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THE STATE OF SOUTH CAROLINA
In the Supreme Court

Feb 09 2022
S.C. SUPREME COURT

CERTIFIED QUESTION FROM THE UNITED STATES DISTRICT
COURT FOR THE DISTRICT OF SOUTH CAROLINA

Case No. 2021-001209

Sullivan Management, LLC,Plaintiff,

v.

Fireman's Fund Insurance Company and
Allianz Global Risks US Insurance Company,Defendants.

UNOPPOSED MOTION FOR LEAVE TO FILE *AMICUS CURIAE*
BRIEF OF SELECTIVE INSURANCE COMPANY OF AMERICA

Pursuant to Rule 213 of the South Carolina Appellate Court Rules, Selective Insurance Company of America (“Selective”) respectfully requests leave to file the accompanying *amicus curiae* brief in this matter.

Selective, like Defendants Fireman's Fund Company and Allianz Global Risks US Insurance Company (collectively, “Fireman's Fund”), issues commercial property insurance policies. Selective, like many commercial insurers, is a defendant in litigation involving claims similar to the ones before

this Court. As particularly relevant here, Selective is defending a pandemic-related business interruption coverage suit in the United States District Court for the District of South Carolina. *See Copper West LLC v. Selective Ins. Co.*, No. 7:20-cv-2281 (D.S.C.). Selective provided commercial property insurance to Copper West, which operates several restaurants.

Like the plaintiff Sullivan Management, LLC (“Sullivan”), Copper West claims insurance coverage for business losses resulting from changes to its dining operations imposed by Governor Henry McMaster’s March 2020 executive order suspending “on-premises or dine-in consumption” of food or beverages because of the COVID-19 pandemic. Executive Order No. 2020-10 at 3 (Mar. 17, 2020). The *Copper West* case currently is stayed pending this Court’s resolution of the certified questions in this case. Because South Carolina law applies in Selective’s litigation, Selective has a substantial interest in the Court’s answers to the pending certified questions.

An *amicus curiae* brief from Selective is appropriate and desirable here. As explained in the simultaneously filed proposed brief, although courts have almost uniformly rejected COVID-19-related business interruption claims, cases differ. Policy language differs across cases. Some cases, for example, involve policies with no virus exclusion. Other cases involve distinct virus

exclusions. The virus exclusion before the Court excludes coverage for “direct physical loss, damage, or expense caused by or resulting from . . . [m]ortality, death by natural causes, disease, sickness, any condition of health, bacteria, or virus.” (Sullivan Policy 7–8). The virus exclusion in Copper West’s policy, in contrast, is broader and omits the atypical “mortality” phrasing. It provides that Selective will “not pay for loss, cost or expense caused by, resulting from, or relating to any virus, bacterium, or other microorganism that causes disease, illness, or physical distress or that is capable of causing disease, illness, or physical distress.” ECF No. 14-2 at 68, No. 7:20-cv-2281 (D.S.C.).

Policies also differ in the types of coverages they provide. For example, unlike many policies, the policy before the Court contains a communicable disease coverage extension, and Sullivan bases certain of its arguments on the presence of that coverage in its policy. By contrast, Copper West’s policy contains no communicable disease coverage.

For another, the insureds’ allegations differ across cases. Sullivan alleges (vaguely) that the coronavirus was present at its premises, and claims coverage based on both the presence of the coronavirus and governmental orders. By contrast, Copper West has expressly disclaimed the presence of the coronavirus at its premises and alleges only that Governor McMaster’s

order (and similar orders in other States) caused “physical loss” of its property.

Selective’s proposed *amicus curiae* brief will help the Court understand the range of policy language, allegations, and arguments in COVID-19 business interruption cases that claim losses resulting from governmental orders, which may be affected by the Court’s decision in this case. In particular, Selective focuses its proposed brief on Certified Questions 1 and 5 to explain (1) why governmental orders restricting business operations do not cause direct physical loss of or damage to property and (2) why losses resulting from such orders result from a virus. Selective’s brief will assist the Court in providing the broadest possible guidance to all parties in South Carolina litigating these issues.

For the foregoing reasons, Selective respectfully requests that this Court grant leave to file an *amicus curiae* brief. A copy of the proposed brief is being conditionally filed with this motion in accordance with Rule 213 of the South Carolina Appellate Court Rules. Plaintiff and Defendants have been notified of the accompanying motion for leave to file an *amicus curiae* brief and have indicated that they do not oppose the motion.

DATED: February 9, 2022

Respectfully submitted,

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