IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS,
EASTERN DIVISION

IN RE: SOCIETY INSURANCE COMPANY COVID-19 BUSINESS INTERRUPTION PROTECTION INSURANCE LITIGATION	)	MDL No. 2964
	)	Master Docket No. 1:20-cv-05965
This document relates to *Big Onion et al. v. Society Ins.*, *Valley Lodge v. Society Ins.*, and *Rising Dough, et al. v. Society Ins.*	)	Hon. Edmond Chang

DEFENDANT'S MOTION FOR CERTIFICATION OF INTERLOCUTORY APPEAL UNDER 28 U.S.C. §1292(b)

Defendant, SOCIETY INSURANCE, by and through its attorneys, Thomas B. Underwood, Michael D. Sanders, Michelle A. Miner, and Amy E. Frantz of Purcell & Wardrope, Chtd., and Laura Foggan of Crowell & Moring LLP, respectfully moves for certification of interlocutory appeal pursuant to 28 U.S.C. §1292(b), and in support thereof state as follows:

Whether "direct physical loss…of covered property" in property insurance policies includes a loss of use of property is a pressing legal question that needs appellate resolution, and if the Court grants this motion, Society intends to file a petition for expedited interlocutory appeal. As this Court stated "[t]he fundamental questions at stake in this litigation are how properly to classify the interruption that has happened here, and whether this particular interruption is covered under the policy." (Dkt. No. 131 at p.3.) To date, businesses in the United States have filed at least 1,574 lawsuits seeking coverage for business income losses caused by the COVID-19 global pandemic that led to governments restricting business activities and group gatherings.[1] The significance of the loss of use question cannot be overstated and, because this is an MDL, the risks associated with delaying the resolution of this question until after a final judgment are immense.

[1] https://cclt.law.upenn.edu/cclt-case-list/

The answer to this legal question determines whether hundreds if not thousands of businesses are entitled to business income coverage, or whether businesses should look to the government for relief from pandemic-related income losses instead. *See* Michael Krueger, *The American Rescue Plan Act: What Restaurants Need to Act on NOW*, JDSupra (March 11, 2021), https://www.jdsupra.com/legalnews/the-american-rescue-plan-act-what-3952969/.

Eight Illinois district courts have issued decisions regarding whether a loss of use alone is a direct physical loss; six have held it is not, and two have held it is. Five of the cases holding a loss of use is not a direct physical loss are currently on appeal in the Seventh Circuit.[2] Similarly, the overwhelming majority of courts to consider the question both before the pandemic and in the context of COVID-19, have held that a loss of use is not a direct physical loss, including the Eighth Circuit's decision in *Pentair* that is binding with respect to the Minnesota *Rising Dough* Plaintiffs. Delaying the resolution of this contestable question and expending both sides' limited assets through expansive and costly discovery, additional motion practice, and (possibly) multiple jury trials will not be to any of the parties' benefit. In contrast, no prejudice will result to the parties if this Court certifies the proposed questions for interlocutory review, as the Court has held there will be no stay in discovery during the pendency of an appeal.

The risks of allowing a contestable ruling to be insulated from review until after final judgments in individual cases within an MDL has been the subject of scholarly analysis and a paper by the U.S. Chamber Institute for Legal Reform ("Institute for Legal Reform).[3] As the

[2] The following are currently under appeal to the 7th Cir.: *Crescent Plaza Hotel Owner, L.P. v. Zurich Am. Ins. Co*., No. 20-cv-3463, 2021 WL 633356 (N.D. Ill. Feb. 18, 2021) (7th Cir. Case No. 21-1316); *Bend Hotel Dev. Co. v. Cinc. Ins.,* No. 20-cv-4636, 2021 WL 271294 (N.D. Ill. Jan. 27, 2021) (7th Cir. Case No. 21-1420); *TJBC, Inc. v. Cincinnati Ins. Co*., No. 20-cv-00815, 2021 WL 243583, at*4-5 (S.D. Ill. Jan. 25, 2021)(7th Circuit Case No. 21-1203); *Bradley Hotel v. Aspen Spec. Ins*., No. 20 C 4249, 2020 WL 7889047 (ND Ill. Dec. 22, 2020) (7th Cir. Case No. 21-1173); and *Sandy Point Dental, PC v. Cinc. Ins. Co.*, No. 20 cv 2160, 2020 WL 5630465 (N.D. Ill. Sept. 21, 2020), *reconsideration denied*, 2021 WL 83758 (Jan. 10, 2021) (7th Cir. Case No.21-1186).

[3] Andrew S. Pollis, The Need for Non-Discretionary Interlocutory Appellate Review in Multidistrict Litigation, 79 Fordham L. Rev. 1667-74 (2011); U.S. Chamber Institute for Legal Reform, *MDL Imbalance: Why Defendants*

Institute for Legal Reform observed, "[a] single [MDL] trial-court decision can implicate hundreds, or even thousands, of individual lawsuits." U.S. Chamber Institute for Legal Reform, *MDL Imbalance: Why Defendants Need Timely Access to Interlocutory Review* at p. 4. Here, in light of the proposed class actions, this Court's ruling has the potential to impact hundreds or even thousands of claims. Consequently, failing to allow interlocutory review of a potentially erroneous ruling can lead to "needless repetition of the same legal errors in case after case," which does not "comport[] with the spirit (let alone the text) of the MDL statute, which was enacted to 'promote the just and efficient conduct' of related actions." *Id.* at 13. Similarly, this Court's holding that Plaintiffs' claims under Section 155 could be maintained while simultaneously finding that "the scope of the term 'direct physical loss' is genuinely in dispute" and "[a] reasonable jury could find for either side based on the arguments and factual record presented so far in the litigation" (Dkt. No. 131, at p. 23) will, without early appellate review, not promote the just and efficient resolution of this MDL, as it will force the parties to litigate bad faith issues based on a ruling that may not survive appellate review.

This Court and the parties can benefit from appellate guidance in a timely way. Gaining that guidance will help avoid pre-trial and trial proceedings that could prove unnecessary, saving time and resources of the parties and the courts. In addition to saving the litigants from unnecessary costs, granting interlocutory review will advance the parties' shared interests in early resolution of significant, disputed legal issues. Permitting an immediate appeal is particularly beneficial in a situation such as this one where the stakes are so high that appeal is inevitable. Moreover, there is no prejudice to Plaintiffs from gaining that appellate guidance now,

---

Need Timely Access to Interlocutory Review, April 24, 2019 (available at https://instituteforlegalreform.com/research/mdl-imbalance-why-defendants-need-timely-access-to-interlocutory-review/).

because this Court already has made clear that pretrial matters will continue to move forward while any interlocutory appeal is taken.

QUESTIONS TO BE CERTIFIED

To avoid inefficiencies and irreparable harm to the Parties if this Court's February 22, 2021 ruling is in error and applied to hundreds or even thousands of claims, Society requests that the following questions of law be certified for interlocutory appeal:

(1) Whether a loss of use, or a partial loss of use, of a policyholder's covered property constitutes a "direct physical loss of" covered property under the Society policy terms?

(2) Whether, as a matter of law, Plaintiffs' claims can be maintained under 215 ILCS 5/155 when the court found that the term "direct physical loss" is genuinely in dispute and "[a] reasonable jury could find for either side based on the arguments and factual record presented so far in the litigation"?

ARGUMENT

I. Applicable Legal Standard

Section 1292(b) allows for an interlocutory appeal of an order that "involves a controlling question of law as to which there is substantial ground for difference of opinion," and if "an immediate appeal from the order materially advance the ultimate termination of the litigation." 28 U.S.C. § 1292(b). Accordingly, an interlocutory appeal is appropriate if it is filed in the district court within a reasonable amount of time after entry of the order and four criteria are satisfied: "(1) the appeal presents a question of law; (2) it is controlling; (3) it is contestable; (4) its resolution will expedite the resolution of the litigation." *Boim v. Quranic Literacy Institute,* 291 F.3d 1000, 1007 (7th Cir. 2002). Where, as here, all four criteria are satisfied, it is "the duty of the district court . . . to allow an immediate appeal." *Ahrenholz v. Bd. Trustees Univ. of Ill.*, 219 F.3d 674, 677 (7th Cir. 2000).

II. The Proposed Questions Satisfy all Four Criteria for Interlocutory Review

a. The Proposed Certified Questions Present Questions of Law

First, whether a loss of use or partial loss of use of property constitutes a "direct physical loss of" covered property under the Society Policy is "an abstract legal issue" and, thus, a "question of law" under Section 1292(b). *Id*. *See also, Roman Catholic Diocese of Springfield in Ill. v. Maryland Cas. Co.,* 139 F.3d 561, 565 (7th Cir.1998) ("Illinois law. . . treats the interpretation of an insurance policy and the respective rights and obligations of the insurer and the insured as questions of law that the court may resolve summarily.") This is a narrow, clean question of law that does not implicate factual issues. As the Court itself stated, "Society's motions for summary judgment rely, and the Court has decided them on, legal rather than factual arguments." (Dkt. No. 131 at p. 15 n. 3.) It can be decided through the application of the plain, ordinary meanings of the words "direct physical loss," the Illinois Supreme Court's decision in *Travelers Insurance Co. v. Eljer Manufacturing*, 757 N.E.2d 481 (2001), the Seventh Circuit's decisions in *Advance Cable Co. v. Cincinnati Ins. Co*., 788 F.3d 743, 747 (7th Cir. 2015) and *Windridge of Naperville Condo v. Philadelphia Indem. Ins. Co.,* 932 F.3d 1035, 1040 (7th Cir. 2019), and various instructive decisions from courts in this district and across the country that have held, as a matter of law, that the plain meaning of the phrase "direct physical loss of property" unambiguously does not encompass restrictions on the use of property. There is no factual dispute as to whether on-site service is restricted, and importantly, this Court found that a reasonable jury might conclude that restrictions on the use of property constitute a "physical" loss of property *regardless of the cause of those restrictions*.[4] Thus the question Society proposes for interlocutory review does not implicate any factual questions; rather, it simply calls for an interpretation of the plain meaning of the phrase "direct physical loss of . . . covered property" as a matter of law.

[4] Dkt. No. 131 at p.19 ("This leaves the question of whether the Plaintiffs' loss is 'physical' in nature—whether it is caused by the coronavirus itself, the coronavirus pandemic, or government shutdown orders.")

Similarly, immediate interlocutory review is needed on whether Plaintiffs' claims under Section 155 can be maintained. Whether Plaintiffs' claims can be maintained under 215 ILCS 5/155 when the court found that the term "direct physical loss" is genuinely in dispute and "[a] reasonable jury could find for either side based on the arguments and factual record presented so far in the litigation," is a "pure" question of law regarding the meaning of a statutory provision, and is therefore appropriate for interlocutory review. *Ahrenholz*, 219 F.3d at 676-77.

b. The Questions of Law Are Controlling

A question of law is controlling "if its resolution is quite likely to affect the further course of the litigation, even if not certain to do so." *Sokaogon Gaming Enter. Corp. v. Tushie-Montgomery Assocs., Inc*., 86 F.3d 656, 659 (7th Cir. 1996). The Seventh Circuit has further explained that "a question is controlling, even though its decision might not lead to reversal on appeal, if interlocutory reversal might save time for the district court, and time and expense of the litigants." *Johnson v. Burken*, 930 F.2d 1202, 1206 (7th Cir. 1991) (internal citations omitted). "'[C]ontrolling' means serious to the conduct of the litigation, either practically or legally," and is a "standard [that] should be kept flexible." *Id*. (internal citations omitted).

The question of whether "direct physical loss of . . . covered property" encompasses a loss of use of physical property is undoubtedly "serious to the conduct of the litigation." If the Seventh Circuit were to reverse this Court's holding that "direct physical loss of …covered property" is ambiguous and may encompass a loss of use of property, Plaintiffs will need to show they suffered a "direct physical loss of or damage to covered property" through different means.[5] This would change the scope of discovery, including expert discovery, and increase the chances of resolving

[5] For example, depending on the Seventh Circuit's ruling, they may need to show that the suspension of their business was caused by a permanent physical dispossession of their property or a physical alteration of their property.

the litigation prior to trial. Moreover, as the discovery topics included in Plaintiffs' recent Scheduling Report show, Plaintiffs intend to seek significant discovery regarding the interpretation of the Society Policies. Much of Plaintiffs' proposed discovery will be unnecessary if the Seventh Circuit holds that the relevant language is unambiguous, as it did with similar policy language in *Advance Cable Co. v. Cincinnati Insurance Co.* and *Windridge of Naperville Condo v. Philadelphia Indemnity Insurance Co*.

Similarly, whether Plaintiffs' claims under Section 155 can survive where this Court found "the scope of the term 'direct physical loss' is genuinely in dispute" and "[a] reasonable jury could find for either side based on the arguments and factual record presented so far in the litigation" is serious to the conduct of this litigation. (Dkt. No. 131, p. 23.) The litigation will be streamlined without bad faith claims. Here again, the Seventh Circuit's resolution of this question would significantly narrow the issues in the litigation moving forward, as well as any available damages. *See In re Brand Name Prescription Drugs Antitrust Lit*., 1998 WL 808992, *5 (N.D. Ill. Nov. 17, 1998) (holding that issue that could result in 10% reduction in damages was a controlling issue of law in an MDL).

c. The Questions are Contestable

i. The Majority of Cases Hold that Loss of Use is Not a Direct Physical Loss

There is substantial ground for a difference of opinion with respect to whether a loss of use constitutes a "direct physical loss of" covered property, as numerous federal courts of appeals and district courts have held that it does not. *See Demkovich v. St. Andrew the Apostle Parish*, No. 16-cv-11576, 2019 WL 8356760, at *2 (N.D. Ill. May 5, 2019) (substantial ground for difference of opinion exists where federal courts of appeals and district courts have answered the question in different ways). Further, a question of law is contestable if "the question is not settled by

controlling authority and there is a substantial likelihood that the district court ruling will be reversed on appeal." *Costello v. Beavex, Inc*., No. 12-cv-7843, 2014 WL 12775669, at *2 (N.D. Ill. Dec. 1, 2014).

The Eighth Circuit has held that a loss of use or function of physical premises does not constitute a "direct physical loss of or damage to" covered property under Minnesota law. *Pentair Inc. v. Am. Guar. & Liab. Ins*., 400 F.3d 613, 614, 616 (8th Cir. 2005). Consistent with *Pentair*, Minnesota federal district courts have found that a loss of use of physical premises caused by the pandemic and resulting government orders do not constitute a "direct physical loss of or damage to property" as a matter of law. *See e.g*., *Seifert v. IMT Ins. Co*., No. 20-1102, 2020 WL 6120002, at *3 (D. Minn. Oct. 16, 2020)[6]; *Torgerson Properties, Inc. v. Cont'l Cas. Co*., No. 20-2184, 2021 WL 615416, at *1-2 (D. Minn. Feb. 17, 2021) ("[T]he Eighth Circuit has made clear that the 'mere loss of use or function' is not 'direct physical loss or damage' within the meaning of the business-interruption provision."). These rulings are particularly significant because Minnesota law governs the claims of several of the *Rising Dough* plaintiffs, and the Eighth Circuit's decision in *Pentair* is binding precedent with respect to those claims.

Similarly, the majority of courts applying Illinois law have found that, as a matter of law, a loss of use or function of property does not constitute a direct physical loss "of" or "to" that property. *See Crescent Plaza Hotel Owner, L.P. v. Zurich Am. Ins. Co*., No. 20-cv-3463, 2021 WL 633356, at *2-3 (N.D. Ill. Feb. 18, 2021); *TJBC, Inc. v. Cinc. Ins.*, No. 20-cv-815, 2021 WL 243583, at *3-4 (S.D. Ill. Jan. 25, 2021); *Bend Hotel Dev. Co. v. Cinc. Ins.,* No. 20-cv-4636, 2021 WL 271294, at *2-3 (N.D. Ill. Jan. 27, 2021)[7]; *Bradley Hotel v. Aspen Spec. Ins*., No. 20 C 4249,

[6] Although *Seifert* involved a virus exclusion, the court held, *independent of the virus exclusion*, that the plaintiffs failed to allege a claim for coverage under the business income provision of the policy.
[7] *TJBC* and *Bend Hotel* involve the phrase "direct 'loss' to property" where loss was defined as "accidental physical loss or accidental physical damage."

2020 WL 7889047, at *4 (ND Ill. Dec. 22, 2020); *T&E Chi. v. Cinc. Ins.*, 2020 WL 6801845, at *5 (ND Ill. Nov. 19, 2020) ("loss of use of property without any physical change to that property cannot constitute direct physical loss or damage to the property"); and *Sandy Point Dental, PC v. Cinc. Ins. Co.*, No. 20 cv 2160, 2020 WL 5630465 at *2-3 (N.D. Ill. Sept. 21, 2020), *reconsideration denied*, 2021 WL 83758 (Jan. 10, 2021). Of these, five are currently on appeal before the Seventh Circuit: *Crescent Plaza*, *Bend Hotel*, *TJBC*, *Sandy Point*, and *Bradley Hotel*, which involves the same language as the Society Policy, "direct physical loss of or damage to."

Moreover, nationwide, this Court's decision reflects a minority review, and the majority of cases have found no business interruption coverage as a matter of law under similar policy terms for economic losses caused by the pandemic and related public health orders. For example, as of the date of this filing, federal courts have decided 69 dispositive motions filed by insurers in COVID-19 business interruption lawsuits involving policies that ***do not contain a virus exclusion***.[8] *See* UPenn Covid Coverage Litigation Tracker at https://cclt.law.upenn.edu/judicial-rulings/. Of those 69, 58 insurer motions have been granted and only 11, including the three decisions issued by this Court, have been denied. Clearly, there is a substantial ground for difference of opinion, as well as a substantial likelihood that the question will ultimately be resolved in a manner that is inconsistent with this Court's ruling.

ii. There Are Substantial Grounds to Dispute this Court's Ruling with Respect to Section 155 Based on Seventh Circuit Precedent

Under Section 1292(b), a question is contestable if "there is substantial ground for difference of opinion." Here, there is a substantial ground for difference of opinion about whether, as a matter of law, Plaintiffs can maintain claims under 215 ILCS 5/155 when the court found that

[8] To date, federal courts have ruled on a total of 203 dispositive motions filed by insurers, of which 187 have been granted and 16 denied. https://cclt.law.upenn.edu/judicial-rulings/. A non-exhaustive list of cases that have found no direct physical loss or damage to property is attached as Exhibit 1.

the term "direct physical loss" is genuinely in dispute. Society is not aware of any other case where a court has held a section 155 claim may proceed when the applicable policy language is genuinely in dispute. Nor is there case law requiring that a conclusion must be reached on the underlying coverage dispute before a determination may be reached on a Section 155 claim. In fact, the Seventh Circuit has held that "an insurer's conduct is not vexatious and unreasonable if (1) there is a bona fide dispute concerning the scope and application of insurance coverage; (2) the insurer asserts a legitimate policy defense; (3) the claim presents a genuine legal or factual issue regarding coverage; or (4) the insurer takes a reasonable legal position on an unsettled issue of law." *Citizens First Nat'l Bank of Princeton v. Cincinnati Ins. Co.,* 200 F.3d 1102, 1110 (7th Cir. 2000). Here, this Court found that "the scope of the term 'direct physical loss' is genuinely in dispute. A reasonable jury could find for either side based on the arguments and factual record presented so far in the litigation." (Dkt. No. 131, at p. 23.) Thus, the Court found that the claim presented a genuine legal or factual issue regarding coverage and that Society had taken a reasonable legal position. There is a substantial likelihood, under the Seventh Circuit's holding in *Citizens*, that the appellate court will reverse this Court's ruling that Plaintiffs can still seek statutory penalties for vexatious and unreasonable conduct under Section 155. Moreover, this Court's decision is in conflict with an Illinois appellate court decision holding that insurer conduct is not vexatious and unreasonable where the insurer takes a position on policy language that has not been interpreted by Illinois courts. *See e.g.*, *Am. Alliance Ins. Co. v. 1212 Rest. Grp. LLC,* 342 Ill. App. 3d 500, 794 N.E.2d 892, 901 (1st Dist. 2003).

d. Resolving the Proposed Questions Would Materially Advance the Litigation

Resolving whether "direct physical loss of" covered property encompasses a loss of use would materially advance the litigation.[9] A reversal of this Court's order will either end the litigation or, at a minimum, significantly limit the number of plaintiffs whose claims will go to trial and the scope of any discovery and damages. Finally, even if the Seventh Circuit affirms this Court's opinion, it will provide the parties a much clearer picture of the value of the case.

Resolving whether Plaintiffs' claims under Section 155 are viable in light of the Court's ruling on the Bellwether motions will also materially advance the litigation. If the Seventh Circuit reverses this Court's ruling, it will significantly narrow the scope of the issues in litigation, class certification consideration, and trials. And regardless of the outcome, a ruling by the Seventh Circuit will provide clarity on a realistic value of the litigation.

As discussed above, if the Court grants this Motion, Society intends to seek expedited interlocutory review. Society believes that it is critical these two questions of law are answered by the Seventh Circuit early in the litigation, before extensive amounts of time and money have been spent by the Court and the parties litigating issues that may prove to be irrelevant to the resolution of these cases. Given the fact that this is an MDL, the potential for unnecessary costs and inefficiency is much greater than if this was a single lawsuit. *See e.g.,* Andrew S. Pollis, *The Need for Non-Discretionary Interlocutory Appellate Review in Multidistrict Litigation*, 79 Fordham L. Rev. 1667-74 (2011). That potential is magnified here, where this Court's ruling on "direct physical loss" is a minority position—and at least for the Minnesota plaintiffs, is arguably in conflict with binding Eighth Circuit precedent—increasing the likelihood that it will not stand

[9] For example, if this Court's order is reversed, it might dispose of any claim brought by Plaintiffs who are unable to prove during discovery that (1) the virus was actually on their premises, (2) the virus physically altered the premises, and (3) the physical alteration of the premises (rather than any public health orders) caused the suspension of the plaintiffs' business. Additionally, many of the plaintiffs may be unable to show their suspension of business was caused by a "direct physical loss of or damage to covered property" if that phrase is not read to encompass a loss of use unaccompanied by a permanent physical dispossession of property or physical alteration of property.

on appeal. Proceeding without early appellate review carries a heightened risk to all parties, as it will not be to the plaintiffs' benefit to develop their cases under a potentially erroneous legal ruling that may ultimately be overturned on appeal. If this was a single case, the damage of such a situation would be more limited. However, here, the effect would be compounded, particularly if subclasses consisting of potentially thousands of unnamed plaintiffs are certified prior to resolution of the proposed questions. On the other hand, there is no risk that certifying the proposed questions for interlocutory appeal will prejudice any of the parties, as the Court has ruled that full discovery will proceed during any appeal. Under these circumstances, early interlocutory review of this Court's ruling is imperative, as there is great potential for significant, irreparable harm to the parties if this Court's ruling is in error.

III. This Motion is Timely

While there is no time limit for seeking Section 1292(b) certification, a request must be "filed in the district court within a reasonable amount of time after entry of the order sought to be appealed. *Boim*, 291 F.3d at 1007. Here, the Court set a deadline of March 23, 2021 for the filing of this motion, which is reasonable period of time after this Court's February 22, 2021 ruling on the Bellwether Motions.

CONCLUSION

WHEREFORE, Defendant, Society Insurance, respectfully requests that this Court certify the two proposed questions of law set forth above for interlocutory appeal and provide such other and further relief as this Court deems just.

Dated: March 23, 2021

Respectfully submitted,

Laura A. Foggan
Crowell & Moring LLP
1001 Pennsylvania Avenue, N.W.
Washington, D.C. 20004
(202) 624-2500 (telephone)
lfoggan@crowell.com
aross@crowell.com

/s/ Thomas B Underwood
Thomas B. Underwood (#3122933)
Purcell & Wardrope, Chtd.
10 South LaSalle Street, Suite 1200
Chicago, IL 60603
(312) 427-3900
tbu@pw-law.com