Case No. 20-17422

In the

United States Court of Appeals

for the

Ninth Circuit

CHATTANOOGA PROFESSIONAL BASEBALL LLC, d/b/a Chattanooga Lookouts; AGON SPORTS AND ENTERTAINMENT LLC; BOISE HOSPITALITY AND FOOD SERVICES LLC; BOISE PROFESSIONAL BASEBALL LLC; COLUMBIA CONCESSIONS & CATERING LLC; COLUMBIA FIREFLIES LLC, d/b/a Columbia Fireflies; EUGENE EMERALDS BASEBALL CLUB, INC., d/b/a Eugene Emeralds; FORT WAYNE PROFESSIONAL BASEBALL LLC, d/b/a Fort Wayne TinCaps; FREDERICKSBURG BASEBALL LLC, d/b/a Fredericksburg Nationals; FRISCO ROUGHRIDERS LP, d/b/a Frisco Roughriders; GREENJACKETS BASEBALL LLC; GREENJACKETS HOSPITALITY FOOD & BEVERAGE SERVICES LLC; IDAHO FALLS BASEBALL CLUB, INC., d/b/a Idaho Falls Chukars; INLAND EMPIRE 66ERS BASEBALL CLUB OF SAN BERNARDINO, INC., d/b/a Inland Empire 66ers; JETHAWKS BASEBALL LP, d/b/a Lancaster Jethawks; MYRTLE BEACH PELICANS LP, d/b/a Myrtle Beach Pelicans; PANHANDLE BASEBALL CLUB, INC., d/b/a Amarillo Sod Poodles; SAJ BASEBALL LLC; SAN ANTONIO MISSIONS BASEBALL CLUB, INC., d/b/a San Antonio Missions; 7TH INNING STRETCH LLC, d/b/a Stockton Ports; WEST VIRGINIA BASEBALL LLC, d/b/a West Virginia Power; BOWIE BAYSOX BASEBALL CLUB LLC; FREDERICK KEYS BASEBALL CLUB LLC; SWING BATTER SWING LLC, d/b/a South Bend Cubs,
Plaintiffs-Appellants,

v.

NATIONAL CASUALTY COMPANY; SCOTTSDALE INDEMNITY COMPANY; SCOTTSDALE INSURANCE COMPANY,
Defendants-Appellees.

Appeal from a Decision of the United States District Court for District of Arizona (Phoenix), Case No. 2:20-cv-01312-DLR · Honorable Douglas L. Rayes, U.S. District Judge

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INTRODUCTION

The District Court made three reversible errors in dismissing the Teams' Complaint.[1] First, the District Court disregarded the lack of anti-concurrent causation ("ACC") language in the Policies' exclusion for certain losses caused by viruses (the "Exclusion") and disregarded the Teams' distinct allegations regarding the causes of their losses. Instead, it resolved the highly fact-specific question of causation in favor of Insurers on a motion to dismiss rather than accepting the Teams' allegations as true and construing all reasonable inferences in their favor as required. Second, the District Court concluded that none of the applicable States would adopt regulatory estoppel to bar Insurers' reliance on the Exclusion, despite at least one State having expressly adopted the doctrine and the other States being silent on the doctrine. Third, the District Court found that coverage was barred by an exclusion for the suspension, lapse, or cancellation of a contract, even though the Complaint does not allege any such thing. Insurers' attempts to defend these reversible errors fall flat.

Insurers contend that *all* the Teams' alleged causes of loss resulted from the virus and, thus, the Exclusion bars coverage. Yet the Teams alleged distinct causes of their losses, such as government inaction and the refusal of Major League Baseball ("MLB") to supply the Teams with players, which do not implicate the

[1] Undefined terms have the same meaning as in Plaintiffs' Opening Brief.

Exclusion. Indeed, particularly in the absence of an ACC clause, the Exclusion cannot apply to these distinct causes, and certainly not at the motion to dismiss stage. Tellingly, the District Court supported its decision on this point by relying exclusively on cases that included ACC clauses, and Insurers' cases either included such clauses or did not involve distinct allegations of causation that did not hinge entirely on COVID-19. Thus, if this Court agrees that even one of the Teams' causes of loss could conceivably fall outside the scope of the Exclusion (which does not contain ACC language), the District Court's ruling must be reversed.

Insurers further contend that they are not estopped from relying on the Exclusion because they have not taken conflicting positions and because the relevant States have not adopted this doctrine. The Complaint, however, includes pages of detailed allegations about Insurers' misrepresentations to state regulators in 2006. Contrary to Insurers' contention, whether they took inconsistent positions is irrelevant. What matters for purposes of regulatory estoppel is that Insurers procured an exclusion through misrepresentation without a commensurate adjustment to their premiums. Further, of the highest courts in the ten subject States, nine have never expressly addressed the doctrine, and the tenth has expressly adopted it. Thus, the District Court's determination that none of the ten States would adopt the doctrine is simply incorrect, and nothing Insurers offer compels a different conclusion. Indeed, regulatory estoppel is a well-established

doctrine in the insurance context and has been held in numerous states to prevent the very conduct Insurers engaged in here.

Finally, Insurers fail to offer any support for their argument that coverage is excluded by their Policies' "suspension, lapse or cancellation of any . . . contract" exclusion. The Teams' contracts with MLB were not suspended, lapsed, or cancelled. As alleged in the Complaint, MLB failed to adhere to certain terms of the contracts – a claim that is legally and conceptually distinct from the suspension, lapse, or cancellation of a contract. Thus, the District Court committed reversible error by applying this exclusion to the Teams' losses.

ARGUMENT

I. THE EXCLUSION DOES NOT APPLY TO NUMEROUS CAUSES OF LOSS PLEADED BY THE TEAMS

A. Insurers Failed to Carry Their Heavy Burden of Establishing That the Exclusion Unambiguously Bars Coverage

Insurers do not dispute that: (1) they bear the burden to prove that the Exclusion unambiguously bars coverage for the Teams' losses under the Policies (Appellants' Br. at 27-28); (2) the Teams' allegations regarding causation must be accepted as true at the motion to dismiss stage and all reasonable inferences must be drawn in their favor (*id.* at 25); (3) causation is ordinarily a question of fact, ill-suited to resolution on a motion to dismiss (*id.* at 30-31 n.7); and (4) where both covered and excluded causes combine to cause the loss, the insurer must establish

that the excluded cause was the efficient or predominant cause of the loss (Appellees' Br. at 22-23). These tacit admissions are fatal to Insurers' motion to dismiss. That is because the Teams allege numerous potential causes of loss that do not fall within the Exclusion. Nevertheless, like the District Court, Insurers simply side-step these critical points and contend that the Teams' "alleged 'causes' all result from the coronavirus" and thus fall within the Exclusion. Appellees' Br. at 20-21. Even a cursory review of the Complaint, however, reveals the error in this conclusion.

The cherry-picked allegations cited by Insurers – drawn from only five paragraphs of the 152-paragraph Complaint – paint a misleading and incomplete picture of the Teams' allegations. The reality is that the Teams specifically and plausibly alleged facts that support multiple, distinct causes of loss, including state and local shut-down orders that restricted access to the Teams' ballparks (2-ER-257-61), government inaction in failing to prevent or curtail the spread of the virus (2-ER-263-64), and MLB's failure to adhere to its contract to provide the Teams with players (2-ER-264-65). These causes are distinct from COVID-19 and, thus, the Exclusion cannot bar coverage – particularly at the motion to dismiss stage. Instead of grappling with these allegations and recognizing that they present a question of fact regarding causation and the applicability of the Exclusion, Insurers

effectively ask this Court to simply resolve this fact question in their favor, just as the District Court erroneously did.

The Court need look no further than Insurers' own cases to understand the error in the District Court's decision. Specifically, nearly all the cases cited by Insurers where "other policy exclusions" were enforced, were decided on summary judgment and/or with the benefit of evidence or expert reports or after discovery when "the record clearly reflect[ed]" that the loss was caused by an excluded peril. *Fireman's Fund Ins. Co. v. Oregon Cold Storage LLC*, 11 Fed. Appx. 969, 970 (9th Cir. 2001); s*ee also Carney v. Assurance*, 2005 WL 899843, at *1 (D. Md. Apr. 19, 2005) (insureds' description of cause of loss during discovery "squarely bring[s] their claim into the exclusion for faulty workmanship"); *Smith v. Shelby*, 936 S.W.2d 261, 266 (Tenn. Ct. App. 1996) (in enforcing an exclusion for theft, the court found that the fact that "plaintiff's loss was caused by or resulted from theft is sustained by proof") (emphasis added); *Crandall v. Hartford Cas. Ins. Co.*, 2013 WL 502194, at *8 (D. Idaho Feb. 8, 2013) (expert testimony and inspection reports commissioned by the insurer that established cause of loss as excluded wear and tear "meet [insurer's] burden of proof upon the application of a Policy exclusion"). Therefore, Insurers' own cases demonstrate that it was error for the District Court to resolve this highly fact-specific question at the motion to dismiss stage.

Moreover, even if the Teams' alleged causes of loss *all* resulted from the virus or contributed with the virus to cause the loss, there is still an open fact question as to which of these causes was the predominant or efficient cause of the loss. Appellants' Br. at 30. Put differently, it is not enough for Insurers to show that the virus was one contributing cause of the loss; they must show that the virus was the predominant cause of the loss – a showing they cannot possibly make based on the allegations in the Complaint. Indeed, the District Court appears to have recognized this fact, noting MLB's failure to provide players as a distinct cause of loss but rejecting that cause on the erroneous ground that it was barred by a separate policy exclusion, discussed in further detail in Section III below.

Insurers even tacitly recognize that these distinct causes do not implicate the Exclusion. Specifically, their contention that the virus is the efficient cause of the loss because it purportedly set all of the other alleged causes in motion (Appellees' Br. at 23-24) focuses exclusively on the Teams' allegations regarding governmental orders and ignores the Teams' other allegations that their losses were caused by governmental inaction and/or MLB's failure to adhere to its contract with the Teams. The reason for this tunnel vision is obvious: Insurers cannot possibly show at the motion to dismiss stage that governmental inaction, for example, was somehow set in motion by the virus. To the contrary, the Teams' contention is that if the government had done its job the Teams never would have

been impacted by the virus, or that the impact would have been significantly reduced. 2-ER-263-64.

In any case, even if the virus was first in this sequence of events, Insurers' own cases also make clear that the test is whether the excluded cause was the "predominant cause" of the loss, not simply where it appears in a temporal sequence. *See*, *e.g.*, *Causeway Auto., LLC v. Zurich Am. Ins. Co.*, No. CV208393FLWDEA, 2021 WL 486917, at *5 (D.N.J. Feb. 10, 2021) ("Ultimately, however, the pertinent question is not where in the sequence the alleged cause of loss occurred, but what was the predominant cause that produced the loss."). Here, whether the virus itself, the governmental orders, government inaction, or MLB's failure to provide players was the *predominant* cause of the loss is a quintessential question of fact.

Once again, Insurers' cases highlight this point. In each of Insurers' cases, the *only* alternative cause of loss alleged by the insured was governmental orders resulting from COVID-19. *See* Appellees' Br. at 19, 21-25. In none of those cases did the insured allege a cause of loss distinct from the virus, like the Teams do here.[2]

[2] *See Mark's Engine Co. No. 28 Rest. LLC v. The Travelers Indem. Co. of Conn.*, 2020 WL 5938689 at *5 (C.D. Cal. Oct. 2, 2020) ("FAC clearly demonstrates that all alleged loss or damage was both caused by and resulted from the novel coronavirus."); *Travelers Cas. Ins. Co. of Am. v. Geragos & Geragos*, 2020 WL

Because the Teams sufficiently pleaded alternate factual bases of causation that fall outside the Exclusion, it was error for the District Court to conclude that "Plaintiffs' amended complaint explicitly attributes their losses to the virus" without crediting all of the alleged causation theories and supporting factual allegations in the Complaint. 1-ER-5. Indeed, in granting the motion to dismiss, the District Court erroneously made a factual determination regarding the cause of loss and relieved Insurers' of their burden to prove that the virus was the predominant cause of the Teams' losses.

6156584, at *3 (C.D. Cal. Oct. 19, 2020) (court cited to explicit language of insured's counterclaim which conceded that the loss resulting from the Order was "based on the dire risks of exposure with the contraction of COVID-19"); *10E, LLC v. Travelers Indem. Co. of Conn.*, 2020 WL 5938689, at *2 (C.D. Cal. Nov. 13, 2020) (insured's "admissions" in "the SAC concede[]" that the business restriction losses resulted from the virus).

Similarly, in *Pez Seafood DTLA, LLC v. Travelers Indem. Co.*, 2021 WL 234355, at *7 (C.D. Cal. Jan. 20, 2021), all causes of loss (other than the virus) were found to be inextricably linked to the virus itself to invoke the virus exclusion. Significantly, the District Court rulings in *Pez Seafood*, *10E, LLC* and *Mark's Engine* are currently pending appeal in this Court. Further, the holdings in *Diesel Barbershop, LLC v. State Farm Lloyds*, 479 F. Supp. 3d 353, 362 (W.D. Tex. Aug. 13, 2020), *Franklin EWC, Inc. v. Hartford Fin. Servs. Grp., Inc.*, 488 F. Supp. 3d 904, 907 (N.D. Cal. Sept. 22, 2020), and *Mikmar, Inc. v. Westfield Ins. Co.*, 2021 WL 615304, at *10 (N.D. Ohio Feb. 17, 2021) are unpersuasive for the additional reason that the dismissals were premised on the policies' inclusion of anti-concurrent causation clauses not present here.

B. The District Court Did not Consider the Significance of Insurers' Failure to Include an Anti-Concurrent Causation Clause in the Exclusion

In rejecting the Teams' alternative theories of causation, the District Court failed to appreciate the significance of Insurers' failure to include an ACC clause in the Exclusion. Whereas ACC clauses are designed to bar coverage when there are both covered and excluded causes of loss and irrespective of the sequence of causation, the Policies here narrowly exclude coverage for "loss or damage caused by or resulting from any virus." 3-ER-345 (§B). Although Insurers do not contest that the Exclusion lacks an ACC clause, and that ACC clauses are intended to contractually resolve causal uncertainties concerning the applicability of policy exclusions – *i.e.*, the type of factual uncertainty that is present here and cannot be resolved on a motion to dismiss – they nevertheless relied heavily in their briefing on cases that included such clauses. *See* Ins. Mot. to Dismiss, ER-161 (citing *Turek Enter., Inc. v. State Farm Mut. Auto. Ins. Co.*, 2020 WL 5258484 (E.D. Mich. Sept. 3, 2020) (citing ACC language in support of dismissal)); Ins. Reply Br., ER-24 (citing *Seifert v. IMT Ins. Co.*, 2020 WL 6120002 (D. Minn. Oct. 16, 2020) (premising dismissal on exclusion's ACC language); *Wilson v. Hartford Cas. Co.*, 2020 WL 5820800 (E.D. Pa. Sept. 30, 2020) (same)).

Similarly, the *only* cases cited by the District Court in support of its decision regarding causation included ACC clauses, pursuant to which the exclusion would

be deemed applicable notwithstanding the existence of other covered causes of loss. *See* Order at 4 (citing *Diesel Barbershop, LLC v. State Farm Lloyds*, 479 F. Supp. 3d 353, 361 (W.D. Tex. Aug. 13, 2020) (addressing exclusion that barred coverage "whether other causes acted concurrently or in any sequence with the excluded event to produce the loss"); *Franklin EWC, Inc. v. Hartford Fin. Servs. Grp., Inc.*, 488 F. Supp. 3d 904 (N.D. Cal. Sept. 22, 2020) (addressing exclusion that barred coverage "regardless of any other cause or event that contributes concurrently or in any sequence to the loss"). Thus, the District Court's decision was based on a false premise regarding the scope of the Exclusion and on inapposite case law.

Insurers' primary retort is to effectively ask this Court to ignore the effect of their decision not to include an ACC clause in the Exclusion.[3] Yet, the emerging

[3] Insurers also ask the Court to disregard any argument related to the absence of ACC language in the Exclusion because "Plaintiffs failed to raise this issue before the District Court." Answering Br. at 21. Insurers' flimsy "waiver" argument, relegated to two sentences in the answering brief, is belied by the record and does not merit consideration by the Court. The Order below makes clear that the District Court expressly, albeit incorrectly, ruled on causation. *See* Order at 4. Thus, under the rules of this Circuit, the Court may properly consider the Teams' arguments concerning the absence of an ACC clause in the Exclusion and the attendant legal ramifications on the issue of causation. *See*, *e.g.*, *E.R. Fegert, Inc. v. Seaboard Sur. Co.*, 887 F.2d 955, 957 (9th Cir. 1989) (argument that was raised sufficiently for the trial court to rule on it was "properly raised" for consideration by the Court). The single case cited by Insurers (Answering Br. at 21-22) to support a contrary result is plainly distinguishable as the defendants in that case, California prison officials, "made no mention" to the court below of the argument

jurisprudence on this issue yields a clear result: If the exclusion includes an ACC clause, it "extends to exclude coverage for any 'loss or damage' where a virus is part of the causal chain of loss or damage." *Santo's Italian Café LLC v. Acuity Ins. Co.*, 2020 WL 7490095, at *15 (N.D. Ohio Dec. 21, 2020). The opposite principle applies with equal force: If an exclusion includes no ACC clause, the exclusion does not, as a matter of law, exclude all loss or damage that may indirectly relate to the excluded peril. *See The Scranton Club v. Tuscarora Wayne Mut. Group, Inc.*, No. 20 CV 2469, 2021 WL 454498, at *11-13 (Pa. Commw. Ct. Jan. 25, 2021) (holding that the absence of an ACC clause meant that an exclusion for virus-related losses did not apply where the insured had pleaded other causes of the loss); *cf. Independence Barbershop, LLC v. Twin City Fire Ins. Co.*, 2020 WL 6572428, at *3 (E.D. Ky. Nov. 4, 2020) (court could not "in good faith hold that the SARS-CoV-2 virus is not even a contributing cause" when the policy contained an ACC clause).

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they sought to raise on appeal, nor did they provide any detail that would have allowed the trial court to evaluate the claim in its ruling. *See Armstrong v. Brown*, 768 F.3d 975, 981 (9th Cir. Sept. 26, 2014). Here, the issue of causation was indisputably raised below, the language of the exclusion was presented to the lower court, and the District Court expressly ruled on causation.

Insurers argue that even in the absence of an ACC clause, the Exclusion still applies here because the virus was the efficient proximate cause of the loss. However, as stated, whether the virus was the efficient or predominant cause of the loss is a quintessential question of fact based on the allegations in the Complaint. Indeed, the cases Insurers cite in which the policies did not include an ACC clause, but the court still granted motions to dismiss, did not involve circumstances where the insured had alleged numerous distinct causes for the loss. Therefore, it was reversible error for the District Court to resolve this issue on a motion to dismiss.

Insurers tacitly concede this point because all but one of the "efficient proximate cause" cases they cite (Answering Br. at 23 n.4) were either decided on an evidentiary record or, in the case of *Murray*, remanded for trial because "the efficient proximate cause of the plaintiffs' losses is a question for the finder of fact." *Murray v. State Farm Fire & Cas. Co.*, 203 W.Va. 477, 589 (1998). *See also Am. Auto. Ins. Co. v. Valentine*, 131 Fed. Appx. 406, 409 (4th Cir. 2005) (case tried and jury determined question of "dominant, efficient cause"); *McWhorter v. Bankers Std. Ins. Co.*, 2020 WL 1322977, at *8-10 (D. Md. Mar. 20, 2020) (relying on expert deposition testimony to determine certain efficient proximate cause issues on summary judgment and reserving others as disputed fact issues for trial); *12W RPO, LLC v. Affiliated FM Ins. Co.*, 353 F. Supp.3d 1039, 1059 (D. Or. Dec. 18, 2018) ("evidence in the record" was insufficient to establish "concurrent cause

entitling [plaintiffs] to coverage"); *Travelers Indem. Co. v. McKillip*, 469 S.W.2d 160, 162 (Tex. 1971) (remanding for new trial because "insureds were obligated to introduce evidence and secure jury findings" on issue of causation). Thus, once again, Insurers' own cases reveal the error in the District Court's decision.

Insurers' heavy reliance on *Boxed Foods Co., LLC. v. California Capital Ins. Co.*, 2020 WL 6271021, at *5 (N.D. Cal. Oct. 27, 2020) is similarly misplaced. There, the exclusion contained expansive language akin to an ACC clause extending the exclusion to losses caused by a virus, whether "direct or indirect, proximate or remote, or in whole or in part caused by, contributed to or aggravated by any physical damage insured by this policy." *Id.* at *3. Based on this language – language not present here – the court ruled that the exclusion barred coverage. In fact, in applying the exclusion to preclude "any claim premised on virus-induced damage," the court specifically noted that the language of the exclusion "contemplates situations where a virus indirectly contributes to or worsens a loss." *Id.* at *5. Accordingly, the Court found that, "[e]ven if the Court accepts Plaintiffs' distinction between a stand-alone virus and a pandemic . . . and subsequent[] civil authority orders . . . COVID-19 remains the 'indirect' cause of the insured's harm . . . ." *Id.* Thus, what persuaded the court in *Boxed Goods* to dismiss the complaint was the breadth of the ACC language in that policy. Far

from bolstering Insurers' position, *Boxed Foods* simply highlights the significance of Insurer's decision to omit an ACC clause from the Exclusion.

In an even more recent decision cited by Insurers, the court also highlighted the significance of an ACC clause in a virus exclusion:

> This policy language sweeps aside any issue of causation as to whether the virus or government orders cause Plaintiff's loss. Put another way, the reach of the exclusion to losses a virus indirectly causes does not require parsing the causal chain legally and ***obviates the need for factual development***.

Ceres Enterprises, LLC. v. Travelers Ins. Co., 2021 WL 634982, at *10 (N.D. Ohio Feb. 17, 2021) (emphasis added); *see also Family Tacos, LLC v. Auto Owners Ins. Co.*, 2021 WL 615307, at *10 (N.D. Ohio Feb. 17, 2021) (same).

These cases are not outliers. Many of Insurers' cases recognize that the presence of an ACC clause in a virus exclusion is the dispositive factor allowing resolution of COVID-19 coverage cases on a motion to dismiss.[4] Thus, in the face

[4] *See, e.g.*, *Diesel Barbershop, LLC v. State Farm Lloyds*, 479 F. Supp. 3d 353, 362 (W.D. Tex. Aug. 13, 2020) ("Thus, the Court finds that the Policies' ACC clause excluded coverage for the losses Plaintiffs incurred in complying with the Orders."); *Franklin EWC, Inc. v. Hartford Fin. Servs. Grp., Inc.*, 488 F. Supp. 3d 904, 907 (N.D. Cal. Sept. 22, 2020) ("Thus, as the loss was caused directly or indirectly by the virus, the Virus Exclusion applies . . . ."); *Dye Salon, LLC v. Chubb Indem. Ins. Co.*, 2021 WL 493288, at *5 (E.D. Mich. Feb. 10, 2021) (because policy included ACC language, the virus exclusion "applies where a virus and another factor (here, Governor Whitmer's Executive Order) 'contribute[d] concurrently' to an insured's loss"); *Santo's Italian Café LLC v. Acuity Ins. Co.*,

of a Complaint that alleges alternate and/or concurrent causes for the Teams' losses and an Exclusion that does not contain an ACC clause, it was error for the District Court to resolve these fact issues in favor of Insurers and to dismiss the Complaint on an undeveloped factual record.[5]

II. THE TEAMS SUFFICIENTLY ALLEGED THE ELEMENTS OF REGULATORY ESTOPPEL

The Complaint adequately alleged that Insurers misrepresented the nature and purpose of the Exclusion to state regulators in 2006. The Complaint includes more than eight pages of allegations about these misrepresentations, including that: (1) Insurers' agents made misrepresentations to state regulators regarding the Exclusion; (2) Insurers capitalized on those misrepresentations by adding the Exclusion to their policies without lowering their premiums; and (3) as a result of

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2020 WL 7490095, at *15 (N.D. Ohio Dec. 21, 2020) (extending virus exclusion to preclude loss resulting from closure orders because "the plain language of the Property Exclusion's Anti-Concurrent Causation Clause . . . extends to exclude coverage for any 'loss or damage' where a virus is part of the causal chain of loss or damage").

[5] Notwithstanding the many cases – including those cited by Insurers – that recognize that the presence or absence of an ACC clause is a determinative factor on resolving a motion to dismiss, Insurers argue that the District Court need not have considered this issue in its ruling. Yet the only case Insurers cite to support their position is currently on appeal to this Court, presumably for the very reason that it does not comport with the majority of decisions to have considered this issue. *See 10E, LLC v. Travelers Indem. Co. of Conn.*, 2020 WL 6749361, at *3 (C.D. Cal. Nov. 13, 2020) (failing to recognize that ACC language extends the scope of an exclusion beyond the standard exclusion term "caused by or resulting from").

this conduct, Insurers are estopped from relying on the Exclusion to bar coverage. 2-ER-272-80. Rather than credit these detailed allegations, the District Court simply assumed there was no possibility that any of the States would adopt regulatory estoppel if presented with the opportunity. This conclusion was erroneous.

A. It Does Not Matter Whether Insurers' Arguments in this Lawsuit Are Consistent with the Their Misrepresentations in 2006

The Teams allege, credibly and in great detail, that the insurance industry misrepresented the purpose of the Exclusion to obtain approval by state regulators. 2-ER-272-80. Insurers make no effort to refute those allegations. Instead, they emphasize that their interpretation of the Exclusion today is no different than what their agents represented to state regulators in 2006. But Insurers' argument—that "estoppel requires the existence of a prior inconsistent position"—is simply incorrect. Appellees' Br. at 34.

The Teams' regulatory estoppel argument is not about whether Insurers are saying the same thing now that they said to regulators in 2006. What matters is that Insurers obtained the Exclusion through a material misrepresentation. Indeed, the policyholder in the seminal *Morton* case prevailed without showing an inconsistency between the insurers' past and present statements. *Morton Int'l, Inc. v. Gen. Accident Ins. Co. of Am.*, 629 A.2d 831, 847-48 (N.J. 1993). Thus, the fact that Insurers are interpreting the Exclusion the same way today as when they

misrepresented it to regulators in 2006 is beside the point. In fact, if an insurer could evade the impact of regulatory estoppel by simply maintaining its misrepresentation, it would mean that insurers who lie consistently would be better off than those who lie inconsistently – a result that makes no sense.

Pre-2006 cases cited in the Teams' Opening Brief support the Teams' allegations that Insurers' agents' 2006 representations about the Exclusion (that it would merely "clarify" pre-existing "policy intent," etc.) were false. The decision in *Motorists Mutual Insurance Co. v. Hardinger*, 131 Fed. Appx. 823 (3d Cir. 2005), is a perfect example. There, a family became ill based on exposure to E. coli bacteria in their home's water system. *Id*. at 824. The insurer denied coverage based on a pollution exclusion. *Id*. The Third Circuit denied the insurer summary judgment, finding issues of fact on the availability of coverage "where sources unnoticeable to the naked eye have allegedly reduced the use of the property to a substantial degree." *Id*. at 826. The Third Circuit, ruling for the policyholder, predicted that the Pennsylvania Supreme Court would determine that substances like E. coli could conceivably "eliminate[] or destroy[]" the "functionality" of property for purposes of a property insurance policy. *Id*. Numerous other decisions reiterate that non-structural losses from microscopic substances were covered under basic property policies prior to 2006. Appellants' Br. at 41 n.11.

Accordingly, when Insurers' agents told regulators that losses from microscopic substances were already excluded and the new exclusion would simply "clarify" that fact, they misrepresented the facts. Thus, the Teams have sufficiently alleged a cognizable regulatory estoppel claim and should be permitted to pursue discovery on it.

B. The States at Issue Have Recognized or Would Recognize Regulatory Estoppel Under the Facts as Pleaded

Insurers fiercely advocate for the application of state law to the Teams' regulatory estoppel argument, but their actual discussion of state law in their opposition brief is thin.[6] This limited analysis is unsurprising because Insurers cannot point to even one of the ten pertinent State's high courts that has confronted regulatory estoppel and rejected it. Indeed, the West Virginia Supreme Court of Appeals has adopted the doctrine (before it came to be known as "regulatory estoppel").

In *Joy Technologies, Inc. v. Liberty Mutual Insurance Co*., 421 S.E.2d 493 (W. Va. 1992), West Virginia's highest court analyzed the same pollution exclusion at issue in *Morton* and reached precisely the same conclusion the *Morton* court would reach just a year later. *Id*. at 495. While Insurers do not dispute that

[6] The Teams incorporate by reference their argument that this Court should apply federal common law to regulatory estoppel. Appellants' Br. at 43-45. For sake of argument, however, the Teams assume on reply that each of the ten States' laws would govern as to the Teams that suffered losses in their relevant States.

Morton concerned regulatory estoppel, they completely discount *Joy* merely because it does not use the word "estoppel." Insurers' argument—and the corresponding footnote discounting *Joy* in the District Court decision—wrongly elevate form over substance.

The *Joy* court barred insurers from asserting an exclusion because their agents had originally convinced the West Virginia Commissioner of Insurance to approve the exclusion by arguing that it "merely clarified the pre-existing" coverage. 421 S.E.2d at 499. Based on the insurance industry's prior misrepresentations about the nature of the exclusion, the insurers were not permitted to use the exclusion to avoid covering a loss that would have been covered prior to the exclusion being added. *Id*. at 500. *Joy* is directly analogous to *Morton*. Unsurprisingly, *Morton* discusses *Joy* at length, specifically citing the West Virginia insurance commissioner's decision to approve the new pollution exclusion *only* as a "mere clarification[] of existing coverages." 629 A.2d at 870. Indeed, it seems the only reason *Joy* did not explicitly speak of "regulatory estoppel" is because it would be another year before the *Morton* court coined the term. Insurers (and the District Court) are manifestly incorrect to disregard *Joy* based on this purely semantic distinction.

Joy warrants much more than the footnote accorded it by the District Court. It represents by far the clearest guidance any of the ten subject States can offer this

Court in evaluating the Teams' regulatory estoppel argument. Indeed, *Joy* actually binds this Court if it applies West Virginia law to the claims by Plaintiff West Virginia Baseball LLC d/b/a West Virginia Power. If Insurers insist that the laws of the ten subject States govern this dispute, they cannot simply ignore the one State that has actually addressed the issue head on simply because it undercuts them.

Whereas *Joy* is a directly on-point decision from a state supreme court, Insurers' two citations to "state" law are factually distinct federal court decisions that do not actually endorse or reject regulatory estoppel. Appellees' Br. at 28, 30. As federal court decisions, they do not bind this Court under *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938). The only State whose high court *has* ruled on this issue, a ruling which *does* bind this Court, is West Virginia. There is nothing to suggest the other States' highest courts would not also adopt regulatory estoppel, much less something sufficiently persuasive to meet Insurers' steep burden of prevailing on a motion to dismiss. As to those States, this Court must simply exercise its "own best judgment in predicting how the [states'] highest court[s] would decide the case[s]." *Fiorito Bros. v. Fruehauf Corp.*, 747 F.2d 1309, 1314 (9th Cir. 1984) (citations omitted). Given that numerous States have adopted regulatory estoppel in analogous circumstances, it was premature at best for the

District Court to conclude that *none* of the other potentially applicable States would adopt regulatory estoppel here.

Moreover, Insurers assert that the Teams have acknowledged that courts in several states have rejected application of regulatory estoppel in COVID-19 business interruption lawsuits similar to this one. Appellees' Br. at 28. However, Insurers glaringly fail to mention, and make no effort to substantively counter, the Teams' discussion distinguishing those cases in their Opening Brief. Appellants' Br. at 49 n.13. This failure further highlights the weakness in Insurers' regulatory estoppel argument.

III. THE "SUSPENSION, LAPSE OR CANCELLATION" EXCLUSION DOES NOT APPLY

Despite identifying MLB's failure to provide players as a distinct cause of loss from the Exclusion, the District Court rejected that cause based on an exclusion barring coverage for an increase in loss caused by the "suspension, lapse or cancellation of any . . . contract." However, Insurers, like the District Court, fail to identify a single case from any jurisdiction holding, or even suggesting, that such an exclusion bars coverage where, as here, the insured has asserted that its losses were caused, in part, by a counterparty's failure to adhere to the terms of a contract, absent a suspension, lapse, or cancellation. Indeed, Insurers cannot dispute that nowhere in the Complaint is there any allegation of a "suspension, lapse or cancellation" of a contract. Indeed, the Teams did not assert that MLB

suspended or canceled the contracts pursuant to which it was required to provide players to the Teams. Nor did the Teams allege that MLB let those contracts lapse. Rather, the Complaint clearly alleges that MLB simply failed to adhere to certain of the terms in its contracts with the Teams.

Nevertheless, and without any supporting analysis or authority, Insurers improperly equate the undefined terms "suspension, lapse or cancellation" with the term "breach." Appellees Br. at 38-39. This false equivalency is contrary to clear and ubiquitous authority that a "suspension," "lapse," or "cancellation" of a contract is distinct from a failure to adhere to contractual obligations. *See*, *e.g.*, *CAI Int'l, Inc. v. S. Atl. Container Lines, Ltd.*, No. C 11-2403 CW, 2012 WL 2598567, at *6 (N.D. Cal. July 5, 2012) (contrasting a breach or failure to adhere to a contract with a cancellation of a contract, the latter being "when either party puts an end to the contract for breach by the other"); *Demers Bros. Trucking v. Certain Underwriters at Lloyd's, London, Subscribing to Certificate No. SRS IM MA 04-124*, 600 F. Supp. 2d 265, 281 (D. Mass. Mar. 3, 2009) (applying an exclusion for loss in connection with a "lapse . . . of . . . contract" to a situation where a tenant declined to renew a contract); *In re Qintex Ent., Inc.*, 950 F.2d 1492, 1497 (9th Cir. 1991) (noting that "a breach of a contract is material if it is so substantial as to defeat the purpose of the transaction or so severe as to justify the other party's suspension of performance"). In fact, as reflected in these cases, suspension or

cancellation of a contract are potential remedies for a party's failure to adhere to the terms of a contract. And a lapse of a contract has nothing to do with a party's failure to adhere to a contract. This conclusion is supported by the fact that other insurers have specifically excluded losses arising from a failure to adhere to a contract, in addition to lapse, cancellation or suspension of contract. *See*, *e.g.*, *Holden v. Connex-Metalna*, No. CIV. A. 98-3326, 2001 WL 40994, at *4 (E.D. La. Jan. 16, 2001) (noting that "[t]he exclusion du jour provides that [the insurer] shall not be liable for loss 'caused by or resulting from [b]reach of contract, late or non-completion of orders and/or suspension, lapse or cancellation of any lease or purchase order'").

At the very least, these undefined terms in the Policies, which must be construed narrowly and in favor of coverage, are susceptible to a reasonable interpretation that results in coverage and, thus, must be interpreted as such. *My Choice Software, LLC v. Travelers Cas. Ins. Co. of Am.*, 823 F. App'x 510, 512 (9th Cir. Aug. 19, 2020) ("insurance coverage is interpreted broadly so as to afford the greatest possible protection to the insured, [whereas] . . . exclusionary clauses are interpreted narrowly against the insurer"); *see also* Appellants' Br. at 27 n.5. Indeed, in every State whose law is relevant to this case, if there exist two reasonable interpretations of an exclusion, the policy must be interpreted liberally

in favor of coverage. *See* Appellants' Br. at 28 n.6. Accordingly, the District Court's reliance on this exclusion to bar coverage was reversible error.

CONCLUSION

For all the above reasons, the decision of the District Court should be reversed, and Insurers' motion to dismiss should be denied.

Date: March 31, 2021

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CERTIFICATE OF COMPLIANCE

I am the attorney for Appellants in this action. Pursuant to Fed. R. App. P. 32(a)(7)(C), I certify that:

This brief complies with the type-volume limitation of Circuit Rules 32-1 because the brief contains 5,927 words, excluding the parts of the brief exempted by Fed. R. App. P. 27(a)(2)(B) and 32(f). This brief complies with the type size and typeface requirements of Fed. R. App. P. 32(a)(5) and 32(a)(6) because this brief has been prepared in a proportionately spaced typeface using Microsoft Word 365, Times New Roman 14-point font.

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CERTIFICATE OF SERVICE

I hereby certify that on March 31, 2021, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

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