IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

RESTAURANT GROUP MANAGEMENT, LLC; et al,	)	
Plaintiffs,	)	
v.	)	**CIVIL ACTION NO. 1:20-cv-04782-TWT**
ZURICH AMERICAN INSURANCE COMPANY	)	
Defendant.	)	

PLAINTIFFS' BRIEF IN SUPPORT OF MOTION FOR RECONSIDERATION OF ORDER DISMISSING THE CASE AND DECLINING TO CERTIFY QUESTIONS OF LAW TO THE SUPREME COURT OF GEORGIA AND IN SUPPORT OF ITS PRIOR REQUEST FOR CERTIFICATION

Pursuant to F.R.C.P. 60 (b) Plaintiffs file this Brief in Support of its Motion For Reconsideration Of Order Dismissing the Case And For Certifying Questions Of Law To The Supreme Court Of Georgia ("Motion") and L.R. 7.2 E asking the Court to reconsider its Order ("Order")(Document number 18) granting Defendant Zurich Insurance Company's Motion to Dismiss.

BASIS AND FACTUAL BACKGROUND

There are over 1500 covid insurance business income loss claims filed in the United States. See, Covid Coverage Litigation Tracker – An insurance law analytics tool (upenn.edu). In Georgia there is no state trial court order or appellate court order sustaining a dismissal of one of these cases. To date all such cases have been

removed to federal court [all but one to the northern district], which is routinely and serially dismissing them primarily on the basis of *AFLAC vs. Chubb Insurance Co.*, 581 S.E.2d 317 (2003), a Georgia Court of Appeals three judge panel decision which did not produce a request for *certiorari* and in eighteen years has **not** been cited by any Georgia appellate court for any reason. Northern district decisions serially dismissing insureds' claims, including this one, make *Erie* guesses as to the current state of Georgia law based on (a) *AFLAC* and (b) a linear progression of northern district opinions also relying on *AFLAC* and reaching the same dismissal result. As shown below *AFLAC* is an unreliable basis for an *Erie* guess.

The continuum of northern district dismissal orders have obviously stopped the filing of insured claims for covid business income losses, putting some food service businesses throughout the state in danger of failing. That is so because the insurance coverage paid for and expected to be a life raft for survival, instead produced industry wide claim denials and lawsuits based on that being removed to the northern district. They have (a) been promptly dismissed *with prejudice*, allowing ongoing unpaid losses and forcing time consuming appeals to the Eleventh Circuit; and (b) without referral to the Supreme Court of Georgia which ought to decide the coverage *vel non* for these claims, particularly here where the policy's declarations pages and the BICF set out microorganism i.e. virus coverage. A ruling from the Supreme Court of Georgia on certified questions now will either reinforce

the position insureds are taking or confirm the recurrent position the northern district is taking in serial dismissal orders.

In this case both the declarations pages of the policy, not discussed in the Court's Order, and the BICF proclaim coverage for "microorganisms" and then bury the coverage with an imported by reference the microorganism and other exclusions from the RPPCF. This "now you see it, now you don't" underwriting is the very essence of "illusory" coverage. The Court's Order clearly decides that a lethal highly contagious virus preventing people from congregating cannot cause direct physical loss or damage. If that is so how does the insurer get to charge a premium for completely ineffectual and illusory coverage?

The Complaint in this case is replete with allegations that the virus caused direct physical loss and damage to the plaintiffs. Virginia, Missouri, Ohio and North Carolina, among others, have all applied *current* dictionary definitions [not a 1985 abridged dictionary cited in *AFLAC*] to the undefined critical language in the policies to find that "direct physical loss or damage" to property can mean "property which is limited or impaired as to function, limited as to capacity, uninhabitable, inaccessible, unusable or dangerous to use." These plaintiffs and others are not looking for a "golden ticket" [Order at p.13], but rather a meaningful current interpretation by the Supreme Court of Georgia as to whether the pandemic and attendant governmental orders (which have closed the doors of businesses and

courthouses throughout the state) caused covered covid business income losses. Respectfully, they have. Plaintiffs' position is augmented below.

ARGUMENT FOR RECONSIDERATION

I. The Court's Order Misapplies the Iqbay/ Twombly Dismissal Standard.

The Complaint in this case is replete with multiple paragraph allegations that the virus caused direct physical loss or damage to the various premises. In *Richards v. Mitcheff*, 696 F.3d 635, 636 (7th Cir. 2012), the Seventh Circuit reversed an Indiana district court's dismissal stating as follows:

> We appreciate the judicial desire to weigh cases as swiftly as possible. Litigation is costly for both sides, and a doomed suit should be brought to a conclusion before costs are needlessly run up. *Twombly* designed its plausibility requirement as a partial antidote to the high costs of discovery and trial.
>
> But neither *Twombly* nor *Iqbal* has changed the rule that judges must not make findings of fact at the pleading stage (or for that matter the summary judgment stage). A complaint that invokes a recognized legal theory (as this one does) and contains plausible allegations on the material issues (as this one does) cannot be dismissed under Rule 12. B

This case is a simple breach of contract claim which also seeks declaratory relief. The Court basically decides that a declination of coverage under the Zurich policy cannot constitute a breach of contract because a virus cannot cause "direct physical loss of or damage to" property. That is essentially a finding that the facts

alleged cannot be proven. The Court's Order transforms findings of fact into conclusions of law to kill the case.

The Court's Order is an unwarranted expansion of the dismissal standard, and beyond that, imposes the draconian remedy of dismissing *with prejudice*, instead of dismissing without prejudice pending a Georgia appellate decision either supporting the northern district's *AFLAC* hypothesis or contradicting it. Nor does the Court contemplate allowing an amendment, apparently being of the view that the virus cannot cause direct physical loss or damage no matter how you plead that. The Court's Order further decides for coverage to exist the virus must cause "tangible destruction or injury" to property-- language absent from even the *AFLAC dictum.* In *Johnson v. City of Shelby, Mississippi, 135 S. Ct. 346 (*2014*)* the Supreme Court of the United States remanded a case dismissing a Complaint with prejudice stating as follows:

> For clarification and to ward off further insistence on a punctiliously stated "theory of the pleadings," petitioners, on remand, should be accorded an opportunity to add to their complaint a citation to § 1983. See 5 Wright & Miller, supra, § 1219, at 277–278 ("The federal rules effectively abolish the restrictive theory of the pleadings doctrine, making it clear that it is unnecessary to set out a legal theory for the plaintiff's claim for relief." (footnotes omitted)); Fed. Rule Civ. Proc. 15(a)(2) ("The court should freely give leave [to amend a pleading] when justice so requires.").

The serial dismissal orders issued by the northern district to multiple insureds tells Georgia lawyers representing them, that if you file a case in the state court

system against an insurer which can remove it and then move to dismiss it, your claim is gone *with prejudice*. So, an insured for whom legal expense is no object, to wit: the Atlanta Falcons and Atlanta United, sued their insurers in Rhode Island. That case could not be removed because the insurers were Rhode Island domiciled and no motion to dismiss was filed—so it proceeds on the merits as noted in the text of this motion. [See, Case No. PC-2020-07625, Superior Court of Bristol County, Providence, R.I.] The same policy language requiring "direct physical loss or damage" is argued by the Atlanta Falcons to apply to the loss of functionality and seating capacity at the stadium because of the virus. [1]

If the northern district court decisions are later rejected by a Georgia appellate court, then the insureds whose claims have been dismissed with prejudice are left with incorrectly decided cases and no remedy. Dismissal with prejudice is an unnecessarily harsh remedy, particularly given the flimsy foundation of the *AFLAC* case discussed next.

II. *AFLAC* IS Outdated and Provides an Unsound Basis for the Court's *Erie* Guess.

AFLAC involved a claim for expenses incurred by AFLAC *prior* to January 1, 2001 in updating its computer systems and software to cope with a "Y2K" anticipated loss which never occurred. The insured had **no** loss or damage, only

[1] See, www.chamberlitigation.com/sites/default/files/Atlanta%20Falcons.pdf

expenses incurred to upgrade its computer systems and software **before** the looming date change. Y2K was a *known* date, not a *fortuitous* event or accident. A discussion of the meaning of "direct physical loss" or "damage" was not necessary to the summary judgment outcome because: (1) the repair costs claimed were incurred before Y2K, (2) there was no loss, and (3) Y2K was a known date, not a fortuitous event. The discussion of the words defined in the decision was *dictum*. Moreover, the discussion was premised on cases from other jurisdictions and the use of a then 18 year old 1985 abridged dictionary [now forty years old and out of date] to define "direct", "loss" and "damage": "[T]he words "loss of" in the International Policy and the words "damage to" used in both policies, make it clear that coverage is predicated upon a change in the insured property resulting from an external event rendering the insured property, initially in a satisfactory condition, unsatisfactory." 581 S.E.2d at 319. The *AFLAC* case says nothing about "tangible injury or destruction" of property nor does it foreclose the more expansive definitions of the critical words based on current dictionaries and employed in multiple other jurisdictions. Those words remain *undefined* in the Zurich policy. More current dictionaries employed by courts in Ohio, Virginia, Missouri and North Carolina lead to results contrary to this one. The further point is that if you have to refer to a dictionary to find definitions of words in an insurance policy, the accepted definition most favorable to the insured ought to apply.

The *dictum* in *AFLAC* interpreting "direct physical loss of or damage to," besides being based on the American Heritage 1985 abridged dictionary definition of the undefined policy terms, is fleshed out by three out of state cases [the court acknowledged there was *no* Georgia precedent]: *Trinity Indus. v. Ins. Co. of North America*, 916 F.2d 267, 271 (5th Cir.1990); *Wolstein v. Yorkshire Ins. Co.*, 97 Wash. App. 201, 213, 985 P.2d 400 (1999); and *North American Shipbuilding, Inc. v. Southern Marine and Aviation Underwriting, Inc.*, 930 S.W.2d 829, 833 (Tex.App.1996). *Trinity* applied Louisiana law and its narrow idea of "physical loss" was later rejected in *In re Chinese Manufactured Drywall Products Liability Litigation*, 759 F. Supp. 2d 822 (E.D. La. 2010) as follows: "Furthermore, in the 20 years since *Trinity* was decided, **no** court has applied its definition for 'physical loss' under a homeowners' insurance policy dispute governed by Louisiana law. The Court sees no reason to do so here." [emphasis added] *Id*. at 833. The Texas and Washington intermediate court cases cited in *AFLAC* simply took the *Trinity* decision as a basis for their findings on this issue.

So, *Erie* guesses as to Georgia law on what can constitute "direct physical loss of or damage to" property are based on *AFLAC*, an 18 year old orphan opinion, uncited since by any Georgia appellate court. The definitions of the policy language came from an outdated dictionary. There was no Georgia precedent. The leading case relied upon applied Louisiana law which has since changed. Cases from Ohio,

Virginia, Missouri and North Carolina have used more current dictionaries to decide that "direct physical loss" or "damage" can mean property limited or impaired as to function, limited as to capacity, uninhabitable, inaccessible, unusable or dangerous to use. *See, Henderson Road Restaurant Systems, Inc. v. Zurich American Ins. Co*., 2021 WL 168422 (N.D. Ohio 2021), *Elegant Massage, L.L.C. v. State Farm Mut. Auto. Ins. Co.,* 2020WL 7249624 (E.D. Va. 2020)] *Studio 417, Inc. v. Cincinnati Ins. Co*., 2020 WL 4692385, (W.D. Mo. 2020) and *North State Deli, LLC v. The Cincinnati Ins. Co.,* 2020 WL 6281507 (Superior Court of Durham County, North Carolina, 2020) (granting partial summary judgment to the insured). This latter North Carolina state court case used a Merriam-Webster 2020 online dictionary and discussed the critical words in the context of the policy's "Civil Authority" coverage:

> Applying these [dictionary] definitions reveals that the ordinary meaning of the phrase "direct physical loss" includes the inability to utilize or possess something in the real, material, or bodily world, resulting from a given cause without the intervention of other conditions. In the context of the Policies, therefore, "direct physical loss" describes the scenario where businessowners and their employees, customers, vendors, suppliers, and others lose the full range of rights and advantages of using or accessing their business property. This is precisely the loss caused by the Government Orders. Plaintiffs were expressly forbidden by government decree from accessing and putting their property to use for the income-generating purposes for which the property was insured. These decrees resulted in the immediate loss of use and access without any intervening conditions. In ordinary terms, this loss is unambiguously a "direct physical loss," and the Policies afford coverage.

Myriad current dictionary definitions broaden what the critical words mean. Zurich has not bothered to define this phrase in its policy. Meanwhile the *Henderson Road* court in Ohio also granted the insured summary judgment on the **very** Zurich policy forms which this court has decided as a matter of law does not support a claim for covid business income losses in Georgia.

III. The Policy's Declarations Pages, ACF and BICF Forms Create an Illusion of Business Income Loss Coverage Caused by the Virus in Violation of Georgia Law.

The Court's Order which concludes that the microorganism coverage [which means "virus" per the policy definition] cannot cause direct physical loss or damage renders that coverage illusory. The declarations pages of the policy proclaim microorganism coverage. Under Georgia law the declarations pages are an important consideration to determine exactly what the policy covers. See, *Simalton v. AIU Ins. Co.*, 284 Ga. App. 152, 154 (2007). Coverage 14 in the ACF and Coverage 8 in the BICF expressly provide the coverage as well, but exclusions in the RPPCF form are imported in mass by reference into the BICP form in an effort to nullify the coverage. The Court's Order here does the same thing and fails to address the "illusory" coverage provided by the policy. Both the illusory nature of the coverage and the "reasonable expectations" of the insureds are directly alleged in paragraph (75) of the Complaint. Illusory coverage is prohibited in insurance

policies under Georgia law. See, *First Mercury Ins. Co. v. Sudderth*, 620 F. Appx 826,830 (11th Cir. 2015) (applying Georgia law).

The Court's Order also decides that a highly contagious, lethal virus which can cling to property surfaces and survive on surfaces for weeks cannot cause direct physical loss or damage – *ergo* the Complaint fails to state a claim for coverage. The policy does not require loss or damage to be "visible" nor that it be "permanent" to be covered. Zurich's policy proclaims coverage for microorganism business income losses, but the Court decides this either cannot happen or cannot be proven. A pleading failure here, if any, is a product of illusory coverage. Perhaps that is why myriad courts use more current definitions of "direct physical loss or damage" –- to make sense out of otherwise nonsensical policy language.

IV. Certified Questions to the Supreme Court of Georgia Are Warranted Given the Court's Suspect *Erie* Guess as to Coverage Under the Zurich Policy.

While the Supreme Court has held that an *Erie* guess may be appropriate even without a decision by the state's highest court, its qualification was that "[t]here are many rules of decision commonly accepted and acted upon by the bar and inferior courts which are nevertheless laws of the state although the highest court of the state has never passed upon them." *West v. AT&T Co.*, 311 U.S. 223, 236 (1940). Here *AFLAC*'s *dictum* does not hold that physical loss requires tangible injury or destruction of property. It is an orphan case, unsupported or cited by any other

Georgia appellate court and is **not** a "decision commonly accepted" in Georgia, so as to support the *Erie* guesses made in the serial northern district orders dismissing these cases.

In *Whiteside v. Geico Indemnity Company*, 977 F.3d 1014,1018 (11th Cir. 2020), the Eleventh Circuit stated that "we should certify questions to the state supreme court when we have substantial doubt regarding the status of state law." *Peoples Gas Sys. v. Posen Constr., Inc.*, 931 F.3d 1337, 1340 (11th Cir. 2019) (quotation marks omitted). Certifying questions is a useful tool **"to avoid making unnecessary *Erie* 'guesses' and to offer the state court the opportunity to interpret or change existing law.**" *CSX Transp., Inc. v. City of Garden City*, 325 F.3d 1236, 1239 (11th Cir. 2003). Today we ask for the Georgia Supreme Court's help in deciding three questions of Georgia law because, as the district court noted, "no Georgia cases squarely addressing the precise issues in this unique case" have come to light. *See also* O.C.G.A. § 15-2-9(a) (permitting certification where key questions lack "clear controlling precedents"). [emphasis added]. Given the breadth and impact of covid business income loss claims, this Court should reconsider and follow the Eleventh Circuit's prescription, particularly when the Georgia precedent is weak, dated and unsupported by subsequent Georgia cases. The Rules of the Supreme Court of Georgia accommodate the requested guidance by certified questions:

VIII. CERTIFIED QUESTIONS

> **Rule 46. ELIGIBLE COURTS.** When it shall appear to the Supreme Court of the United States, or to any District Court or Circuit Court of Appeals of the United States, or to any state appellate court, that there are involved in any proceeding before it questions or propositions of the laws of this State which are determinative of said cause and there are no clear controlling precedents in the appellate court decisions of this State, such court may certify such questions or propositions of the laws of Georgia to this Court for instructions.
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> **Rule 47. QUESTION PRESENTED.** The Court certifying to this Court a question of law shall formulate the question and cause the question to be certified and transmitted to this Court, together with copies of such parts of the record and briefs in the case as the certifying Court deems relevant.

The questions Plaintiffs' propose to certify are these: (a) Can the presence of the coronavirus at a restaurant or food service business, which results in suspension of its operations or which renders the property "limited or impaired as to function, limited as to capacity, uninhabitable, inaccessible, unusable or dangerous to use" constitute "direct physical loss of or damage to" property when the underlined quoted language is undefined in the property insurance policy; (b) Does the Zurich policy business income coverage form, which specifies Microorganism coverage for losses due to the suspension of operations from direct physical loss or damage to covered property caused by "microorganisms" (the definition of which includes "virus") provide coverage for business income losses attributable to the coronavirus; (c) If not, is the microorganism coverage in the business income loss form illusory

and in violation of Georgia law; or (d) If "civil authority" orders required restaurants to close or suspend or delay operations due to the coronavirus are the losses occasioned by those orders subject to the "Civil Authority" coverage provided by the BICF form in the Zurich policy. The Court can certainly tweak the questions, but the overriding issue is whether *AFLAC* precludes a determination that the undefined policy terms "direct physical loss of or damage" to property should be more broadly construed under Georgia law to include one or more of the following: "property limited or impaired as to function, limited as to capacity, uninhabitable, inaccessible, unusable or dangerous to use" if the source of that loss or damage is a microorganism or virus. Certified questions should put to the Supreme Court of Georgia *now*, not a year from now after the same argument to the Eleventh Circuit by which time more businesses will have failed.

CONCLUSION

Of the 1500 covid insurance case roughly one in six has been challenged by a motion to dismiss and 80% of those motions have been filed in federal court which has granted them five times as often as state courts, a gross imbalance given that insurance coverage is a state law issue. See, Covid Coverage Litigation Tracker – An insurance law analytics tool (upenn.edu). In Georgia, *every* case filed in a state court in the northern district has been removed by the insurer to federal court, and no state trial or appellate court in Georgia has construed the undefined policy term

"direct physical loss of or damage to" used in the Zurich and most other policies in the context of this pandemic. In Georgia, *AFLAC* is an orphan case which itself professed it was acting without Georgia precedent. It is not a widely accepted body of case law. It is not part of a body of case law at all, or even a limb, except as now relied upon in the northern district again and again to dismiss these cases.

The pandemic is an unprecedented cause of loss with sweeping adverse economic consequences to small businesses in every state. Because the crucial coverage terms remained undefined in the policies, rulings are largely grounded in dictionary definitions to construe policy terms which neither Zurich nor the insurance industry defines. The Zurich policy itself is replete with incomprehensible definitions, myriad cross references, forms inapplicable to the insureds and contradictory provisions—most notably here the ones dealing with microorganism coverage, included in some forms and excluded in others.[2]

Finally, this—lead counsel for the plaintiffs has litigated insurance issues in state and federal courts for forty-nine years. These truths come from that experience: (1) trial judges in both state and federal court dislike motions for reconsideration

[2] These comments are not meant to be flippant. Lead counsel for the plaintiffs has been in practice 49 years, taught the Insurance Law Class at the University of Georgia School of Law from 2008-2011, co-authored a treatise entitled "Excess Liability—Rights and Duties of Commercial Risk Insureds and Insurers" (published in two volumes by Thomson Reuters since 1998) and still in print), and been deemed qualified as an insurance expert on insurance claim handling in cases in the northern and middle districts of Georgia. *See, e.g. Whiteside v. Infinity Casualty Ins. Co*, 2008 WL 3456508.

because it suggests the underlying Order was wrong, when it is obvious to them that the lawyer does not understand the other side of the case so they are regularly and summarily rejected; (2) federal court trial judges routinely decline to refer state law questions to the state supreme court because state law, particularly in cases involving insurance contracts, is typically full of cut and paste established precedent; (3) the pervasive removal/motion to dismiss process in these pandemic business income loss cases, nationally and here, reflect no inclination by federal trial courts to refer heavily one-sided outcomes to state supreme courts, thereby blocking insureds from access to those courts; (4) these cases are being brought in extraordinary times, involve unprecedented losses threatening the survival of businesses in Georgia and elsewhere; (5) the *AFLAC* opinion uncited by any Georgia appellate court presents a distinct likelihood that the Supreme Court of Georgia would review it in these extraordinary times, reject its restrictive definitions, and follow the cases in Missouri, Ohio, North Carolina and Virginia because *AFLAC* on the critical issues here was premised on law from other jurisdictions and a dated dictionary; and (6) the interests of justice for Georgia businesses and these Plaintiffs demands something more than an *Erie* guess based on the weak foundation *AFLAC* provides. The Court has the prerogative and the power to obtain definitive feedback from the Supreme Court of Georgia. It should exercise that by submitting certified questions

to the Supreme Court of Georgia instead of forcing the usual routing to the Eleventh Circuit where the sane requests will be made.

The microorganism coverage proclaimed in the BICF form in the Zurich policy is illusory and that is reason enough not to dismiss this case, but certified questions to the Supreme Court of Georgia is the more appropriate path to determine whether *AFLAC*'s view of "direct physical loss" or "damage" is unduly narrow and not good law. If the Court will not go there either then it should dismiss this case without prejudice pending a Georgia appellate decision conforming to the northern district view, or stay the Order until that happens.

Respectfully submitted, this 8th day of April, 2021.

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/s/ J. Robert Persons .

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CERTIFICATE OF SERVICE AND TYPE SIZE COMPLIANCE

This is to certify that I electronically filed the foregoing ***Plaintiffs' Brief In Support Of Motion For Reconsideration Of Order Dismissing The Case And For Certifying Question Of Law To The Supreme Court Of Georgia*** (which has been prepared in Times New Roman, 14 point font, pursuant to Local Rule 5.1(C), N.D. GA.) with the Clerk of Court using the CM/ECF system which will automatically send e-mail notification of such filing to the following attorneys of record:

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