

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
GALVESTON DIVISION

_____,
Plaintiff(s),
VS. _____,
Defendant(s).

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§ CIVIL ACTION NO. _____
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**INITIAL DISCOVERY PROTOCOLS FOR BUSINESS INTERRUPTION
INSURANCE LITIGATION ARISING FROM THE COVID-19
PANDEMIC AND SIMILAR PUBLIC HEALTH THREATS**

PART 1: INTRODUCTION AND DEFINITIONS.

(1) Statement of purpose.

- a. These Business Interruption Insurance Litigation Initial Discovery Protocols (“BI Insurance Protocols”) apply to cases involving first-party insurance business interruption and related coverage claims, arising from the COVID-19 pandemic or similar public-health threats from disease or other sources of infection or contamination (“BI Insurance Cases”).
- b. The BI Insurance Protocols are designed to be implemented by trial judges, lawyers, and litigants in state and federal courts. The BI Insurance Protocols make it easier and faster for the parties and their counsel to: (1) exchange important information and documents early in the case; (2) frame the issues to be resolved; (3) value the claims for possible early resolution; and (4) plan for more efficient and targeted subsequent formal discovery, if needed.
- c. Participating courts may implement the BI Insurance Protocols by local rule or by standing, general, or individual-case orders. Although the BI Insurance Protocols are designed for the full range of case size and complexity, if any party believes that there is good

cause why a case should be exempted, in whole or in part, from these BI Insurance Protocols, that party may raise the issue with the court. The Protocols recognize, for example, that coverage questions are frequently raised and that parties may agree, or courts may decide, whether or not to defer responses to these BI Insurance Protocols pending a decision on a motion to dismiss.

- d. In a case brought as a class action, these BI Insurance Protocols are presumptively limited to information and documents from or about representative or named plaintiffs.
- e. The Federal Rules of Civil Procedure (“FRCP”) referred to in the BI Insurance Protocols apply to Business Interruption Insurance Cases in federal court. The state-law counterparts to the FRCP referred to in the BI Insurance Protocols apply to cases in state court, unless the court orders otherwise.
- f. The BI Insurance Protocols are intended to supersede the parties’ obligations to make initial disclosures under FRCP 26(a)(1), or under the applicable state disclosure rules, for BI Insurance Cases. The BI Insurance Protocols are not intended to preclude or modify any party’s rights to formal discovery as provided by those rules, other applicable local federal rules, or state rules. Responses to the BI Insurance Protocols do not waive or foreclose a party’s right to seek additional discovery under the applicable rules.
- g. The BI Insurance Protocols were prepared by a balanced group of highly experienced attorneys from across the country with expertise in BI Insurance Cases. The BI Insurance Protocols require parties to exchange information and documents routinely requested in every BI Insurance Case (“Initial Discovery”). This Initial Discovery is unlike initial disclosures under FRCP 26(a)(1) because it includes unfavorable as well as favorable information and documents, is limited to information and documents that are not subject to objection, and is limited to the information and documents most likely to be important and useful in facilitating early settlement discussion and resolving or narrowing the issues requiring further litigation.

(2) Definitions. The following definitions apply to the BI Insurance Protocols.

- a. **Business.** “Business” means the for-profit or nonprofit activities or transactions for which the Insured seeks coverage from the Insurer in the litigation.
- b. **Claimed Loss.** “Claimed Loss” means the loss or damage that the Insured seeks to recover from the Insurer in the litigation.
- c. **Document.** “Document” and “documents” are defined to be synonymous in meaning and equal in scope to the phrase “documents or electronically stored information” in FRCP 34(a)(1)(A). A draft of a document or a nonidentical copy is a separate document.
- d. **Event.** “Event” means the alleged cause(s) of the Insured’s Claimed Loss.
- e. **Identify (Documents).** When referring to documents, to “identify” means to describe, to the extent known: (i) the type of document; (ii) the general subject matter; (iii) the date; (iv) the author(s), according to the document; and (v) the person(s) to whom, according to the document, the document (or a copy) was to have been sent. Alternatively, to “identify” a document means to produce a copy.
- f. **Identify (Natural Persons).** When referring to natural persons, to “identify” means to give the person’s: (i) full name; (ii) present or last known address and telephone number; (iii) email address; (iv) present or last known place of employment; (v) present or last known job title; and (vi) relationship, if any, to the parties. Once a person has been identified in accordance with this subparagraph, only the name of that person need be listed in response to subsequent requests to identify that person.
- g. **Identify (Non-Natural Persons or Entities).** When referring to a corporate entity, partnership, or other unincorporated association, to “identify” means to give the: (i) corporate or entity name and, if known, the trade or other names under which it has

done business during the relevant time period; (ii) state of incorporation or registration; (iii) address of its principal place of business; (iv) primary phone number; and (v) internet address. Once a corporate or other business entity has been identified in accordance with this subparagraph, only the name of that entity needs to be listed in response to subsequent requests to identify that entity.

- h. **Insurer.** “Insurer” means the entity that issued the Policy alleged to have insured the Claimed Loss.
- i. **Insured.** “Insured” means any named individual(s), corporate entity(ies), partnership(s), or other unincorporated association(s) alleging the Claimed Loss as an insured in the litigation, or asserting a claim under an assignment.
- j. **Other Insurance.** “Other Insurance” means any insurance policy, other than the Policy, that covers or potentially covers the Claimed Loss.
- k. **Policy.** “Policy” means the insurance policy issued by the Insurer alleged to cover some or all of Insured’s Claimed Loss.
- l. **Property.** “Property” means each physical location or premises where the Insured alleges the Claimed Loss occurred.
- m. **Relating to.** “Relating to” means concerning, referring, describing, evidencing, or constituting.

(3) Instructions.

- a. The relevant period for this Initial Discovery begins one day before the earliest Event and ends 14 days before the deadline to respond to this Initial Discovery.
- b. This Initial Discovery is presumptively not subject to objections except for attorney-client privilege or work-product protection, including joint-defense agreements. Documents withheld based on a privilege or work-product protection claim are subject to FRCP

26(b)(5) or applicable state rules. A detailed privilege log is not required. Instead, documents withheld as privileged or work-product protected communications may be described briefly by category or type. Withholding documents on this basis does not alleviate any obligation to produce the withheld documents or additional information about them at a later date, if the court orders or the applicable rules require. Non-testifying consulting experts need not be disclosed.

- c. If a partial or incomplete or “unknown at this time” answer or production is given to any disclosure requirement in this Initial Discovery, the responding party must state the reason that the answer or production is partial, incomplete, or unknown and when supplemental information or documents providing a complete response will be produced.
- d. For this Initial Discovery, a party must disclose information and documents that the disclosing party has in its possession, custody, or control and that are reasonably available. This Initial Discovery is subject to FRCP 26(e) on supplementation, to FRCP 26(g) on certification of responses, and to similar applicable state rules. This Initial Discovery does not preclude either party from seeking additional discovery under the rules at a later date.
- e. This Initial Discovery is subject to FRCP 33(d) and 34(b)(2)(E) or applicable state rules on production.
- f. This Initial Discovery is subject to the attached Interim Protective Order unless the parties agree or the court orders otherwise. The Interim Protective Order will remain in place until and unless the parties agree on, or the court orders, a different protective order. Absent party agreement or court order, the Interim Protective Order does not apply to subsequent discovery.
- g. Within 14 days after the entry of this Order, the Parties must meet and confer on the format (e.g., TIFF/text, searchable pdf, or Excel) for responding to this Initial Discovery. This will not delay the timeframes for Initial Discovery, absent court order. Nor will

production in one format preclude requesting production in another format, if the applicable discovery rules allow.

PART 2: INFORMATION AND DOCUMENTS TO BE PRODUCED BY THE INSURED.

(1) Timing.

- a. Unless the parties agree or the court decides to defer responses to these BI Insurance Protocols, the Insured's Initial Discovery responses must be provided within 30 days after the Insurer has submitted a responsive pleading or motion.

(2) Information to be produced by the Insured:

- a. A description of the Insured's ownership or other interest in the Property.
- b. The address of the Property (or location of movable Property) on the date of the Event.
- c. For each Policy or Other Insurance, the name of each insurer, policy numbers, and claim numbers relating to the Claimed Loss.
- d. An explanation of the factual basis of the Claimed Loss in relation to the terms of the Policy, including a computation of each item or element of the Claimed Loss.
- e. Identify any payments received under the Policy relating to the Event.
- f. Identify the source and amount of any payments received after the Event from Other Insurance, or any other source, for all or any part of the Claimed Loss.
- g. Identify any grant or other similar payment that the Insured applied for after the Event for all or any part of the Claimed Loss, including for payments under the CARES Act or similar legislation, or under the Small Business Administration loan program.

- h. Identify those with managerial responsibility for the preparation of and decision to submit the Insured's claim under the Policy to the Insurer.
- i. Identify the public or other adjusters, forensic experts, accountants, valuation professionals, or other persons engaged by or on behalf of the Insured relating to the Claimed Loss.
- j. A general description, including the court, parties, and case number, of any other lawsuits arising from the Event relating to the Property.
- k. Identify any sale, transfer, or foreclosure of the Property after the Event.
- l. Identify any sale, transfer, bankruptcy, or receivership of the Business after the Event.
- m. Identify any public or civil authority orders, directives, legislative acts, or similar governmental edicts relied on by the Insured as causing or contributing to the Claimed Loss.

(3) Documents to be produced by the Insured:

- a. Documents relating to the Claimed Loss, including:
 - materials quantifying or substantiating the Claimed Loss, such as profit and loss statements, receipts, invoices, and records of actual costs incurred to address, mitigate, or reduce the amount of Claimed Loss from the Event;
 - documents relied on by the Insured to quantify or substantiate the revenues, profits, and losses of the Property or Business for the Claimed Loss;
 - public or other adjusters' reports;
 - forensic reports;
 - accountant reports;
 - valuation reports; and
 - any other report of persons engaged by or on behalf of the Insured relating to the Claimed Loss.

- b. The complete Policy in effect at the time of the Event, or portions of the Policy, to the extent the Insured actually possesses a copy.
- c. Any proofs of loss, including attachments, for the Claimed Loss.
- d. The Insured's responses to requests for information sent by or on behalf of the Insurer for the Claimed Loss.
- e. Documents relied on by the Insured in generating a proof of loss or responses to the Insurer's requests for information provided under the Policy.
- f. Communications exchanged between the Insured and Insurer relating to the Insured's Claimed Loss, Property, or Business, or otherwise relating to the Insured's loss.
- g. Documents containing recordings, transcripts, or notes of statements, conversations, or communications by or between the Insurer and the Insured relating to the Event or the Claimed Loss.
- h. Photographs and videos of the Property taken for the purpose of documenting the condition of the Property after the Event, including photographs and videos relating to the Claimed Loss.
- i. Written communications, photographs, or estimates of damages sought from or paid under any Other Insurance related to the Event.
- j. Any Other Insurance policy, and the claim numbers for claims made under that policy, to recover loss relating to the Event.
- k. If there has been an appraisal or other valuation relating to the Claimed Loss, documents relating to that appraisal or valuation.
- l. Any public or civil authority orders, directives, legislative acts, or similar governmental edicts relied on by the Insured as causing or contributing to the Claimed Loss.
- m. Communications of the Insured related to the Claimed Loss.

- n. Any other document(s) on which the Insured relies to support the Claimed Loss.

PART 3: INFORMATION AND DOCUMENTS TO BE PRODUCED BY THE INSURER.

(1) Timing.

- a. Unless the parties agree or the court decides to defer responses to these BI Insurance Protocols, the Insurer's Initial Discovery responses must be provided within 30 days after the Insurer has submitted a responsive pleading or motion.

(2) Information to be produced by the Insurer:

- a. **If there is a dispute over coverage**, in whole or in part, an explanation of the Insurer's reason for the denial or limitation of coverage, including:
 - i. any exclusions or exceptions, or other coverage or legal defenses;
 - ii. the factual basis for any exclusion, limitation, exception, or condition-based dispute or defense;
 - iii. whether there is also a dispute as to the value or amount of the Claimed Loss; and
 - iv. any other basis on which coverage was denied or limited.
- b. **If there is a dispute over all or part of the valuation**, an explanation of the Insurer's basis for disputing the value or amount of the Claimed Loss, including:
 - i. the Insurer's understanding of the nature of the dispute;
 - ii. the amount the Insurer disputes and the basis for that dispute, including any applicable Policy provisions that the Insurer alleges or believes are relevant to the dispute; and
 - iii. the amount the Insurer agrees to pay, if any, with respect to any undisputed part of the Claimed Loss.
- c. Any Policy terms or conditions that the Insurer alleges the Insured failed to comply with, including conditions precedent or other terms.

- d. Any payments previously made under the Policy relating to the Event.
- e. A general description of any other basis for nonpayment of the Claimed Loss, in whole or in part.
- f. A general description, including the court, parties, and case number, of any other lawsuits arising from the Event relating to the Property
- g. Identify the adjuster(s) who handled the claim for the Claimed Loss.
- h. Identify the individual(s) who recommended, made, approved, or rejected the claim decision.
- i. Identify the accountants, appraisers or other valuation professionals, estimators, inspectors, forensic experts, contractors, engineers, or other persons who participated in valuing the Claimed Loss or in other aspects of the claims process or on whom the Insurer relied in making its claim decision.

(3) Documents to be produced by the Insurer:

- a. The claim file maintained by the Insurer.
- b. Any claim log, journal, or diary maintained by the Insurer relating to the Claimed Loss.
- c. The complete Policy in effect at the time of the Event.
- d. Assessments of the Claimed Loss, including: public or other adjusters' reports; forensic reports; accountant reports; valuation reports; and other reports of persons engaged by or on behalf of the Insurer relating to the Claimed Loss, including reports that contain any description or analysis of the scope or valuation of the Claimed Loss or of any defenses under the Policy.

- e. Photographs and videos of the Property taken for the purpose of documenting the condition of the Property after the event, including photographs and videos relating to the Claimed Loss.
- f. Any other evaluations or estimates of the Claimed Loss.
- g. If there has been an appraisal or other valuation relating to the Claimed Loss, documents relating to that appraisal or valuation.
- h. Documents containing recordings, transcripts, or notes of statements, conversations, or communications by or between the Insurer and the Insured relating to the Event or the Claimed Loss.
- i. The underwriting file, or those portions of the underwriting file, maintained by the Insurer for the Policy relating to the Claimed Loss.
- j. Proofs of loss, including attachments, for the Claimed Loss.
- k. Responses to requests for information received by the Insurer for the Claimed Loss.
- l. Communications exchanged between the Insured and Insurer relating to the Insured's Claimed Loss, Property, Business, or otherwise relating to the Insured's loss.
- m. Any public or civil authority orders, directives, legislative acts, or similar governmental edicts pertaining to the public health threat at issue on which it relied, in whole or in part, in denying the Claimed Loss.
- n. Communications of the Insurer relating to the Claimed Loss.
- o. Any general internal memoranda or directives defining the scope of coverage for, or the handling of, business interruption claims arising from the public health threat at issue relating to the Event, as well as any bulletins, position statements, or administrative memoranda on which it relied in denying, in whole or in part, the Claimed Loss.

p. Any other document(s) on which the Insurer relies to support its defenses.

Signed on Galveston Island this ____ day of _____, 202__.

ANDREW M. EDISON
UNITED STATES MAGISTRATE JUDGE