

The Honorable Thomas S. Zilly

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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON AT SEATTLE

WADE K. MARLER, DDS, individually and on
behalf of all others similarly situated,

Plaintiff,

v.

ASPEN AMERICAN INSURANCE
COMPANY,

Defendant.

No. 2:20-cv-00616 TSZ

AMENDED CLASS ACTION
COMPLAINT

JURY DEMAND

I. INTRODUCTION

Plaintiff, WADE K. MARLER, DDS (“MARLER”), individually and on behalf of all other similarly situated members of the defined national class and Washington State subclasses (collectively, the “Class Members”), by and through the undersigned attorneys, brings this class action against Defendant Aspen American Insurance Company (“Aspen” or “Defendant”) and alleges as follows based on personal knowledge and information and belief:

II. JURISDICTION AND VENUE

1. This Court has subject matter jurisdiction pursuant to the Class Action Fairness Act of 2005, 28 U.S.C. § 1332(d), because at least one Class member is of diverse citizenship

1 from Defendant, there are 100 or more Class members nationwide, and the aggregate amount in
2 controversy exceeds \$5,000,000. The Court has supplemental jurisdiction over Plaintiff's state
3 law claims under 28 U.S.C. § 1367.

4 2. This Court has personal jurisdiction over Defendant because Defendant is
5 registered to do business in Washington, has sufficient minimum contacts in Washington, and
6 otherwise intentionally avails itself of the markets within Washington through its business
7 activities, such that the exercise of jurisdiction by this Court is proper. Moreover, the claims of
8 Plaintiff and all of the Washington subclass members in this case arise out of and directly relate
9 to Defendant's contacts with Washington.
10

11 3. Venue is proper in this District pursuant to 28 U.S.C. § 1391(b)(3) because the
12 Court has personal jurisdiction over Defendant, a substantial portion of the alleged wrongdoing
13 occurred in this District and the state of Washington, and Defendant has sufficient contacts with
14 this District and the state of Washington.
15

16 4. Venue is proper in the Western District of Washington pursuant to 28 U.S.C.
17 § 1391(b)(2) because a substantial part of the events or omissions giving rise to the claims at
18 issue in this Complaint arose in this District. Plaintiff's business is located in Covington, King
19 County. This action is therefore appropriately filed in the Seattle Division because a substantial
20 portion of the events giving rise to this lawsuit arose in King County.
21

22 **III. PARTIES**

23 5. Plaintiff WADE K. MARLER, DDS, operates a family dentistry practice located
24 at 17203 SE 270th Pl., Covington, WA 98502.
25
26

1 13. On information and belief, Defendant issued materially identical policy
2 provisions to other policyholders concerning business interruption coverage for the relevant
3 period.

4 14. Plaintiff paid all premiums for the coverage when due.

5 15. On or about January 2020, the United States of America saw its first cases of
6 persons infected by COVID-19, which has been designated a worldwide pandemic.

7 16. In light of this pandemic, Washington Governor Jay Inslee issued certain
8 proclamations and orders affecting many persons and businesses in Washington, whether
9 infected with COVID-19 or not, requiring certain public health precautions. Among other
10 things, Governor Inslee's "Stay Home, Stay Healthy" orders required the closure of all non-
11 essential businesses, including Plaintiff's business.
12

13 17. Governor Inslee's "PROCLAMATION BY THE GOVERNOR AMENDING
14 PROCLAMATION 20-05: 20-24 Restrictions on Non-Urgent Medical Procedures," dated
15 March 19, 2020, also provides, in part:
16

17 WHEREAS, the health care personal protective equipment supply chain in
18 Washington State has been severely disrupted by the significant increased use of
19 such equipment worldwide, such that there are now critical shortages of this
20 equipment for health care workers. To curtail the spread of the COVID-19
21 pandemic in Washington State and to protect our health care workers as they
22 provide health care services, it is necessary to immediately prohibit all hospitals,
23 ambulatory surgery centers, and dental, orthodontic, and endodontic offices in
24 Washington State from providing health care services, procedures and surgeries
25 that require personal protective equipment, which if delayed, are not anticipated
26 to cause harm to the patient within the next three months.

18 18. By order of Governor Inslee, dentists including Plaintiff were prohibited from
19 providing services but for urgent and emergency procedures.

20 19. No COVID-19 virus has been detected on Plaintiff's business premises.

1 20. Plaintiff's property sustained direct physical loss and/or damage related to
2 COVID-19 and/or the proclamations and orders.

3 21. Plaintiff's property will continue to sustain direct physical loss or damage
4 covered by the Aspen policy or policies, including but not limited to business interruption, extra
5 expense, interruption by civil authority, and other expenses.

6 22. Plaintiff's property cannot be used for its intended purposes.

7 23. As a result of the above, Plaintiff has experienced and will experience loss
8 covered by the Aspen policy or policies.

9 24. Upon information and belief, Aspen intends to deny or has denied Plaintiff
10 Marler's claim for coverage and has or will continue to deny coverage for other similarly
11 situated policyholders..
12

13 **V. CLASS ACTION ALLEGATIONS**

14 25. This matter is brought by Plaintiff on behalf of itself and those similarly situated,
15 under Federal Rules of Civil Procedure 23(b)(1), 23(b)(2), and 23(b)(3).
16

17 26. The Classes that Plaintiff seeks to represent are defined at this time as:

18 A. ***Practice Income Breach of Contract Class:*** All persons and entities in
19 the United States issued an Aspen policy with Practice Income Coverage who suffered a
20 suspension of their practice at the covered premises related to COVID-19 and/or orders
21 issued by Governor Inslee, other Governors, and/or other civil authorities and whose
22 Business Practice claim has been denied by Aspen.

23 B. ***Practice Income Breach of Contract Washington Subclass:*** All persons
24 and entities in the State of Washington issued an Aspen policy with Practice Income
25 Coverage who suffered a suspension of their practice at the covered premises related to
26

1 COVID-19 and/or orders issued by Governor Inslee, and/or other civil authorities and
2 whose Business Practice claim has been denied by Aspen.

3 C. ***Practice Income Declaratory Relief Class:*** All persons and entities in the
4 United States issued an Aspen policy with Practice Income Coverage who suffered a
5 suspension of their practice at the covered premises related to COVID-19 and/or orders
6 issued by Governor Inslee, other Governors, and/or other civil authorities.

7 D. ***Practice Income Declaratory Relief Washington Subclass:*** All persons
8 and entities in the State of Washington issued an Aspen policy with Practice Income
9 Coverage who suffered a suspension of their practices at the covered premises related to
10 COVID-19 and/or orders issued by Governor Inslee, and/or other civil authorities.

11 E. ***Extended Practice Income Breach of Contract Class:*** All persons and
12 entities in the United States issued an Aspen policy with Extended Practice Income
13 Coverage who suffered a suspension of their practice at the covered premises related to
14 COVID-19 and/or orders issued by Governor Inslee, other Governors, and/or other civil
15 authorities and whose Extended Practice Income claim has been denied by Aspen.

16 F. ***Extended Practice Income Breach of Contract Washington Subclass:***
17 All persons and entities in the State of Washington issued an Aspen policy with
18 Extended Practice Income Coverage who suffered a suspension of their practice at the
19 covered premises related to COVID-19 and/or orders issued by Governor Inslee, and/or
20 other civil authorities and whose Extended Practice Income claim has been denied by
21 Aspen.

22 G. ***Extended Practice Income Declaratory Relief Class:*** All persons and
23 entities in the United States issued an Aspen policy with Extended Practice Income
24
25
26

1 Coverage who suffered a suspension of their practice at the covered premises related to
2 COVID-19 and/or orders issued by Governor Inslee, other Governors, and/or other civil
3 authorities.

4 H. ***Extended Practice Income Declaratory Relief Washington Subclass:*** All
5 persons and entities in the State of Washington issued an Aspen policy with Extended
6 Practice Income coverage who suffered a suspension of their practice at the covered
7 premises related to COVID-19 and/or orders issued by Governor Inslee, and/or other
8 civil authorities.
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10 I. ***Extra Expense Breach of Contract Class:*** All persons and entities in the
11 United States issued an Aspen policy with Extra Expense Coverage who sought to
12 minimize losses from the suspension of their practice at the covered premises in
13 connection with COVID-19 and/or orders issued by Governor Inslee, other Governors,
14 and/or other civil authorities and whose Extra Expense claim has been denied by Aspen.
15

16 J. ***Extra Expense Breach of Contract Washington Subclass:*** All persons
17 and entities in the State of Washington issued an Aspen policy with Extra Expense
18 Coverage who sought to minimize losses from the suspension of their practice at the
19 covered premises in connection with COVID-19 and/or orders issued by Governor
20 Inslee, and/or other civil authorities and whose Extra Expense claim has been denied by
21 Aspen.
22

23 K. ***Extra Expense Declaratory Relief Class:*** All persons and entities in the
24 United States issued an Aspen policy with Extra Expense Coverage who sought to
25 minimize losses from the suspension of their practice at the covered premises in
26

1 connection with COVID-19 and/or orders issued by Governor Inslee, other Governors,
2 and/or other civil authorities.

3 L. ***Extra Expense Declaratory Relief Washington Subclass:*** All persons
4 and entities in the State of Washington issued an Aspen policy with Extra Expense
5 Coverage who sought to minimize losses from the suspension of their practice at the
6 covered premises in connection with COVID-19 and/or orders issued by Governor
7 Inslee, and/or other civil authorities.

8
9 M. ***Civil Authority Breach of Contract Class:*** All persons and entities in the
10 United States issued an Aspen policy with Civil Authority Coverage who suffered a
11 suspension of their practice and/or extra expense at the covered premises related to
12 COVID-19 and/or orders issued by Governor Inslee, other Governors, and/or other civil
13 authorities and whose Civil Authority claim has been denied by Aspen.

14 N. ***Civil Authority Breach of Contract Washington Subclass:*** All persons
15 and entities in the State of Washington issued an Aspen policy with Civil Authority
16 coverage who suffered a suspension of their practice and/or extra expense at the covered
17 premises related to COVID-19 and/or orders issued by Governor Inslee, and/or other
18 civil authorities and whose Civil Authority claim has been denied by Aspen.

19 O. ***Civil Authority Declaratory Relief Class:*** All persons and entities in the
20 United States issued an Aspen policy with Civil Authority Coverage who suffered a
21 suspension of their practice at the covered premises related to COVID-19 and/or orders
22 issued by Governor Inslee, other Governors, and/or other civil authorities.
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24 P. ***Civil Authority Declaratory Relief Washington Subclass:*** All persons
25 and entities in the State of Washington issued an Aspen policy with Civil Authority
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1 Coverage who suffered a suspension of their practice at the covered premises related to
2 COVID-19 and/or orders issued by Governor Inslee, and/or other civil authorities.

3 27. Excluded from the Classes are Defendant's officers, directors, and employees;
4 the judicial officers and associated court staff assigned to this case; and the immediate family
5 members of such officers and staff.

6 28. Plaintiff reserves the right to amend the above-described Class definitions based
7 on information obtained in discovery, including Defendant's internal records presently
8 unavailable to Plaintiff.
9

10 29. This action may properly be maintained on behalf of each proposed Class under
11 the criteria of Rule 23 of the Federal Rules of Civil Procedure.

12 30. **Numerosity:** The members of the Class are so numerous that joinder of all
13 members would be impractical. Plaintiff is informed and believes that the proposed Class
14 contains hundreds of members. The precise number of class members can be ascertained
15 through discovery, which will include Defendant's records of policyholders.
16

17 31. **Commonality and Predominance:** Common questions of law and fact
18 predominate over any questions affecting only individual members of the Class. Common
19 questions include, but are not limited to, the following:

20 A. Whether the Class Members suffered covered losses based on common
21 policies issued to members of the Class;

22 B. Whether Aspen acted in a manner common to the Class and wrongfully
23 denied claims for coverage relating to COVID-19 and/or orders issued by Governor
24 Inslee, other Governors, and/or other civil authorities;
25
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1 C. Whether Practice Income Coverage in Aspen's policies of insurance
2 applies to a suspension of practice relating to COVID-19 and/or orders issued by
3 Governor Inslee, other Governors, and/or other civil authorities;

4 D. Whether Extended Practice Income Coverage in Aspen's policies of
5 insurance applies to a suspension of practice relating to COVID-19 and/or orders issued
6 by Governor Inslee, other Governors, and/or other civil authorities;

7 E. Whether Extra Expense Coverage in Aspen's policies of insurance
8 applies to efforts to minimize a loss at the covered premises relating to COVID-19
9 and/or orders issued by Governor Inslee, other Governors, and/or other civil authorities;

10 F. Whether Civil Authority Coverage in Aspen's policies of insurance
11 applies to a suspension of practice relating to COVID-19 and/or orders issued by
12 Governor Inslee, other Governors, and/or civil authorities;

13 G. Whether Aspen has breached its contracts of insurance through a blanket
14 denial of all claims based on business interruption, income loss or closures related to
15 COVID-19 and/or orders issued by Governor Inslee, other Governors, and/or other civil
16 authorities;

17 H. Whether, because of Defendant's conduct, Plaintiff and the Class
18 Members have suffered damages; and if so, the appropriate amount thereof; and

19 I. Whether, because of Defendant's conduct, Plaintiff and the Class
20 Members are entitled to equitable and declaratory relief, and if so, the nature of such
21 relief.
22

23 32. **Typicality:** Plaintiff's claims are typical of the claims of the Class Members.
24

25 Plaintiff and the Class Members have been injured by the same wrongful practices of
26

1 Defendant. Plaintiff's claims arise from the same practices and course of conduct that give rise
2 to the claims of the Class Members and are based on the same legal theories.

3 33. **Adequacy:** Plaintiff will fully and adequately assert and protect the interests of
4 the Class Members and has retained class counsel who are experienced and qualified in
5 prosecuting class actions. Neither Plaintiff nor its attorneys have any interests contrary to or in
6 conflict with the Class.

7
8 34. **Federal Rule of Civil Procedure 23(b)(1), the Risk of Inconsistent or**
9 **Varying Adjudications and Impairment to Other Class Members' Interests:** Plaintiff seeks
10 adjudication as to the interpretation, and resultant scope, of Defendant's policies, which are
11 common to all Class Members. The prosecution of separate actions by individual Class
12 Members would risk inconsistent or varying interpretations of those policy terms and create
13 inconsistent standards of conduct for Defendant.

14
15 35. **Federal Rule of Civil Procedure 23(b)(2), Declaratory and Injunctive Relief:**
16 Defendant acted or refused to act on grounds generally applicable to Plaintiff and other
17 members of the proposed class making injunctive relief and declaratory relief appropriate on a
18 classwide basis.

19
20 36. **Federal Rule of Civil Procedure 23(b)(3), Superiority:** A class action is
21 superior to all other available methods of the fair and efficient adjudication of this lawsuit.
22 While the aggregate damages sustained by the classes are likely to be in the millions of dollars,
23 the individual damages incurred by each class member may be too small to warrant the expense
24 of individual suits. Individual litigation creates a risk of inconsistent and/or contradictory
25 decisions and the court system would be unduly burdened by individual litigation of such cases.
26

1 A class action would result in a unified adjudication, with the benefits of economies of scale and
2 supervision by a single court.

3 **VI. CAUSES OF ACTION**

4 **Count One—Declaratory Judgment**

5 *(Brought on behalf of the Practice Income Declaratory Relief Class, Practice Income*
6 *Declaratory Relief Washington Subclass, Extended Practice Income Declaratory Relief Class,*
7 *Extended Practice Income Declaratory Relief Washington Subclass, Extra Expense*
8 *Declaratory Relief Class, Extra Expense Declaratory Relief Washington Subclass, Civil*
9 *Authority Declaratory Relief Class, and Civil Authority Declaratory Relief Washington*
10 *Subclass)*

11 37. Previous paragraphs alleged are incorporated herein.

12 38. This is a cause of action for declaratory judgment pursuant to the Declaratory
13 Judgment Act, codified at 28 U.S.C. § 2201.

14 39. Plaintiff Marler brings this cause of action on behalf of the Practice Income
15 Declaratory Relief Class, Practice Income Declaratory Relief Washington Subclass, Extended
16 Practice Income Declaratory Relief Class, Extended Practice Income Declaratory Relief
17 Washington Subclass, Extra Expense Declaratory Relief Class, Extra Expense Declaratory
18 Relief Washington Subclass, Civil Authority Declaratory Relief Class, and Civil Authority
19 Declaratory Relief Washington Subclass.

20 40. Plaintiff Marler seeks a declaratory judgment declaring that Plaintiff's and Class
21 Members' losses and expenses resulting from the interruption of their business are covered by
22 the Policy.

23 41. Plaintiff Marler seeks a declaratory judgment declaring that Aspen is responsible
24 for timely and fully paying all such claims.

Count Two—Breach of Contract

(Brought on behalf of the Practice Income Breach of Contract Class, Practice Income Breach of Contract Washington Subclass, Extended Practice Income Breach of Contract Class, Extended Practice Income Breach of Contract Washington Subclass, Extra Expense Breach of Contract Class, Extra Expense Breach of Contract Washington Subclass, Civil Authority Breach of Contract Class, and Civil Authority Breach of Contract Washington Subclass)

42. Previous paragraphs alleged are incorporated herein.

43. Plaintiff Marler brings this cause of action on behalf of the Practice Income Breach of Contract Class, Practice Income Breach of Contract Washington Subclass, Extended Practice Income Breach of Contract Class, Extended Practice Income Breach of Contract Washington Subclass, Extra Expense Breach of Contract Class, Extra Expense Breach of Contract Washington Subclass, Civil Authority Breach of Contract Class and Civil Authority Breach of Contract Washington Subclass.

44. The Policy is a contract under which Plaintiff Marler and the Class Members paid premiums to Aspen in exchange for Aspen’s promise to pay plaintiff and the Class Members for all claims covered by the Policy.

45. Plaintiff Marler has paid its insurance premiums.

46. On information and belief, Aspen intends to deny or has denied Plaintiff Marler’s claim for coverage and has or will continue to deny coverage for other similarly situated policyholders.

47. Denying coverage for the claim is a breach of the insurance contract.

48. Plaintiff Marler is harmed by the breach of the insurance contract by Aspen.

VII. REQUEST FOR RELIEF

1
2 1. A declaratory judgment that the policy or policies cover Plaintiff's losses and
3 expenses resulting from the interruption of the Plaintiff's business practice related to COVID-19
4 and/or orders issued by Governor Inslee, other Governors, and/or other authorities.

5 2. A declaratory judgment that the defendant is responsible for timely and fully
6 paying all such losses.

7 3. Damages.

8 4. Class action status under Fed. R. Civ. P. 23.

9 5. Pre- and post-judgment interest at the highest allowable rate.

10 6. Reasonable attorney fees and costs.

11 7. Such further and other relief as the Court shall deem appropriate.

12
13 **VIII. JURY TRIAL DEMANDED**

14 Plaintiff demands a jury trial on all claims so triable.

15 DATED this ____ day of May 2020.

KELLER ROHRBACK L.L.P.

By: s/ Ian S. Birk

By: s/ Lynn L. Sarko

By: s/ Gretchen Freeman Cappio

By: s/ Irene M. Hecht

By: s/ Amy Williams Derry

By: s/ Maureen Falecki

By: s/ Nathan L. Nanfelt

Ian S. Birk, WSBA #31431

Lynn L. Sarko, WSBA #16569

Gretchen Freeman Cappio, WSBA #29576

Irene M. Hecht, WSBA #11063

Amy Williams Derry, WSBA #28711

Maureen Falecki, WSBA #18569

Nathan Nanfelt, WSBA #45273

1201 Third Avenue, Suite 3200

Seattle, WA 98101

Telephone: (206) 623-1900

Fax: (206) 623-3384

Email: ibirk@kellerrohrback.com

Email: lsarko@kellerrohrback.com

Email: gcappio@kellerrohrback.com

Email: ihecht@kellerrohrback.com

Email: awilliams-derry@kellerrohrback.com

Email: mfalecki@kellerrohrback.com

Email: nnanfelt@kellerrohrback.com

By: s/ Alison Chase

Alison Chase, *pro hac vice forthcoming*

801 Garden Street, Suite 301

Santa Barbara, CA 93101

Telephone: (805) 456-1496

Fax: (805) 456-1497

Email: achase@kellerrohrback.com

Attorneys for Plaintiff

4836-1418-3869, v. 1