

**STATE OF INDIANA
IN THE MARION COUNTY SUPERIOR COURT**

INDIANA REPERTORY THEATRE,
INC.,

Plaintiff,

v.

THE CINCINNATI CASUALTY
COMPANY,

Defendant.

CAUSE NO.

COMPLAINT FOR DECLARATORY JUDGMENT

Plaintiff Indiana Repertory Theatre, Inc. (“IRT”), for its complaint against Defendant The Cincinnati Casualty Company (“Cincinnati”), states as follows:

**I.
Introduction**

1. This is an action for declaratory relief concerning insurance. Pursuant to Trial Rule 57 and the Indiana Declaratory Judgment Act, Indiana Code § 34-14-1 *et seq.*, IRT seeks a judgment declaring the scope of Cincinnati’s obligation to pay IRT’s losses under a commercial property insurance policy related to the novel coronavirus and COVID-19 pandemic.

**II.
The Parties**

2. IRT is an Indiana nonprofit corporation and professional theatre based in Indianapolis, Indiana.

3. Cincinnati is an Ohio insurance company doing business in Indiana.

III.
Jurisdiction and Venue

4. This Court has jurisdiction over Cincinnati under Trial Rules 4.4(A)(1) and (6) because Cincinnati does business in Indiana and Cincinnati is an insurance company currently licensed to do business in Indiana.

5. Marion County is a preferred venue for this action because Cincinnati has its registered agent and its principal Indiana office in Marion County.

IV.
Factual Circumstances

6. IRT is the largest professional nonprofit theatre in Indiana. IRT presents live theatre performances September through May and rents its facilities for other performances and events the rest of the year. IRT employs approximately 65 full-time year-round and seasonal employees in the design and production of theater sets, scenes, costumes, lighting and sound effects, in addition to actors, writers, directors and other artists. IRT also welcomes nearly 40,000 school children from across the state to student matinees each season.

7. In January 2020, the first known case of a U.S. resident infected by the novel SARS-CoV-2 coronavirus was reported in the state of Washington. SARS-CoV-2 quickly spread across the United States.

8. SARS-CoV-2 is a coronavirus that is believed to be primarily spread through respiratory droplets and by fomite—objects and surfaces contaminated by the respiratory droplets. Studies have found that SARS-CoV-2 can survive on surfaces for extended periods.

9. SARS-CoV-2 reportedly has an incubation period of 2-12 days, during which time it can be transmitted even before symptoms develop. Symptoms often include fever, cough, shortness of breath, and, in severe cases, pneumonia. The illness caused by SARS-CoV-2 is called COVID-19 (Coronavirus Disease 2019).

10. On March 6, 2020, Indiana Governor Holcomb issued Executive Order 20-02, which declared that a public health emergency existed throughout the State of Indiana as a result of the COVID-19 outbreak in the United States and a confirmed report that SARS-CoV-2 was in Indiana.

11. On March 11, 2020, the World Health Organization declared COVID-19 to be a global pandemic.

12. On March 12, 2020, Indianapolis Mayor Joe Hogsett and the Marion County Health Department ordered a 30-day suspension of all non-essential gatherings of more than 250 individuals in Indianapolis.

13. That same day, Indiana's top health official estimated that about 1% of Hoosiers, or about 70,000 people, were already infected with SARS-CoV-2. At that time, there were only 12 reported cases in Indiana.

14. After the March 12 Order by Mayor Hogsett limiting non-essential gatherings of more than 250 individuals, IRT announced that its current performances of *Murder on the Orient Express* would continue, but that the capacity would be limited to 250 people.

15. On March 13, 2020, the President of the United States declared a national emergency.

16. On March 16, 2020, Mayor Hogsett issued a series of orders for Marion County prohibiting all public gatherings of 50 or more people, closing Indianapolis bars and nightclubs that do not serve food, as well as movie theatres, entertainment venues, gyms, and fitness facilities. He also issued an executive order declaring a local disaster emergency in Marion County.

17. That same day, IRT publicly announced its decision to close its doors for the rest of its 2019-2020 season. It was not feasible to postpone or reschedule the productions.

18. On March 23, 2020, Governor Holcomb issued Executive Order 20-08 which ordered all individuals living in the State of Indiana to stay at home through at least April 6, 2020, with limited exceptions. On April 3, 2020, Governor Holcomb extended the stay-home order two more weeks, to April 20, 2020

19. Cincinnati insures IRT under a commercial property policy, Policy No. EPP 050 25 09, with an effective date of August 30, 2019 through August 30, 2020 (the “Policy”). A true and accurate copy of the Policy is attached as **Exhibit A**.

20. The Policy provides Building and Personal Property Coverage and Business Income and Extra Expense coverage. This “all risks” coverage is broad. It provides coverage for the losses suffered by IRT when it was forced to close its doors, including the loss of “Business Income” sustained due to the necessary “suspension” of IRT’s “operations.”

21. IRT has paid all required premiums and performed all conditions precedent for obtaining coverage under the Policy and timely notified Cincinnati of

the loss.

22. On March 23, 2020, Cincinnati informed IRT that it was investigating the claim under a full reservation of rights. Throughout this letter, however, Cincinnati stated:

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. . . . Direct physical loss or damage generally means a physical effect on Covered Property, such as a deformation, permanent change in physical appearance or other manifestation of a physical effect. Your notice of claim indicates that your claim involves Coronavirus. However, the fact of the pandemic, without more, is not direct physical loss or damage to property at the premises.

23. The meaning Cincinnati assigns to the phrase direct physical loss or damage—"a physical effect on Covered Property, such as a deformation, permanent change in physical appearance or other manifestation of a physical effect"—appears nowhere in Cincinnati's policy. The complete loss of use the IRT has sustained fits easily within a "direct physical loss." It also fits within other coverage provisions of the policy.

24. If Cincinnati had intended to exclude coverage for loss due to a virus it could have included a virus exclusion. Such an exclusion was available to Cincinnati when it created the form it sold to the IRT. Cincinnati included no such exclusion.

V.
Cause of Action

Count 1: Declaratory Relief

25. IRT incorporates by reference the averments of Paragraphs 1 through 24 above.

26. An actual controversy exists as to the scope of IRT's rights and Cincinnati's obligations under the Policy.

27. Multiple coverage provisions yield coverage for the IRT's losses under Cincinnati's policy. For example, the coverage grant of the Business Income and Extra Expenses Form portion of the Policy states:

We will pay for the actual loss of "Business Income" you sustain due to the necessary "suspension" of your "operations" during the "period of restoration". The "suspension" must be caused by direct "loss" to property at "premises" which are described in the Declarations and for which a "Business Income" Limit of Insurance is shown in the Declarations. The "loss" must be caused by or result from a Covered Cause of Loss.

28. IRT has suffered a loss of "Business Income," among other losses, that is covered by the terms of the Policy.

29. Cincinnati's refusal to pay this loss has damaged, and will continue to damage IRT as long as this loss continues.

30. This declaratory judgment action is necessary and useful in determining all of the rights and responsibilities of the parties.

31. Pursuant to Indiana Code § 34-14-1-1 and Rule 57 of the Indiana Rules of Trial Procedure, IRT is entitled to declaratory relief establishing that the losses suffered by IRT are covered by the Policy.

WHEREFORE, IRT prays that the Court enter judgment against Cincinnati and in favor of IRT:

A. declaring that, under the terms of the Policy, (1) IRT's losses constitute an actual loss of "Business Income" sustained due to a necessary

“suspension” of IRT’s “operations,” (2) that the “suspension” has been caused by “direct ‘loss’ to property,” and (3) the “loss” has been caused by or resulted from a “Covered Cause of Loss”;

B. ordering Cincinnati to pay IRT all amounts owed pursuant to the terms of the Policy; and

C. awarding IRT all other compensatory, consequential and other damages to which it may be entitled, including but not limited to the attorneys’ fees and expenses incurred in bringing this action to enforce the Policy, and all other and further relief as this Court may deem proper.

By: s/Peter M. Racher

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