

# Contamination Exclusion, Personal and Advertising Injury and Property Damage Coverage Update

March 15, 2023

## Contamination Exclusion – Eastern District of Michigan (Michigan Law)

*Detroit Ent., LLC, v. Am. Guarantee and Liab. Ins. Co.*

--- F.Supp.3d ---, 2023 WL 2392031 (E.D. Mich. Mar. 7, 2023)

The U.S. District Court for the Eastern District of Michigan found that a commercial insurance policy issued to a casino did not provide coverage for losses sustained by the casino following the outbreak of COVID-19.

Detroit Entertainment, LLC (Detroit Entertainment) owns and operates the MotorCity Casino Hotel (Casino Hotel) in Detroit. American Guarantee and Liability Insurance Company (AGLIC) issued an “all risk” commercial insurance policy to Detroit Entertainment that contained, among other terms and conditions, a contamination exclusion that barred coverage for losses caused by contamination or cost due to contamination. The definition of contamination is “[a]ny condition of property due to the actual presence of ... virus, [or] disease causing or illness causing agent[.]”

Detroit Entertainment alleged that the outbreak of COVID-19 in March 2020 resulted in infections and deaths, the closure of businesses and the “widespread physical loss of or damage to property[.]” Detroit Entertainment alleged that the Casino Hotel was “repeatedly and continuously exposed to, invaded by, actually physically damaged and physically and materially altered by the presence of the airborne Coronavirus” and that it closed the Casino Hotel on March 16, 2020.

Detroit Entertainment sought coverage from AGLIC, which reserved its rights to deny coverage to Detroit Entertainment. Detroit Entertainment filed a lawsuit against AGLIC seeking a declaration that the AGLIC policy issued to Detroit Entertainment covered Detroit Entertainment’s losses, including lost business income, which Detroit Entertainment alleged exceeded \$270 million.

AGLIC filed a motion dismiss the complaint, which the district court ultimately granted. More specifically, the district court agreed with AGLIC’s argument that the contamination exclusion precluded coverage for Detroit Entertainment’s losses because the definition of “contamination” specifically included viruses. The district court reasoned that “[i]t is undisputed that COVID-19 is a

'virus' and that all of Detroit Entertainment's claimed losses were caused by the alleged presence of COVID-19 at MotorCity[.]” The district court “concur[red] in the conclusion reached by so many other courts” that coverage is precluded under the policy by virtue of the contamination exclusion.

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## Personal and Advertising Injury and Property Damage Coverages – Michigan

### *Bridging Cmty's, Inc. v. Hartford Cas. Ins. Co.*

--- N.W.2d ---, 2023 WL 2334582 (Mich. Ct. App. Mar. 2, 2023)

In March 2006, Top Flite Financial (Top Flite) conducted a fax advertising campaign, prior to which it did not contact recipients to seek permission before sending Top Flite's advertisements to thousands of fax numbers, including those belonging to the plaintiffs.

The plaintiffs filed a class action against Top Flite in federal court, alleging violations of the Telephone Consumer Protection Act (TCPA). The plaintiffs and Top Flite eventually agreed to a settlement of the class action, and in May 2019, the federal district court entered judgment against Top Flite for the faxes sent in March 2006. Top Flite created a settlement fund to pay a portion of the judgment, and the remaining portion was to be satisfied through Top Flite's insurance policies.

Hartford Casualty Insurance Company (Hartford) insured Top Flite under a series of commercial business insurance policies that provided business liability coverage to Top Flite for “property damage” caused by an “occurrence” during the policy period and “‘personal and advertising injury’ caused by an offense arising out of [the insured's] business” during the policy period.” Occurrence was defined in the policy as “an accident, including continuous or repeated exposure to substantially the same general harmful conditions.”

The policy excluded coverage for property damage “expected or intended from the standpoint of the insured” and excluded coverage under a “statutory right to privacy exclusion,” which precluded coverage for personal and advertising injury “[a]rising out of the violation of a person's right of privacy created by any state or federal act.” However, this exclusion did not preclude coverage for “liability for damages that the insured would have in the absence of such state or federal act[.]”

In July 2019, the plaintiffs, Bridging Communities, Inc. (Bridging) and Gamble Plumbing & Heating, Inc. (Gamble), filed a complaint against Hartford in state court seeking declaratory relief and alleging that the policy provided coverage for the damages awarded in the federal action and that Hartford had a duty to indemnify Top Flite for the unsatisfied portion of the judgment awarded.

Specifically, the plaintiffs asserted that the policy provided coverage for “property damage” and “personal [and] advertising injury” because Top Flite “injured or destroyed [the recipients'] personal property, including but not limited to fax toner and paper” and “caused them to lose the use of their

personal property, including but not limited to the use of their fax machines during the fax transmissions.” The plaintiffs also sought personal and advertising injury coverage, asserting that their injuries satisfied the policy’s definition of injury arising from publication of written or electronic material that violated a person’s right of privacy.

Hartford moved for summary disposition, contending, in part, that coverage under the personal and advertising injury provision was precluded by the statutory right to privacy exclusion, that there was no “property damage” at issue because the plaintiffs did not allege an “occurrence” since the fax transmissions were not accidental, and that the expected or intended injury exclusion applied because the damage was the expected result of Top Flite’s conduct. The trial court granted Hartford’s motion for summary disposition. The plaintiffs appealed.

On appeal, the Michigan Court of Appeal affirmed the lower court’s holding, finding that the trial court did not err in concluding there was no coverage under the personal and advertising injury provision of the policy because the statutory right to privacy exclusion applied where the plaintiffs only claimed violations under the TCPA in the federal action and that Top Flite would not have been liable in the absence of the TCPA.

In addition, the appellate court held that the trial court did not err in concluding there was no coverage under the property damage provisions of the policy. The appellate court found that Top Flite’s actions were intentional, not accidental or an “occurrence” under the property damage coverage part. Furthermore, even if Top Flite’s actions were accidental or qualified as an “occurrence,” the expected or intended injury exclusion applied, according to the appellate court, because Top Flite intentionally sent its advertisements via fax machines.

The appellate court concluded that the “[p]laintiffs’ acts and the consequences that resulted were intended by the insured, and therefore, the acts were not accidents, and the consequences of their intended acts created a direct risk of harm that the insureds should have expected, negating plaintiffs’ claim for coverage for any qualifying occurrence.”

By: Danielle Chidiac