

IN THE IOWA DISTRICT COURT FOR DES MOINES COUNTY

<p>GREAT RIVER ENTERTAINMENT, LLC,</p> <p>Plaintiff,</p> <p>v.</p> <p>ZURICH AMERICAN INSURANCE COMPANY, or ZURICH,</p> <p>Defendant.</p>	<p>Case No. _____</p> <p>PETITION AT LAW AND JURY DEMAND</p>
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COMES NOW the Plaintiff, by and through the undersigned counsel, and for its Petition at Law and Jury Demand states as follows:

PARTIES AND JURISDICTION

1. This Petition is for a civil action in which Plaintiff seeks to recover damages for breach of contract caused by Defendant's denial of a business interruption insurance claim, and further seeks declaratory relief regarding the coverage provided under Plaintiff's insurance policy.

2. Plaintiff, Great River Entertainment, LLC, is an Iowa limited liability company whose principal place of business is Burlington, Iowa.

3. Great River Entertainment, LLC owns, operates, and manages a casino, six hotels, a convention center and banquet operation, various food and beverage restaurants, an arcade and bowling center, water park, and various other operations primarily located in Burlington, Iowa.

4. Upon information and belief, Zurich American Insurance Company, or Zurich, is authorized to sell property casualty insurance and business interruption insurance in Iowa.

5. That Defendant is listed as being licensed in Iowa and whose business corporate address is 1299 Zurich Way, Schaumburg, IL 60196.

6. The insurance policy at issue (the “Policy”) was purchased and primarily to be enforced and interpreted in Burlington, Iowa.

7. The Plaintiff submitted a claim for insurance benefits to Defendant provided for in the Policy and Defendant denied the claim by letter dated February 25, 2021.

8. The damages giving rise to this Petition are sufficient to meet the jurisdictional requirements for the amount in controversy.

9. Jurisdiction is conferred upon this Court pursuant to the Iowa Code.

10. Venue is conferred pursuant to the Iowa Code.

THE ZURICH EDGE POLICY

11. To protect its businesses in the event it suddenly had to suspend operations for reasons outside of its control, Plaintiff purchased The Zurich EDGE Policy that included Time Element coverage essentially providing coverage for loss of business income from Zurich American Insurance Company, or Zurich.

12. In return for the payment of premiums, Defendant caused to be issued the Zurich EDGE Policy to the Plaintiff on December 31, 2019, Policy No. ERP0273025-02. A copy of the Policy is attached hereto as Exhibit A.

13. Plaintiff paid premiums totaling \$950,000 for insurance coverages for Policy No. ERP0273025-02.

14. The Policy is an “all-risk” policy which covers [a]ll risks of direct physical loss of or damage from any cause unless specifically excluded.”

15. The Zurich EDGE Policy’s Time Element coverage is part of a 44-page form policy drafted entirely by Defendant and identified as Form “EDGE-100-B (12/10)”. The provisions and exclusions of the Zurich EDGE Policy are not the product of discussions or negotiations between

Defendant and the Plaintiff. Rather, the exclusions in the all-risk policy consist of standardized language and terms that have been developed by Defendant.

16. Section 4.01.01 of the Time Element coverage provision in the Policy requires Defendant to “pay for the actual Time Element loss the Insured sustains, as provided in the time Element Coverages, during the Period of Liability. The Time Element loss must result from the necessary **Suspension** of the Insured’s business activities at the Insured Location. The **Suspension** must be due to the direct physical loss of or damage to Property) of the type insurable under this Policy other than **Finished Stock**) caused by a **Covered Cause of Loss** at the **Location....**”

17. Section 4.01.02 of the Time Element coverage provision further provides recovery to the extent the Insured is: unable to make up lost production within a reasonable period of time not limited to the period during which production is suspended; unable to continue such operations or services during the Period of Liability; and able to demonstrate a loss of revenue for the operations, services or production suspended.

18. Pursuant to Section 4.02 of the Policy, the measure of the Time Element loss is the gross earnings, defined as the actual loss sustained by the Insured during the Period of Liability.

19. Section 4.02.03 of the Time Element coverage provision also provides “Extra Expense” coverage, which promises to pay “for the reasonable and necessary Extra Expenses incurred by the Insured during the Period of Liability, to resume and continue as nearly as practicable the Insured’s normal business activities that otherwise would be necessarily suspended, due to direct physical loss of or damage caused by a **Covered Cause of Loss** to Property of the type insurable under this policy at a **Location.**”

20. Section 7.11 of the Policy defines “Covered Cause of Loss” as “All risks of direct physical loss of or damage from any cause unless excluded.” This definition does not state or otherwise define “Covered Cause of Loss” to require an actual alteration of property.

21. The Policy defines “Occurrence” in relevant part as “All loss(es) or damage that is attributable directly or indirectly to one cause or a series of similar or related causes.”

22. The Policy defines “Operations” as “The Insured’s business activities at the Insured Location.”

23. The Policy defines “Suspension” in relevant part as “The slowdown or cessation of the Insured’s business activities....”

24. The Policy does not define the phrase “direct physical loss of or damage to” property, nor does it separately define “direct”, “physical”, “loss”, or “damage.”

25. The use of the disjunctive “or” in the phrase “direct physical loss of or damage to” means that coverage is triggered if either a direct physical loss **of** property **or** damage **to** property occurs.

26. The Policy’s use of the disjunctive word “or” between the terms “physical loss” and “damage” necessarily means that either a “loss of property” or “damage to property” is required, and that “loss” is distinct from “damage.”

27. The Policy does not exclude losses arising out of a pandemic, or government closure orders mandating cessation or slowdown of Plaintiff’s business in an effort to slow the spread of a pandemic.

28. The Defendant’s failure to define key terms of the policy at best creates an ambiguity regarding what constitutes “direct physical loss of” property vis-à-vis “direct physical damage to” property.

29. The Defendant could have and should have defined these key terms rather than asking the Court to interpret, define, or re-write the policy after a claim arises in manner favorable to the Defendant.

THE VIRUS EXCLUSION

30. Section 3.03.01.01 of the Policy sets out an exclusion purporting to preclude coverage resulting from “Contamination, and any cost due to Contamination including the inability to use or occupy property or any cost of making property safe or suitable for use or occupancy, except as provided by the Radioactive Coverage of this Policy.”

31. The exclusion itself does not mention the word the “virus”, although “virus” is included in the definition of “contamination”.

32. Neither the exclusion, nor the definition of “contamination” reference a global pandemic.

33. In 2006, the two major insurance industry trade groups, Insurance Services Office, Inc. (“ISO”) and the American Association of Insurance Services (“AAIS”) represented hundreds of insurers in a national effort so seek approval from state insurance regulators for the adoption of the Virus Exclusion.

34. In their filings with the various state regulators, on behalf of insurers, ISO and AAIS represented that the adoption of the Virus Exclusion was only meant to “clarify” that coverage for “disease-causing agents” has never been in effect and was never intended to be included in property policies.

35. In its “ISO Circular” dated July 6, 2006 entitled “New Endorsements Filed to Address Exclusion of Loss Due to Virus or Bacteria”, ISO represented to state regulatory bodies that: “While property policies have not been a source of recovery for losses involving

contamination by disease-causing agents, the specter of pandemic or hitherto unorthodox transmission of infectious material raises the concern that insurers employing such policies may face claims in which there are efforts to expand coverage to create sources of recovery for such losses, contrary to policy intent.”

<https://www.propertyinsurancecoveragelaw.com/files/2020/03/ISO-Circular-LI-CF-2006-175-Virus.pdf> (last accessed August 16, 2020)

36. Similarly, AAIS, in its “Filing Memorandum” in support of the Virus Exclusion, represented: “Property policies have not been, nor were they intended to be, a source of recovery for loss, cost or expense caused by disease-causing agents. With the possibility of a pandemic, there is concern that claims may result in efforts to expand coverage to create recovery for loss where no coverage was originally intended....This endorsement clarifies that loss, cost, or expense caused by, resulting from, or relating to any virus, bacterium, or other microorganism that causes disease, illness, or physical distress or that is capable of causing disease, illness, or physical distress is excluded.”

https://www.uphelp.org/sites/default/files/attachments/aais_virus_or_bacteria_filing_memo_ap.pdf (last accessed August 16, 2020).

37. The foregoing representations made by the insurance industry justifying the inclusion of the Virus Exclusion were false.

38. By 2006, the time of the state applications to approve the Virus Exclusion, courts had repeatedly found that property insurance policies covered claims involving disease-causing agents.

39. In securing approval for the adoption of the Virus Exclusion by misrepresenting to the state regulators that the Virus Exclusion would not change the scope of coverage, but

rather just clarify existing coverage, the insurance industry effectively narrowed the scope of the insuring agreement without a commensurate reduction in premiums charged.

40. Based on information and belief, Defendant directly or indirectly participated in the insurance industry's efforts to effect state Insurance Commissioners, including the State of Iowa's Insurance Commissioner, to approve the suggested virus exclusion.

41. Defendant incorporated suggested provisions of the Insurance Services Office, Inc. into the policy issued to Plaintiff, including its "Virus Exclusion".

PLAINTIFF'S CLAIM FOR INSURANCE BENEFITS

42. In December 2019, an outbreak of illness known as COVID-19 caused by a novel coronavirus formally known as SARS-CoV-2 was first identified in Wuhan, Hebei Province, China.

43. On March 11, 2020, the World Health Organization declared COVID-19 a pandemic.¹

44. On March 13, 2020, the federal government declared a national emergency. Three days later, the CDC and members of the national Coronavirus Task Force issued public guidance, styled as "30 Days to Slow the Spread," that advocated for the first time far-reaching social-distancing measures, such as working from home; avoiding shopping trips and gatherings of more than 10 people; and staying away from bars, restaurants, and food courts.

45. On March 17, 2020, Iowa Governor Kim Reynolds issued a Proclamation closing all bars, restaurants, convention and public meeting spaces, bowling centers, arcades, and casinos, among other businesses, from gatherings of customers, dining, drinking, in-person services and gaming.

¹ <https://www.who.int/emergencies/diseases/novel-coronavirus-2019/interactive-timeline/#!> (last accessed on August 15, 2020).

46. The Proclamation did not mandate the closing of or impact other stores and businesses, such as grocery stores, gas stations, and golf courses. Other businesses that provided service to Plaintiff were, however, closed.

47. The Proclamation resulted in the necessary suspension of Plaintiff's operations.

48. The Proclamation caused "direct physical loss of or damage to" Plaintiff's covered property as contemplated by the Policy by precluding Plaintiff from conducting its operations, precluding customers from patronizing the business, and otherwise frustrating the intended use of the property at Plaintiff's businesses, all thereby causing the suspension, cessation and/or slowdown of Plaintiff's business activities during a period of restoration.

49. Losses caused by the Governor Reynolds' Proclamation, not the COVID-19 virus itself, triggered the Time Element coverage (including the Extra Expense coverage) provided in the Policy.

50. As a result of the Proclamation, Plaintiff has suffered a covered Time Element loss as provided for and defined in in the Policy.

51. Plaintiff has fully complied with its obligations under the policy, to include submitting a claim for loss.

DEFENDANT'S DENIAL OF COVERAGE

52. On February 25, 2021 Plaintiff received a letter from Zurich by email stating that Zurich had completed its investigation and determined that there would be no coverage under the insurance policy for the claim. The denial-of-coverage letter is attached hereto as Exhibit B.

53. The purported reason for the denial of coverage as set forth in the declination letter is the policy's exclusion of loss due to the COVID-19 virus, and because there was no "direct physical loss or damage to" property.

54. Defendant's denial of Plaintiff's claims relied in part on an exclusion contained in the policy regarding a loss due to "contamination."

55. Plaintiff did not close due to "contamination" of its facilities; rather, Plaintiff closed solely because of the Governor's Proclamation on March 17, 2020 and subsequent extensions and modifications of said Proclamation.

56. Indeed, despite COVID-19 being still active and spreading in the community, Plaintiff's facility is now fully open and operating pursuant to the Governor's Proclamation on February 5, 2021 allowing Plaintiff to restore its operations.

57. No one on behalf of Defendant in any manner investigated any of the insured facilities to determine whether the coronavirus or any other virus was present or otherwise contaminated Plaintiff's facility.

58. Plaintiff has no knowledge of its facilities being contaminated or infected with COVID-19.

59. Based on information and belief, Defendant has no knowledge of Plaintiff's facility being contaminated or infected with COVID-19.

COUNT I
DECLARATORY JUDGMENT AGAINST ZURICH AMERICAN INSURANCE
COMPANY, or ZURICH
PURSUANT TO IOWA RULES OF CIVIL PROCEDURE 1.1101

60. Plaintiff re-alleges all of the above paragraphs 1 through 59 as if fully set forth herein.

61. Plaintiff claims damages that are covered under the Time Element coverage (also known as business interruption coverage) provided in The Zurich EDGE Policy for which Plaintiff purchased and paid premiums.

62. Defendant has denied coverage under the Policy.

63. Plaintiff suspended its operations due to direct physical loss of its property caused by a covered cause of loss at its insured facilities, as required to trigger coverage under the Policy.

64. At the time Plaintiff purchased the policy, Defendant knew that courts had held on numerous occasions that a condition making it impossible to use property for its intended use constituted “physical loss or damage to property.”

65. Additionally, as recently as January 19, 2021, the United States District Court Northern District of Ohio Eastern Division denied Zurich American Insurance Co.’s Motion for Summary Judgment in a case with a similar business interruption clause and identical to the issues in this case. *Henderson Road Restaurant Systems, Inc. v. Zurich American Insurance Co.* Case No. 1:20 CV1239.

66. An actual justiciable controversy exists between the Plaintiff and Defendant with regard to whether the loss claimed by Plaintiff is covered under the policy that has been issued to Plaintiff.

WHEREFORE, Plaintiff respectfully requests that the Court enter judgment in its favor and against the Defendant, including the relief of:

- a. Entering a Declaratory Judgment acknowledging the rights of the Plaintiff and obligation of the Defendant under the policy and declaring that the loss claimed by the Plaintiff is covered under Policy ERP0273025-02;
- b. Entering a Declaratory Judgment determining the exclusion based on Contamination does not apply to preclude coverage under these circumstances;
- c. Ordering payment of Time Element Coverages (business interruption) pursuant to the Policy purchased and all benefits provided under the Policy to be substantiated by the

Plaintiff, and for such other and further relief as the Court deems proper, including costs and attorney fees.

COUNT II
BREACH OF CONTRACT

67. Plaintiff re-alleges paragraphs 1 through 66 as fully set forth herein.

68. Plaintiff's Policy is a contract under which Defendant was paid premiums in exchange for its promise to pay Plaintiff's losses for claims covered by the Policy.

69. The Time Element coverage in the policy Requires Defendant to pay for Plaintiff's loss of gross earnings sustained due to the necessary suspension of its operations during the period of liability.

70. Governor Reynolds' Proclamation caused "direct physical loss of" Plaintiff's property resulting in the necessary suspension of Plaintiff's business activities and operations, thereby triggering the Time Element coverage (including the Extra Expense coverage) of Plaintiff's Policy.

71. At all times material hereto, Plaintiff maintained reasonable expectations that the loss arising out of the Proclamation would be covered under the Time Element coverage provided for in the Policy under the circumstances described herein, as indeed the very purpose of purchasing such coverage is to insure this type of loss.

72. The losses described herein are covered losses under the policy.

73. Plaintiff has complied with the applicable provisions of the policy and has proven that the Plaintiff has experienced a covered loss and necessarily suspended its business operations as required by the policy.

74. No valid policy exclusion exists to preclude coverage.

75. To the extent the Contamination Exclusion would potentially apply, Defendant should be estopped from claiming the exclusion excludes coverage under these circumstances.

76. By denying coverage for the claims and losses set forth herein, Defendant has breached its coverage obligations under the policy.

77. As a result of Defendant's Breach of the Policy, Plaintiff has sustained significant damages for which Defendant is liable.

WHEREFORE, the Plaintiff respectfully requests that the Court enter judgment in favor of the Plaintiff and against the Defendant, including the following relief:

- a. An award to the Plaintiff and against the Defendant for the loss of gross revenue and extra expenses substantiated by the Plaintiff, and for all other covered damages, and;
- b. Such other and further relief as the Court deems proper, including costs and reasonable attorney fees for having to pursue this matter.

JURY DEMAND

The Plaintiff hereby makes a demand for trial by jury on all issues so triable.

Respectfully submitted,

CARNEY & APPLEBY, P.L.C.

/s/ James W. Carney

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/s/ Nicholas J. Mauro

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