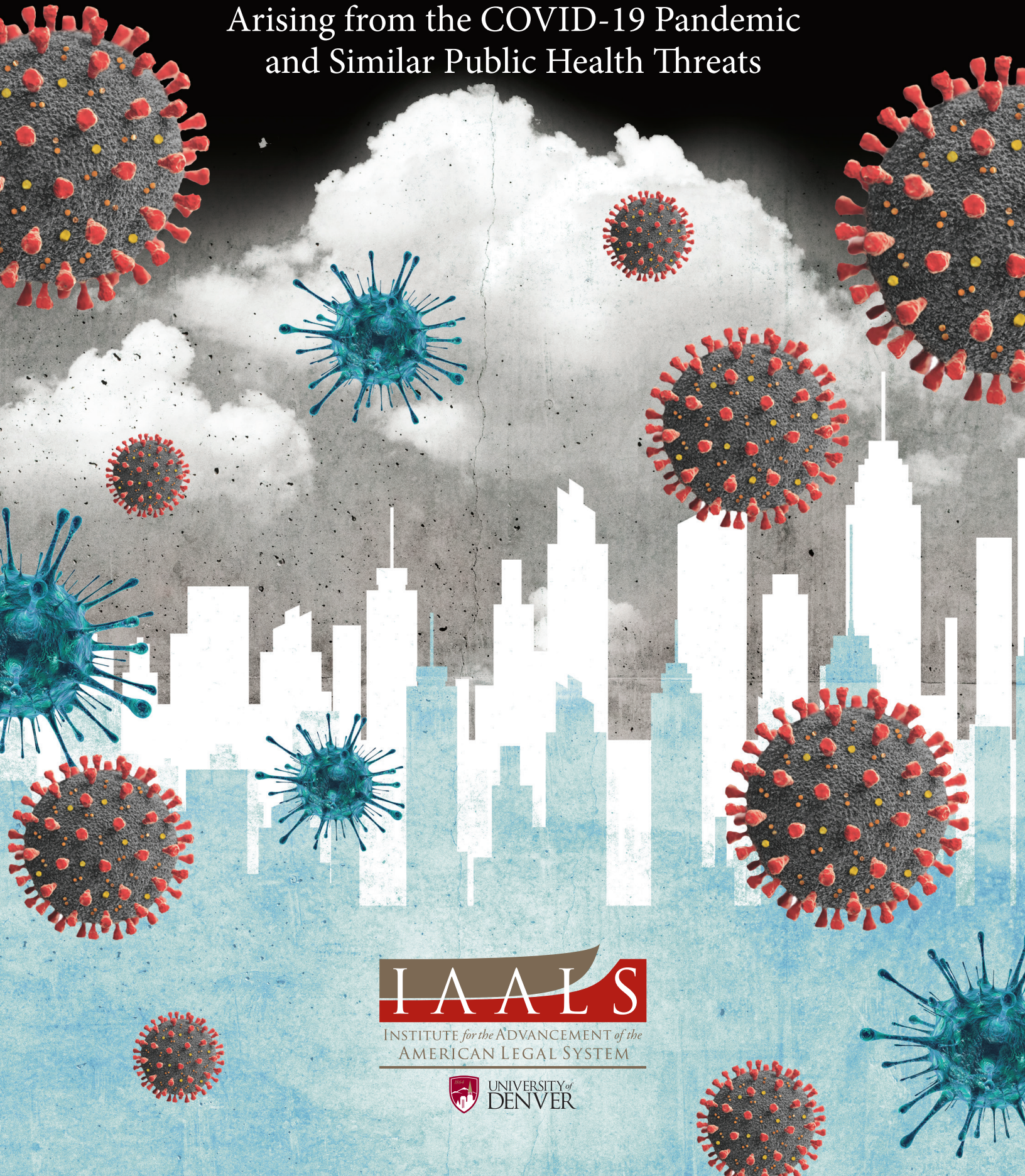


# INITIAL DISCOVERY PROTOCOLS

for Business Interruption Insurance Disputes  
Arising from the COVID-19 Pandemic  
and Similar Public Health Threats



IAALS

INSTITUTE *for the* ADVANCEMENT of the  
AMERICAN LEGAL SYSTEM



UNIVERSITY of  
DENVER





INSTITUTE *for the* ADVANCEMENT  
*of the* AMERICAN LEGAL SYSTEM



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IAALS, the Institute for the Advancement of the American Legal System, is a national, independent research center at the University of Denver dedicated to facilitating continuous improvement and advancing excellence in the American legal system. We are a “think tank” that goes one step further—we are practical and solution-oriented. Our mission is to forge innovative and practical solutions to problems within the American legal system. By leveraging a unique blend of empirical and legal research, innovative solutions, broad-based collaboration, communications, and ongoing measurement in strategically selected, high-impact areas, IAALS is empowering others with the knowledge, models, and will to advance a more accessible, efficient, and accountable American legal system.

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## **Introduction**

The COVID-19 coronavirus swept across the world in 2020, causing a global pandemic that dominated lives, economies, and businesses. By the end of 2020, the United States surpassed 2 million infections and more than 346,000 deaths. COVID-19 significantly impacted businesses as well, resulting in many businesses turning to their insurance companies to cover lost income and other pandemic-related losses. Simultaneously, insurers have been inundated with coverage claims despite being adamant that commercial property insurance policies were not intended to cover the COVID-19 pandemic. The extent to which these policies provide coverage—be it under business insurance interruption or civil authority clauses—is a question that will ultimately be resolved by the courts. For the increasing numbers of businesses and insurers who end up in court to resolve coverage disputes, the process may be protracted and complex. These complexities may be amplified by the impact of the pandemic on the court system, which has faced its own courthouse closures, postponement of jury trials, and prioritization of criminal matters. Even post-pandemic, courts will face backlogs of trials along with an influx of cases due to the economic impacts on both businesses and individuals.

Recognizing the need to efficiently process the influx of business interruption cases in both state and federal courts, IAALS, the Institute for the Advancement of the American Legal System, facilitated the development of its fourth set of discovery protocols—Initial Discovery Protocols for Business Interruption Insurance Litigation Arising From the COVID-19 Pandemic and Similar Public Health Threats (BI Insurance Protocols or Pandemic Protocols) for BI insurance disputes.

The first set of IAALS-facilitated protocols, the Initial Discovery Protocols for Employment Cases Alleging Adverse Action (Employment Protocols), was published as a pilot project by the Federal Judicial Center (FJC) in November 2011.<sup>1</sup> The Employment Protocols project grew out of the 2010 Conference on Civil Litigation at Duke University, sponsored by the Judicial Conference Advisory Committee on Civil Rules. During the conference, a wide range of attendees expressed support for the idea of case-type-specific “pattern discovery” as a possible solution to the problems of unnecessary cost and delay in the litigation process. As a result, a nationwide committee of attorneys with expertise in employment matters developed the Employment Protocols that have since been adopted by over 75 federal judges and district courts in multiple jurisdictions around the country, including the District of Connecticut and the District of Oregon. The FJC has issued multiple reports evaluating the pilot project.<sup>2</sup> The reports reflect that discovery motions are less common in pilot cases than comparison cases.

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<sup>1</sup> FED. JUDICIAL CTR., PILOT PROJECT REGARDING INITIAL DISCOVERY PROTOCOLS FOR EMPLOYMENT CASES ALLEGING ADVERSE ACTION (2011).

<sup>2</sup> JASON A. CANTONE AND EMERY G. LEE, III, FED. JUDICIAL CTR., INITIAL DISCOVERY PROTOCOLS FOR EMPLOYMENT CASES ALLEGING ADVERSE ACTION: REPORT ON A PILOT PROJECT TO THE JUDICIAL CONFERENCE ADVISORY COMMITTEE ON RULES OF CIVIL PROCEDURE (2018); EMERY G. LEE, III AND JASON A. CANTONE, FED. JUDICIAL CTR., REPORT ON PILOT PROJECT REGARDING INITIAL DISCOVERY PROTOCOLS FOR EMPLOYMENT CASES

Following the successes of the Employment Protocols, IAALS facilitated several additional protocols for specific case types, including the Initial Discovery Protocols for Fair Labor Standards Act Cases Not Pleaded as Collective Actions (FLSA Protocols) in 2018,<sup>3</sup> and the Initial Discovery Protocols for First Party Insurance Property Damage Cases Arising from Disasters (Disaster Protocols) in 2019.<sup>4</sup> Each time, IAALS brought together a balanced committee of attorneys from across the country who regularly represent plaintiffs and defendants, along with judges who provided both support and leadership.

At the beginning of the pandemic, IAALS was encouraged by multiple bench and bar leaders to facilitate the development of a set of discovery protocols, this time for the growing number of business interruption insurance cases. IAALS once again gathered a balanced working group comprised of highly experienced attorneys from across the country who regularly represent plaintiffs or defendants in BI insurance and other commercial property damage disputes. As with prior protocols, the working group also benefited from the leadership and support of several judges, including Judge John Koeltl, District Judge of the United States District Court for the Southern District of New York; Judge Andrew Edison, United States Magistrate Judge for the Southern District of Texas, Galveston Division; and Judge Lee Rosenthal, Chief Judge of the United States District Court for the Southern District of Texas, Houston Division, who played a key facilitation role throughout the process.

The working group was kept small to promote efficiency. Through virtual meetings, the working group developed a draft set of discovery protocols based on the Disaster Protocols. The draft was then reviewed by a second, broader group of experts, which helped gain additional input and buy-in for the project. The final product is the result of rigorous debate and compromise on both sides, inspired by the goal of improving the pretrial process in BI cases nationwide. The BI Insurance Protocols aim to reduce conflict and cost and to help businesses and insurers reach quick resolution during the pandemic, whether it be in settlement, motions practice, or trial.

The 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.” The protocols create new categories of information exchange and replace initial disclosures with initial discovery specific to BI Insurance cases. This discovery is provided automatically by both sides within 45 days of the Insurer’s responsive pleading or motion.

While the parties’ subsequent right to discovery under the Federal Rules of Civil Procedure is not affected, the amount and type of information initially exchanged will focus the disputed issues, streamline the discovery process, and minimize opportunities for gamesmanship. The

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ALLEGING ADVERSE ACTION (2015). *See also* Memorandum from Emery G. Lee, III and Jason A. Cantone to the Judicial Conference Advisory Committee on Civil Rules (Oct. 26, 2016).

<sup>3</sup> FED. JUDICIAL CTR., INITIAL DISCOVERY PROTOCOLS FOR FAIR LABOR STANDARDS ACT CASES NOT PLEADED AS COLLECTIVE ACTIONS (2018).

<sup>4</sup> INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS., INITIAL DISCOVERY PROTOCOLS FOR FIRST-PARTY INSURANCE PROPERTY DAMAGE CASES ARISING FROM DISASTERS (2019).

Initial Discovery Protocols are accompanied by a Standing Order for their implementation by individual judges, as well as an Interim Protective Order that the court and parties can use as a template for discussion. While the parties and the court each come with a different perspective, everyone involved has the shared goal of an accessible, fair, and efficient process.

The BI Insurance Protocols are designed to be implemented by trial judges, lawyers, and litigants in state and federal courts. As described in the BI Insurance Protocols, their intent is to “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.”

Courts and litigants around the country will be dealing with COVID-19 insurance issues long after this pandemic has run its course. The goal of these protocols is to provide courts with an effective tool to streamline the critical early stage of litigation in order to reduce conflict and cost for both businesses and insurers alike.

## **Acknowledgments**

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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.



\_\_\_\_\_  
**COURT**  
**FOR THE \_\_\_\_\_ DISTRICT OF \_\_\_\_\_**  
**\_\_\_\_\_ DIVISION**

	)	
	)	
Plaintiff,	)	
	)	
vs.	)	Case No. _____
	)	
	)	Judge _____
	)	
Defendant.	)	

**STANDING ORDER FOR BUSINESS INTERRUPTION INSURANCE DISPUTES  
ARISING FROM THE COVID-19 PANDEMIC AND SIMILAR PUBLIC HEALTH  
THREATS**

This court is implementing the INITIAL DISCOVERY PROTOCOLS FOR BUSINESS INTERRUPTION INSURANCE DISPUTES ARISING FROM THE COVID-19 PANDEMIC AND SIMILAR PUBLIC HEALTH THREATS. 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 and similar public health threats arising from disease or other sources of infection or contamination.

Parties and counsel must comply with the BI Insurance Protocols attached to this Order. If any party believes that there is good cause why a particular case should be exempted from the BI Insurance Protocols, in whole or in part, that party may raise the issue with the court.

Unless the parties agree or the court decides to defer responses to these BI Insurance Protocols, within 30 days after the defendant’s submission of a responsive pleading or motion, the parties must provide to one another the documents and information described in the BI Insurance Protocols for the relevant time period. This obligation supersedes the parties’

obligations to provide initial disclosures under FRCP 26(a)(1), or under the applicable state disclosure rules.

The parties' responses to the BI Insurance Protocols must comply with FRCP 26(e) on supplementation, with FRCP 26(g) on certification of responses, and to similar applicable state rules. As stated in the Protocols, this Initial Discovery is not subject to objections, except on the grounds of attorney-client privilege or work-product protection, including a joint defense agreement. Documents or information withheld based on an attorney-client privilege or work-product protection claim are subject to FRCP 26(b)(5) or similar applicable state rules.

SIGNED on \_\_\_\_\_, at \_\_\_\_\_.

---

[Name]

[Title] Judge

These Business Interruption Insurance Initial Discovery Protocols (“BI Insurance Protocols”) are designed to achieve more efficient and targeted discovery. Prompt entry of a protective order will allow the parties to begin exchanging documents and information without delay. The BI Insurance Protocols Committee offers the following Interim Protective Order. The Interim Protective Order will remain in place until the parties agree to, or the court orders, a different protective order, but absent agreement or court order, the Interim Protective Order will not apply to subsequent discovery. The parties may agree to use the Interim Protective Order throughout litigation.

Recognizing that whether to enter a protective order and its terms is within the court’s discretion and is subject to local practice, courts might use an approach along the following lines:

### **INTERIM PROTECTIVE ORDER**

The Court orders that the following restrictions and procedures apply to certain information, documents, and excerpts from documents and information the parties exchange in response to the BI Insurance Protocols:

1. ☐ Any party may designate as “Confidential” any document, or information contained in or revealed in a document, provided in response to these BI Insurance Protocols or, if applicable, in subsequent discovery, if the party determines, in good faith, that the designation is necessary to protect the party’s interests. Information and documents a party designates as confidential will be stamped “CONFIDENTIAL.” Confidential information or documents are referred to collectively as “Confidential Information.”
2. ☐ Unless the Court orders otherwise, the Confidential Information disclosed will be held and may be used by any person receiving the information solely in this litigation.
3. ☐ If a party challenges another party’s Confidential Information designation, counsel must make a good-faith effort to resolve the dispute. If that is unsuccessful, the challenging party may seek resolution by the Court. Nothing in this Interim Protective Order is an admission by any party that Confidential Information disclosed in this case is relevant or admissible. Each party specifically reserves the right to object to the use or admissibility of all Confidential Information disclosed, in accordance with applicable law and court rules.
4. ☐ “Confidential Information” must not be disclosed to any person, except:
  - a. ☐ the requesting party and counsel, including in-house or agency counsel;
  - b. ☐ employees of counsel assigned to and necessary to assist in the litigation;
  - c. ☐ consultants or experts assisting in the prosecution or defense of the litigation, to the extent deemed necessary by counsel;

- d. ☐ any person from whom testimony is taken or is to be taken in this litigation, but that person may be shown the Confidential Information only in preparation for, and during, the testimony and may not retain the Confidential Information; and
  - e. ☐ The judge and court staff, including the clerk, case manager, and court reporter, or other person with access to Confidential Information by virtue of that person's position with the court or the jury.
- 5. ☐ Before disclosing or displaying Confidential Information to any person, a party must:
  - a. ☐ inform the person of the confidential nature of the information and documents; and
  - b. ☐ inform the person that the Court has enjoined the use of the information or documents for any purpose other than this litigation and has enjoined the disclosure of that information or documents to any other person.
- 6. ☐ Confidential Information may be displayed to and discussed with the persons identified in Paragraphs 4(c) and (d) only on the condition that before any such display or discussion, each person must be asked to sign an agreement to be bound by this Order in the form attached as Exhibit A. If the person refuses to sign an agreement in the form attached, the party seeking to disclose the Confidential Information may seek relief from the Court.
- 7. ☐ The disclosure of a document or information without designating it as "Confidential Information" does not waive the right to designate the document or information as "Confidential Information" under this Order. If designated, the document or information will be treated as Confidential Information subject to this Order.
- 8. ☐ Documents or information filed with the Court that is subject to confidential treatment under this Order, and any pleadings, motions, or other papers filed with the Court disclosing any Confidential Information must be filed under seal to the extent permitted by the law, rules, or court orders, and must be kept under seal until the Court orders otherwise. To the extent the Court requires any further act by the parties as a precondition to filing the documents or information under seal, the filing party is responsible for satisfying the requirements. If possible, only the confidential parts of documents of information filed with the Court will be filed under seal.
- 9. ☐ No party may use or disclose any other party's Confidential Information for any purpose after this litigation has concluded. Within 30 days after the entry of a final judgment that is no longer subject to appeal, a party that has received Confidential

Information from another party must return the original copy of the Confidential Information it received, or certify that it has been destroyed. If the receiving party has made copies or excerpts of another party's Confidential Information, those copies or excerpts must also be returned or certified as destroyed, but this obligation does not apply to Confidential Information: (a) in counsel's working files; (b) in electronic mail, backup archives, or locations that are not reasonably accessible; or (c) that the receiving party is required by law to retain. Confidential Information filed with the court will remain in the court's file unless the court orders its return.

10. ☐ Producing documents or information, including Confidential Information, in this litigation does not waive attorney-client privilege or work-product protection for the documents or information, under FRE 502(d) or similar applicable state laws.

This Order does not diminish the right of any party to apply to the Court for a different or additional Protective Order relating to Confidential Information, to object to the production of documents or information, to apply to the court for an order compelling production of documents or information, or to modify this Order. Any party may seek enforcement of this Order and the Court may sanction violations.



## EXHIBIT A

I have been informed by counsel that certain documents or information to be disclosed to me in connection with the matter entitled \_\_\_\_\_ have been designated as confidential. I have been informed that any of the documents or information labeled “CONFIDENTIAL” are confidential by Order of the Court.

I hereby agree that I will not disclose any information contained in the documents to any other person. I further agree not to use this information for any purpose other than this litigation.

\_\_\_\_\_ DATED: \_\_\_\_\_

Signed in the presence of:

\_\_\_\_\_

(Attorney)