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July 18, 2022

Via Email

The Honorable Patricia A. Howard
Clerk of Court
South Carolina Supreme Court
P.O. Box 11330
Columbia, SC 29211

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Jul 18 2022

S.C. SUPREME COURT

Re: *Sullivan Management, LLC v. Fireman's Fund Insurance Company et al.*
("Sullivan matter")
Appellate Case No. 2021-001209

Dear Ms. Howard:

Pursuant to Rule 208(b)(7) of the South Carolina Appellate Court Rules, Plaintiff is writing to notify the Court of one recent appellate level decision, and its content pertinent to the pending certified questions.

The decision is from the California Second Appellate District: *Marina Pacific Hotel & Suites, LLC et al., v. Fireman's Fund Ins. Co.*, No. 20SMCV00952 (L.A. Cnty. Super. Ct. July 13, 2022). The *Marina Pacific* Court addressed an all-risk Fireman Fund's policy that contains several identical policy coverages, extensions, and exclusions as Sullivan's policy, e.g., the same Communicable Disease Extension ("CD Extension") and the Mortality and Disease Exclusion ("Mortality Exclusion").¹ The *Marina Pacific* Court concluded it was error at the motion to dismiss stage to conclude that COVID-19 cannot cause direct physical loss or damage to property when the pleading alleged facts that COVID-19 can and did cause such harm. In finding error, the Court stated:

For more than two years our understanding of COVID-19, the infectious disease caused by the SARS-CoV-2 virus and its many variants, has evolved. Today we think we know how it spreads, how to protect against it and how we best treat those who have it. Perhaps we do. But even so, when a pleading alleges facts sufficient to constitute a cause of action, what we think we know—beliefs not yet appropriately subject to judicial notice—has never been a proper basis for concluding, as a matter of law, those alleged facts cannot be true and, on that ground, sustaining a demurrer without leave to amend. Yet that is precisely what

¹ Similarly, the definitions for suspension, period of restoration, communicable disease event are similar if not identical to Sullivan's.

occurred here . . . That might be the correct outcome following a trial or even a motion for summary judgment. It was error at this nascent phase of the case.

Id. at 2-3.

Like Sullivan’s policy, the Mortality Exclusion provided that the insurer will not pay for any loss, damage, or expense cause directly or indirectly by, or resulting from:

[m]ortality, death by natural causes, disease, sickness, any condition of health, bacteria, or virus.

Id. at 5; Policy at 8. To Plaintiff’s counsels’ knowledge, this is the first appellate level decision containing both the CD Extension and the Mortality Exclusion in the same policy.² Notably, the *Marina Pacific* Court stated that the language in the CD Extension, which includes necessary costs to “[r]epair or rebuild” damage by the communicable disease, contemplates that a communicable disease can constitute direct physical loss or damage:

This language explicitly contemplates that a communicable disease, such as a virus, can cause damage or destruction to a property and that such damage constitutes direct physical loss or damage as defined in the policy.

Id. at 24; *see* Plaintiffs’ Principal Brief at pp. 13-16. The *Marina Pacific* Court further noted how Fireman’s Fund failed to include the ISO standard virus exclusion in their policy, thereby illustrating the more limited nature of the Mortality Exclusion:

Particularly when compared to the all-encompassing language of the ISO virus exclusion, the most reasonable interpretation of this language is that it precludes coverage for losses related to death from any of the listed causes—that is, it excludes losses resulting from a death caused by a virus or other disease, and not more broadly any otherwise covered losses resulting from a virus or disease. At the very least, the language is ambiguous.

Id. at 26; *see* Plaintiffs’ Principal Brief at p. 30. Then, looking at the CD Extension and the Mortality Exclusion together, the Court states:

This understanding of the [Mortality and Disease] exclusion’s more limited reach is reinforced by the policy’s communicable disease coverage . . . if all losses caused by a virus were excluded, even those indirectly resulting from the virus, as Fireman’s Fund contends, the communicable disease coverage would be meaningless . . . we [hold] the mortality and disease exclusion does not bar the insured’s claims in this lawsuit.

Id. at 26-27; *see* Plaintiffs’ Principal Brief at pp. 47-48. In so holding, the Court rejects Fireman Fund’s proposition, cited from many other federal court decisions on the topic, that “[c]ommon sense’ confirms that ‘the pandemic impacts human health and human behavior, not physical

² In Plaintiff’s Counsels’ June 21, 2022 correspondence to this Court, Plaintiff clarified its position at oral arguments that Plaintiff was unaware of a reported decision that contained Sullivan’s Communicable Disease coverage with the Mortality and Disease exclusion. This supplemental authority letter also serves to update our prior statements in that regard.

structures,” and instead states that the Court must wait to “actually receive evidence to determine whether the plaintiff’s factual allegations can be proved.”³

As the decisions are only recently published, they are appended hereto for the Court’s convenience.

Respectfully submitted,

/s/ Justin Lucey

Justin Lucey, Esq.

³ An additional recent decision that also applies some of the analysis advocate by Plaintiff is the *Spectrum* case out of Colorado. *See Spectrum Retirement Communities, LLC, et al. v. Continental Cas. Co.*, No. 2021CV30695 (Colo. Dist. Ct. July 13, 2022). The Court here found that plaintiffs Complaint plausibly alleged that COVID-19 was “physically present” on and in each of Spectrum’s covered properties, making them “unusable, inaccessible, and unduly dangerous to use.” *Id.* at 7. While the decision addresses many similar points, most notable is the Court’s acknowledgement of pre-COVID-19 caselaw throughout the country, “follow[ing] the same line of reasoning, finding that ‘physical loss’ occurs when property is rendered unsafe, even without tangible or structural damage.” *Id.* at 8, n. 1.