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One Bite at the Apple:
Offensive Collateral Estoppel & COVID-19 Business Interruption Claims

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Corporate policyholders, who have monitored COVID-19 business interruption litigation over the past year, will know that reported decisions favoring insurers currently outnumber those granting relief to insureds. But fortunately, judicial rulings are not based on majority rule. To the contrary, sometimes all it takes is one substantive decision against an insurer to justify another consistent ruling on the same issue. Under the doctrine of offensive collateral estoppel, one policyholder plaintiff may seek to estop a defendant insurer from relitigating an issue that the insurer previously litigated and lost in a suit involving another party. Insureds, who have heretofore watched from the sidelines for positive developments in pending COVID-19 business interruption cases, should consider whether existing pro-policyholder decisions and the doctrine of offensive collateral estoppel could support the advancement of the insured's claims in litigation.

To date, state and federal courts in more than a dozen states have issued substantive rulings holding that insuring clauses requiring "physical loss or damage" are triggered by (1) the presence of the SARS-CoV-2 virus, which causes the disease known as COVID-19; and/or (2) pandemic-related civil authority orders, which have rendered countless insured structures and premises unusable to policyholders or their patrons over the past year. These findings have been rendered against more than a dozen insurers, including the following:

- Cincinnati Insurance Company[1]
- Owners Insurance Company[2]

[1] *See, e.g.*, *Studio 417 v. Cincinnati Ins. Co.*, 478 F. Supp. 3d 794, 800 (W.D. Mo. Aug. 12, 2020) ("Plaintiffs allege a causal relationship between COVID-19 and their alleged losses. Plaintiffs further allege that COVID-19 'is a physical substance,' that it 'live[s] on' and is 'active on inert physical surfaces,' and is also 'emitted into the air.' (Doc. #16, ¶¶ 47, 49-60.) COVID-19 allegedly attached to and deprived Plaintiffs of their property, making it 'unsafe and unusable, resulting in direct physical loss to the premises and property.' (Doc. #16, ¶ 58.) Based on these allegations, the Amended Complaint plausibly alleges a 'direct physical loss' based on 'the plain and ordinary meaning of the phrase.'"); *N. State Deli v. Cincinnati Ins. Co.*, 2020 N.C. Super. LEXIS 38, *9-10 (N.C. Sup. Ct. Oct. 7, 2020) ("For these primary reasons, the Court concludes that the Policies provide coverage for Business Income and Extra Expenses for Plaintiffs' loss of use and access to covered property mandated by the Government Orders as a matter of law."); *Francois Inc. v. Cincinnati Insurance Co.*, No. 20CV201416, in the Court of Common Pleas, Lorain County, Ohio (Sept. 29, 2020) (denying insurer's motion to dismiss because "[t]he complaint states claims which arguably fit the terms and conditions of the insurance policy and therefore the claims and defenses need to be developed with a record"); *K.C. Hopps v. Cincinnati Ins. Co.*, 2020 U.S. Dist. LEXIS 144285 (W.D. Mo. Aug. 12, 2020) (denying insurer's motion to dismiss, following *Studio 417*).

[2] *Neco, Inc. v. Owners Ins. Co.*, 2021 U.S. Dist. LEXIS 28761, at *9 (W.D. Mo. Feb. 16, 2021) ("[T]he Court finds that Plaintiff has adequately stated a claim for a direct physical loss."); *Blue Springs Dental Care v. Owners Ins. Co.*, 2020 U.S. Dist. LEXIS 172639, 2020 WL 5637963, at *20 (W.D. Mo. Sept. 21, 2020) ("The Court finds Plaintiffs have satisfied their burden at this stage of the proceeding and plausibly alleged that COVID-19 caused their alleged physical loss. As discussed earlier in this Order, Plaintiffs plausibly allege that COVID-19 had

- Philadelphia Indemnity Insurance Company.[3]
- Lexington Insurance Company[4]
- Certain Underwriters at Lloyds, London[5]
- Sentinel Insurance Company[6]
- Franklin Mutual Insurance Company[7]

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physically occupied and contaminated their dental clinics and thereby deprived them of their use of those clinics by making them unusable.").

[3] *Goodwill Indus. of Orange Cnty., Cal. v. Philadelphia Indem. Ins. Co.*, No. 30-2020-01169032-CU-IC-CXC, at 3 (Superior Ct. Cal. Orange Cnty. Jan. 28, 2021) (holding allegations of the presence of COVID-19 at the plaintiff's properties when government closure orders were issued is sufficient to state a claim for business interruption coverage); *Ridley Park Fitness, LLC v. Phil. Indem. Ins. Co.*, No. 01093 (Pa. Dist. Ct. Aug. 31, 2020) (overruling preliminary objections to the insured's amended complaint).

[4] *Cherokee Nation v. Lexington Ins. Co.*, No. CV-20-150, at 9 (Okla. D. Ct. Cherokee Cnty. Jan. 29, 2021) (holding "direct physical loss" includes the presence of COVID-19 at the plaintiff's properties because it deprived the plaintiff of the intended use of those properties)

[5] *Taps & Bourbon on Terrace, LLC v. Underwriters at Lloyds London*, No. 20-CVS-02569 (Pa. Ct. Com. Pl., Philadelphia Cnty. Oct. 26, 2020); *Cajun Conti LLC v. Certain Underwriters at Lloyd's London*, No. 2020-02558 (Civ. Dist. Ct. Parish of Orleans Nov. 4, 2020) (denying defendant's motion for summary judgment because "direct physical loss or damage" constituted a matter of first impression).

[6] *Urogynecology Specialist of Fla. LLC v. Sentinel Ins. Co.*, 2020 U.S. Dist. LEXIS 184774, *10-11 (M.D. Fla. Sept. 24, 2020) ("In arguing that the Court should give the virus exclusion a straightforward application to exclude coverage for losses caused by COVID-19, Sentinel cites cases dealing with pollution exclusions and sewage backups, damage caused by mold, and claims resulting from illness or disease, all of which fell under policy exclusions. (Doc. 6 at 11-12). Importantly, none of the cases dealt with the unique circumstances of the effect COVID-19 has had on our society—a distinction this Court considers significant. Thus, without any binding case law on the issue of the effects of COVID-19 on insurance contracts virus exclusions, this Court finds that Plaintiff has stated a plausible claim at this juncture. Plaintiff alleged the existence of the insurance contract, losses which may be covered under the insurance contract, and Sentinel's failure to pay for the losses. These allegations, when read in the light most favorable to Plaintiff, are facially plausible.").

[7] *Optical Servs. USA v. Franklin Mut. Ins. Co.*, 2020 N.J. Super. Unpub. LEXIS 1782, at *28 (N.J. Super. Ct. Aug. 13, 2020) ("The plaintiffs are offering in advancing in a novel theory of insurance coverage in this matter that warrants a denial of the Motion to Dismiss at this early stage of the litigation. As such, this Court must afford the plaintiffs an opportunity to engage in issue-oriented discovery with FMI in order to fully establish the record with respect to direct covered losses and to amend the Complaint accordingly if required.").

- State Farm Mutual Automobile Insurance Company[8]
- Zurich American Insurance Company[9]
- Society Insurance Company[10]
- Firstline National Insurance Company[11]
- Indemnity Insurance Company of North America[12]

[8] *Elegant Massage, LLC v. State Farm Mut. Auto, Ins. Co.*, No. 2:20-cv-00265-RAJ-LRL, 2020 U.S. Dist. LEXIS 231935, at *28 (E.D. Va. Dec. 9, 2020) ("Here, while the Light Stream Spa was not structurally damaged, it is plausible that Plaintiffs experienced a direct physical loss when the property was deemed uninhabitable, inaccessible, and dangerous to use by the Executive Orders because of its high risk for spreading COVID-19, an invisible but highly lethal virus.").

[9] *Henderson Rd. Rest. Sys., Inc. v. Zurich Am. Ins. Co.*, No. 1:20 CV 1239, 2021 U.S. Dist. LEXIS 9521, at *37-38 (N.D. Ohio Jan. 19, 2021) ("Plaintiffs have shown that the state orders leading to the restaurants' closings were caused by a fortuitous event. As argued by Plaintiffs, no one could have anticipated that state governments would issue orders shutting down or greatly restricting Plaintiffs' restaurants — this was an 'occurrence of chance.' Because Zurich's Policy is susceptible of more than one interpretation and because Plaintiffs have shown that they incurred 'loss of "business income" due to the necessary "suspension" of their "operations" during the "period of restoration"' 'caused by direct physical loss of or damage to property at a "premises,"' they are entitled to summary judgment on the issue of coverage under the Policy.").

[10] *Valley Lodge Corp. v. Soc'y Ins.*, 2021 U.S. Dist. LEXIS 32351, at *1 (N.D. Ill. Feb. 22, 2021) ("'[I]t is axiomatic that courts interpret contracts so as to give effect to all of their provisions.' That interpretive principle refuses Society's first argument: that the coronavirus could not constitute 'direct physical loss of or damage to' the covered property because the virus 'does not cause a tangible change to the physical characteristics of property.' It would be one thing if coverage were limited to direct physical 'damage.' But coverage extends to direct physical 'loss of' property as well. So the Plaintiffs need not plead or show a change to the property's physical characteristics." (citations omitted)).

[11] *Humans & Res., LLC v. Firstline Nat'l Ins. Co.*, 2021 U.S. Dist. LEXIS 3998, *29 (E.D. Pa. Jan. 8, 2021) ("These allegations, we find, plausibly allege facts which could give rise to a basis to afford coverage to Plaintiff if proven. Given the complete absence of an evidentiary foundation upon which to resolve this issue, we are therefore compelled to deny Defendant's Motion to Dismiss this matter and provide Plaintiff the opportunity to take discovery on this point.").

[12] *Lombardi's Inc. v. Indemnity Insurance Company of North America*, Cause No. DC-20-05751-A, in the 14th Judicial District Court of Dallas County, Texas (Oct. 15, 2020) (denying insurer's motion to dismiss pursuant to Texas Rule of Civil Procedure 91a, addressing "baseless" causes of action).

- Mutual of Enumclaw Insurance Company[13]

Decisions entered against these insurers and in favor of other policyholders are significant, not just in the abstract and not for the general proposition that other persuasive authority validates a policyholder's claim for coverage. Rather, when pursuing coverage from one of the named insurers, these adverse findings may form the basis for an offensive collateral estoppel argument binding the insurer to previously determined findings relating to the existence of "physical loss" or other issues critical to pandemic business interruption claims.

Under Texas law, "collateral estoppel, or issue preclusion, applies when 'an issue decided in the first action is actually litigated, essential to the prior judgment, and identical to an issue in a pending action' and when the party against whom it is asserted had a full and fair opportunity to litigate the issue in the first suit. Collateral estoppel can be applied offensively or defensively."[14]

As it relates to COVID-19 business interruption claims, subject to individual facts and circumstances, an insured may assert that offensive collateral estoppel precludes an insurer from relitigating mixed factual and legal determinations regarding "physical loss," "virus exclusions" or related matters the insurer previously litigated and lost in a different suit involving a different insured. The doctrine of offensive collateral estoppel applies in a variety of jurisdictions,[15] where it may be invoked by one not a party to the prior action giving rise to the adverse finding.[16] Moreover, the principle may be triggered by a finding rendered in the context of a prior motion to dismiss.[17]

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[13] *Perry Street Brewing Co. LLC v. Mutual of Enumclaw Insurance*, 2020 WL 7258116 (Wash. Super. Ct. Nov. 23, 2020).

[14] *Yarbrough's Dirt Pit, Inc. v. Turner*, 65 S.W.3d 210, 216 (Tex. App.—Beaumont 2001, no pet.) (citations omitted).

[15] *See, e.g.*, *Zoeller v. Lake Shore Sav. Bank*, 140 A.D.3d 1601, 1602, 33 N.Y.S.3d 607, 609, 2016 N.Y. App. Div. LEXIS 4385, *3, 2016 NY Slip Op 04506, 1 (N.Y. Sup. Ct. App. Div. Jun. 10, 2016) ("New York law has now reached the point where there are but two necessary requirements for the invocation of the doctrine of collateral estoppel. There must be an identity of issue which has necessarily been decided in the prior action and is decisive of the present action, and, second, there must have been a full and fair opportunity to contest the decision now said to be controlling."); *see also, e.g.*, *Imen v. Glassford*, 201 Cal. App. 3d 898, 905-906 (Cal. App. Ct. May 31, 1988) ("We first wish to acknowledge that the application of the doctrine of collateral estoppel is not the sine qua non for efficient use of the courts. Obviously, there are times when its application will promote the sound public policy of limiting litigation by preventing a party who has had one fair trial on an issue from again drawing that issue into controversy and by avoiding inconsistent judgments which are contrary to our perception of the judicial system." (citations omitted)).

[16] *Zoeller*, 140 A.D.3d at 1602 ("We reject plaintiff's contention that the doctrine of res judicata is not available to defendant as a defense because defendant was not a party to the Surrogate's Court proceeding. The '"doctrine of mutuality" is a dead letter' in New York . '[T]he fact that a party has not had his day in court on an issue as against a particular litigant is not decisive in determining whether the defense of res judicata is applicable.'" (citations omitted)).

[17] *See, e.g.*, *Arena v. McShane*, 150 F. App'x 165, 167 (3d Cir. 2005) (finding that collateral estoppel barred claims that were litigated at motion to dismiss stage); *Blackburn v. Aventis Pharms., Inc.*, No. 06-4951, 2006 U.S. Dist.

Consequently, while every case is different, when an insurer has previously litigated and lost key issues over the application of insuring terms relating to "physical loss or damage" (or any number of other issues pertaining to coverage for COVID-19 business interruption claims), principles of equity and judicial efficiency dictate that such insurers not be given license to re-litigate these same issues over and over again. Policyholders with pending claims against any of the insurers, who have litigated and lost such issues against other policyholders, should consider whether the doctrine of offensive collateral estoppel may hold insurers to the findings in existing pro-policyholder decisions.

LEXIS 89010, 2006 WL 3544980, at *3 (D.N.J. Dec. 8, 2006) (concluding that dismissal of claims on statute of limitations grounds constituted a final decision on the merits for collateral estoppel purposes).