

IN THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF NEW YORK

EMPLOYERS INSURANCE  
COMPANY OF WAUSAU,

Plaintiff,

v.

616 FIRST AVENUE LLC, FOURTH  
AVENUE PROPERTY OWNER LLC,  
AND 514 WEST 24<sup>TH</sup> OWNER LLC,

Defendants.

Civil Action No.: 1:20-cv-6942

**COMPLAINT FOR DECLARATORY JUDGMENT**

NOW COMES the Plaintiff, Employers Insurance Company of Wausau (“Employers”) and, for its Complaint in this action, states the following:

**Nature of the Action**

1. Employers brings this action for a declaratory judgment concerning the scope and availability of insurance coverage under the Premier Property Protector™ policy (the “Policy”)<sup>1</sup> it issued to Defendant 616 First Avenue LLC, and under which Defendants Fourth Avenue Property Owner LLC, and 514 West 24th Owner LLC are also insureds (collectively, the “Insureds”).

2. The Insureds own and/or operate three residential or condominium buildings located in New York City: (1) 626 First Avenue, New York, New York (“American Copper”); (2) 613 Baltic Avenue, Brooklyn, New York (“Baltic”); and (3) 514

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<sup>1</sup> A certified copy of the Policy, which is policy number YAC-L9L-470617-019, is attached hereto as Exhibit 1. References to the Policy will be use the .pdf pagination of **Ex. 1**.

West 24<sup>th</sup> Street, New York, New York (the “Fitzroy”) (collectively, the “Covered Properties”).

3. Employers seeks a declaration that it has no obligation to make payment under the Policy for the losses claimed by the Insureds arising from the novel coronavirus and the disease it causes, known as “COVID-19”, including the governmental responses to it.

4. The Insureds presented an insurance claim under the Policy seeking recovery for economic losses incurred because the three Covered Properties were reportedly forced to suspend or reduce their business due to COVID-19, including the closure orders issued by civil authorities of the State of New York and New York City.<sup>2</sup>

5. The Policy provides insurance coverage, according to its terms, for covered property against covered risks of direct physical loss or damage.

6. The Policy does not provide for coverage the Insureds’ claimed losses because these losses were not the result of direct physical loss or damage of the type insured.

7. Under the plain terms of the Policy, there is no coverage for the Insureds’ claimed losses.

### **Parties**

8. Plaintiff Employers is a corporation incorporated under the laws of Wisconsin with its principal place of business in Boston, Massachusetts.

9. Defendant 616 First Avenue LLC is a limited liability company formed under the laws of the State of Delaware, with a principal place of business in New York, New York. Upon information and belief, its sole member is JDS-BP Investors LLC, a

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<sup>2</sup> Complaint, at ¶ 8, *616 First Avenue LLC et al. v. Employers Insurance Company of Wausau*, No. 2020CV001456 (Dane County, Wis. Cir. Ct.) (hereinafter, “Wis. Compl.”). The Wisconsin Complaint is attached as Exhibit 2 hereto.

limited liability company formed under the laws of the State of Delaware, whose members are domiciled in and citizens of New York, and none are domiciled or citizens of Wisconsin or Massachusetts. 616 First Avenue LLC may be served with process through its registered agent Corporate Creations Network, Inc., 3411 Silverside Road, Tatnall Building Ste 104, Wilmington, DE 19810.

10. Defendant Fourth Avenue Property Owner LLC is a limited liability company formed under the laws of the State of Delaware, with a principal place of business in New York, New York. Upon information and belief, its sole member is Fourth Avenue Mezz LLC, a limited liability company formed under the laws of the State of Delaware, whose members are domiciled in and citizens of New York, and none are domiciled or citizens of Wisconsin or Massachusetts. Upon further information and belief, Fourth Avenue Mezz LLC is owned, managed, and controlled by a joint venture, a Delaware limited liability company, whose ultimate controlling members, Michael Stern and Domenick Tonacchio, are domiciled in New York.<sup>3</sup> Fourth Avenue Property Owner LLC may be served with process through its registered agent Corporate Creations Network, Inc., 3411 Silverside Road, Tatnall Building Ste 104, Wilmington, DE 19810.

11. Defendant 514 West 24th Owner LLC is a limited liability company formed under the laws of the State of Delaware, with a principal place of business in New York, New York. Upon information and belief, it is owned by the joint venture JDS-Largo 514 West 24th Street LLC, a limited liability company formed under the laws of the State of New York. The members of JDS-Largo 514 West 24th Street LLC are Delaware and New York limited liability companies whose members are domiciled in and citizens of New York, and none are domiciled or citizens of Wisconsin or Massachusetts. Upon further information and belief, as it relates to the joint venture members, JDS Highline LLC is a Delaware limited liability company whose principal place of business is in New York,

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<sup>3</sup> See *Baltic Fourth LLC v. Stern*, No. 654881/2018, 2020 WL 1431655 (N.Y. Sup. Ct. Mar. 24, 2020).

New York. JDS Highline LLC is owned by Michael Stern, who is domiciled in New York. 514 West 24th Partners LLC and 514 West 24th SR Investor LLC, are both New York limited liability companies that are headquartered in New York, New York and owned by members Nicholas Werner and Nissim Ben-Nun, both of whom are domiciled in New York. 514 West 24th Owner LLC may be served with process through its registered agent Corporate Creations Network, Inc., 3411 Silverside Road, Tatnall Building Ste 104, Wilmington, DE 19810.

### **Jurisdiction and Venue**

12. This Court has subject matter jurisdiction over this action pursuant to 28 U.S.C. § 1332 because the parties are citizens of different States and the amount in controversy exceeds \$75,000, exclusive of interest and costs.

13. Employers is a citizen of Wisconsin and Massachusetts, and the Insureds are citizens of Delaware and New York.

14. The Insureds seek coverage under the Policy for “several millions of dollars in real estate tax, interest and other carrying costs.” (Ex. 2, Wis. Compl. ¶57). Plaintiffs also seek coverage for “lost rentals and other costs at American Cooper where monthly rents on available apartments during the period of liability or period of interruption range from approximately \$4,000 to \$30,000, and lost sales and other costs at Baltic and The Fitzroy, where unsold units during the period of liability or period of interruption range from \$2,000,000 to \$25,000,000.” (*Id.*)

15. The amount in controversy in this declaratory judgment action far exceeds the sum of \$75,000.

16. Venue is proper in this District pursuant to 28 U.S.C. § 1391(b)(1) and (2) and § 1391(c)(2) and (d) because the Defendants are deemed to reside in this District, where there is personal jurisdiction over Defendants, and the claimed economic losses giving rise to the Insureds’ claim occurred in this District.

**Facts**

17. Employers issued policy number YAC-L9L-470617-019 to the Insureds for the policy period of June 15, 2019 to June 15, 2020 (i.e., the “Policy”) for the Covered Properties.

18. In or about late 2019, a novel coronavirus was first identified in Wuhan, China, which has been named that virus SARS-CoV-2. The World Health Organization proposed the nomenclature COVID-19, standing for coronavirus disease 2019, and this name has been widely adopted by governments and the public.

19. In March, April and May 2020, government officials in New York issued a series of orders (collectively, the “Orders”) because of and in response to the public health crisis associated with the spread of COVID-19, including the following:

(a) On or about March 7, 2020, the State of New York Office of the Governor issued Executive Order No. 202 which, *inter alia*, declared that a State disaster emergency due to the public health threat posed by COVID-19. A true and accurate copy of this Executive Order is attached hereto as Exhibit 3.

(b) On or about March 12, 2020, the State of New York Office of the Governor issued Executive Order No. 202.1. A true and accurate copy of this Executive Order is attached hereto as Exhibit 4.

(c) On or about March 16, the State of New York Office of the Governor issued Executive Order No. 202.3, a true and accurate copy of which is attached hereto as Exhibit 5.

(d) On or about March 16, 2020, the City of New York Office of the Mayor issued Emergency Executive Order No. 100 in response to COVID-19, a true and accurate copy of which is attached hereto as Exhibit 6.

(e) On or about March 18, 2020, the State of New York Office of the Governor issued Executive Order No. 202.6, a true and accurate copy of which is attached hereto as Exhibit 7.

(f) On or about March 19, 2020, the State of New York Office of the Governor issued Executive Order No. 202.7, a true and accurate copy of which is attached hereto as Exhibit 8.

(g) On or about March 20, 2020, the State of New York Office of the Governor issued Executive Order No. 202.8, a true and accurate copy of which is attached hereto as Exhibit 9.

(h) On or about March 23, 2020, the State of New York Office of the Governor issued Executive Order No. 202.10, a true and accurate copy of which is attached hereto as Exhibit 10.

(i) On or about March 25, 2020, the City of New York Office of the Mayor issued Emergency Executive Order No. 103, a true and accurate copy of which is attached hereto as Exhibit 11.

(j) On or about May 8, 2020, the State of New York Office of the Governor issued Executive Order No. 202.31, a true and accurate copy of which is attached hereto as Exhibit 12.

(k) On or about May 14, 2020, the State of New York Office of the Governor issued Executive Order No. 202.33, a true and accurate copy of which is attached hereto as Exhibit 13.

(l) On or about May 29, 2020, the State of New York Office of the Governor issued Executive Order No. 202.35, a true and accurate copy of which is attached hereto as Exhibit 14.

20. None of the Orders prohibit or prevent access to the Covered Properties.

21. None of the Orders were issued due to direct physical loss or damage covered the Policy.

22. On or about April 2, 2020, the Insureds reported a claim under the Policy for losses arising out of the Coronavirus disease (COVID-19).

23. Employers investigated the claim and on or about April 20, 2020, Employers informed the Insureds in writing that the Policy did not provide coverage for the claimed losses. A true and correct copy of its coverage position letter is attached as Exhibit 15 hereto.

24. In response to Employer's coverage determination and despite the dispute's clear connection to New York City, the Insureds filed suit against Employers on July 15, 2020 in the Circuit Court in Dane County, Wisconsin. The Wisconsin Complaint contains the Insureds' own description of their insurance claim and the losses reported under the Policy to Employers, and as reflected in Note 2 above, is attached as Exhibit 2 hereto.

### **Operative Policy Provisions**

25. The Policy provides in pertinent part:

INSURING AGREEMENT

In consideration of this Policy's Provisions, Conditions, Stipulations, LIMITS OF LIABILITY and premium charged, **we** cover property, as described in this Policy, against all risks of direct physical loss or damage, except a hereinafter excluded or limited, while located as described in this Policy.

(Ex. 1 at p. 11).

26. The Policy contains several exclusions that exclude coverage for the Insureds' claim. The Policy's virus exclusion, which appears in Section II - Property Damage, provides, in relevant part, as follows:

**We** do not cover the following unless directly resulting from a **covered loss**:

- a. **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 elsewhere in this Policy.

(Ex. 1, p. 28.)

27. Contamination is defined as "[a]ny condition of property that results from a **contaminant**." (*Id.*, p. 65.) Contaminant is defined as "[a]ny foreign substance, impurity, pollutant, hazardous material, poison, toxin, pathogen or pathogenic organism, bacteria, virus, disease causing or illness causing agent, fungus, mold or mildew." (*Id.*, p. 65.)

28. The Section II Exclusions further provides:

#### EXCLUSIONS

The following exclusions apply unless otherwise stated in this Policy:

1. **We** do not cover:

- a. Indirect or remote loss or damage;
- b. Interruption of business, except to the extent provided by this Policy;
- c. Loss of market or loss of use;
- d. Loss or damage or deterioration arising from any delay;
- e. Loss or damage from enforcement of any law or ordinance:



- (1) Regulating the construction, repair, replacement, use or removal, including debris removal, of any property;

...

except as provided by the DECONTAMINATION COSTS and DEMOLITION AND INCREASED COST OF CONSTRUCTION coverages of this Policy.

(*Id.*, pp. 25–26.)<sup>4</sup>

29. All exclusions contained in Section II and elsewhere in the Policy apply to the Time Element coverages under Section III – Time Element of the Policy.

30. The Time Element Exclusions provides in pertinent part:

#### TIME ELEMENT EXCLUSIONS

In addition to the exclusions elsewhere in this Policy, the following exclusions apply to TIME ELEMENT loss:

1. Any loss during any idle period, including but not limited to when production, operation, service or delivery or receipt of goods would cease, or would not have taken place or would have been prevented due to:
  - a. Physical loss or damage not insured by this Policy on or off of the covered location.
  - b. Planned or rescheduled shutdown.
  - c. Strikes or other work stoppage.
  - d. Any reason other than physical loss or damage insured under this Policy.
2. Any increase in loss due to:
  - a. Suspension, cancellation or lapse of any lease, contract, license or orders.
  - b. Damages for breach of contract or for late or noncompletion of orders.
  - c. Fines or penalties.

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<sup>4</sup> “[D]econtamination costs must be a direct result of enforcement of the law or ordinance that is in force at the time of the loss regulating decontamination....” (Ex. 1, pp. 31–32.)

d. Any other consequential or remote loss

31. The Policy's Gross Earning and Extra Expense provision provides, in relevant part, as follows:

**We cover *your* actual loss sustained, as provided in the TIME ELEMENT COVERAGES and TIME ELEMENT COVERAGES AND LIMITATIONS, directly resulting from a loss of the type insured by this Policy:**

- a.** To property described elsewhere in this Policy and not otherwise excluded by this Policy,
- b.** Used by **you**, or by others with whom **you** have a contract,
- c.** At a covered **location** or while in transit as provided by this Policy,
- d.** During the applicable PERIOD OF LIABILITY described in this section.

(*Id.*, p. 40.)

32. The Policy's pertinent Period of Liability is provided, in relevant part, as follows:

The PERIOD OF LIABILITY applying to CONTINGENT TIME ELEMENT, GROSS EARNINGS, EXTRA EXPENSE and RENTAL INSURANCE is as follows:

- a.** For building and equipment, the period:
  - (1)** Starting from the time of physical loss or damage of the type insured; and
  - (2)** Ending when with due diligence and dispatch the building and equipment could be:
    - (a)** Repaired or replaced; and
    - (b)** Made ready for operations, under the same or equivalent physical and operating conditions that existed prior to the damage.
  - (3)** Not to be limited by the expiration of this Policy.

b. For building(s) and equipment covered under COURSE OF CONSTRUCTION:

- (1) The equivalent of the above period of time will be applied to the level of business that would have been reasonably achieved after construction and startup would have been completed had no physical damage happened; and
- (2) Due consideration will be given to the actual experience of the business after completion of the construction and startup.

(*Id.*, p. 43.)

33. The Policy's Civil or Military Authority provision provides, in relevant part, as follows:

CIVIL OR MILITARY AUTHORITY

- a. We cover **your** actual loss sustained and EXTRA EXPENSE during the period of interruption if an order of civil or military authority prohibits access to a covered **location** provided such order is caused by physical loss or damage of the type insured by this Policy at a covered **location** or within the number of statute miles specified in the LIMITS OF LIABILITY Table in the Declarations [five (5) miles].
- b. This TIME ELEMENT COVERAGE AND LIMITATION does not apply to LEASEHOLD INTEREST.
- c. The *period of interruption* for this TIME ELEMENT COVERAGE AND LIMITATION will be the period of time:
  - (1) Starting at the time of such direct physical loss or damage; and
  - (2) Continuing until the order is lifted, or the time limit specified in the LIMITS OF LIABILITY Table in the Declarations [thirty (30) consecutive days] expires, whichever happens first.

This period of time is part of and not in addition to any PERIOD OF LIABILITY applying to any coverage provided in the TIME ELEMENT section.

(*Id.*, pp. 45-46.)

34. The Policy's Contingent Time Element provision provides, in relevant part, as follows:

CONTINGENT TIME ELEMENT

- a. **We** cover **your** actual loss sustained and EXTRA EXPENSE during the PERIOD OF LIABILITY directly resulting from physical loss or damage of the type insured by this Policy at *Direct Dependent Time Element Location(s)* and *Indirect Dependent Time Element Location(s)* located within the territory of this Policy.
- b. **You** agree to take every reasonable and necessary action to mitigate the loss payable hereunder.
- c. As used in this Policy, *Direct Dependent Time Element Location(s)* are:
  - (1) Any **location(s)** of a direct: customer, supplier, contract manufacturer or contract service provider to **you**; or
  - (2) Any **location(s)** of any company under a royalty, licensing fee or commission agreement with **you**.

*Direct Dependent Time Element Location(s)* does not include **location(s)** that are covered **location(s)** under this Policy or the **location(s)** of any company directly or indirectly supplying to, or receiving from **you**, electricity, fuel, gas, water, steam, refrigeration, sewage, voice, data or video.

- d. As used in this Policy, *Indirect Dependent Time Element Location(s)* are:
  - (1) Any **location(s)** of any company that is a direct: customer, supplier, contract manufacturer or contract service provider to **your** *Direct Dependent Time Element Location(s)*.

*Indirect Dependent Time Element Location(s)* does not include **location(s)** that are covered **location(s)** under this Policy or the **location(s)** of any company directly or indirectly supplying to, or receiving from, the *Direct Dependent Time Element Location(s)* or the *Indirect Dependent Time Element Location(s)*, electricity, fuel, gas, water, steam, refrigeration, sewage, voice, data or video.

- e. As respects CONTINGENT TIME ELEMENT:

- (1) Exclusion **D.3** in the TIME ELEMENT EXCLUSIONS does not apply

(*Id.*, pp. 46–47.)

35. The Policy’s Ingress/Egress provision provides, in relevant part, as follows:

INGRESS/EGRESS

- a.** We cover **your** actual loss sustained and EXTRA EXPENSE due to the necessary interruption of **your** business if ingress to or egress from a covered **location** is prevented, whether or not **your** premises or property is damaged, provided that such prevention is a direct result of physical loss or damage of the type insured to property of the type insured.
- b.** The *period of interruption* for this TIME ELEMENT COVERAGE AND LIMITATION will be the period of time starting at the time of such direct physical loss or damage, and continuing until ingress or egress is no longer prevented, or for the time limit specified in the LIMITS OF LIABILITY Table in the Declarations [thirty (30) consecutive days], whichever is less.

(*Id.*, p. 48.)

36. The Policy’s Rental Insurance<sup>5</sup> provision provides, in relevant part, as follows:

- a.** We cover **your** actual loss sustained of rental income during the PERIOD OF LIABILITY for:
- (1) The fair rental value of any portion of rental property occupied by **you**;
  - (2) The income reasonably expected from rentals of unoccupied or unrented portions of such property; and
  - (3) The rental income from the rented portions of such property according to written leases, contracts or agreements in force at the

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<sup>5</sup> Only 616 First Avenue LLC is pursuing a claim under this provision of the Policy.

time of loss, all not to include non-continuing charges and expenses.

- b. RENTAL INSURANCE Exclusions: As respects RENTAL INSURANCE, TIME ELEMENT EXCLUSIONS **D.1.** does not apply and the following applies instead:

**We** do not cover any loss of rental income during any period in which the covered **location** would not have been tenantable for any reason other than a **covered loss**.

(*Id.*, pp. 42–43.)

37. The Policy’s Protection and Preservation of Property provision, contained in Section II – Property Damage, provides in pertinent part:

PROTECTION AND PRESERVATION OF PROPERTY

- a. **We** cover **your** reasonable and necessary costs to temporarily protect or preserve **covered property** provided such actions are necessary due to actual, or to prevent immediately impending threat of, physical loss or damage of the type covered by this Policy to such **covered property**.
- b. This PROPERTY DAMAGE COVERAGE AND LIMITATION is subject to the deductible provisions that would have applied had the physical loss or damage happened

(*Id.*, p. 36.)

38. The Policy’s Protection and Preservation of Property Time Element provision, contained in Section III – Time Element, provides in pertinent part:

PROTECTION AND PRESERVATION OF PROPERTY TIME ELEMENT

- a. **We** cover **your** actual loss sustained for a period of time not to exceed forty eight (48) hours prior to and forty eight (48) hours after you first took reasonable action for the temporary protection and preservation of property insured by this Policy provided such action is necessary to prevent immediately impending physical loss or damage of the type insured to such **covered property**.

- b. This TIME ELEMENT COVERAGE AND LIMITATION is subject to the deductible provisions that would have applied had the direct physical loss or damage occurred.

(*Id.*, p. 49).

39. The Duties After a Loss provision, which the Insureds refer to as a “Sue & Labor” provision, states in relevant part, as follows:

SECTION VI - LOSS CONDITIONS

...

**E. DUTIES AFTER A LOSS**

In case of loss **you** will:

...

4. Take all reasonable steps to protect the **covered property** from further damage;
5. Promptly separate the damaged property from the undamaged property, and keep it in the best possible order for examination;
6. Furnish a complete inventory of the lost, damaged and destroyed property, showing in detail the quantity, and amount of loss claimed under the valuation provision of the Policy;
7. Keep an accurate record of all repair costs....

(*Id.*, pp. 62-63.)

**COUNT ONE**

**(Declaratory Judgment Pursuant to 28 U.S.C. § 2201)**

40. Employers repeats and realleges the allegations contained in Paragraphs 1 through 39 above, as if fully set forth herein.

41. The Insureds presented a claim under the Policy for losses caused by COVID-19, including the Orders resulting from COVID-19. Particularly, the Insureds’ claim seeks coverage under the Policy for the Time Element coverage for Gross Earnings, Extra Expense, Rental Insurance, Civil Authority, Contingent Time Element, Ingress/Egress, and the Protection and Preservation of Property Time Element, the

Protection and Preservation of Property, and Duties After a Loss provisions of the Policy, for alleged losses resulting from COVID-19, including the Orders.

42. Losses caused by COVID-19, including the Orders, were not the result of direct physical loss or damage, and certainly not the result of direct physical loss or damage of the type insured under the Policy.

43. The exclusions in the Policy, including but not limited to the virus exclusion, bar coverage for the Insureds' claim.

44. The Insureds were not subject to any enforcement of a law or ordinance regulating decontamination of the Covered Properties.

45. COVID-19, including the Orders, did not prohibit or prevent access to the Covered Properties.

46. The Policy does not provide coverage for Time Element loss during any period during which the Covered Properties would have been idle for reason(s) other than a direct physical loss or damage covered under the Policy.

47. The Policy does not provide coverage for loss of rental income during any period during which the covered location would not have been tenantable for any reason other than a covered loss.

48. The Duties After a Loss and the two Protection and Preservation of Property provisions do not create coverage for costs or expenses incurred in response to uncovered losses, including the Insureds' alleged response to COVID-19 and the resulting Orders.

49. There is no coverage available under the Policy for the Insureds' claim.

50. Employers has advised the Insureds in writing that the Policy affords no insurance coverage for the alleged losses.

51. The Insureds continue to claim entitlement to payment under the Policy.

52. An actual controversy has arisen and persists among the parties over the scope and availability of coverage for the Insureds' claim.



53. Pursuant to 28 U.S.C. § 2201, Employers is entitled to a declaration that, under the Policy, it has no obligation to provide coverage for the losses claimed by the Insureds.

**REQUESTS FOR RELIEF**

WHEREFORE, Employers respectfully requests that the Court grant it the following relief:

- A. Enter a declaratory judgment that the Policy does not provide coverage for or otherwise obligate Employers to make payment for the losses claimed by 616 First Avenue LLC, Fourth Avenue Property Owner LLC, and 514 West 24th Owner LLC; and
- B. Grant such other relief as this Court deems just and appropriate.

Dated: August 27, 2020

By: /s/ Gerald P. Dwyer, Jr.  
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