

**United States Court of Appeals  
For the First Circuit**

---

LEGAL SEA FOODS, LLC,  
Plaintiff-Appellant,

v.

STRATHMORE INSURANCE CO.,  
Defendant-Appellee.

---

ON APPEAL FROM A JUDGMENT OF THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF MASSACHUSETTS  
CASE No. 1:20-cv-10850-NMG  
JUDGE NATHANIEL M. GORTON

---

---

**APPELLANT LEGAL SEA FOODS, LLC'S MOTION TO  
CERTIFY QUESTIONS TO THE SUPREME JUDICIAL COURT  
OF MASSACHUSETTS**

---

---

Christopher M. Pardo (CA1# 1154495)  
Nicholas D. Stellakis (CA1# 1139768)  
Harry L. Manion III (CA1# 15742)  
Hunton Andrews Kurth LLP  
60 State Street, Suite 2400  
Boston, Massachusetts 02109  
(617) 648-2800  
cpardo@HuntonAK.com  
nstellakis@HuntonAK.com  
hmanion@HuntonAK.com

Michael S. Levine (CA1# 1198107)  
Hunton Andrews Kurth LLP  
2200 Pennsylvania Ave. NW  
Washington, DC 20037  
(202) 955-1500  
mlevine@huntonAK.com

Dated: May 3, 2021

---

Plaintiff-Appellant Legal Sea Foods, LLC, asks that this Court certify a single question of law to the Massachusetts Supreme Judicial Court (“SJC”) pursuant to SJC Rule 1:03. No SJC precedent decides the central question on appeal, the meaning of the phrase “direct physical loss of or damage to” insured property in a commercial property-insurance policy. Interpretation of an insurance policy is a quintessential state-law question. The SJC should be permitted to speak first and decisively on this important question of state law, which will be of assistance in other cases on appeal to this Court. Another matter is currently on appeal in the state courts in Massachusetts. Certification is the most efficient course and will avoid the potential of conflicting results in this Court and in the Massachusetts state courts.

As set forth in Legal Sea Foods’ opening brief filed contemporaneously with this motion, this is an action for the physical loss of and damage to property that Legal Sea Foods suffered because of the novel coronavirus and its disease that have spread across the globe. The physical effects of the virus and disease—on property as well as lives—caused Legal Sea Foods to close all of its restaurants. The virus and disease were actually present at each of Legal Sea Foods’ locations. Moreover, the virus and disease caused federal, state, and local governments to issue orders requiring business closures and urging residents to stay at home. Legal Sea Foods’ closures complied with these orders.

Legal Sea Foods purchased a commercial property policy (“Policy”) from Strathmore Insurance Company (“Strathmore”). This policy went into effect on March 1, 2020. Strathmore chose not to include a virus exclusion, following its longstanding practice of not including one for most restaurant clients because it judged the potential for an air-borne pandemic risk to be minimal. After Legal Sea Foods closed its locations, it sought coverage under the Policy. Strathmore denied coverage in an incomplete form letter with unfilled placeholder text after a perfunctory two-minute telephone call with its insured.

Legal Sea Foods alleged that the virus, physically present at all of its locations, rendered those locations unfit and uninhabitable, thus causing physical loss of property within the plain meaning of those words. It also alleged that the virus altered the composition of its indoor air to include infectious particles and that the virus attached to surfaces throughout Legal Sea Foods’ locations, rendering that air and those surfaces deadly disease vectors. Legal Sea Foods also alleged that the virus is omnipresent and cannot be removed while it is still prevalent in the community.

No SJC precedent supports the district court’s decision in this case. The judge held that the phrase “direct physical loss of or damage to” insured property requires impact to the “structural integrity” of that property. For this, it relied solely on federal precedent, and it disregarded two decisions by experienced and

respected Massachusetts Superior Court judges in analogous circumstances, decisions on which this court has relied in the similar context of whether noxious odor from a carpet could be “physical injury” under a liability policy. *Essex Ins. Co. v. BloomSouth Flooring Corp.*, 562 F.3d 399, 404 (1st Cir. 2009), citing *Matzner v. Seaco Ins. Co.*, Suffolk No. CIV. A. 96-0498-B, 1998 WL 566658 (Mass. Super. Aug. 12, 1998) (Hinkle, J.), and *Arbeiter v. Cambridge Mut. Fire Ins. Co.*, Middlesex No. 9400837, 1996 WL 1250616 (Mass. Super. Mar. 15, 1996) (Graham, J.).

This case presents purely state-law issue—an issue of great and growing importance to Massachusetts business owners. In the last month alone, three other insurance-coverage appeals have been lodged in this Court, and more are sure to follow, all raising the same issue. *Select Hosp., LLC v. Strathmore Ins. Co.*, No. CV 20-11414-NMG, 2021 WL 1293407, at \*1 (D. Mass. Apr. 7, 2021) (motion to stay entry of final judgment pending); *Am. Food Sys., Inc. v. Fireman’s Fund Ins. Co.*, No. CV 20-11497-RGS, 2021 WL 1131640 (D. Mass. Mar. 24, 2021), *appeal filed*, No. 21-1307 (1st Cir. Apr. 20, 2021); *Kamakura, LLC v. Greater New York Mut. Ins. Co.*, No. CV 20-11350-FDS, 2021 WL 1171630 (D. Mass. Mar. 9, 2021), *appeal filed*, No. 21-1259 (1st Cir. Apr. 13, 2021); *SAS Int’l, Ltd. v. Gen. Star Indem. Co.*, No. CV 20-11864-RGS, 2021 WL 664043 (D. Mass. Feb. 19, 2021), *appeal filed*, No. 21-1219 (1st Cir. Mar. 24, 2021).

Importantly, the issues presented in this case are also before the Massachusetts Appeals Court in at least one matter involving the same legal questions and the same policy language written by the very same insurer, Strathmore. *Verveine Corp. v. Strathmore Ins. Co.*, Suffolk No. SUCV20201378-BLS2, 2020 WL 8766370 (Mass. Super. Dec. 21, 2020), *appeal filed*, No. 2021-P-0231 (Mass. App. Ct. Mar. 15, 2021). As of this writing, that matter is still in the briefing phase. While there was no request by the parties for direct appellate review by the SJC, the SJC may transfer the appeal *sua sponte*. Mass. R. App. P. 11(f).

### **PROPOSED CERTIFIED QUESTION**

Legal Sea Foods proposes the following certified question:

Under Massachusetts law, does the phrase “direct physical loss of or damage to” insured property unambiguously require an impact to the “structural integrity” of insured property, so as to preclude coverage for loss or damage from COVID-19 and SARS-CoV-2 as alleged in the Second Amended Complaint?

### **ARGUMENT**

The SJC has not spoken on the proposed certified question. This Court can either predict how the SJC would construe the Policy language or it can ask the SJC that question directly. The first course would be uncertain and inefficient. With no SJC precedent to guide this Court, this Court could issue a decision inconsistent with the state courts. And since the issues are already pending before the Massachusetts state courts on a parallel track, there is little possibility that

certifying the same question already under consideration would overburden the Massachusetts court.

SJC Rule 1:03 speaks directly to this situation:

This court may answer questions of law certified to it by . . . a Court of Appeals of the United States . . . when requested by the certifying court if there are involved in any proceeding before it questions of law of this State which may be determinative of the cause then pending in the certifying court and as to which it appears to the certifying court there is no controlling precedent in the decisions of this court.

SJC Rule 1:03, § 1. That is exactly what is present here: a question that is determinative of the cause that is pending in this Court as to which there is no controlling SJC precedent.

Strathmore will doubtless argue that requests for certification made for the first time on appeal are disfavored, but this Court has held that “delay alone does not tie our hands.” *Castagnaro v. Bank of N.Y. Mellon*, 772 F.3d 734, 736 (1st Cir. 2014); see *Real Estate Bar Ass’n for Mass., Inc. v. Nat’l Real Estate Info. Servs.*, 608 F.3d 110, 119 n.2 (1st Cir. 2010) (certifying question despite failure to seek certification below). In fact, this Court has invoked SJC Rule 1:03 even when certification was sought for the first time on a motion for reconsideration made to *this* Court. *Thompson v. JP Morgan Chase, N.A.*, 931 F.3d 109, 111 (1st Cir. 2019).

This is a case where there is a question of Massachusetts state substantive law on which there is no “clear, controlling precedent in the decisions of the

Supreme Judicial Court of Massachusetts” that “may be determinative.” *Globe Newspaper Co. v. Beacon Hill Architectural Comm’n*, 40 F.3d 18, 25 (1st Cir. 1994). Certification is not just appropriate but it is the best approach. It will permit the SJC to issue an authoritative decision that will apply to similar cases arising under Massachusetts law and will eliminate the potential for inconsistent decisions issued by this Court and the state appellate courts. It will also permit the SJC to speak on an important an issue that is firmly within the domain of state law. It is fitting to allow the SJC to have the first appellate opportunity to decide this question of Massachusetts law.

### **CONCLUSION**

For the foregoing reasons, Legal Sea Foods respectfully requests that the Court certify this important and pressing policy-interpretation question to the Massachusetts Supreme Judicial Court for a clear and final resolution.

\*\*\*

Respectfully submitted,

/s/ Nicholas D. Stellakis

Christopher M. Pardo (CAI# 1154495)

Nicholas D. Stellakis (CAI # 1139768)

Harry L. Manion III (CA1# 15742)

Hunton Andrews Kurth LLP

60 State Street, Suite 2400

Boston, Massachusetts 02109

(617) 648-2800

cpardo@huntonAK.com

nstellakis@huntonAK.com

hmanion@huntonAK.com

Michael S. Levine (CAI# 1198107)

Hunton Andrews Kurth LLP

2200 Pennsylvania Ave. NW

Washington, DC 20037

(202) 955-1500

mlevine@huntonAK.com

*Counsel for Appellant Legal Sea Foods,  
LLC*

Dated: May 3, 2021

## CERTIFICATE OF COMPLIANCE

I hereby certify that this motion complies with the type-volume limitation of Fed. R. App. P. 27(d)(2) because

(1) this motion contains 1,389 words excluding the parts of the motion exempted by Fed. R. App. 32(f); and

(2) this motion complies with the typeface requirements of Fed. R. App. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this motion has been prepared in 14 point proportionally spaced using Times New Roman font.

*/s/ Nicholas D. Stellakis*  
Nicholas D. Stellakis

**CERTIFICATE OF SERVICE**

On May 3, 2021, a copy of the foregoing motion was electronically filed with the Clerk of the Court for the United States Court of Appeals for the First Circuit by using the Court's appellate CM/ECF system, and that service will be accomplished by the appellate CM/ECF system.

/s/ Nicholas D. Stellakis  
Nicholas D. Stellakis