.6477
14 mwilner@gordontilden.com
15 jcadagan@gordontilden.com
16
17
18
19
20
21
22
23
24
25
26
27
28
29
30
31
32
33
34
35
36
37
38
39
40
41
42
43
44
45