BEFORE THE UNITED STATES JUDICIAL PANEL ON MULTIDISTRICT LITIGATION

IN RE: COVID-19 BUSINESS INTERRUPTION PROTECTION INSURANCE LITIGATION	**MDL NO. 2942**

MOTION OF PERSONAL INSURANCE FEDERATION OF CALIFORNIA FOR LEAVE TO FILE AN AMICUS BRIEF IN OPPOSITION TO TRANSFER AND COORDINATION OR CONSOLIDATION OF ACTIONS UNDER 28 U.S.C. § 1407

Personal Insurance Federation of California (PIFC) requests leave to file the accompanying brief as *amicus curiae* in opposition to the motions for transfer and coordination or consolidation of actions under 28 U.S.C. § 1407. In support of this Motion, PIFC states:

1. PIFC is a California not-for-profit trade association representing seven personal lines property/casualty insurers who collectively write the majority of the personal lines auto and homeowners insurance in California. PIFC's members also write commercial policies, primarily for small business owners. PIFC and its members have extensive experience with the formation, application, and interpretation of property insurance policies under state law, and a substantial interest in ensuring that questions of contract interpretation are resolved under the appropriate body of law and in a suitable forum.

2. PIFC offers a unique perspective to this Panel as a state trade association in an industry uniquely regulated by state law. Other briefs have thoroughly discounted the propositions that the language of all insurance contracts at issue is materially the same, and that the facts surrounding each of over 100 different situations are materially the same. But the briefs have devoted comparatively little discussion to the differences in state law that make these cases poor candidates for consideration by an MDL.

3. The tagged cases involve hundreds of contracts entered under the laws of all 50 states and the District of Columbia. Although an insurer designs standard contract terms to be interpreted and enforced consistently throughout the country, it is not uncommon for state courts to disagree as to the meaning of those terms. Further, different states enforce insurance agreements pursuant to different procedural and substantive rules, including different standards for assessing causation, different principles for evaluating claims of bad faith, and different rules for choosing the governing law. All of these differences would require a transferee court to apply a dizzying array of state-law rules to resolve the legal questions presented in these cases, causing state-by-state variations to dwarf any conceivable efficiencies gained from consolidation.

4. And that is just for the *common* contract terms. Policies also differ from insurer to insurer, from insured to insured, and from industry to industry. The contracts in these cases involve different state-specific endorsements, are subject to different regulatory guidance issued during the COVID-19 pandemic, must be applied to different state and local closure orders, and may be affected by different legislation under consideration in several states.

5. PIFC—a California state trade association—is uniquely situated to describe these state-by-state differences to the Panel, and to explain why they render the tagged cases poor candidates for resolution by the MDL. The Panel should not entrust a single court with the unadministrable and exceedingly complex task of applying 50 different sets of state laws to the numerous different contracts at issue in these cases. Rather, it should permit the claims to be resolved by local district courts that are best suited to account for local variations in questions of insurance law that, under our federal system, are governed by "the laws of the several States." 15 U.S.C. § 1012(a) (McCarran-Ferguson Act).

6. Due to the large number of parties involved in this proceeding, it was not feasible for PIFC to secure the consent of all parties involved in this matter.

For the foregoing reasons, PIFC respectfully requests that the Court grant its motion for leave to file a brief as *amicus curiae*, and to deem the accompanying brief filed.

Dated: July 20, 2020

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By: */s/ Neal Kumar Katyal*

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CERTIFICATE OF SERVICE

I hereby certify that, on July 20, 2020, the foregoing document was filed electronically. Notice of this filing will be sent by e-mail to all parties by operation of the Court's electronic filing system. Parties may access this filing through the Court's CM/ECF System.

/s/ Neal Kumar Katyal

BEFORE THE UNITED STATES JUDICIAL PANEL ON MULTIDISTRICT LITIGATION

IN RE: COVID-19 BUSINESS INTERRUPTION PROTECTION INSURANCE LITIGATION	**MDL NO. 2942**

AMICUS CURIAE BRIEF OF PERSONAL INSURANCE FEDERATION OF CALIFORNIA IN OPPOSITION TO TRANSFER AND COORDINATION OR CONSOLIDATION OF ACTIONS UNDER 28 U.S.C. § 1407

Personal Insurance Federation of California files this brief as *amicus curiae* in opposition to Plaintiffs' Motion for Transfer and Consolidation under 28 U.S.C. § 1407 (Dkt. 1) and Subsequent Motion for Transfer of Actions under 28 U.S.C. § 1407 for Coordinated or Consolidated Pretrial Proceedings (Dkt. 4), and all papers filed in support or partial support of those motions.

INTEREST OF AMICUS CURIAE

Personal Insurance Federation of California (PIFC) is a California not-for-profit trade association representing seven personal lines property/casualty insurers who collectively write the majority of the personal lines auto and homeowners insurance in California. PIFC's members also write commercial policies, primarily for small business owners. PIFC and its members have extensive experience with the formation, application, and interpretation of property insurance policies under state law, and a substantial interest in ensuring that questions of contract interpretation are resolved under the appropriate body of law and in a suitable forum. PIFC offers its perspective to this Panel as a state trade association in an industry uniquely regulated by state law.

Other briefs have thoroughly discounted the propositions that the language of all insurance contracts at issue is materially the same, and that the facts surrounding each of over

100 different situations are materially the same. PIFC—a California state trade association—submits this brief to address the critical point that, under our federal system, insurance is governed by "the laws of the several States." 15 U.S.C. § 1012(a) (McCarran-Ferguson Act).

INTRODUCTION

Movants seek the transfer and consolidation of dozens of actions, involving hundreds of contracts, entered under the laws of all 50 states and the District of Columbia, on the ground that these different agreements involve "standard-form" contract terms and present "the same" questions of fact and law. Pls. Br. in Supp. of Subsequent Mot. for Transfer 5, Dkt. 4-1 ("Pls. Br.").

Movants' argument rests on a misunderstanding of the governing law. Insurance contracts are regulated principally at the state level: They are subject to different state laws, enforced by different state regulators, and interpreted according to different bodies of state precedent. As a result, while an insurer designs standard contract terms to be interpreted and enforced consistently throughout the country, it is not uncommon for state courts to disagree as to the meaning of those terms. Further, different states enforce insurance agreements pursuant to different procedural and substantive rules, including different standards for assessing causation, different principles for evaluating claims of bad faith, and different rules for choosing the governing law.

It would accordingly be antithetical to the state-by-state nature of the cases presented for a single transferee court to provide uniform answers to the questions presented, as Movants urge. At minimum, attempting to resolve the claims jointly would entail a complex choice-of-law analysis; a series of burdensome 50-state surveys; and the application of multiple varying legal standards to the widely divergent facts of these cases. And that is just for the *common* contract

terms. Policies differ from insurer to insurer, from insured to insured, and from industry to industry. The contracts in these cases involve different state-specific endorsements, are subject to different regulatory guidance issued during the COVID-19 pandemic, must be applied to different state and local closure orders, and may be affected by different legislation under consideration in several states. Put simply, the state-level differences between these cases overwhelm any superficial similarities in the terms of the relevant contracts.

PIFC recognizes that, despite these state-by-state variations, defendant-insurers strongly believe that the contracts at issue do not provide coverage in *any* state for losses arising from COVID-19 or steps taken by government entities to slow the spread of the virus. But the path to the result varies by jurisdiction, and will require the resolution of numerous complex questions of state law along the way. The Panel should permit these questions to be resolved by local district courts, familiar with the laws and procedures of the states in which they sit, and far better suited to resolve the considerable variety of state-law issues these cases present.

ARGUMENT

I. THE REGULATION AND INTERPRETATION OF INSURANCE CONTRACTS VARIES WIDELY BY STATE.

In our federal system, the business of insurance is regulated primarily by the states. *See* Federal Insurance Office, U.S. Dep't of Treasury, *How to Modernize and Improve the System of Insurance Regulation in the United States*, at 1 (Dec. 2013) ("Treasury Report").[1] The Supreme Court first established "state supremacy over insurance" in 1868. Susan Randall, *Insurance Regulation in the United States: Regulatory Federalism and the National Association of Insurance Commissioners*, 26 Fla. State U.L. Rev. 625, 630-631 (1999) (discussing *Paul v.*

[1] *Available at* https://www.treasury.gov/initiatives/fio/reports-and-notices/documents/how%20to%20modernize%20and%20improve%20the%20system%20of%20insurance%20regulation%20in%20the%20united%20states.pdf

Virginia, 75 U.S. (8 Wall.) 168 (1868)). Although the Court briefly called that supremacy into question in 1944, *see United States v. South-Eastern Underwriters Ass'n*, 322 U.S. 533 (1944), Congress swiftly responded by enacting the McCarran-Ferguson Act, 59 Stat. 33 (1945), which reaffirmed that "[t]he business of insurance, and every person engaged therein, shall be subject to the laws of the several States" unless expressly displaced by Congress. 15 U.S.C. §§ 1011, 1012. The upshot is that, for "more than a century," states have "domina[ted]" regulation of insurance contracts. Randall, *supra*, at 626; *see, e.g.*, *Uniforce Temporary Personnel, Inc. v. Nat'l Council on Comp. Ins., Inc.*, 892 F. Supp. 1503, 1515 (S.D. Fla 1995) ("[T]he clear structure imposed by Congress through the McCarran-Ferguson Act was to lodge regulatory power over the business of insurance in the insurance department of the 'several States', i.e., for each state to regulate conduct within its own borders.").

One important consequence of this system of state-by-state control has been "an absence of uniformity." Treasury Report at 16. Different state legislatures have enacted "a patchwork quilt of inconsistent laws" governing insurance. Christopher C. French, *Dual Regulation of Insurance*, 64 Vill. L. Rev. 25, 28 (2019). Different states insurance regulators have "interpreted and enforced even similar standards differently." Treasury Report at 31; *see* Daniel Schwarcz & Steven L. Schwarcz, *Regulating Systemic Risk in Insurance*, 81 U. Chi. L. Rev. 1569, 1632 (2014) ("coordination is substantially impeded by the fifty-plus different insurance jurisdictions"). And the manner in which state courts "address similar interpretive issues can vary widely from one state to the next." Peter J. Kalis et al., Policyholder's Guide to the Law of Insurance Coverage § 26.03[B] (1st ed. 1997 & Supp. 2018).

As a result, "the choice of which jurisdiction's law will govern can have serious consequences for an insurance dispute." 2 Couch on Insurance § 24:1. Choosing and applying

the correct body of law can "mean the difference between a covered and a noncovered claim." Kalis et al., *supra*, § 26.03[B].

II. THE CONTRACT TERMS AT ISSUE IN THE TAGGED CASES ARE SUBJECT TO DIVERGENT STATE-SPECIFIC RULES OF INTERPRETATION AND SUBJECT TO VARYING STATE LAWS THAT MAKE THEM UNSUITABLE FOR RESOLUTION IN AN MDL.

The variations among different states' insurance laws make the plaintiffs' cases poor candidates for consideration by an MDL. Movants assert that all of these cases involve claims filed under similar "standard-form property insurance policies," present the same "legal and factual questions," and should be interpreted in a "uniform" manner. Pls. Br. 5-8. Each element of that argument is wrong. Courts in each state use widely varying rules in interpreting even standardized terms in insurance contracts, including the particular policies at issue here. The contracts at issue include materially different state-specific endorsements and—as previously submitted briefs have emphasized—contain other variations in language. And the contracts are governed by different state-specific laws and regulations, which may well change in any given state over the coming months. All of those differences would make it inappropriate for a court to attempt to produce a "uniform" answer to the interpretive questions at issue. Local district courts would be far better suited to resolve the disparate state-law issues these cases present.

A. Courts Apply Different Rules In Interpreting The Core Terms Of The Contracts At Issue.

Movants' leading argument for consolidation is that the contracts in every tagged case include standardized terms that present "the same" interpretive questions. Pls. Br. 6. Even putting aside the dubious premise of this argument—as several Interested Parties have observed, the contracts included markedly different terms, *see* Westchester Surplus Lines Ins. Co. Resp. to Pls. Mot. for Transfer and Consolidation 5-6, Dkt. 376, and arise from widely varying factual

circumstances, *see id.* at 10-14—plaintiffs are incorrect that even identical contract terms would be subject to "the same" legal rules across all of the contracts at issue. These cases involve contracts entered into under the laws of all 50 states and the District of Columbia. *See, e.g.*, Pls. Mot. for Transfer & Coordination, Ex. 5, Dkt. 1-8 (nationwide class action filed in Florida), Ex 6, Dkt. 1-9 (nationwide class action filed in New York), Ex. 7, Dkt. 1-10 (nationwide class action filed in Wisconsin). The key contract terms at issue are interpreted and enforced pursuant to widely varying legal rules, which would complicate analysis of the common questions in these cases and potentially lead to divergent results.

1. States interpret the key contractual terms in these cases differently.

It is an unavoidable feature of our federal system that courts often give "different interpretations [to] the same standardized language" in insurance contracts. Kalis et al., *supra*, § 26.03[B]. Insurers do not approve of these variations: an insurer using identical language in a policy provision intends identical language to be given a consistent and predictable interpretation across the country. Nonetheless, different state judiciaries—applying different interpretive methodologies, using different bodies of precedent, and comprised of different judges—often disagree as to the meaning of the same standard contract terms. Accordingly, the question "whether a claim is covered by identically worded insurance policies varies from state to state." French, *supra*, at 58.

The contract terms at issue in these cases are no exception. In the tagged cases, plaintiffs hailing from all 50 states and the District of Columbia seek coverage under contract terms covering business interruptions due to "direct physical loss or damage" or closures ordered by a "civil authority." Because each state is sovereign as to the meaning of those terms, their meaning must be determined based on the case law and interpretive principles that exist in each

jurisdiction. And not every jurisdiction applies the same approach. *See, e.g.*, Jess B. Millikan & Stacey E. DiCicco, *One Court, Two Decisions: The Debate Continues as to What Constitutes "Direct Physical Loss" Under Business Interruption Insurance*, 28 No. 21 Ins. Litig. Rep. 797 (2006); 10A Couch on Insurance § 148:64; 37 A.L.R.5th 41.

For instance, most jurisdictions interpreting the phrase "direct physical loss or damage" apply a straightforward analysis that requires a "tangible" damage to the property, 10A Couch on Insurance § 148:46, that results in a complete cessation of operations, *Royal Indem. Ins. Co. v. Mikob Properties, Inc.*, 940 F. Supp. 155, 158 & n.3 (S.D. Tex. 1996); *see, e.g.*, *Newman Myers Kreines Gross Harris, P.C. v. Great N. Ins. Co.*, 17 F. Supp. 3d 323, 331 (S.D.N.Y. 2014); *Hotel Properties Ltd. v. Heritage Ins. Co. of Am.*, 456 So.2d 1249, 1250 (Fla. Ct. App. 1984); *Howard Stores Corp. v. Foremost Ins. Co.*, 982 A.D.2d 398, 401 (N.Y. App. Div. 1981), *aff'd*, 56 N.Y.2d 991 (Ct. App. 1982). Some (but not all) authorities take into account whether premises have been made untenantable in other ways—for example, because of permeating fumes or an extended power outage. *See, e.g.*, *W. Fire Ins. Co. v. First Presbyterian Church*, 165 Colo. 34, 38-39 (1968); *Wakefern Food Corp. v. Liberty Mut. Fire Ins. Co.*, 406 N.J. Super. 524, 543 (App. Div. 2009); *Hampton Foods, Inc. v. Aetna Cas. & Sur. Co.*, 787 F.2d 349, 351 (8th Cir. 1986); *Archer Daniels Midland Co. v. Aon Risk Servs., Inc. of Minn.*, 356 F.3d 850, 856 (8th Cir. 2004) *Am. Med. Imaging Corp. v. St. Paul Fire & Marine Ins. Co.*, 949 F.2d 690, 693 (3d Cir. 1991). To ascertain how states interpret this key term, and many others besides, a transferee court would thus be required to conduct a detailed survey of the law in all 50 states, ascertain what approach each state applies to the policy terms at issue, and apply those interpretations to the varying facts of these cases.

2. States disagree over the requisite degree of causation.

In addition to interpreting specific contract terms differently, states also take different approaches with regard to the degree of causation that must exist between a covered risk and the loss claimed. *See* 7 Couch on Insurance § 101.55. Plaintiffs in the covered suits may only recover if the risk insured against—here, direct physical loss or closure due to a civil authority order—actually caused their losses. But different states do not agree on the standard for determining causation.

Jurisdictions have adopted at least three divergent approaches in identifying the legally relevant cause of a loss for insurance purposes. Some jurisdictions have adopted the "efficient proximate cause" rule, which holds that the legal cause must "set[ ] the other causes in motion that, in an unbroken sequence, produced the result for which recovery is sought." *Id.*; *see, e.g.*, *Shelter Mut. Ins. Co. v. Maples*, 309 F.3d 1068, 1072 (8th Cir. 2002) (Arkansas); *Burgess v. Allstate Ins. Co.*, 334 F. Supp. 2d 1351, 1361 (N.D. Ga. 2003) (Georgia). Other jurisdictions apply a "concurrent cause" approach, under which "coverage should be permitted whenever two or more causes do appreciably contribute to the loss and at least one of the causes is a risk which is covered under the terms of the policy." 7 Couch on Insurance § 101.55; *see, e.g.*, *Davidson Hotel Co. v. St. Paul Fire & Marine Ins. Co.*, 136 F. Supp. 2d 901, 907 (W.D. Tenn. 2001) (Tennessee); *Cawthon v. State Farm Fire & Cas. Co.*, 965 F. Supp. 1262, 1269 (W.D. Mo. 1997) (Missouri). And still other jurisdictions have adopted an "independent concurrent cause" rule, which holds that a concurrent cause is sufficient, but only if it is "independent" of the other cause. 7 Couch on Insurance § 101.55; *see, e.g.*, *Guideone Elite Ins. Co. v. Old Cutler Presbyterian Church, Inc.*, 420 F.3d 1317, 1330 (11th Cir. 2005) (Florida); *Guar. Nat'l Ins. Co. v. N. River Ins. Co.*, 909 F.2d 133, 136 (5th Cir. 1990) (Texas).

The choice between those rules may matter for these cases. A complex set of causal factors may contribute to a business's losses during the COVID-19 pandemic. Revenues may decline because customers are unwilling to make expenditures due to temporary loss of employment; because the availability of supplies dropped due to the reduction in transportation; because closure orders reduce the customer base able to visit a location; or because employees do not appear for work because of fear of contracting the virus. Identifying which if any of these risks was insured, and then singling out the legally relevant cause, would require a different analysis under each of the three frameworks applied by different jurisdictions.

3. States disagree as to the standard for "bad faith."

Bad-faith claims present another source of potential state-by-state variation. As part of the package of state-law counts that would be delivered to the MDL court to resolve, several of the complaints in the tagged cases include claims for "bad faith"—that is, tort or breach-of-contract claims alleging that an insurer breached a covenant of good faith and fair dealing by denying coverage for alleged COVID-related losses.[2] Yet while all jurisdictions recognize claims for bad faith, the meaning of "'bad faith' . . . eludes a consistent definition" and embodies a range of standards "[d]epending on the jurisdiction." 14 Couch on Insurance § 198:5; *see* Douglas R. Richmond, *Insured's Bad Faith as Shield or Sword: Litigation Relief for Insurers?*,

[2] *See, e.g.*, Compl. ¶¶ 67-74, *Big Onion Tavern Group, LLC, et al. v. Soc'y Ins. Co.*, No. 1:20-cv-02005 (N.D. Ill. Mar. 27, 2020) (MDL Dkt. Nos. 1-7 & 4-9); Compl. ¶¶ 31-33, *Odyssey Imports Inc. v. Charter Oak Fire Ins. Co.*, No. 1:20-cv-00542 (W.D. La. filed Apr. 30, 2020) (MDL Dkt. No. 26-3); Compl. ¶¶ 41-46, *Roscoe Same LLC, et al. v. Soc'y Ins.*, No. 1:20-cv-02641 (N.D. Ill. filed Apr. 24, 2020) (MDL Dkt. No. 107-3); Compl. ¶¶ 54-61, *Ciao Baby on Main LLC v. Soc'y Ins. Inc.*, No. 1:20-cv-03251 (E.D. Ill. filed June 3, 2020) (MDL Dkt. No. 374-1); Compl. ¶¶ 67-69, *Fla. Wellness Ctr. of Tallahassee, Inc. v. Hartford Cas. Ins. Co.*, No. 4:20-cv-00279 (N.D. Fla. removed May 27, 2020) (MDL Dkt. No. 499-3); Compl. ¶¶ 30-39, *Mark's Engine Co. No. 28 Rest., LLC v. Travelers Indem. Co. of Conn., et al.*, No. 20-cv-04423 (C.D. Cal. removed May 15, 2020) (MDL Dkt. No. 499-6); Compl. ¶¶ 28-36, *Geragos & Geragos Engine Co. No. 28, LLC v. Hartford Ins. Co.. et al.*, No. 2:20-cv-0467 (C.D. Cal. removed May 22, 2020) (MDL Dkt. No. 628-8); Compl. ¶¶ 61-68, *Ultimate Hearing Solutions II, LLC et al. v. Hartford Underwriters Ins. Co.*, No 2:20-cv-02401 (E.D. Pa. filed May 21, 2020) (MDL Dkt. No. 628-18).

77 Marq. L. Rev. 41, 45-47 (1993) (explaining that "[i]n the insurance realm, 'bad faith' conduct defies uniform definition," and surveying different approaches).

Some jurisdictions apply an objective "negligence" test in adjudicating bad-faith claims. 14 Couch on Insurance § 198:6. In these states, an insurer's "liability for bad faith breach of insurance contract depends on whether its conduct was appropriate under the circumstances," and "must be determined objectively," not based on the insurer's subjective intentions. *Goodson v. Am. Standard Ins. Co. of Wisconsin*, 89 P.3d 409, 415 (Colo. 2004); *see, e.g.*, *Penton Media, Inc. v. Affiliated FM Ins. Co.*, 245 F. App'x 495, 502 (6th Cir. 2007) (under Ohio law "subjective intentions are not relevant"; what matters is whether the insurer had "a reasonable basis for its decision and t[oo]k reasonable steps in adjusting the claim"); *Willcox v. Am. Home Assur. Co.*, 900 F. Supp. 850, 858 (S.D. Tex. 1995) (under Texas law, claim for bad faith sounds in "negligence" and depends on actions of "ordinarily prudent insurer").

Other jurisdictions, in contrast, require a showing of *subjective* bad faith. 14 Couch on Insurance § 198:6. In those states, "poor judgment or negligence do not amount to bad faith"; rather, the claimant must prove "the additional element of conscious wrongdoing," by showing that "the insurer had *knowledge* that there was no legitimate basis for denying liability" and acted with "a state of mind reflecting dishonest purpose, moral obliquity, furtive design, or ill will." *Pearman v. Stewart Title Guar. Co.*, 108 N.E.3d 342, 348 (Ind. Ct. App. 2018) (emphasis added; citation omitted); *see, e.g.*, *State Farm Fire & Cas. Co. v. Slade*, 747 So. 2d 293, 303–04 (Ala. 1999) ("Bad faith . . . is not simply bad judgment or negligence. It imports a dishonest purpose and means a breach of known duty, i.e., good faith and fair dealing, through some motive of self-interest or ill will."); *Jian Liang v. Progressive Cas. Ins. Co.*, 172 A.D.3d 696, 699 (N.Y. App.

Div. 2019) (claimant must demonstrate that the "insurer engaged in a pattern of behavior evincing a conscious or knowing indifference to the interests of the insured").

Still other jurisdictions have displaced the common law of bad faith by statute, and have imposed detailed statutory requirements for making a showing of bad faith. 14 Couch on Insurance § 198:11. For instance, in Louisiana, the Insurance Code enumerates a list of acts that constitute a breach of the duty of good faith "if knowingly committed or performed by the insurer," including "[m]isleading a claimant as to the applicable prescriptive period" or "[f]ailing to pay the amount of any claim due any person insured by the contract within sixty days after receipt of satisfactory proof of loss from the claimant when such failure is arbitrary, capricious, or without probable cause." 22 La. Stat. Ann. § 1973(B). Texas has similarly adopted a long list of "unfair settlement practices." Tex. Ins. Code § 541.060(a). Likewise, Kansas does "not recognize the tort of bad faith against an insurance company by an aggrieved insured in a first-party relationship," and instead limits a plaintiff to "statutory remedies." *Patterson v. Allstate Ins. Co.*, 31 Kan. App. 2d 919, 922 (2003).[3]

The choice between these standards will be of central significance in resolving the various plaintiffs' bad-faith claims. For states that apply an objective standard, analysis would turn principally on the terms of the contracts and the reasonableness of the insurers' interpretations of the disputed terms. For states that apply a subjective standard, courts would need to conduct individualized fact-finding into the insurers' knowledge and motivations. And in other states, courts would need to apply a state-specific statutory standard instead. That

[3] Relatedly, several complaints in the tagged cases include allegations of "fraud on the regulator" in adopting a virus exclusion. *See, e.g.*, Compl. ¶ 20, *Troy Stacy Enters. Inc., et al. v. Cincinnati Ins. Co*., No. 1:20-cv-00312 (S.D. Ohio filed Apr, 19, 2020) (MDL Dkt. No. 4-14); Compl. ¶¶ 48-55, *1 S.A.N.T., Inc., et al. v. Berkshire Hathaway, Inc., et al.,* No. 2:20-cv-00862 (W.D. Pa. filed June 11, 2020) (MDL Dkt. No. 712-9). Different states have different regulatory requirements for form adoption—for instance, California law does not provide for form filing and approval—rendering the law governing this claim, too, subject to state-by-state variation.

divergent analysis—which may in some cases devolve into a fact-bound inquiry into the state of mind of particular insurers—does not lend itself to uniform resolution.

4. States apply different approaches in determining which state's law governs an insurance contract.

All of these variations in state law are magnified by at least one more: Because different states prescribe different approaches to the contract interpretation questions at stake, the transferee court would be required to begin its analysis of each contract by determining which state's laws applies. But states do not agree on how to conduct that threshold choice-of-law inquiry.

Courts apply a "diversity" of approaches in determining which state's substantive law will be applied to interpret an insurance contract. 2 Couch on Insurance § 24:1; *see id.* §§ 24:4-24:17 (surveying different approaches). The two most common approaches are the *lex loci contractus* test—which applies the law of the state in which the contract was made[4]—and the "most significant relationship" test—which takes into account the location in which the contract was entered, negotiated, and performed, as well as residence of the parties and the subject matter of the contract.[5] But other states apply idiosyncratic approaches that do not neatly fall into either of these buckets. California, for example, uses the "government interest analysis" to determine choice of law, "under which 'the forum [state court] 'must search to find the proper

[4] *See, e.g.*, *State Farm Mut. Auto. Ins. Co. v. Roach*, 945 So. 2d 1160, 1163 (Fla. 2006) ("in determining which state's law applies to contracts, we have long adhered to the rule of lex loci contractus"); *Boardman Petroleum, Inc. v. Federated Mut. Ins. Co.*, 135 F.3d 750, 752 (11th Cir. 1998) (similar, under Georgia law).

[5] *See, e.g.*, *Am. States Ins. Co. v. Allstate Ins. Co.*, 282 Conn. 454, 461 (2007) (Connecticut has "abandoned the ancient lex loci contractus approach to choice of law," and "adopted the 'most significant relationship' approach" instead); *One Beacon Am. Ins. Co. v. Huntsman Polymers Corp.*, 276 P.3d 1156, 1164 (Utah Ct. App. 2012) (Utah applies "significant relationship analysis"); *see generally* Restatement (Second) Conflicts of Laws § 188 (1971).

law to apply based upon the interests of the litigants and the involved states.' " *Textron Inc. v. Travelers Cas. & Sur. Co.*, 45 Cal. App. 5th 733, 747–48 (Cal. Ct. App. 2020) (citation omitted). Other states have specified their own choice-of-law rules by statute. *See* 2 Couch on Insurance § 24:3 (giving examples).

The identification and application of different choice-of-law rules is notoriously challenging. *See* Kalis et al., *supra*, § 26.03[B] (explaining that there is often "substantial uncertainty about the rule of law to be applied to a particular insurance dispute," and that "careful analysis of the applicable choice-of-law doctrines is necessary" in "comprehensive insurance coverage suits, where multiple policies, insurers and jurisdictions are involved"). In this case, that challenge would be multiplied by the presence of dozens of contracts spanning all fifty states, under which a court would be required to determine, case-by-case, which choice-of-law doctrine applied and how that choice-of-law analysis came out before even reaching the highly contested substantive questions at stake.

* * *

In short, the superficial "uniformity" of the legal questions presented in these cases is illusory. The contractual terms at issue are subject to the laws of different states, such that an MDL court could not resolve the meaning of those terms without (1) engaging in a complex threshold choice-of-law analysis; (2) performing a series of successive 50-state surveys on the manner each state applies in interpreting each of the disputed terms at issue; (3) applying multiple divergent standards for interpreting each of those terms; and (4) resolving various case-specific factual questions necessitated by each of those standards. No two states would necessarily supply the same answer to any two questions, let alone of all them. These individualized legal questions would thus "overwhelm a single judge" and dwarf any efficiencies

created by centralization. *In re: DIRECTV, Inc., Fair Labor Standards Act (FLSA) & Wage & Hour Litig.*, 84 F. Supp. 3d 1373, 1375 (J.P.M.L. 2015).

B. The Suits Are Characterized By Other State-By-State Variations.

And that is not the end of it. Once an MDL court got past the core terms of the various contracts, it would also need to grapple with other significant state-by-state variations between the claims at issue. We briefly identify four: (1) the inclusion of different state-specific endorsements, (2) the differing regulatory responses across states, (3) the wide array of state and local closure orders at issue, and (4) the possibility of different state-level legislative responses to business interruption claims relating to COVID-19.

1. Nearly all of the contracts contain state-specific endorsements

Insurance contracts typically include state-specific endorsements—that is, modifications to an insurer's standard provisions that apply only in particular states. Sometimes these endorsements are mandated by state law. *See, e.g.*, 11 N.Y.C.R.R. § 65-1.1. In other cases, insurers adopt them voluntarily to address factual or legal circumstances unique to certain states. Endorsements are "part of the contract to the same extent as if [they] were actually embodied therein," and so are an indispensable part of contract interpretation. 2 Couch on Insurance § 18:19.

Nearly all of the policies at issue in the tagged cases include extensive state-specific endorsements that may bear on the resolution of the questions presented. For instance, the Dentists Insurance Company notes that its California policies "contain a non-standard virus exclusion" and use "wholly different terms" than its Washington policies in defining the scope of business interruption coverage. The Dental Insurance Co. Opp'n 4-5 & nn.2-4, Dkt. 397. The Big Onion plaintiffs oppose transfer in part because of the state-specific terms of their policy,

which includes a lengthy set of Illinois-specific endorsements governing liability for property losses. *See* Big Onion Pls.' Opp'n Ex. D at 21-37, Dkt. 198-4. Resolving all of these cases in an MDL would require a court to wade through the details of hundreds of state-specific endorsements, sort out what they mean pursuant to the applicable state law, and assess how they apply to the questions presented here.

2. Different state insurance regulators have issued different guidances and directives on coverage of losses relating to COVID-19.

Different states have also produced varying regulatory responses to business interruption claims relating to COVID-19. In almost every state, insurance commissioners have issued guidance on such claims. *See* Nat'l Association of Insurance Commissioners, NAIC Coronavirus Resource Center, State Bulletins and Alerts: Property and Casualty, https://content.naic.org/naic_coronavirus_info.htm (last updated July 9, 2020) (collecting notices). Some state regulators have advised that business interruption policies generally do not cover losses arising from COVID-19, and have discouraged policyholders from filing such claims.[6] Other States have stated or reiterated detailed regulatory requirements (specific to each state) that insurers should follow when processing business interruption claims. *See, e.g.*, Cal. Insurance Comm'r, Notice (Apr. 14, 2020); Alaska Div. of Insurance, Consumer Advisory Alert (May 13, 2020) (quoting 3 AAC 26.070).

These differing regulatory responses—which are still evolving as the COVID-19 pandemic progresses—could affect litigation over the claims arising in any given state. Some plaintiffs have invoked these guidance documents in an effort to show that insurers have denied business interruption claims in "bad faith." And regulatory decisions by insurance

[6] *See, e.g.*, Vt. Dep't of Financial Regulation, COVID-19 Guidance for Business Owners During the Phased Restart Vermont Initiative (May 4, 2020), https://dfr.vermont.gov/sites/finreg/files/doc_library/dfr-covid19-guidance-for-business-owners-during-phased-restart.pdf;

commissioners are often entitled to some legal weight in the interpretation or application of state law. Addressing the relevance of any individualized state's regulatory response would also complicate any effort at uniform resolution of these claims.

3. Different states and localities have issued a dizzying array of closure orders.

States and local governments have also issued a wide range of stay-at-home or closure orders related to COVID-19. *See* Nat'l Association of Insurance Commissioners, NAIC Coronavirus Resource Center, State Bulletins and Alerts: Emergency Declarations/Shelter in Place Orders/Essential Business Definitions, *available at* https://content.naic.org/naic_coronavirus_info.htm (last updated May 13, 2020) (collecting orders). Some orders have urged residents to limit activities and engage in social distancing. Other orders have shut down all non-"essential" businesses, which are defined according to a variety of different standards. Still others have imposed partial restrictions on business activities, such as requiring businesses to limit the number of customers or employees who may be present on site. A court interpreting the contracts in these cases would need to overlay the different bodies of state law on top of this complex quilt of underlying state and local orders.

4. Different states are considering different legislative responses to business interruption claims under COVID-19.

Finally, several States have considered legislation that would mandate some form of retroactive business insurance coverage for losses related to COVID-19. Bills to require such coverage have been introduced in Louisiana, Massachusetts, New York, New Jersey, Ohio, Pennsylvania, Rhode Island and South Carolina. *See* Nat'l Council of Insurance Legislators, NCOIL COVID-19 Resource Page: Business Interruption Insurance, http://ncoil.org/ncoil-covid-19-resource-page/ (last visited July 20, 2020). The District of Columbia nearly enacted such a requirement before it was removed from a coronavirus relief bill shortly before its passage. *See*

Evan Weinberger, *D.C. Decides Against Retroactive Virus Insurance Coverage*, Bloomberg Law (May 5, 2020), https://news.bloomberglaw.com/coronavirus/d-c-decides-against-retroactive-virus-insurance-coverage. It is a distinct possibility that legislation of this kind may become law in one or more states during the pendency of any MDL.

The enactment of such legislation would introduce yet further complexity into the case. State laws requiring retroactive coverage of business interruption claims would raise difficult constitutional issues under the Contracts Clause and the Takings Clause. And the court would be required to analyze the terms of each such statute to determine whether it applied to a given dispute, and to resolve inevitable disputes about its meaning or scope. The prospect of a changing legal landscape at the state level—on top of the already widely divergent precedents governing such contracts, and the factual differences between the agreements themselves—provides yet further reason why transfer to an MDL is unwarranted.

C. Local District Courts Are Better Suited To Resolve These Cases.

In contrast to the complexity that transfer would entail, resolution of these cases in individual district courts would be efficient and workable. Any given district court would be required to apply the law of one or several states, rather than all fifty, to resolve the cases before them.[7] District courts would be especially well-suited for that task: They have special familiarity with the laws of the states in which they sit, and are often aware of distinctive state approaches to contract interpretation, causation, and choice of law. *See, e.g.*, *Stone & Webster, Inc. v. Ga. Power Co.*, 779 F.3d 614, 618 (D.C. Cir. 2015) ("The Georgia district court is presumably more familiar with the law governing the contract—that is, Georgia state law."). Further, district courts are more likely to be apprised of pertinent legal developments in those

[7] To the extent that individual complaints raise claims on behalf of a putative nationwide class, the marked legal and factual differences between the claims would likely render class certification inappropriate. *See* Fed. R. Civ. P. 23(b)(3).

states—including the manner in which state courts have addressed related litigation, the issuance of new regulations and closure orders, and the progress of pending state legislation.

District courts will also be better situated to identify and address areas of uncertainty in state law. They will more likely be aware of whether a given state's body of law is rich or sparse, and whether it is clear how a state court would address a pertinent issue. And where district courts identify significant sources of uncertainty on the legal questions before them, they may certify those questions to the state's high court for clarification. *See, e.g.*, *Bhasker v. Fin. Indem. Co.*, No. 1:17-cv-00260-KWR/JHR, 2020 WL 128305, at *2 (D.N.M. Jan. 10, 2020) (insurance coverage question certified to New Mexico Supreme Court).

Local district courts would also have greater ease at managing their dockets. A district court can stay litigation pending a relevant decision expected to be issued from a state court across the street. And it can coordinate cases within a district to the extent they present identical or closely overlapping issues, or the same or similar discovery. For example, a publicly-available chart listing COVID-19 cases filed nationwide shows that 38 state cases and 25 federal cases have been filed in California, with about a third of the total cases filed against PIFC members.[8] District courts in California would be well suited to coordinate these cases at the local level, and ensure that the common legal questions in these cases are resolved in a consistent and efficient manner.

Further, many of the complaints in the tagged cases anticipate further proceedings in state or federal court. Some complaints, for instance, request only declaratory relief, or expressly state that they do not seek a declaration as to the existence of COVID-19 at the insured premises, even

[8] *See* Hurwitz & Fine, P.C., COVID-19 Business Interruption Complaint Survey, at 1-3, https://www.hurwitzfine.com/content/Copy%20of%20BI%20Complaint%20Survey%207.17.20.pdf (last updated July 17, 2020).

though that would be a necessary fact for relief.[9] Permitting these cases to proceed in a local district court, rather than a centralized federal forum, would avoid wasteful claim-splitting and the confusion and complexity that would entail.

In short, as between the alternative of localized resolution of these cases and the prospect of a massive consolidated MDL proceeding—in which a single court would be required to apply 50 bodies of state law to hundreds of claims involving numerous different contracts subject to an array of different state and local regulatory regimes—the choice is clear. Movants argue that these cases are "too important to the survival of the insured businesses and indeed, to the recovery of the economy as a whole" to leave to the localized process befitting a state-by-state regulated industry. Pls.' Mot. for Transfer and Coordination 3, Dkt. 1-1. But "importance" does not equal "federal": These are important questions of *state* law, and they should be resolved by local district courts familiar with the 50 sets of state laws and state procedures that govern the questions at stake.

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[9] *See, e.g.,* Compl. ¶ 45, *LH Dining L.L.C., dba River Twice Rest. v. Admiral Indem. Co.*, No. 2:20-cv-01869 (E.D. Pa. filed Apr. 10, 2020) (MDL Dkt. No. 1-4); Compl. ¶ 48, *Newchops Rest. Comcast LLC, dba as Chops v. Admiral Indem. Co.*, No. 2:20-cv-01949 (E.D. Pa. filed Apr. 17, 2020) (MDL Dkt. No. 1-5); Compl. ¶ 29, *Mark's Engine Co. No. 28 Rest., LLC v. Travelers Indem. Co. of Conn., et al*., No. 20-cv-04423 (C.D. Cal. removed May 15, 2020) (MDL Dkt. No. 499-6); Compl. ¶ 27, *Geragos & Geragos Engine Co. No. 28, LLC v. Hartford Ins. Co., et al.,* No. 2:20-cv-0467 (C.D. Cal. removed May 22, 2020) (MDL Dkt. No. 628-8).

CONCLUSION

The Motions for transfer and consolidation should be denied.

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CERTIFICATE OF SERVICE

I hereby certify that, on July 20, 2020, the foregoing document was filed electronically. Notice of this filing will be sent by e-mail to all parties by operation of the Court's electronic filing system. Parties may access this filing through the Court's CM/ECF System.

/s/ Neal Kumar Katyal