

INDIANA COMMERCIAL COURT

STATE OF INDIANA)	IN THE ALLEN COUNTY
)	COMMERCIAL COURT
)SS:	
COUNTY OF ALLEN)	CAUSE NO. _____
)	
)	
THE TRUSTEES OF PURDUE)	
UNIVERSITY,)	
)	
Plaintiff,)	
)	
v.)	
)	
AMERICAN HOME ASSURANCE)	
COMPANY,)	
)	
Defendant.)	

COMPLAINT AND REQUEST FOR JURY TRIAL

Plaintiff The Trustees of Purdue University (“Purdue”), for its complaint on behalf of itself and other insureds, including Purdue University, its regional campuses and affiliated entities, against Defendant American Home Assurance Company (“American Home”), states as follows:

I.
Introduction

1. This is an action for declaratory relief concerning insurance. Purdue seeks a declaration and judgment, pursuant to Trial Rule 57 and the Indiana Declaratory Judgment Act, Indiana Code § 34-14-1 *et seq.*, confirming American Home’s obligation to pay Purdue’s losses under a commercial property insurance policy on a claim arising from the natural disaster known as the COVID-19 pandemic. American Home has refused to acknowledge its obligations under the American

Home policy, which Purdue purchased for millions of dollars. American Home's policy obligates it indemnify Purdue for the tens of millions of dollars in losses Purdue has suffered.

II. **The Parties**

2. Purdue is an Indiana public institution of higher education with operations throughout the State of Indiana, including Tippecanoe and Allen Counties.

3. American Home is a New York insurance company doing business in Indiana.

III. **Jurisdiction and Venue**

4. This lawsuit requests declaratory judgment against American Home under Trial Rule 57 and Indiana Code § 34-14-1 *et seq.*

5. The Court has jurisdiction over American Home under Trial Rule 4.4(A)(i) because American Home does business in Indiana, is licensed to do so, and sold a policy to Purdue insuring property and risks within the State of Indiana.

6. Venue is proper in in this Court pursuant to Indiana Commercial Court Rule 2(E)(12).

IV. **Factual Circumstances**

7. Purdue is a world renowned, public research, land-grant university. Purdue's West Lafayette campus is a top-five U.S. public university.

8. Purdue's three separately-accredited campuses operate two NCAA Division I and one NCAA Division II intercollegiate athletics programs and serve as cultural, educational and social hubs for their respective communities and surrounding regions.

9. 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.

10. On March 6, 2020, Indiana Governor Eric Holcomb issued Executive Order 20-02 declaring the COVID-19 outbreak a disaster emergency for the State of Indiana.

11. On March 11, 2020, the World Health Organization (“WHO”) declared the illness caused by SARS-CoV-2, COVID-19 (Coronavirus Disease 2019), to be a global pandemic.

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

13. SARS-CoV-2 has an incubation period of 2-12 days, during which time it can be transmitted even before symptoms of COVID-19 develop. Symptoms often include fever, cough, shortness of breath, and, in severe cases, pneumonia and death.

14. SARS-CoV-2 is a coronavirus. It is a physical substance. It is visible under a microscope. It has mass.

15. SARS-CoV-2 is transmitted in multiple ways. When an infected person exhales, they project live virus particles into the environment. Those particles adhere

to, and alter, water molecules suspended in the air. Virus molecules also adhere to, and alter, porous and nonporous surfaces with which they come into contact. An uninfected person can contract the virus by inhaling the altered air. They can also contract the virus by touching an altered surface and then touching their eyes, nose, or mouth. Because SARS-CoV-2 can survive outside the body suspended in the air and on surfaces for extended periods of time, SARS-CoV-2 physically harms real and personal property, such as indoor air and furniture, rendering that property dangerous to students, teachers, staff, and visitors.

16. Scientific research concerning SARS-CoV-2 has evolved since the start of the pandemic. The latest research shows that wiping surfaces no longer completely destroys the virus. Wiping surfaces can cause the SARS-CoV-2 to become airborne.

17. When SARS-CoV-2 travels through the air it can repeatedly land on surfaces even after they have been cleaned. Such surfaces are again harmed, making that property physically unusable while SARS-CoV-2 exists on it or in the surrounding air physically altered by SARS-CoV-2. In an attempt to mitigate the spread of COVID-19, national, state, and local civil authorities have issued various orders ordering people to stay at home and restricting entities from operating (collectively, the “Orders”).

18. On March 23, 2020, Governor Holcomb issued Executive Order 20-08 which closed all non-essential businesses and ordered all individuals living in Indiana to stay at home through at least April 6, 2020, with limited exceptions. Governor Holcomb extended the stay-home order through May 1, 2020.

19. On May 1, 2020, Governor Holcomb issued Executive Order 20-26 announcing a staggered approach to reopening the state. Effective May 11, 2020, Executive Order 20-26 allowed educational institutions, including universities, to open only for purposes of facilitating distance learning, performing critical research, or performing essential functions. The order required educational institutions reopening for those purposes to perform enhanced cleaning of commonly touched surfaces. Governor Holcomb extended these restrictions until September 25, 2020.

20. On September 24, 2020, Governor Holcomb issued Executive Order 20-43 announcing “the new normal during a global pandemic.” Effective September 26, 2020, all Hoosier businesses and entities, including non-profit educational entities, were required to develop COVID-response plans, take proactive measures to ensure compliance with social distancing and sanitation measures, and utilize policies regarding remote work when reasonable and practicable, among other requirements.

21. On March 12, 2020, Dr. Jeremy Adler of the Tippecanoe County Health Department recommended that all general public events with 50 persons or greater be modified, cancelled, or postponed and that prevention supplies (such as hand sanitizer) be provided to event staff and participants.

22. On April 8, 2020, Dr. Adler ordered that all community events, including camps and sporting events, be cancelled through June 30, 2020. Social gatherings were limited to 25 people on May 2, 2020.

23. Beginning August 14, 2020, Dr. Adler ordered that, in addition to Governor Holcomb’s applicable directives, all restaurants and food service facilities,

including those located on Purdue's West Lafayette campus, must continue to limit utilized capacity to 75% of available seating.

24. Effective November 4, 2020, Dr. Adler ordered that social gatherings, including those on Purdue's West Lafayette campus, must be limited to 100 people or less unless approved by the Tippecanoe County Health Department.

25. Beginning November 18, 2020, Dr. Adler ordered that, in addition to Governor Holcomb's applicable directives, all restaurants and food service facilities, including those located on Purdue's West Lafayette campus, must continue to limit capacity to 75% of available seating, but if the county's 7-day all tests percent positivity equals or exceeded 10%, then capacity utilization must be limited to 50%. Also beginning November 18, 2020, Dr. Adler ordered that, in addition to Governor Holcomb's applicable directives, capacity utilized in cultural, entertainment, and tourism venues and in gyms and fitness centers, including those located on Purdue's West Lafayette campus, was to be limited to 75% and 50%, respectively, when the county's 7-day all tests percent positivity equals or exceeded 10%.

26. The pandemic, the existence of the virus in and/or on the property's indoor air and/or surfaces, and/or these Orders have required Purdue to partially or totally close its West Lafayette campus and limit its occupancy, causing Purdue to sustain losses and damages.

27. Purdue has confirmed the presence of SARS-CoV-2 at its West Lafayette campus.

28. A study conducted in April 2020 by researchers at the Indiana University

Fairbanks School of Public Health established that the prevalence of SARS-CoV-2 in West Lafayette was at a minimum 5%.¹

29. The presence of SARS-CoV-2 has physically altered the indoor air and surfaces in Purdue's facilities (e.g., classrooms, dormitories, offices, stadiums, auditoriums, gyms, and other buildings), damaging them and rendering them unsafe, uninhabitable, and/or unsuitable for their intended purposes. This resulted in an interruption of Purdue's operations.

30. Purdue has had to modify the physical use of its faculty, employees, students, and invitees through social distancing, avoiding confined indoor spaces, and avoiding gatherings in order to reduce the impact and transmission of SARS-CoV-2.

31. Purdue has had to modify its operations to mitigate the impact of SARS-CoV-2's physical presence on surfaces (such as door handles, desks, chairs, computers, and numerous other places) and in indoor air within Purdue's facilities, including but not limited to the physical alteration of spaces, the disinfection of surfaces, and changes to its air filtration systems and the operating parameters of those systems.

32. SARS-CoV-2 has caused Purdue to sustain losses and damages, including, but not limited to, losses and damages associated with: the cancellation of and occupancy limitations for athletic events, including revenue loss from gameday operations and conference distributions; the cancellation of and occupancy limitations for on-campus conferences; the cancellation of on-campus housing contracts, including revenue loss from dining hall sales; decreased demand for on-campus retail (i.e., non-

¹ See <https://www.pnas.org/content/118/5/e2013906118#T5>.

dining hall) dining; occupancy limitations for the Union Club Hotel; decreased demand for student health center services; increased demand for online classes and the necessary de-densification of in-person classes;. The gross losses to revenue are tens of millions of dollars.

V.
The Policy

33. American Home sold Purdue a global commercial property insurance policy, Policy No. 044243935, with an effective date of September 30, 2017 through September 30, 2020 (the “Policy”). A true and accurate copy of the Policy is attached as **Exhibit 1**.

34. Purdue has paid all required premiums (millions of dollars) and performed all conditions precedent for obtaining coverage under the Policy.

35. Purdue timely notified American Home of the loss and provided a proof of loss on April 6, 2020 under Claim Number 8760219875US.

36. On May 1, 2020, American Home informed Purdue that it was investigating the claim. A true and accurate copy of American Home’s reservation of rights letter is attached as **Exhibit 2**.

37. American Home identified two reasons why it refused to pay any of Purdue’s losses:

- (a) “The insuring agreement for business interruption requires that the interruption of your business be the result of direct physical damage by a covered cause of loss. There is no claim of direct physical damage.”
- (b) “Additionally, the COVID-19 virus is considered a contaminant or pollutant and may be specifically excluded by the policy.”

Ex. 2 at 5.

38. American Home still has not accepted coverage.

39. American Home's reservations and refusal to provide coverage are wrong. The Policy covers "all risks of *direct physical loss* **or** damage" Ex. 1 at PDF p. 52 (emphasis added).

40. American Home understood and intended Purdue's covered "loss" under the Policy to include the inability to use its facilities for their intended purposes.

41. American Home unilaterally chose to use the disjunctive "or" in the business-income insuring agreement quoted in paragraph 38 above.

42. A reasonable policyholder expects coverage for loss of use of physical property for its intended purpose because "physical loss" is different than "physical damage" in the Policy's insuring agreement.

43. Courts have found that the Policy's "direct physical loss" language is ambiguous, and that this language does not require policyholders to show physical alteration to their property.

44. The insurance industry has acknowledged that the existence of the virus on surfaces constitutes a covered cause of loss that triggers time element business income coverage.

45. Moreover, even if physical alteration of some kind was required under the Policy, as discussed above, SARS-CoV-2 has physically altered and damaged the indoor air and surfaces of Purdue's facilities.

46. The Policy provides several coverages for Purdue's losses, including, but

not limited to, Time Element, Attraction Property, Contingent Time Element, Extra Expense, Interruption by Civil or Military Authority, Logistics Extra Cost, Research and Development Expense, Fundraising Expenses, and Relocation Expenses coverages.

47. The “pollutants or contaminants” exclusion does not apply for various factual and legal reasons.

48. The Policy provides coverage for the losses suffered by Purdue associated with the COVID-19 pandemic.

Count 1: Declaratory Relief

49. Purdue incorporates by reference the above Paragraphs.

50. An actual controversy exists as to the scope of Purdue’s rights and American Home’s obligations under the Policy.

51. Multiple coverage provisions yield coverage for Purdue’s losses under the Policy. For example, the coverage grant of the Time Element portion of the Policy states:

We will pay for the actual **business income** loss sustained by you due to the necessary partial or total interruption of your business operations, services or production during the **period of indemnity** as a result of direct physical loss or damage to: (1) **covered property** by a **covered cause of loss** or (2) property of the type insured under this Policy by a **covered cause of loss** which directly affects your use of the **covered property**, provided that you are a lessee or occupant of the premises where the direct physical loss or damage occurred.

Ex. 1 at PDF p. 52.

52. Purdue has suffered a loss of business income, among other losses, that

is covered by the terms of the Policy.

53. American Home's refusal to agree the Policy provides coverage has created an actual controversy. Purdue has suffered losses and will continue to do so as long as the losses continue and remain unpaid.

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

55. Pursuant to Trial Rule 57 and Indiana Code § 34-14-1 *et seq.* Purdue is entitled to declaratory relief establishing the losses Purdue suffered that are covered by the Policy.

WHEREFORE, Purdue requests that the Court enter judgment against American Home and in favor of Purdue:

- A. declaring that Purdue's losses are covered under the terms of the Policy;
- B. declaring the amounts American Home owes to Purdue pursuant to the terms of the Policy;
- C. declaring American Home in breach of its obligations under the Policy and ordering American Home to pay Purdue to full amount of its losses, plus prejudgment and post-judgment interest; and
- D. declaring and ordering payment of all other compensatory, consequential, and other amounts owed to Purdue, including but not limited to Purdue's attorneys' fees, costs, and expenses incurred in bringing this action and all other and further relief as this Court may deem proper.

Respectfully submitted,

/s/ Gregory M. Gotwald

Attorneys for Plaintiff

The Trustees of Purdue University

George M. Plews, Atty. No. 6274-49

Gregory M. Gotwald, Atty. No. 24911-49

Joanne R. Sommers, Atty. No. 32740-49

Christopher E. Kozak, Atty. No. 35554-49

Plews Shadley Racher & Braun LLP

1346 North Delaware Street

Indianapolis, Indiana 46202

Tel: (317) 637-0700

Fax: (317) 637-0710

gplews@psrb.com

ggotwald@psrb.com

jsommers@psrb.com

ckozak@psrb.com

REQUEST FOR JURY TRIAL

Plaintiff The Trustees of Purdue University demands a trial by jury for all issues so triable.

Respectfully submitted,

/s/ Gregory M. Gotwald

Attorneys for Plaintiff

The Trustees of Purdue University

George M. Plews, Atty. No. 6274-49
Gregory M. Gotwald, Atty. No. 24911-49
Joanne R. Sommers, Atty. No. 32740-49
Christopher E. Kozak, Atty. No. 35554-49
Plews Shadley Racher & Braun LLP
1346 North Delaware Street
Indianapolis, Indiana 46202
Tel: (317) 637-0700
Fax: (317) 637-0710
gplews@psrb.com
ggotwald@psrb.com
jsommers@psrb.com
ckozak@psrb.com