

INDIANA COMMERCIAL COURT

STATE OF INDIANA)
) SS:
COUNTY OF ELKHART)

ELKHART SUPERIOR COURT 2
CAUSE NO. _____

STEINWAY MUSICAL INSTRUMENTS,)
INC. and CONN-SELMER, INC.)

Plaintiffs,)

v.)

**JURY TRIAL
DEMANDED**

ZURICH AMERICAN INSURANCE)
COMPANY,)

Defendant.)

COMPLAINT

The Plaintiffs, Steinway Musical Instruments, Inc. (“Steinway”) and Conn-Selmer, Inc. (“Conn-Selmer”) (collectively, “Plaintiffs”), by counsel, for their claims against the Defendant, Zurich American Insurance Company (“Zurich”), allege and state as follows:

INTRODUCTION

1. This action arises out of Zurich’s stated intent to deny coverage under two “all-risk” insurance policies for business interruption losses that Zurich issued to Plaintiffs.

2. Zurich first issued Edge Global Policy No. PPR8650838-00 (Effective Date: 04/01/2019 to 04/01/2020) (“2019 Policy”). Zurich then subsequently issued Zurich Edge Global Policy No. PPR8650838 01 (“2020 Policy”) (Effective Date: 04/01/2020 to 04/01/2021) (collectively “the Policies”). A true and accurate copy of the Policies are attached as **EXHIBITS A AND B**.

3. The “all-risk” Policies drafted by Zurich expressly include coverage for many types of contamination, including radiation, ammonia, virus, pathogen or pathogenic organism, and disease-causing illness or agent.

4. Steinway submitted a claim to Zurich seeking coverage for its losses and losses sustained by it and its subsidiaries, including Conn-Selmer, for business interruption and other covered losses, costs and expenses arising in connection with the ongoing COVID-19 pandemic.

5. Zurich has consistently indicated its intent to deny coverage of Plaintiffs’ claim. Indeed, upon information and belief, Zurich has taken, and is taking, a corporate-wide position that deprives Plaintiffs and Zurich’s other insureds of hundreds of millions of dollars of promised insurance. Upon information and belief, Zurich has done so, and is doing so, to protect its financial interests at the expense of its insureds’ interests and with conscious disregard and disdain for the rights, interests, and reasonable expectations of its insureds, including Plaintiffs.

6. Plaintiffs seek damages for breach of contract against Zurich for its failure to honor its obligations under the Policies. Plaintiffs further seek a judgment declaring the scope of Zurich’s obligation to pay Plaintiffs’ losses under the Policies.

PARTIES

7. Steinway is a Delaware corporation with its principal place of business in Astoria, New York. Steinway, through its wholly owned subsidiary, Steinway, Inc., has retail stores in California, Connecticut, Florida, Illinois, New Jersey, New York and Washington and manufacturing venues in New York and Ohio. Steinway also has retail locations internationally in Austria, China, France, Germany, Japan and the United

Kingdom and manufacturing venues in Germany and Poland.

8. Conn-Selmer is a Delaware corporation with its principal place of business in Elkhart, Indiana. Conn-Selmer is a wholly owned subsidiary of Steinway. Conn-Selmer has manufacturing and distribution locations in Elkhart, Indiana and also in North Carolina and Ohio. Internationally, Conn-Selmer has corporate offices and distribution locations in China and the United Kingdom.

9. Upon information and belief, Zurich is a New York corporation with its principal place of business at 1299 Zurich Way, Schaumburg, IL 60196. Zurich is a part of the Zurich Insurance Group of Companies. Upon information and belief, Zurich is owned by Zurich Holding Company of America, and its ultimate parent is Zurich Insurance Group Ltd.

10. Zurich and the other members of the Zurich Insurance Group Ltd. brand hold themselves out to the public as the Zurich Insurance Group. They maintain a website at <https://www.zurich.com>. The Zurich Insurance Group makes various statements and representations on its website on behalf of its member companies, including Zurich.

11. Since the outbreak of the COVID-19 pandemic, the Zurich Insurance Group has made wide-ranging representations. The following are some of the many representations and promises that the Zurich Insurance Group has made, and still makes as of the date of the filing of this lawsuit:

- “As a society, we are facing unprecedented challenges that are immediate and will have long-lasting implications. At Zurich, responding to these challenges goes to the heart of our purpose as a business, and our promise to customers.”¹

¹ <https://www.zurich.com/services/coronavirus-support>.

- “The spread of Coronavirus (Covid-19) is unprecedented and we understand this is an incredibly difficult time for families and businesses. We are here to help customers and businesses who are affected by the impact of Covid-19 in these challenging times.”²
- “Our customers need us now more than ever. It’s a challenging time for everyone, everywhere, both personally and professionally. How we in the insurance sector react in a crisis can make all the difference for the people we work with, especially the customers who trust and depend on us.”³
- “David Henderson, chief human resources officer at Zurich, says that employers’ duty of care is vital to the success of the social contract and that companies who protect their workforce – physically, mentally, financially – will be applauded in the post-Covid-19 era. He calls this a ‘moment of truth’ for all businesses.”⁴

12. Unfortunately for Plaintiffs, Zurich has breached its contract with its insureds in this instance. In its “moment of truth,” Zurich has failed to fulfill its obligations under the Policies.

JURISDICTION AND VENUE

13. This Court has jurisdiction over Zurich in accordance with applicable constitutional principles and Rule 4.4, among others, of the Indiana Rules of Trial Procedure, the Commercial Court Rules and the applicable Policies between the parties.

14. Venue is proper in this Court under the Commercial Court Rules and the applicable Policies between the parties.

15. Indiana law will govern this contractual dispute.

FACTS

16. For over 160 years, Steinway has been dedicated to making the finest

² <https://www.zurich.com/en/knowledge/topics/covid-19/covid-19-and-project-closures-for-large-complex-construction-projects>.

³ <https://www.zurichna.com/knowledge/articles/2020/06/covid-19s-business-impact-6-ideas-for-insurance-brokers>.

⁴ <https://biggerpicture.ft.com/agile-protection/article/building-better-social-contract/>.

handcrafted pianos in the world. Similarly, Conn-Selmer is the leading manufacturer and distributor of hand-crafted musical instruments for student, amateur, and professional use.

17. As a part of its prudent business practices, Steinway maintains insurance coverage. Conn-Selmer is an “additional insured” under the Policies.

18. Plaintiffs specifically maintain “all risk” coverage with Zurich, covering not only more commonly known risks like fire, but also entirely unknown and novel risks that may arise which were not previously considered by Zurich or by the public at large. As described below in greater detail, the Policies at issue here provides coverage for “*all risks of direct physical loss of or damage from any cause unless excluded.*” And the Policies at issue here contains no exclusion for viruses, infectious diseases or losses due to a pandemic.

A. The COVID-19 Pandemic

19. COVID-19 is an infectious disease that has caused a global pandemic.

20. Upon information and belief, the first instance of the disease spreading to humans was on or about December 31, 2019, where the outbreak of COVID-19 was first reported in Wuhan, China.

21. In January 2020, the first known case of a U.S. resident infected by COVID-19 was reported in the state of Washington. In early 2020, COVID-19 spread across the United States.

22. As early as February 26, 2020, the Center for Disease Control and Prevention (“CDC”) advised that COVID-19 was spreading freely without the ability to trace the origin of new infections, also known as community transmission.

23. On March 11, 2020, the World Health Organization (“WHO”) declared COVID-19 to be a pandemic.

24. COVID-19 is a physical substance that can be present outside the human body in several forms, for example, in fluid droplets.

25. The WHO has confirmed that COVID-19 can be transmitted from person to person by physical droplets in the air or on surfaces: "The disease can spread from person to person through small droplets from the nose or mouth which are spread when a person with COVID-19 coughs or exhales. These droplets land on objects and surfaces around the person. Other people then catch COVID-19 by touching these objects or surfaces, then touching their eyes, nose or mouth."

26. These droplets can travel over significant distances. On surfaces, they can remain detectable for several days.

27. COVID-19 particles have been transmitted by way of human contact with surfaces and items of physical property, spreading the COVID-19 disease. It has also been transmitted by human-to-human contact and interaction with premises, and by way of human contact with airborne COVID-19 particles present in the air.

28. The presence of COVID-19 particles can render items of physical property unsafe and the premises unsafe.

29. The presence of COVID-19 in and on property, including in indoor air, on surfaces, and on objects, causes direct physical harm to and altering property and otherwise making it incapable of being used for its intended purpose.

30. COVID-19 adheres to surfaces and objects, harming and physically changing and physically altering those objects by becoming a part of their surface and

making physical contact with them unsafe for their ordinary and customary use. Once COVID-19 is in, on, or near property, it is easily spread by the air, people and objects from one area to another, causing additional direct physical loss of or damage.

31. Additionally, the presence of COVID-19 in and on property, including in indoor air, on surfaces, and on objects, renders the property unsafe and unfit for its normal use. Respiratory particles (including droplets and airborne aerosols) and fomites are physical substances that alter the physical properties of the interiors of buildings to make them unsafe, untenable and uninhabitable.

32. The presence of any COVID-19 particles causes direct physical harm to property, direct physical damage, and direct physical loss to property.

33. The presence of people infected with COVID-19 and/or carrying the disease particles renders physical property in their vicinity unsafe and unusable, resulting in actual and direct physical loss to that property.

34. Via its corporate web pages, Zurich admitted to the physical dangers associated with COVID-19, advising its insureds to rely on the same scientific studies by the New England Journal of Medicine, the CDC, and other such sources concerning how long the virus survives on surfaces and touch points like door handles and counters. Zurich has underscored the need to repeatedly disinfect these surfaces. *See, e.g.,* <https://www.zurichna.com/knowledge/articles/2020/05/disinfecting-offices-and-facilities-during-the-covid-19-crisis>.. A true and accurate copy of this article is attached hereto as **EXHIBIT C**.

35. A particular challenge with COVID-19 is that it is possible for a person to be infected with the disease, but be asymptomatic. Such seemingly healthy people

unknowingly spread COVID-19 via speaking, breathing, and touching objects.

36. While infected droplets and particles carrying COVID-19 may not be visible to the naked eye, they are physical objects which travel to other objects and cause harm. Habitable surfaces on which COVID-19 has been shown to survive include, but are not limited to, stainless steel, plastic, wood, paper, glass, ceramic, cardboard, and cloth.

B. The COVID-19 Spread and Civil Authority Orders

37. On March 16, 2020, the CDC and the national Coronavirus Task Force issued to the American public guidance titled “30 Days to Slow the Spread” of COVID-19. The guidance called for extreme social distancing measures, such as working from home, avoiding gatherings of more than 10 people, and staying away from bars and restaurants.

38. Around the same time, state governments across the nation recognized the unprecedented and catastrophic situation, with California, Connecticut, Illinois, Indiana, New Jersey, New York, Ohio, and Washington making “State of Emergency” declarations that began in mid-March, 2020, and Florida in April, 2020.

39. These states also issued orders suspending or severely limiting all of Plaintiffs’ retail, office, manufacturing and/or distribution locations in these states in response to the dangers to people and property from COVID-19.

40. By mid-March, 2020, Austria, France, Germany, Japan and the United Kingdom ordered the closure or severe limitation of business activities of all of Steinway’s retail, office, manufacturing and/or distribution locations in their respective countries in response to the dangers to people and property from COVID-19.

41. On March 16, 2020, Indiana’s Governor Holcomb issued an order relating to COVID-19 and issued many other orders subsequent to that date. Many of Governor

Holcomb's orders expressly acknowledged COVID-19's "propensity to physically impact surfaces and personal property."

42. As a result of COVID-19 and the related pandemic, the property damage caused by COVID-19, and in compliance with government guidance and orders, Plaintiffs were forced to close or severely limit activities at all of its retail, office, manufacturing and/or distribution locations world-wide.

43. Plaintiffs have suffered and continue to suffer significant losses from the closures of its insured locations caused by COVID-19 and the pandemic.

C. The Policies

44. Zurich introduced its EDGE policies in 2008. When it did so, it stated:

"We listened to our customers and developed a policy that meets their needs," said Mario Vitale, CEO of Zurich's Global Corporate in North America (GCiNA) business unit. "This new policy gives them higher limits, broader coverage and greater flexibility. The Zurich Edge dramatically enhances our ability to serve customers in this important line of business and offers significant advantages for global property programs and global property fronting arrangements."

"In addition to being globally compliant, the policy also has the advantage of being offered by Zurich, which is often recognized for offering one of the broadest and most diverse portfolios of products and services in the world," Vitale said. "The Zurich Edge policy is clearly written with all limits, sub-limits and other critical coverage issues incorporated within the policy declarations and is supported by Zurich's global network of risk engineering and claims professionals."⁵

45. In exchange for a very substantial premium, Zurich sold Steinway the Policies, which provides coverage for property losses, for business interruption losses ("Time Element" per the policy language), and other losses. The Policies' limits are \$200

5

http://www.zurichservices.com/zus/zna_config.nsf/pages/9123da88864cd81485257433006ed710!OpenDocument&Click=.

million, which are subject to deductibles, sublimits, and other conditions described in relevant part below.

46. The Policies contains sublimits for many losses, but other losses are simply subject to the full \$200 million per Policy limit. For example, the Policies have no sublimit for Time Element (business interruption) meaning the full \$200 million in coverage is available. The Policies limit coverage to \$5 million per location for Contingent Time Element coverage. The Policies also contains some time limits on coverage. For example, coverage for gross earnings (part of Time Element) is limited to 12 months. Civil or Military Authority is limited \$5 million per property and a 30-day time frame.

47. The insuring clause in the Policies provides in relevant part that the Policy “[i]nsures against direct physical loss of or damage caused by a **Covered Cause of Loss** to Covered Property, at an Insured Location. . .” The term “**Covered Cause of Loss**” is defined as “[a]ll risks of direct physical loss of or damage from any cause unless excluded.”

48. In several distinct ways, the Policies explicitly recognize that contamination of property constitutes “direct physical loss of or damage” to property:

(a) First, the Policies contain a sublimit of \$2.5 million for ammonia contamination.

(b) Second, the Policies extend coverage to radioactive contamination.

(c) Third, the Policies contain an exclusion removing certain types of contamination from coverage while leaving other types of contamination as covered. In the base policy form, Zurich defined “Contamination” to include “pathogen or pathogenic organism, bacteria, virus, disease causing or illness causing agent. . .” The base policy form also defined “Contaminant” to include ammonia. But through an endorsement that was issued at the inception of coverage, the terms “contamination” and “contaminant” were redefined in relevant part to delete pathogen or pathogenic organism, bacteria, virus and disease-causing illness or agent and ammonia from the exclusion.

49. Zurich deleted the exclusion for ammonia contamination and applied a \$2.5 million sublimit to that loss only.

50. With respect to pathogen or pathogenic organism, bacteria, virus and disease-causing illness or agent, the Policies do not apply a sublimit, meaning the entire \$200 million limit is available.

51. Beginning with its introduction in 2008, Zurich marketed its Edge policy form as offering uniquely “broader coverage and greater flexibility.” Zurich CEO made this announcement and lauded the clarity of the form. Zurich knew it was selling an insurance product that did not exclude loss from virus, which is demonstrated by its regulatory filings.

52. In December 2019, just before COVID-19 was discovered, Zurich filed a regulatory request to modify its policy language. Buried in the edits, and without reference to the significance of the change, Zurich’s filing sought to add back an exclusion for virus, which it sought to have take effect in July 2020.

53. Zurich’s effort to add this exclusion into the Edge policy after July 2020 is evidence that the Policies protected Zurich’s insureds against losses caused by viruses.

54. The Policies cover Plaintiffs’ Time Element losses up to \$200 million, subject to the applicable deductible, based on COVID-19 and direct physical loss of or damage to property.

55. COVID-19 and the ensuing government orders have caused “direct physical loss of or damage to” Plaintiffs’ property insured under the Policies.

56. The Policies contain deductibles of \$100,000 for Time Element per occurrence. The Policies contain a deductible of \$100,000 for Contingent Time Element

per location. The Policies contain other deductibles for specific properties and circumstances.

57. The Policies contain a section entitled “Time Element Coverages” which insures Plaintiffs’ gross earnings. Within that section, coverage is extended for “Extra Expense” which covers the cost to resume normal business operations with a \$20 million limit.

58. The Policies also contain what are described as “Special Coverages.” These include items such as “Civil or Military Authority,” “Contingent Time Element,” “Decontamination Costs,” “Ingress/Egress,” and many others.

59. “Civil or Military Authority” coverage insures the Time Element Loss (gross earnings) resulting from “the necessary **Suspension** of the Insured’s business activities at an Insured Location if the **Suspension** is caused by order of civil or military authority that prohibits access to the **Location**. That order must result from a civil authority’s response to direct physical loss of or damage caused by a **Covered Cause of Loss** to property not owned, occupied, leased or rented by the Insured” and within one mile of an insured location.

60. As alleged above, state, local and international governments issued orders closing and otherwise limiting access to Plaintiffs’ retail, office, manufacturing and/or distribution locations world-wide in order to control spread of COVID-19, and specifically because COVID-19 is causing property loss or damage everywhere, including many places within one mile of plaintiffs’ locations. As a result of those civil orders, Plaintiffs have suffered loss insured under the Policies.

61. “Contingent Time Element” coverage covers the gross earning loss “directly

resulting from the necessary **Suspension** of the Insured’s business activities at an Insured Location if the **Suspension** results from the direct physical loss of or damage caused by [any non-excluded cause] to Property . . . at **Direct Dependent Time Element Locations, Indirect Dependent Time Element Locations,** and **Attraction Properties** located worldwide” Attraction Properties are defined as properties that attract customers to the insured’s business. In plain English, the Policies provide coverage for Plaintiffs’ losses if certain types of neighboring properties suffer property loss or damage of the type not excluded under the Policies.

62. “Decontamination Costs” are covered to the sublimit where a law or ordinance regulating contamination results in increased cost of decontamination.

63. The insuring clause covers “loss of or damage to property,” with the word “or” signifying that those are two different concepts. There is no requirement that the loss of property be permanent or complete. Here, Plaintiffs are suffering both a “loss of” its retail, office, manufacturing and/or distribution locations, *and* property damage based on the scientific studies quoted above.

D. Zurich’s Denial of Claim

64. In April, 2020, Plaintiffs gave notice to Zurich of its COVID-19 loss. Zurich responded with an email from its Property Claims division dated April 24, 2020.

65. Even prior to addressing its coverage position to Plaintiffs, Zurich announced to the world press that it denies there is coverage for virtually all business interruption losses arising from COVID-19. On or about May 14, 2020, Zurich’s CFO, George Quinn, announced Zurich’s position that virtually all (more than 99%) of its policies in the United States exclude losses for virus (even though its broadly marketed

Edge form does not exclude virus losses). He further claimed that Zurich’s worldwide business interruption claims due to COVID-19 would be about \$450 million (60% of \$750 million) in 2020, with the bulk of those claims payments being in Europe. <https://www.zurich.com/en/media/news-releases/2020/2020-0514-01>, <https://www.insurancejournal.com/news/international/2020/05/14/568567.htm>.

66. On July 10, 2020, Plaintiffs received a letter from Zurich and stated: “As a preliminary matter, it does not appear that the presence of the COVID-19 virus constitutes direct physical loss or damage to property.”

67. Zurich also referenced, in its July 10, 2020 letter, a “Contamination” exclusion in 3.03.01.01, and claimed: “The presence of the COVID-19 virus falls within the definition of **Contamination**. Accordingly, any loss resulting from the presence of the COVID-19 virus may be excluded under the Policies.” This statement was in direct conflict with an endorsement that specifically removed viruses from the definition of contamination in the Policies.

68. Plaintiffs have pointed out Zurich’s erroneous contractual positions in letters dated August 21, 2020 and February 23, 2021. As of the date that this Complaint was filed, Zurich has not yet agreed to provide coverage for Plaintiffs’ claim.

CLAIMS FOR RELIEF

Count One (Breach Of Contract)

69. Plaintiffs repeat and re-allege the allegations set forth in the preceding paragraphs as if fully stated in this paragraph.

70. The Policies are a valid and enforceable contract between Plaintiffs and Zurich.

71. In the Policies, Zurich agreed to cover Plaintiffs against all risks of direct physical loss of or damage covered by a covered cause of loss.

72. COVID-19 and the resulting state, local and international governmental orders are a covered cause of loss as described in the Policy.

73. COVID-19 and the state, local and international governmental orders have caused and are continuing to cause physical loss of and/or damage to Plaintiffs.

74. Plaintiffs are entitled to coverage from the losses it has sustained because it has suffered damage covered in the Policies' limit and/or applicable sublimits of liability.

75. Plaintiffs' losses, costs and expenses, as outlined above, are covered under multiple Policy coverages and are not excluded.

76. Plaintiffs complied with all applicable provisions pursuant to the Policies, including paying premiums and providing timely notice of its claim to Zurich.

77. Nonetheless, Zurich unjustifiably refuses to pay for Plaintiffs' claim, therefore breaching the Policies.

78. Plaintiffs have suffered and continues to suffer damages because of Zurich's breach of the Policies.

79. Plaintiffs are entitled to damages because of Zurich's breach in an amount to be determined at trial, including pre- and post-judgment interest and other cost and relief that this Court deems appropriate.

Count Two (Declaratory Relief)

80. Plaintiffs repeat and re-allege the allegations set forth in the preceding paragraphs as if fully stated in this paragraph.

81. Indiana's Uniform Declaratory Judgment Act states:

Any person interested under a deed, will, written contract, or other writings constituting a contract, or whose rights, status, or other legal relations are affected by a statute, municipal ordinance, contract, or franchise, may have determined any question of construction or validity arising under the instrument, statute, ordinance, contract, or franchise and obtain a declaration of rights, status, or other legal relations thereunder.

Ind. Code § 34-14-1-2.

82. Plaintiffs have standing to bring an action for declaratory relief as to the proper interpretation under the Policies because they have a direct interest in determining the rights and obligations owed by Zurich to Plaintiffs under said Policies.

83. Pursuant to the terms of the Policies, Zurich is obligated to pay, up to the limit of its respective liabilities, for all covered risks or property loss and/or damage.

84. Plaintiffs' losses, costs and expenses, as outlined above, are covered under multiple coverages in the Policies.

85. Zurich has stated an intent to dispute its legal rights and obligations to pay Plaintiffs' claims, and has not yet agreed to pay Plaintiffs for any of their claims.

86. This Court should enter a declaratory judgment in favor of Plaintiffs and against Zurich declaring that there is coverage available for Plaintiffs' claims up to the full limits or applicable sublimits of the Policies and award any other just and proper relief.

WHEREFORE, Plaintiffs, Steinway Musical Instruments, Inc. and Conn-Selmer, Inc., request the Court enter a judgment in their favor and against the Defendant, Zurich American Insurance Company, in an amount appropriate to compensate them for their damages, together with interest and all other appropriate relief.

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