Docket No. 21-15413

In the

United States Court of Appeals

For the

Ninth Circuit

LEVY AD GROUP, INC.,
LEVY PRODUCTION GROUP, LLC and LEVY ONLINE,

Plaintiffs-Appellants,

v.

FEDERAL INSURANCE COMPANY,

Defendant-Appellee,

CHUBB CORPORATION,

Defendant.

Appeal from a Decision of the United States District Court for the District of Nevada,
No. 2:20-cv-00763-JAD-DJA · Honorable Jennifer A. Dorsey

APPELLANTS' OPENING BRIEF

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DISCLOSURE STATEMENT

Each of the Plaintiffs-Appellants is a privately held corporation or limited liability company. None has a parent entity.

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JURISDICTIONAL STATEMENT

(A) The District Court had subject-matter jurisdiction pursuant to 28 U.S.C. § 1332(a) because each of the Plaintiff entities is a citizen of Nevada, each of the shareholders or members of each Plaintiff entity is a citizen of Nevada, and each of the Defendant entities is a citizen of Indiana and/or New Jersey.

(B) The Court of Appeals has jurisdiction of this appeal pursuant to 28 U.S.C. § 1291 because the district court's order granting Defendants' motion to dismiss Plaintiffs' Complaint with prejudice, and denying Plaintiffs leave to amend, was a final decision of a district court of the United States, in that it fully and finally disposed of all pending claims asserted by all parties. The Order Granting Defendants' Motion to Dismiss and Closing Case was filed February 16, 2021. Plaintiffs-Appellants' Notice of Appeal was filed March 8, 2021.

ISSUES PRESENTED FOR REVIEW

1. Did the district court commit reversible error by finding, as a matter of law, that Plaintiffs-Appellants' business interruption insurance policy did not provide coverage because Plaintiffs-Appellants did not sustain structural damage to their business premises?

2. Did the district court commit reversible error by dismissing with prejudice Plaintiffs-Appellants' Complaint without leave to amend?

STATEMENT OF THE CASE

On April 28, 2020, Plaintiffs-Appellants Levy Ad Group, Inc., Levy Production Group, LLC, and Levy Online, LLC ("the Levy Companies") filed a Complaint alleging that the defendant insurance companies had wrongfully delayed and denied coverage under the business interruption provisions of their all-risk insurance policy, after their businesses were forced to close by the business closure and stay-at-home orders of the Governor of Nevada that were enacted to stem the COVID pandemic. See, 3-ER-385-394.

The Complaint attaches and incorporates by reference the insurance policy at issue and alleges that the policy provides coverage for "Business Income With Extra Expense." 2-ER-90-349, 102-103, 112-113. The Complaint alleges that the policy provides coverage for business income loss caused by the actual impairment of business operations resulting from direct physical loss of or damage to their business premises due to the actions of a civil authority. 3-ER-388, 2-ER-148-149, 160.

The Complaint alleges that the policy does not define "direct physical loss," nor does it define "direct," "physical," "loss," or "damage." 3-ER-389, 2-ER-193-214. The Complaint alleges that the policy does not contain a virus exclusion, although it does have express exclusions for other airborne and disease-related causes including fungus and pollutants. 3-ER-389, 2-ER-126-133, 3-ER-225-227.

The Complaint alleges that Plaintiffs-Appellants suffered actual impairment of their business operations due to the direct physical loss of their business premises caused by prohibition of access to the premises by orders of a civil authority, specifically, the Governor of Nevada, and by regulations promulgated by the State of Nevada pursuant to the Governor's orders. 3-ER-389. The Complaint attaches and incorporates by reference the Governor's business closure and stay-at-home orders and the State's regulations promulgated pursuant to those orders. 3-ER-350-372. The Complaint alleges that the defendant insurance companies breached the insurance contract and engaged in bad faith insurance practices by failing to timely adjust Plaintiffs' claim and provide coverage under the policy. 3-ER-391-392.

On June 11, 2020, Defendant-Appellant Federal Insurance Company filed a Motion to Dismiss pursuant to Rule 12(b)(6), Fed. R. Civ. P., arguing that the insurance policy did not provide coverage for Plaintiffs-Appellants' claim.[1] 2-ER-66-85. Defendant-Appellant argued that the Governor's business closure and stay-at-home orders did not trigger coverage because the Levy companies did not suffer direct physical loss of or damage to the insured premises. *Id*.

[1] The parties disputed whether the Chubb defendant had been properly named and served. Because Defendant Federal Insurance Company made no such challenge, Plaintiffs-Appellants did not oppose the Chubb defendant's motion to dismiss, and Chubb was dismissed.

On July 9, 2020, Plaintiffs-Appellants filed their Response in Opposition to Defendants-Appellants' Motion to Dismiss, contending that the Complaint alleged that the Governor's business closure and stay-at-home orders prevented the Levy Companies' employees from having access to the insured premises and prohibited the Levy Companies from conducting business at the insured premises, thereby resulting in a loss of the business premises and triggering the business interruption insurance coverage. 2-ER-52-65. Plaintiffs-Appellants asked that the district court deny Defendants' motion or, alternatively, grant Plaintiffs-Appellants leave to amend to cure any uncertainty as to the allegations in the Complaint. 2-ER-64.

On July 30, 2020, Defendant-Appellee Federal Insurance Company filed a reply in support of its motion to dismiss. 2-ER-12-24. On February 16, 2021, the district court entered an order granting Defendant-Appellee's motion to dismiss because the complaint did not allege structural damage that altered the functionality or use of Plaintiff-Appellant's business premises, and denying leave to amend on grounds of futility because "physical damage" could not be alleged. 1-ER-6. On March 8, 2021, Plaintiffs-Appellants' filed their Notice of Appeal from the district Court's "Order Granting Defendants' Motion to Dismiss and Closing Case." 3-ER-395-396.

SUMMARY OF THE ARGUMENT

Plaintiffs-Appellants purchased a business insurance policy from Defendants-Appellants. The policy included coverage for losses resulting from impairment of Plaintiffs-Appellants' operations caused by the prohibition, by a civil authority, of access to Plaintiffs-Appellants' business premises resulting from "direct physical loss or damage" occurring within one mile of the premises.[2]

In March 2020, Plaintiffs-Appellants' were forced to close their businesses by business closure and stay-at-home orders of the Governor of Nevada, and by regulations promulgated pursuant to the Governor's orders, all of which were imposed to combat the COVID pandemic. This closure substantially impaired Plaintiffs-Appellants' businesses and caused economic loss to each of the three businesses operating at Plaintiffs-Appellants' business premises.

Plaintiffs-Appellants submitted a claim to Defendants, who failed to timely act, refusing to either accept or deny the claim.[3] As a result of Defendants' failure to act, Plaintiffs-Appellants filed their complaint below---alleging the facts explained in the preceding paragraph. Defendant-Appellee Federal Insurance

[2] This coverage is labeled "Business Income With Extra Expense" in the insurance policy at issue and is commonly referred to as "business interruption insurance."

[3] At the time the Complaint was filed, Defendants had not accepted or denied coverage. However, Defendants denied coverage during the pendency of proceedings below. 2-ER-53 at fn. 3.

Company moved to dismiss under Rule 12(b)(6), arguing that coverage was not triggered under its policy because there had been no physical damage to Plaintiffs-Appellants' business premises.

Despite acknowledging that interpretation of the phrase "direct physical loss or damage" is an unanswered question under substantive Nevada law, the district court ruled that Plaintiffs-Appellants' complaint was insufficient, as a matter of law, because a claim based on "direct physical loss or damage" requires an allegation of structural or physical change to a property that alters its functionality or use, and that Plaintiffs-Appellants' complaint contained no such allegation. Accordingly, the district court granted Defendant-Appellee's motion to dismiss with prejudice, denying leave to amend.

The district court erred in interpreting this critical phrase in Defendant-Appellee's policy. "Or" is a disjunctive word and "direct physical loss or damage" is a disjunctive phrase that was drafted by Defendant-Appellee and included in its business interruption coverage provision. The district court's order provides no construction of or analysis as to why the disjunctive word "or" is used between the words "loss" and "damage" if, based on the district court's holding, the two words mean the same thing.

Disjunctive means "expressing a choice between two mutually exclusive possibilities." Accordingly, the disjunctive phrase "direct physical loss or damage"

describes two separate and distinct circumstances under which business interruption coverage is triggered. "Direct physical loss or damage" does not require, as the district court found, a "structural or physical change to a property, actually altering its functionality or use." Loss of business premises is alone sufficient to trigger coverage under the language drafted and included by Defendant-Appellee, as long as the loss extends beyond the 24-hour threshold required by the policy. Moreover, if this coverage language, which is undefined by Defendant-Appellee in its policy, is capable of being understood in two or more possible ways, then substantive Nevada law requires that the ambiguity be resolved in favor of coverage.

Plaintiffs-Appellants' complaint accurately describes and sufficiently alleges Plaintiffs-Appellants' entitlement to coverage under one of the two circumstances under which Defendant-Appellee's policy provides coverage---the direct physical loss of Plaintiffs-Appellants' business premises caused by prohibition of access to their business premises resulting from the orders of a civil authority.

For this reason, Plaintiffs-Appellants' Complaint seeking declaratory relief and money damages for breach of contract and bad faith insurance practices is legally sufficient under Rule 8(a) because it alleges cognizable legal theories and plausible facts to support the legal theories alleged. For the same reason, Plaintiffs-Appellants' request for leave to amend their complaint to cure any perceived shortcomings was not futile. Defendant-Appellee's contention that the phrase

"direct physical loss or damage" intends and means physical damage only---which was effectively the basis for the district court's order of dismissal---should be tested by discovery, not by dismissal under Rule 12(b)(6).

ARGUMENT

A. This Court Reviews *De Novo* the District Court's Order, the Defendant's Insurance Policy, and the District Court's Application of State Substantive Law.

This Court reviews *de novo* the district court's dismissal of Plaintiffs-Appellants' complaint under Rule 12(b)(6), *Puri v. Khalsa*, 844 F.3d 1152, 1157 (9th Cir. 2017), accepting all factual allegations as true and construing the pleadings in the light most favorable to Plaintiffs-Appellants. *Rowe v. Educ. Credit Mgmt. Corp*., 559 F.3d 1028, 1029-30 (9th Cir. 2009). This Court reviews *de novo* the district court's interpretation of the language of Defendant-Appellee's insurance policy. *Archer W. Constr. v. Nat'l Union Fire Ins. Co*., 680 Fed. Appx. 604, 602 (9th Cir. 2017). This Court reviews *de novo* the district court's application of state substantive law applicable to construction of the terms of insurance policies. *Travelers Indem. Co. v. Crown Corr., Inc*., 598 Fed. Appx. 828 (9th Cir. 2014).

B. Direct Physical Loss or Damage Are Separate and Distinct Triggers for Coverage Under the Business Interruption Insurance Purchased by Plaintiffs-Appellants.

The district court's order of dismissal noted that, when terms in an insurance policy are not defined, the words should be viewed "in their plain, ordinary[,] and

popular sense." 1-ER-6. Plaintiffs-Appellants agree with that proposition and respectfully suggest that the district court failed to apply that proposition to all of the words in the very phrase on which its decision turns.

Specifically, the district court misinterpreted, misread, or disregarded the word "or" as it appears in the phrase "direct physical loss or damage." That error is implicit in and accounts for the district court's order---because the order concludes that only physical damage would trigger business interruption insurance under Defendant-Appellee's policy. Upon *de novo* review under *Archer W. Constr. v. Nat'l Union Fire Ins. Co*., supra, the operative phrase should be read as it is written, and the district court's order finding Plaintiffs-Appellants' complaint insufficient under Rule 12(b)(6) should be reversed.

"Or" is a disjunctive term. *Hill v. Opus Corp*., 2011 U.S. Dist. LEXIS 152705 (C.D. Cal. 2011) citing *United States v. Gallegos*, 613 F.3d 1211, 1215 (9th Cir. 2010) and *Azure v. Morton*, 514 F.2d 897, 900 (9th Cir. 1975). In a legal context, the word "or" means that terms separated by "or" must be treated separately and that "or" serves to create separate categories of eligibility. *Id*. See also, *In re Pacific-Atlantic Trading Co*., 64 F.3d 1292, 1302 (9th Cir. 1995) and *Nievod v. Sebellius*, 2013 U.S. Dist. LEXIS 17550 (N.D. Cal. 2013).

According to the Oxford English Dictionary, "disjunctive" means "lacking connection; expressing a choice between two mutually exclusive possibilities, for

example, *she asked if he was going or staying*." According to the Cambridge Dictionary, "disjunctive" means "lacking any clear connection, expressing a choice between two or more things, where only one is possible." The same source defines "or" as a word "used to connect different possibilities."

There is no legal or logical basis for reading the word "or" out of Defendant-Appellee's insurance policy, or for reading it in the conjunctive rather than the disjunctive. The Nevada Supreme Court has not done so in the insurance context or any other. The district court erred in doing so. The phrase "direct physical loss or damage" is properly interpreted to create two separate categories of eligibility for business interruption insurance coverage: "loss" of business premises and "damage" to business premises. When so read, Plaintiffs-Appellants' complaint is legally sufficient under Rule 8(a), Fed. R. Civ. P., as is next shown.

C. The Complaint Plausibly Alleges Direct Physical Loss of the Insured Premises Caused by Prohibition of Access Resulting from Orders of a Civil Authority.

Rule 12(b)(6) dismissal is proper only if a complaint fails to allege a cognizable legal theory or sufficient facts to support a cognizable legal theory. *Balistreri v. Pacifica Police Dep't,* 901 F.2d 696, 699 (9th Cir. 1990). A complaint need only provide a "short and plain statement of the claim showing that a plaintiff is entitled to relief." Fed. R. Civ. P. 8(a)(2). Specific facts are not necessary; the statement need only give a defendant fair notice of what the claim is

and the grounds upon which it rests, *Erickson v. Pardus,* 551 U.S. 89 (2007), pleading "enough facts to state a claim for relief that is plausible on its face." *Bell Atl. Corp. v. Twombly,* 550 U.S. 544, 127 S. Ct. 1955, 1974, 167 L. Ed. 2d 929 (2007). All well-pleaded factual allegations must be accepted as true, as well as any reasonable inferences to be drawn from the facts alleged. *Broam v. Bogan,* 320 F.3d 1023, 1028 (9th Cir. 2003).

Plaintiffs-Appellants' Complaint alleges that Plaintiffs-Appellants own and operate an advertising agency, a video production and post-production business, and a digital marketing agency in Las Vegas, Nevada. 3-ER-385. The Complaint alleges that Plaintiffs-Appellants purchased business interruption insurance from Defendant-Appellee to protect their business from situations beyond their control, that Plaintiffs-Appellants paid more than $16,000 in premiums for that insurance, and that the insurance was in full force and effect from October 3, 2019 to October 3, 2020. 3-ER-386, 388, 2-ER-98-100. The Complaint attaches and incorporates by reference Defendant-Appellee's insurance policy in its entirety. 2-ER-90-214, 3-ER-215-349.

The Complaint alleges that, in March 2020, in response to the COVID pandemic, the Governor of Nevada issued a series of emergency business closure and stay-at-home orders that forced the closure of Plaintiffs-Appellants' business premises. 3-ER-389, 350-372. The Complaint attaches and incorporates by

reference the Governor's business closure and stay-at-home orders and the State of Nevada regulations promulgated pursuant to the Governor's orders. 3-ER-350-372. The Complaint alleges that the orders of the Governor and the regulations promulgated thereunder are actions of a civil authority. 3-ER-389. The Complaint alleges that Plaintiffs-Appellants sustained business losses as a direct result of the business closure and stay-at-home orders of the Governor and regulations promulgated thereunder. 3-ER-389, 392, 393.

The Complaint alleges that coverage for Plaintiffs-Appellants' losses exists under the business interruption provisions of the insurance policy purchased by Plaintiffs-Appellees from Defendant-Appellee, for which Plaintiffs-Appellants paid in full. 3-ER-388-389. The Complaint alleges that Plaintiffs-Appellants' loss of their business premises extended for the requisite period of time required by the business interruption provisions in Defendant-Appellee's insurance policy. 3-ER-389, 103. The Complaint alleges that the policy written by Defendant-Appellee contains no virus exclusion that would exclude coverage. *Id*.

The Complaint alleges that Plaintiffs-Appellees submitted a claim under the provisions of the insurance policy that provide coverage for actual impairment of their business operations caused by prohibition of access to their business premises by a civil authority resulting from direct physical loss or damage occurring within one mile of the business premises. 3-ER-388-389, 2-ER-148-149, 160. The

Complaint alleges that, despite Plaintiffs-Appellants' repeated inquiries, Defendants failed to timely act upon, investigate, adjust, and pay Plaintiffs-Appellants' claim.[4] 3-ER-390-393. The Complaint alleges three claims for relief based upon Defendants' acts and omissions: a declaration that Plaintiffs-Appellants have coverage under the business interruption insurance sold to them by Defendants; a claim for money damages for breach of the insurance contract; and a claim for money damages for bad faith insurance practices. *Id*.

The Complaint asserts cognizable legal theories under the Federal Declaratory Judgments Act and under well-established substantive Nevada law. 28 U.S.C. § 2201; *Bernard v. Rockhill Dev. Co.,* 734 P.2d 1238, 1240 (Nev. 1987) (breach of contract); *Pemberton v. Farmers Insurance Exchange*, 858 P.2d 380, 382 (Nev. 1993) (bad faith insurance practices). The Complaint alleges facts that plausibly suggest entitlement to relief, *Starr v. Baca*, 652 F.3d 1202, 1216 (9th Cir. 2011), because the facts alleged allow the court to draw the reasonable inference that Defendant-Appellee is liable for the claims made. *Ashcroft v. Iqbal*, 556 U.S. 662, 663 (2009), citing *Bell Atl. Crop. v. Twombly*, 550 U.S. 544, 556 (2007). Under

[4] As noted at fn 3, supra, Defendants had not denied coverage at the time the Complaint was filed but did so during the pendency of proceedings below. 2-ER-53 at fn. 3.

Erickson v. Pardus, supra, the Complaint gives Defendant-Appellee fair notice of what the claim is and the grounds upon which it rests.

In sum, the Complaint is sufficient in every respect under the pleading requirements of Rule 8, Federal Rules of Civil Procedure. To the extent that detailed facts are not specifically alleged, under *Broam v. Bogan*, supra, the reasonable inferences to be drawn from the facts alleged make clear that Plaintiffs-Appellants' business premises were shuttered and Plaintiffs-Appellees' employees were prohibited from having access to their place of work, resulting in actual impairment of Plaintiffs-Appellants' business operations, by the Governor's orders and regulations thereunder that imposed business closure and stay-at-home conditions at locations within one mile of Plaintiffs-Appellants' insured premises and beyond. For these reasons, the district court's dismissal under Rule 12(b)(6) was reversible error.

D. If "Direct Physical Loss or Damage" is Ambiguous, the Ambiguity Must Be Resolved in Favor of Coverage.

The district court, sitting in diversity, was required to apply the substantive law of Nevada in interpreting the language of Defendant-Appellee's insurance policy. *Hyundai Motors Am., Inc. v. Ace-A-Dent, Inc*., 93 Fed. Appx. 148 (9th Cir. 2004). The substantive law of Nevada, as consistently announced by its Supreme Court, was and is that (1) coverage provisions of insurance policies (as distinguished from clauses excluding coverage) are construed broadly to afford the insured the

greatest possible coverage, *Fed. Ins. Co. v. Am. Hardware Mut. Ins. Co.*, 184 P.3d 390 (Nev. 2008); (2) ambiguous provisions in insurance policies must be interpreted in favor of the insured and in favor of coverage, *Id*. and *Nat'l Union Fire Ins. Co. of State of Pa., v. Reno's Executive Air, Inc*., 682 P.2d 1380 (Nev. 1984); and (3) an insurance policy may restrict coverage only if the policy's language clearly and distinctly communicates the limitation. *United Nat'l Ins. Co. v. Frontier Ins. Co., Inc*., 99 P.3d 1153, 1156 (Nev. 2004).

Plaintiffs-Appellants respectfully submit that the phrase "direct physical loss or damage" clearly creates two separate categories of eligibility for business interruption insurance coverage, one for "loss" of business premises and one for "damage" to business premises. At worst from the insured's perspective, the phrase "direct physical loss or damage" is capable of two or more interpretations or meanings. When a provision in an insurance policy is reasonably or fairly susceptible of different interpretations, or may have two or more different meanings, the provision is ambiguous. *Federated Rural Elec. Ins. Corp. v. Certain Underwriters at Lloyds*, 293 Fed. Appx. 539, 540 (9th Cir. 2008).

The district court correctly acknowledged that the Nevada Supreme Court has not interpreted the phrase "direct physical loss or damage." But, the Nevada Supreme Court has unequivocally and repeatedly held that (1) coverage provisions (which the disputed provision is) are construed broadly to afford the insured the

greatest possible coverage; (2) insurance provisions that are susceptible of different interpretations, or may have two or more different meanings, must be interpreted in favor of the insured and in favor of coverage; and (3) an insurance policy may restrict coverage only if it does so in clear and distinct language.

Accordingly, under Nevada substantive law, *if* "direct physical loss or damage" is fairly susceptible of different interpretations, or *if* the phrase may have two or more different meanings, or *if* the phrase does not clearly and distinctly restrict coverage, then, Nevada rules of construction compel the conclusion that coverage *does* exist under the facts alleged in Plaintiffs-Appellants' complaint. For this reason, the district court erred in granting Defendant-Appellee's motion to dismiss regardless of whether the disputed phrase is interpreted to create two separate categories of coverage or the disputed phrase is found to be ambiguous. The only basis upon which the district court's conclusion could be affirmed would be to write the word "loss" out of the business interruption provision, which would do violence to the principle that every phrase and word in a contract must be given meaning if at all possible. *Webster v. State Mut. Life Assurance Co*., 50 F. Supp. 11 (C.D. Cal. 1943); see also, *Global Hunter Secs., LLC v. MannKind Corp*., 2013 U.S. Dist. LEXIS 69376 (C.D. Cal. 2013).

E. Nevada Cases Provide No Answer. Cases From Other Jurisdictions Provide the Better Interpretation of "Direct Physical Loss or Damage" Under Applicable Rules of Construction.

As the district court's order observes, the Nevada Supreme Court has not interpreted the phrase "direct physical loss or damage" and, to be sure, it has not done so in the COVID context. This issue is one of first impression nationwide and is only now beginning to work its way through the courts. So far as undersigned counsel's research reveals, this Court has not yet ruled on the issue although approximately fifty district court decisions in this Circuit have been rendered.

The United States District Court for the Eastern District of Virginia has thoughtfully analyzed the issue in a case that presents a factual and legal context closely analogous to that alleged in Plaintiffs-Appellant's Complaint, to wit: Plaintiffs-Appellants here, as there, have suffered a "direct physical loss" of their business premises because the premises were rendered unusable and uninhabitable by the prohibition of access to the premises resulting from the actions of a civil authority. *Elegant Massage, LLC v. State Farm Mut. Auto. Ins. Co*., 2020 U.S. Dist. LEXIS 231935 (E.D. Va. 2020). Because the insurance policy in *Elegant Massage*, as here, did not define "direct physical loss" or its constituent words, the Virginia federal court based its analysis and interpretation upon the same rules of construction for insurance contracts that the Nevada court has repeatedly endorsed: (1) coverage provisions are construed broadly to afford the insured the greatest possible coverage;

(2) ambiguous provisions are interpreted in favor of the insured and in favor of coverage; and (3) an insurance policy may restrict coverage only if it does so in clear and distinct language. See, *Fed. Ins. Co. v. Am. Hardware Mut. Ins. Co.*, *Nat'l Union Fire Ins. Co. of State of Pa., v. Reno's Executive Air, Inc.*, and *United Nat'l Ins. Co. v. Frontier Ins. Co., Inc.*, supra.

The Virginia federal court identified several examples of cases in which premises were rendered unusable such that an owner suffered a physical loss of the property, even where no physical damage had occurred:

- The presence of invisible and intangible noxious gases or toxic air particles
- Odor from a methamphetamine lab
- Increased risk of a rockslide from adjacent property
- Ammonia entering a facility
- Asbestos that is present but does not damage a physical structure

Based on this range of circumstances---and specifically relying upon Virginia rules of insurance contract construction that mirror Nevada's---the court wrote:

> Therefore, given the spectrum of accepted interpretations, the Court interprets the phrase "direct physical loss" in the Policy in this case most favorably to the insured to grant more coverage. *See Virginia Farm Bureau Mut. Ins. Co. v. Williams*, 278 Va. 75, at 81, 677 S.E.2d 299 (2009) ("[I]f disputed policy language is ambiguous ... we construe the language in favor of coverage and against the insurer."). Based on the case law, the Court finds that it is plausible that a fortuitous "direct physical loss" could mean that the property is uninhabitable, inaccessible, or dangerous to use because of intangible, or non-

> structural, sources. *See US Airways, Inc. v. Commonwealth Ins. Co.*, 64 Va. Cir. 408, 2004 WL 1094684, at *5 (Va. Cir. Ct. 2004) (holding FAA order grounding flights at Reagan National Airport could constitute direct physical loss when "nothing in the Policy . . . requires that [there] be damage to [the insured's] property."). Here, while the Light Stream Spa was not structurally damaged, it is plausible that Plaintiff's experienced a direct physical loss when the property was deemed uninhabitable, inaccessible, and dangerous to use by the Executive Orders because of its high risk for spreading COVID-19, an invisible but highly lethal virus. That is, the facts of this case are similar those where courts found that asbestos, ammonia, odor from methamphetamine lab, or toxic gasses from drywall, which caused properties uninhabitable, inaccessible, and dangerous to use, constituted a direct physical loss.
>
> Accordingly, the Court finds that Plaintiff submitted a good faith plausible claim to the Defendants for a "direct physical loss" covered by the policy. Therefore, Plaintiff's complaint has alleged "facts and circumstances, some of which, if proved, would fall within the risk covered by the policy." [Citations omitted].

Applying these principles---given Defendant-Appellee's failure to define "direct physical loss or damage" or any of its constituent words; given the legal and plain meanings of the disjunctive word "or" as used in the coverage term of Defendant-Appellee's policy; given the absence of any language in Defendant-Appellee's policy requiring *permanent* loss of business property; given the brief 24-hour waiting period required before coverage commences; and given the unmistakable rules of construction for insurance policies so often restated by the Nevada Supreme Court, Plaintiffs-Appellant's Complaint plausibly alleges coverage under Defendant-Appellee's policy for actual impairment of their operations resulting from the physical loss of the insured premises due to the orders of a civil

authority. Whether that conclusion represents the ultimate interpretation of Defendant-Appellee's insurance policy, after the facts surrounding Defendant-Appellee's use of the words "loss or damage" have been fully discovered, is a question for a different day. The issue presently before this Court is limited to the sufficiency of Plaintiffs-Appellants' Complaint.

F. Because the Terms "Direct Physical Loss or Damage" and "Direct," "Physical," "Loss," and "Damage" are not Defined by the Insurance Policy, Discovery is Necessary to Establish the Intent and Meanings of those Terms.

Notably, Defendant-Appellee's policy does not define the phrase on which its motion is based and on which the district court's order turns---direct physical loss or damage---despite a 22-page definition section in which 76 separate words and phrases *are* defined. 2-ER-193-214. Neither does Defendant-Appellee's policy define any of the constituent words within that phrase. *Id*. Moreover, the critical phrase and terms cannot be defined with any reasonable degree of precision from definitions of words or phrases that are defined, or from the four corners of the entire insurance policy.

These omissions speak volumes. If an insurance company wanted to define away business interruption coverage for an insured's lost use of its business premises in the absence of structural damage, the industry has legions of competent attorneys who could easily do so. But it hasn't. And in this case, notably, neither has

Defendant-Appellee included a virus exclusion from its business interruption coverage. 3-ER-389, 2-ER-102, 126-133, 3-ER-225-227.

A person skeptical of an insurance company's intentions might argue that an insurer did not want to discourage potential insureds from paying premiums for business interruption insurance by making it too apparent that its business interruption insurance was a thin slice of swiss cheese with more holes than cheese. A lesser skeptic might see a mere oversight---although the hundreds of cases now being litigated in which these same definitional omissions are common to all business interruption provisions makes that too coincidental to be a coincidence. Notably, none of the defense memoranda in this case or any other offer an explanation, plausible or otherwise, for these omissions.

The tools of discovery provided by the Federal Rules of Civil Procedure provide the only mechanism available to answer---with a degree of certainty that would make first-party insurance jurisprudence reasonably predictable---the questions: What was the phrase "direct physical loss or damage" intended by its drafters to mean in the context of business interruption coverage? Why is the disjunctive "or" used in hundreds of business insurance policies if "loss" and "damage" mean the same thing? Why are courts and litigants having to spend countless hours and dollars on linguistic gymnastics when a one or two sentence definition would answer the question?

The virtually universal rule of construction for insurance policies is that, if insurers do not clearly and unmistakably communicate the absence of coverage for a given circumstance, then coverage exists. Here, the striking lack of clarity in policy language is a circumstance that is strictly of Defendant-Appellee's making. In such a circumstance, either coverage should be found as a matter of law or discovery should be permitted so that the facts can be ascertained. But Plaintiffs-Appellants should not be victimized twice---first, by the Defendant-Appellee's failure to make its words and intentions clear; and second, by the district court's error when trying to divine the meaning of Defendant-Appellee's uncertain words and phrases.

G. Amendment Should Have Been Permitted and Was Not Futile.

Dismissal without leave to amend is improper unless it is clear, upon *de novo* review, that a complaint could not be saved by any amendment. *Polich v. Burlington Northern, Inc*., 942 F.2d 1467, 1472 (9th Cir. 1991). For the reasons explained above, amending the Complaint would not have been futile and it was error for the district court to disallow amendment.

CONCLUSION AND RELIEF SOUGHT

The Complaint sufficiently and plausibly alleges that Plaintiffs-Appellants had in force a business insurance policy that provided coverage for actual impairment of business operations caused by direct loss of their insured premises resulting from prohibition of access to the premises due to the actions of a civil authority. The Complaint sufficiently and plausibly alleges that the actions of a civil authority caused a direct loss of Plaintiff-Appellants' business premises and actual impairment of their business operations. The Complaint sufficiently and plausibly alleges that Plaintiffs-Appellants made a claim under their insurance policy and that Defendant-Appellant failed to timely investigate, adjust, and pay the claim. The Complaint sufficiently and plausibly alleges claims for declaratory relief, breach of contract, and bad faith insurance practices. It was reversible error for the district court to dismiss the Complaint under Rule 12(b)(6), without leave to amend, based on the district court's finding that structural damage to Plaintiffs-Appellants' business premises was required before coverage was triggered.

For these reasons, Plaintiffs-Appellants respectfully request that this Court reverse and vacate the order of the district court granting Defendant-Appellee's motion to dismiss, reverse and vacate the order of the district court denying Plaintiffs-Appellants leave to amend their complaint, and remand the case to the

district court with directions to order Defendant-Appellee to answer the complaint and proceed to discovery.

Respectfully submitted,

Dated this 11th day of June 2021.

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CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the type-volume limitation set forth in Circuit Rule 32-1(a) and Federal Rules of Appellate Procedure 32(a)(5)(A). This brief uses a proportional typeface and 14-point font, and contains 5,174 words.

Dated this 11th day of June 2021.

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STATEMENT OF RELATED CASES

There are no related cases pending in this Court.

CERTIFICATE OF SERVICE

I hereby certify that on June 11, 2021, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

/s/ Kirstin E. Largent