

BEFORE THE UNITED STATES JUDICIAL PANEL ON  
MULTIDISTRICT LITIGATION

IN RE: COVID-19 BUSINESS  
INTERRUPTION PROTECTION  
INSURANCE LITIGATION

MDL No. 2942

**Interested Parties Westchester Surplus Lines Insurance Company and Indemnity Insurance Company of North America’s Supplemental Brief in Response to Café International Holding Company LLC’s Opposition to Motion for Transfer (Dkt. 444) and Replies in Support of Motions to Transfer (Dkts. 543, 544)**

Café International Holding Company LLC (“Café International”), the plaintiff in a putative class action complaint against Westchester Surplus Lines Insurance Company (“Westchester”) and Chubb Limited<sup>1</sup> in the Southern District of Florida, filed an Opposition to Motion for Transfer and Consolidation Pursuant to 28 U.S.C. § 1407 (Dkt. 444). Westchester and Indemnity Insurance Company of North America (“IINA”) submit this supplemental brief in response, and also to respond to certain new arguments and evidence movants presented in their replies in support of the transfer motions (Dkts. 543, 544).

**I. CAFÉ INTERNATIONAL, LIKE MANY OTHER POLICYHOLDER-PLAINTIFFS, ACKNOWLEDGES THAT THE STANDARD FOR TRANSFER AND CONSOLIDATION IS NOT MET**

Though some plaintiffs support transfer, many others—including Café International—agree with Westchester and IINA (and the many other defendants who have filed oppositions) that the standard for transfer and consolidation is not met. Café International notes, “[t]he Actions involve *different* insurers, *different* policies, *different* coverage provisions, *different*

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<sup>1</sup> The undersigned attorneys do not represent Chubb Limited, which is a foreign holding company that, on information and belief, has not been served with Café International’s complaint.

claims, and *different* legal theories,” and centralization would not “produce any real efficiencies or other benefits.” (Dkt. 444 at 1-2 (emphasis in original).) It acknowledges “[a]s a result, transfer and consolidation should be denied.” (*Id.* at 2.) Westchester and IINA made these same points in their Response to Plaintiffs’ Motions for Transfer and Coordination or Consolidation Under 28 U.S.C. § 1407 (Dkt. 376) (“Westchester/IINA Opposition”). The *Café International* action is just one of many cases in which both the plaintiff policyholder (Café International) and the defendant insurer (Westchester) object to moving their dispute to an MDL.<sup>2</sup>

Although the original movants assert in their reply that “plaintiff-policyholders [largely] support[] transfer and consolidation or coordination,” and only “[a] handful of plaintiff-policyholders argued against consolidation” (Dkt. 543 at 2 and n. 4), this is demonstrably false. *Seventy-one plaintiff policyholders—approximately twenty-five percent of the policyholders that have taken a position on the transfer motions—are opposed.* (See Ex. A.) This does not include United Policyholders, which claims it “uniquely speaks to and looks out for the interests of insurance *policyholders*,” and submitted an amicus brief vigorously opposing an MDL. (Dkt. 470 at 6 (emphasis in original).)

## **II. THE PANEL SHOULD NOT CREATE A DEFENDANT-SPECIFIC MDL FOR ACTIONS INVOLVING WESTCHESTER OR IINA**

Though it agrees that the standard for transfer is not satisfied, Café International proposes

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<sup>2</sup> Other examples include: *Big Onion Tavern Group, LLC, et al. v. Society Insurance, Inc.*, No. 1:20-cv-02005 (N.D. Ill.) (*see* Dkt. 198 and Dkt. 371); *Thor Equities, LLC v. Factory Mutual Insurance Company*, No. 1:20-cv-03380 (S.D.N.Y.) (*see* Dkt. 379 and Dkt. 399); *Black Magic LLC v. Hartford Financial Services Group Inc., et al.*, No. 2:20-cv-01743 (D.S.C.) (*see* Dkt. 417 and Dkt. 425); *Wagner Shoes LLC v. Auto-Owners Insurance Company*, No. 7:20-cv-00465 (N.D. Ala.) (*see* Dkt. 415 and Dkt. 422); *PGB Restaurant, Inc. v. Erie Insurance Company*, No. 1:20-cv-02403 (N.D. Ill.) (*see* Dkt. 427 and Dkt. 449); *Billy Goat Tavern I, Inc., et al. v. Society Insurance*, No. 1:20-cv-02068 (N.D. Ill.) (*see* Dkt. 371 and Dkt. 431); and *Homestate Seafood, LLC d/b/a Automatic Seafood & Oysters v. The Cincinnati Insurance Companies*, No. 2:20-cv-00649 (N.D. Ala.) (*see* Dkt. 398 and Dkt. 456).

“[i]n the event that the Panel determines that some measure of centralization is appropriate, . . . it would be more efficient to create insurer-specific MDLs for those insurer defendants that have been named in numerous Actions,” and “an appropriate transferee forum for an MDL for Actions involving Chubb or Westchester is the Southern District of Florida.”<sup>3</sup> (*Id.* at 7.) Café International’s proposal would include the following four actions against Westchester and/or Chubb Limited that have been tagged for potential transfer to this MDL:

Defendant(s)	Case Name	Case No.	Court	Judge	MDL Dkt.
Westchester, Chubb Limited	<i>Café Int’l Holding Co. LLC v. Chubb Ltd. and Westchester Surplus Lines Ins. Co.</i>	1:20-cv-21641	S.D. Fla.	Marcia G. Cooke	12
Westchester	<i>The K’s Inc. v. Westchester Surplus Lines Ins. Co.</i>	1:20-cv-01724	N.D. Ga.	William M. Ray, II	335
IINA, Chubb Limited	<i>Truhaven Enters., Inc. d/b/a Fiorino Ristorante v. Chubb Ltd. and Indem. Ins. Co. of N. Am.</i>	2:20-cv-04586	D.N.J.	Stanley R. Chesler	10
IINA, Chubb Limited	<i>Beniak Enters., Inc. v. Chubb Ltd. and Indem. Ins. Co. of N. Am.</i>	2:20-cv-05536	D.N.J.	Kevin McNulty	179

But this approach would not solve the problems of an industry-wide MDL and there are not sufficient cases to justify an MDL for the Westchester and IINA actions.

**A. Actions Involving Westchester or IINA Do Not Meet the Standard for Transfer**

Actions involving Westchester or IINA do not meet the standard for transfer under 28 U.S.C. § 1407 for the same reasons set forth in the Westchester/IINA Opposition. (*See* Dkt.

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<sup>3</sup> Some other parties have likewise suggested insurer-specific MDLs. (*See* Dkts. 432, 435, 456, 461, 462, 473, 474.)

376.)

*Different policies with different provisions.* The policies involved in these actions contain variations that policyholders have already argued are material. United Policyholders, for example, pointed out that policies differ in whether they contain material exclusions and limitations on coverage, such as “virus and bacteria” exclusions. (See Dkt. 470 at 7.) For example, the policies in *Truhaven* and *Beniak* (which were issued by IINA) contain a virus exclusion, (see Dkt. 10-4 at ¶ 46; Dkt. 179-3 at ¶ 49), while the policies in *Café International* and *The K’s* (which were issued by Westchester) do not (see Dkt. 12-1 & case no. 1:20-cv-21641 at Dkt. 1-1; Dkt. 335-3 & case no. 1:20-cv-01724 at Dkt. 5-1). And while the *Truhaven* and *Beniak* plaintiffs claim that “losses were not caused by a ‘virus, bacterium or other microorganism that induces or is capable of inducing physical distress, illness or disease,’” but were instead caused by “precautionary measures taken by [the state] to prevent the spread of COVID-19 in the future,” (Dkt. 10-4 at ¶ 46; Dkt 179-3 at ¶ 49), the *Cafe International* and *The K’s* plaintiffs allege that “[t]he presence of COVID-19 caused direct physical loss of and/or damage to the covered premises,” (see Dkt. 12-1 & case no. 1:20-cv-21641, Dkt. 1 at ¶ 43; Dkt. 335-3 at ¶ 31). Even in actions against the same insurer, the policies vary. As United Policyholders noted, “[e]ven when two insurance policies contain the same general *type* of coverage (such as ‘civil authority’), those provisions are often worded differently.” (Dkt. 470 at 6.) Indeed, the Westchester policy in *The K’s* provides civil authority coverage if (among other things) the covered premises are “not more than one mile from the damaged property,” (see Dkt. 335-3 & case no. 1:20-cv-01724 at Dkt. 5-1), while the Westchester policy in *Café International* contains a Florida-specific endorsement that eliminates this one-mile requirement, (see Dkt. 12-1

& case no. 1:20-cv-21641 at Dkt. 1-1). Discovery in each case will need to be tailored to the specific terms of each particular policy.

***Other individualized questions of fact.*** Actions against Westchester or IINA—which are pending in three different states—will also involve other individualized questions of fact because different states interpret common insurance terms differently and each plaintiff will need to prove individualized facts about its business to obtain coverage. (*See* Westchester/IINA Opposition, Dkt. 376 at 8-14.) Government orders related to COVID-19 and their alleged impact on each policyholder also differ significantly—for example, Florida and Georgia permitted certain gatherings of 10 people or fewer,<sup>4</sup> while New Jersey permitted gatherings of 50 people or fewer.<sup>5</sup> (*See id.* at 10-13.)

***Transfer will not be more convenient.*** Transfer of these actions would inconvenience the parties and witnesses because the actions involve localized disputes. *Truhaven* and *Beniak*, for example, both involve a policy issued in New Jersey to a New Jersey business, and discovery is likely to be concentrated in New Jersey. *Café International*, meanwhile, involves a policy issued in Florida to a Florida business, and discovery is likely to be located in Florida. (*Id.* at 15-16.) And *The K's*, which involves a policy issued in Massachusetts to a Massachusetts business, was filed in Georgia, the state in which Westchester resides.

***Transfer will not promote justice and efficiency.*** Resolving these claims will necessarily implicate the particular circumstances in each case, and discovery directed to

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<sup>4</sup> *See* March 20, 2020 State of Florida Executive Order No. 20-71 at 5, *available at* [https://www.flgov.com/wp-content/uploads/orders/2020/EO\\_20-71.pdf](https://www.flgov.com/wp-content/uploads/orders/2020/EO_20-71.pdf); March 23, 2020 State of Georgia Executive Order at 2, *available at* <https://gov.georgia.gov/executive-action/executive-orders/2020-executive-orders>.

<sup>5</sup> *See* March 16, 2020 State of New Jersey Executive Order No. 104 at 5, *available at* <https://nj.gov/infobank/eo/056murphy/pdf/EO-104.pdf>.

Westchester will have no relevance to cases against IINA (and vice versa). (*Id.* at 16-18.) Even in cases against the same defendant, there will likely be little overlapping discovery because the policies differ, the claim handlers differ, and the majority of discovery will be insured-focused and directed to the specific nature of the claim.

**B. Informal Coordination of Actions Involving Westchester or IINA Is Feasible**

Centralization of the few actions involving Westchester or IINA should also be denied because informal coordination of these actions is feasible. “Where only a minimal number of actions are involved, the proponent of centralization bears a heavier burden to demonstrate that centralization is appropriate.” *See In re Brazilian Prosthetic Device Bribery Litig.*, 283 F. Supp. 3d 1381, 1382 (J.P.M.L. 2017). Thus, absent compelling circumstances, the Panel typically denies motions that seek to centralize a small number of actions. *See, e.g., In re Emergency Helicopter Air Ambulance Rate Litig.*, 273 F. Supp. 3d 1365, 1367 (J.P.M.L. 2017) (denying motion to transfer because feasible alternatives to transfer existed where only four actions were involved); *In re Forcefield Energy, Inc., Secs. and Deriv. Litig.*, 154 F. Supp. 3d 1351, 1352 (J.P.M.L. 2015) (denying motion to transfer because “cooperative efforts by the parties and involved courts” were “superior to formal centralization” where only five actions were involved).

Westchester is only named in two actions, and IINA is only named in two others. Even if these cases are considered together, the proposed MDL would encompass just four actions. Because so few actions are involved, informal coordination will be feasible: the two cases against IINA are in the same district (the District of New Jersey), and the two cases against Westchester are in nearby districts (the Southern District of Florida and the Northern District of

Georgia), so the parties could easily coordinate these cases.<sup>6</sup> Thus, centralization of these actions is unnecessary and should be denied. *See Global TelLink Corp. Inmate Calling Servs. Litig.*, 140 F. Supp. 3d 1338, 1339 (J.P.M.L. 2015) (denying motion to transfer because “[t]he circumstances of this litigation indicate that voluntary coordination is a practicable and preferable alternative to centralization”); *In re SLB Enters. RICO Litig.*, 412 F. Supp. 3d 1350, 1352 (J.P.M.L. 2019) (denying motion to transfer where only six actions were implicated and alternatives to centralization were feasible, even though the actions “unquestionably involve nearly identical factual allegations” ); *In re Express Scripts Holding Co. Secs., Deriv. and Employee Retirement Income Sec. Act Litig.*, 273 F. Supp. 3d 1369, 1370 (J.P.M.L. 2017) (denying motion to transfer where only four actions were implicated and voluntary cooperation was feasible, even though “the actions unquestionably share common factual allegations”); *In re Enhanced Recovery Co., LLC, Fair Debt Collection Practices Act Litig.*, 363 F. Supp. 3d 1375, 1377 (J.P.M.L. 2019) (denying motion to transfer where only seven actions were implicated).

### **III. THE FINANCIAL CONDUCT AUTHORITY PROCEEDINGS IN THE UNITED KINGDOM ARE NOT ANALOGOUS TO AN MDL**

In their replies, movants contend that proceedings initiated by the Financial Conduct Authority (“FCA”) in the United Kingdom (the “FCA Test Case”) provide a “template” for how an MDL could be conducted, (Dkt. 544 at 8; *see also* Dkt. 543 at 5), but the FCA Test Case is completely dissimilar from an MDL.<sup>7</sup> Indeed, the nature of the FCA Test Case underscores the reasons an MDL for business interruption insurance cases would be inefficient and impractical.

*First*, on May 31, 2020, the FCA and eight insurers entered into a Business Interruption

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<sup>6</sup> The Panel has instructed the parties to address efforts to pursue alternatives to centralization in their briefs. (Dkt. 5.)

<sup>7</sup> The FCA is the “conduct regulator” for UK financial service firms and financial markets.

Insurance Test Case Framework Agreement (“Framework Agreement”) to adjudicate certain claims related to COVID-19 under a limited set of policies. (See Framework Agreement, attached as Ex. B.) In establishing the Test Case, the FCA recognized that there is likely no coverage for losses related to COVID-19 under policies that contain a physical loss or property damage requirement,<sup>8</sup> and therefore the FCA’s Framework Agreement only applies to policies that “provide cover in principle for business interruption losses *without the need for physical/property damage.*” (*Id.* at ¶ D (emphasis added).) The Westchester and IINA policies at issue here, on the other hand, only provide coverage if, among other things, there is “direct physical loss of or damage to property”—and whether there is evidence of “direct physical loss of or damage to property” at any insured business will thus be an important issue. (See Westchester/IINA Opposition, Dkt. 376 at 13-14.)

*Second*, the parties to the FCA Test Case have agreed that the proceedings will be based on a stipulated set of “agreed facts” and “assumed facts.” (Framework Agreement at §§ 1.1-2.8.) “[A]s much information as possible” must be included in the agreed facts, and evidence submitted to the court will either be “limited to scientific evidence on discrete issues” or disallowed entirely. (*Id.* at § 4.1.) Thus, the considerations that militate against forming an MDL—such as individualized questions of fact and the lack of overlapping discovery—are not

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<sup>8</sup> In a January 5, 2020 statement, the FCA noted: “[O]ur view is that most SME insurance policies are focused on property damage (and only have basic cover for BI as a consequence of property damage) so, at least in the majority of cases, insurers are unlikely to be obliged to pay out in relation to the coronavirus pandemic.” *FCA Statement - Insuring SMEs: Business Interruption*, Financial Conduct Authority, January 5, 2020, available at <https://www.fca.org.uk/news/statements/insuring-smes-business-interruption>. Likewise, Christopher Woolard, the Interim Chief Executive of the FCA, stated on a BBC news program on June 2, 2020, that the “vast majority” of business interruption policies were very simple and he did not “think anyone expects them to be engaged or be paying out under the current crisis.” *BBC Sounds*, June 2, 2020, available at <https://www.bbc.co.uk/sounds/play/m000jmsb> (18:15).



present in the FCA proceedings because the parties to those proceedings are required to agree to a common set of facts and discovery (if any) will be minimal.

*Third*, the parties to the Framework Agreement have agreed that the proceedings commenced by the FCA will be limited to a claim for a declaratory judgment against the eight insurers. (*See id.* at ¶ H.) In the MDL, however, dozens of cases tagged as potential related actions also involve putative class actions, as well as claims for breach of contract and bad faith, all of which raise questions of law and fact that are highly individualized and would be addressed more efficiently in the courts in which plaintiffs chose to sue.

*Fourth*, the FCA proceedings are applicable only to England and Wales, and all of the policies there are governed by the same national insurance laws; the proposed MDL, on the other hand, would encompass actions in many different states, each of which imposes its own individual set of laws and regulations. (*See Westchester/IINA Opposition*, Dkt. 376 at 8-10.) The United Kingdom is also less than 1/40th the size of the United States, so the FCA proceedings will not uproot localized disputes and require extensive travel that will inconvenience the parties and witnesses to the same degree as the proposed MDL. (*See id.* at 15-16.) And because the FCA proceedings involve just eight insurers, they will not give rise to the same inefficiencies that would result from an MDL involving hundreds of different parties that would each need to be heard on every issue affecting them. (*See id.* at 18.)

**IV. THE DECLARATION OF TOM BAKER DOES NOT ESTABLISH THAT THE ACTIONS SHARE SUFFICIENT COMMON QUESTIONS OF FACT**

Certain movants have also submitted a declaration from Professor Tom Baker purporting to show similarities among the policies at issue (*see* Dkt. 544-1), but that declaration does not establish that the policies are sufficiently similar to warrant centralization. Baker cites just three examples of policy provisions that share some similarities (but also contain some variances)

across four defendants' policies, and claims that "most of the provisions" will be "similarly substantially identical" (implicitly acknowledging that the provisions are not completely identical and that some provisions are not even substantially identical). (*Id.* at 4-5.)<sup>9</sup> Baker's analysis is flawed in several respects.

*First*, Baker fails to acknowledge that even small differences in policy language and structure can potentially lead to different outcomes—a noncontroversial proposition that Baker himself has acknowledged elsewhere. For example, in the Restatement of the Law of Liability Insurance—for which Baker was the Reporter—Baker notes that "[t]he plain meaning of an insurance policy term is the single meaning to which the language of the term is reasonably susceptible when applied to facts of the claim at issue *in the context of the entire insurance policy*." Restatement of Liability Insurance § 3(2) (2019) (emphasis added).<sup>10</sup> Thus, the fact that differently-worded policies contain some similarities does not necessarily mean that they will receive the same interpretation.

*Second*, Baker only examines language in the standard forms that make up the body of the policy—he fails to acknowledge that policies often contain endorsements that alter provisions within the standard form. The policy issued to *Café International*, for example, contains a Florida-specific endorsement that changes the scope of civil authority coverage set out in the body of the policy. (*See* Dkt. 12-1 & case no. 1:20-cv-21641 at Dkt. 1-1.) United Policyholders notes that the Insurance Services Office ("ISO") currently utilizes 16 different business income coverage policies and more than 170 endorsements that may be added to a policy to modify

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<sup>9</sup> As his declaration shows, Baker has not even seen the actual language from many of the policies at issue in this litigation. (*See* Dkt. 544-1, ¶ 4 (stating that his team collects data on policy forms "when we can obtain the insurance policy").)

<sup>10</sup> The Restatement only applies to liability insurance, not first-party property insurance, but even in first-party coverage cases, the entire policy and the applicable facts are plainly relevant.

coverage, and that even when policies incorporate ISO forms, “two policies are never the same.” (Dkt. 470 at 5.)

*Third*, even to the extent the policies contain some common language, the interpretation of that language can vary based on the particular facts at issue in each case. Indeed, in the Restatement of the Law of Liability Insurance, Baker repeatedly notes that policy provisions are interpreted with reference to the facts of the claim at issue. *See, e.g.*, Restatement of Liability Insurance § 3(1) (2019) (“If an insurance policy term has a plain meaning *when applied to the facts of the claim at issue*, the term is interpreted according to that meaning.”) (emphasis added); *Id* § 3(2) (“The plain meaning of an insurance policy term is the single meaning to which the language of the term is reasonably susceptible *when applied to facts of the claim at issue* in the context of the entire insurance policy.”) (emphasis added). Thus, policyholders have argued that the interpretation of the policies—even if they contain some similar wording—will depend on the particular facts presented as to each individual insured. (*See* Dkt. 470 at 12.)<sup>11</sup>

## V. CONCLUSION

The Panel should deny transfer entirely and should not create a defendant-specific MDL for actions involving Westchester or IINA.

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<sup>11</sup> As discussed in the Westchester/IINA Opposition, policyholders have also argued that different courts may interpret common insurance terms differently under their different laws. (Westchester/IINA Opposition, Dkt. 376 at 8-10.) In their replies, movants argue that no response has identified any differences in states’ interpretations of the policy language at issue in these actions. (Dkt 544 at 3-4.) But movants concede that this is because “there simply is no law or legal rule anywhere with respect to how the language of the various policies apply to the facts of the COVID-19 pandemic,” and acknowledge that different states employ different frameworks for interpreting insurance policies. (*Id.* at 3-4.) Thus, when these policy provisions are eventually adjudicated, policyholders may argue that they should be treated differently under different states’ laws.

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