No. 21-1493

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

BEL AIR AUTO AUCTION, INC.,
Plaintiff-Appellant,

v.

GREAT NORTHERN INSURANCE COMPANY,
Defendant-Appellee.

On Appeal From The United States District Court
For The District of Maryland
The Honorable Richard D. Bennett
Case No. 1:20-cv-02892-RDB

DEFENDANT-APPELLEE'S OPPOSITION TO PLAINTIFF'S MOTION FOR CERTIFICATION TO THE MARYLAND COURT OF APPEALS

GABRIELA RICHEIMER
M. ADDISON DRAPER
CLYDE & CO US LLP
1775 Pennsylvania Ave. NW
Washington, DC 20006
(202) 747-5100

JONATHAN D. HACKER
BRADLEY N. GARCIA
O'MELVENY & MYERS LLP
1625 Eye St. NW
Washington, D.C. 20006
(202) 383-5300

Counsel for Defendant-Appellee Great Northern Insurance Company

INTRODUCTION

This is an insurance coverage dispute, calling for the routine application of settled contract interpretation principles to an insurance contract. But rather than have this Court resolve the case on its own terms, plaintiff-appellant Bel Air Auto Auction, Inc. ("Bel Air") has moved to certify three distinct questions to the Maryland Court of Appeals concerning interpretation of the specific policy language at issue here. There is no need to certify. This Court regularly resolves contract disputes under state law without burdening the state high court with questions on simple matters of contract language. This case is not the rare exception requiring special guidance from a state high court. Just the opposite: as the district court observed, every issue in the case can be resolved through "a straightforward application of Maryland contract law." JA477. Bel Air's motion to certify should be denied.

Bel Air is a vehicle auction business that sought coverage under an insurance policy issued by defendant-appellee Great Northern Insurance Company ("Great Northern") for losses it incurred during the COVID-19 pandemic. In the court below, Bel Air insisted that the district court should refrain from interpreting the policy and instead certify questions of state law to the Maryland Court of Appeals. The court refused, recognizing that it was well-equipped to undertake the routine interpretive question before it. Applying settled principles of contract

interpretation to the unambiguous language of the policy, the district court determined that there was no coverage as a matter of law and entered judgment in favor of Great Northern.

On appeal, Bel Air recycles its arguments for certification, insisting that this Court cannot proceed without enlisting the guidance of the Maryland Court of Appeals. Bel Air's motion essentially presumes that this Court should automatically certify any time an appeal requires the interpretation of contractual language that has not been specifically ruled upon by the highest court of a state. But the Supreme Court and this Court have made clear that this is not the standard for certification. As demonstrated by over 400 decisions from other courts in COVID-19 insurance coverage cases interpreting similar or identical policy language and overwhelmingly ruling for insurers, the task before this Court is neither novel, nor complex, nor unprecedented. This Court is perfectly capable of resolving these issues without imposing the time and expense of a distinct proceeding in the Maryland Court of Appeals.

For these and the other reasons stated below, this Court should deny Bel Air's motion for certification.

BACKGROUND

Bel Air commenced this action in August 2020, seeking a declaratory judgment that coverage exists under a property insurance policy issued by Great

Northern.[1] JA464. Bel Air sought coverage for business interruption losses, contending that the SARS-Cov-2 virus and its potential for causing COVID-19, together with orders issued by the State of Maryland and Harford County to contain the spread of the virus, caused covered losses to Bel Air's vehicle auction business. JA464-65.

The policy in question—Policy Number 3601-95-62 BAL (the "Policy")—was issued by Great Northern on October 18, 2019 and contains two key coverage provisions at issue in this appeal. JA466. First, the "Business Income and Extra Expense" section provides coverage where "direct physical loss or damage … to property" (1) is caused by or results from a "covered peril," and (2) occurs at or within 1,000 feet of relevant premises. JA149. This provision covers "business income loss" incurred "due to the actual impairment of [] operations" and "extra expense" incurred "due to the actual or potential impairment of [] operations" taking place "during the period of restoration." *Id.*

Second, the "Civil Authority" section provides coverage for "business income loss" incurred "due to the actual impairment" of operations and "extra expense" incurred, "directly caused by the prohibition of access to: your premises

[1] The parties do not dispute that Maryland law applies in this case because the policy was formed in Maryland and, under Maryland law, the law of the state where the contract was formed is applied in a contract action. *See Transamerica Premier Life Ins. Co. v. Selman & Co., LLC*, 401 F. Supp. 3d 576, 590 (D. Md. 2019).

… by a civil authority," but only where the civil authority prohibition is "the direct result of direct physical loss or damage to property away from such premises … by a covered peril" and the property is within one mile or another pre-identified distance from the premises, "whichever is greater." JA152.[2]

Bel Air conceded in its Amended Complaint that "SARS-Cov-2 and Covid-19 and the State and local governmental orders have *not* resulted in structural alteration or physical change to its premises." JA12 ¶ 28 (emphasis added). Moreover, because vehicle dealerships were designated as "essential businesses" under the Maryland governmental orders, Bel Air was permitted to stay open throughout the entire relevant period. JA466-67. Bel Air nevertheless alleged that it was entitled to recover under the coverage provisions identified above. JA467.

On October 7, 2020, Great Northern removed the suit to the U.S. District Court for the District of Maryland. JA464. On January 7, 2021, Bel Air moved for summary judgment. Bel Air also filed a Motion to Certify Questions of Law to the Maryland Court of Appeals, arguing principally that certification was required because Maryland courts had not squarely addressed the interpretation of the

[2] The Policy also contains an "Acts or Decisions" exclusion providing that the insurance "does not apply to loss or damage caused by or resulting from acts or decisions, including the failure to act or decide, of any person, group, organization or governmental body." JA173. This exclusion "does not apply to ensuing loss or damage caused by or resulting from a peril not otherwise excluded." *Id.* The district court did not address this exclusion and it should have no bearing in this appeal. *See infra* at 16.

contractual language at issue. JA465. On February 17, 2021, Great Northern moved for judgment on the pleadings under Rule 12(c). *Id.*

On April 14, 2021, the district court issued a Memorandum Opinion denying Bel Air's motion to certify and its motion for summary judgment, while granting Great Northern's Rule 12(c) motion. JA464-91. The court first rejected Bel Air's arguments for certification, explaining that "a straightforward application of Maryland contract law … can resolve all remaining issues in this case." JA477. Certification was unnecessary, the court determined, because there was "sufficient guidance from Maryland state courts, [the District of Maryland], and other federal district courts applying the same basic principles of contract law to almost identical insurance policy provisions," and because numerous federal district courts "addressing almost identical questions of state law under commercial property insurance policies have come to decisions without certification of such questions of law to state courts," including after having "denied motions for certification." JA478 & n.5.

Turning next to the merits, the court held that no coverage exists under any provisions of the Policy. JA479-91. First, relying on dictionary definitions and abundant case law analyzing similar policy language "through the application of the same basic principles of contract law that this Court must apply under Maryland law," JA481, the court interpreted the phrase "direct physical loss or

damage" to exclude "loss of use unrelated to physical, structural, tangible damage to property," JA485. According to Bel Air, the SARS-Cov-2 virus had caused physical damage when it "contaminated" its premises, but the district court held that Bel Air's Amended Complaint did not adequately allege such "contamination," JA485-86, and that in any event any such contamination did not constitute "direct physical loss or damage" because the virus did not threaten the structure covered by the Policy, JA488-89. The district court also concluded that Bel Air could not recover under the Civil Authority provision for the further reason that it had not been prohibited from using its facilities. JA486. The court therefore concluded that the Policy provided no coverage to Bel Air as a matter of law and entered judgment in favor of Great Northern. JA491.

Bel Air appealed, and has now moved for certification to the Maryland Court of Appeals by filing the motion now before this Court. Doc. No. 14 ("Mot.").

LEGAL STANDARD

Under the Maryland Uniform Certification of Questions of Law Act ("Act"), a federal court may certify a question of law to the Maryland Court of Appeals "if the answer may be determinative of an issue in pending litigation in the certifying court and there is no controlling appellate decision, constitutional provision, or statute of this State." Md. Code Ann., Cts. & Jud. Proc. § 12-603. But

"[c]ertification is by no means obligatory merely because state law is unsettled; the choice instead rests in the sound discretion of the federal court." *McKesson v. Doe*, 141 S. Ct. 48, 51 (2020) (internal quotation marks omitted). Indeed, "[f]ederal courts have only rarely resorted to state certification procedures, which can prolong the dispute and increase the expenses incurred by the parties." *Id.* Certification is therefore "advisable" solely in certain "exceptional instances." *Id.*

As this Court has long emphasized, "federal courts should take care not to burden their state counterparts with unnecessary certification requests." *Boyter v. C.I.R.*, 668 F.2d 1382, 1385 n.5 (4th Cir. 1981). "Only if the available state law is clearly insufficient should the court certify the issue to the state court." *Roe v. Doe*, 28 F.3d 404, 407 (4th Cir. 1994). A court thus should not certify "where the answer to the question sought to be certified is reasonably clear." *Simpson v. Duke Energy Corp.*, 191 F.3d 448, 1999 WL 694444, at *3 (4th Cir. 1999) (table) (per curiam) (internal quotation marks and alterations omitted). That rule applies "[e]ven where there is no case law from the forum state which is directly on point"—in that situation, "the district court must attempt to do as the state court would do if confronted with the same fact pattern." *Id.* (alterations and internal quotation marks omitted).

Applying those principles, courts in this Circuit "routinely" decline to certify questions of state law, even absent a controlling state court decision, if the issues

are "neither novel nor complex," and the court is capable of reaching a "reasoned and principled conclusion." *Marshall v. Sel. Way Ins. Co.*, 2015 WL 1186442, at *7 (D. Md. Mar. 13, 2015) (citing *Hafford v. Equity One, Inc.*, 2008 WL 906015, at *4 (D. Md. Mar. 31, 2008)); *see Lynn v. Monarch Recovery Mgmt., Inc.*, 953 F. Supp. 2d 612, 621-22 (D. Md. 2013) (recognizing that court "remains under a duty to decide questions of state law, even if difficult and uncertain, when necessary to render judgment"), *aff'd*, 586 F. App'x 103 (4th Cir. 2014). A matter of state law is not "genuinely unsettled just because of the absence of a definitive answer from the state supreme court on a particular question." *Arrington v. Colleen, Inc.,* 2001 WL 34117735, at *5 (D. Md. Mar. 29, 2001). Rather, when state-law precedent to guide a federal court's adjudication is available, "the federal court *should* decide the case before it rather than staying and prolonging the proceedings." *Id.* (emphasis in original; internal quotation marks omitted).

ARGUMENT

A. Certification Is Unnecessary Because This Appeal Involves Straightforward Application Of Well-Established Legal Principles

This Court, like the court below, is entirely capable of resolving the straightforward questions in this appeal without resort to certification. Contrary to Bel Air's assertion, this case requires no intricate weighing of "moral, social, and economic factors." Mot. 11 (citing *McKesson*, 141 S. Ct. at 51). It calls only for

the application of well-established principles of contract interpretation to unambiguous policy language, and there is abundant guidance from courts in Maryland and throughout the country on similar issues. Bel Air's opening brief on the merits—in contrast to its motion to certify—conspicuously contains *no* reference to *any* "public policy" arguments the state high court might be better suited to address. Instead, Bel Air essentially argues that the Court should certify merely because there is no directly on-point state court precedent addressing the specific language at issue on appeal—a rule that would necessitate certification in virtually every state-law contract case that comes before this Court. This Court has never applied such an approach. Rather, the Court has recognized that certification is appropriate "[o]nly if the available state law is *clearly insufficient*." *Roe*, 28 F.3d at 407 (emphasis added). Bel Air has not made that showing here.

The threshold, and dispositive, question in this appeal is whether Bel Air adequately pleaded a "direct physical loss or damage" to property, as required to trigger coverage under both the Business Income And Extra Expense and Civil Authority provisions in the Policy. That question is made particularly straightforward by Bel Air's explicit concession in its Amended Complaint that SARS-Cov-2 has "not resulted in structural alteration or physical change to its premises." JA12 ¶ 28. As the district court's thorough analysis demonstrates, and as will be detailed in Great Northern's response brief on appeal, a simple

application of settled principles shows that mere loss of use of property does not constitute "direct physical loss or damage" to that property. JA477, 481.

Most important for purposes of Bel Air's certification motion, existing case law provides ample guidance on that issue and the other arguments Bel Air raises. First, the legal issues in this case can be resolved based on the application of settled contract-law principles. As the district court recognized, Maryland applies "the same basic principles of contract law" that are applied in many jurisdictions throughout the country, JA478, with one exception that makes the case even easier to resolve: "Maryland does not follow the rule that insurance policies should, as a matter of course, be construed against the insurer." *Dutta v. State Farm Ins. Co.*, 769 A.2d 948, 957 (Md. 2001). Accordingly, in Maryland, insurance policy interpretation is just like any other form of contract interpretation. It is a question of law for the court, *see Clendenin Bros. v. U.S. Fire Ins. Co.*, 889 A.2d 387, 393 (Md. 2006), subject to "the usual principles of contract interpretation," which "require that a contract be interpreted as a whole, in accordance with the objective law of contracts, to determine its character and purpose,'" *Agency Ins. Co. v. State Farm Mut. Auto. Ins. Co.*, 998 A.2d 936, 940 (Md. Ct. Spec. App. 2010) (quoting *Anderson v. Gen. Cas. Ins. Co.*, 935 A.2d 746, 752 (Md. 2007)). Further, Maryland law requires courts to "accord a word its usual, ordinary and accepted meaning unless there is evidence that the parties intended to employ it in a special or

technical sense," *Clendenin*, 889 A.2d at 393 (quotation omitted), and to give effect to each clause "so that a court will not find an interpretation which casts out or disregards a meaningful part of the language of the writing unless no other course can be sensibly and reasonably followed," *Muhammad v. Prince George's Cnty. Bd. of Educ.*, 228 A.3d 1170, 1179 (Md. Ct. Spec. App. 2020) (quotation omitted).

In addition to this well-established Maryland contract law precedent, this Court can consider the recent decisions of more than 400 courts analyzing similar policy language in the COVID-19 business interruption coverage context. *See* Penn Law COVID Coverage Litigation Tracker, available at https://cclt.law.upenn.edu/judicial-rulings/ ("Penn Law Tracker"). Each of these courts has applied similar state-law rules of contract interpretation, analyzed dictionary definitions and treatises, and looked to other courts for guidance in resolving these insurance coverage disputes. *Id.* To date, at least 356 federal courts have resolved these cases without any expressed need to certify the contract-interpretation questions involved, *id.*, and several federal courts have specifically *denied* certification requests. *See*, *e.g.*, *Henry's Louisiana Grill, Inc. v. Allied Ins. Co. of Am.*, 495 F. Supp. 3d 1289, 1297 (N.D. Ga. 2020) ("[A] dearth of Georgia Supreme Court decisions addressing a particular phrase cannot be sufficient cause—on its own—to certify a question to that court. That is especially true

where, as here, the contract language is unambiguous as to coverage on these facts."), remanded on other grounds, 2021 WL 1851381 (11th Cir. Apr. 8, 2021); *Hillcrest Optical, Inc. v. Cont'l Cas. Co.*, 497 F. Supp. 3d 1203, 1210 (S.D. Ala. 2020) (despite "scant state-specific case law on the issue before the Court," declining to certify question and reaching decision based on existing case law, dictionary definitions, and treatises); *see also Drama Camp Prods., Inc. v. Mt. Hawley Ins. Co.*, 2020 WL 8018579, at *4 (S.D. Ala. Dec. 30, 2020) (denying request to certify and dismissing complaint, finding "the question presented is not sufficiently close").

Underscoring the simplicity of the issues in this case, courts in the overwhelming majority of the decisions addressing these issues have reached the same outcome as the district court below, finding no coverage in similar scenarios under similar policy language. Penn Law Tracker, *supra.* Indeed, contrary to Bel Air's unsupported assertion that most state courts have sided with insureds (Mot. 13), a clear majority of state courts have reached the same conclusion as the district court. *See* Penn Law Tracker, *supra*.

This case bears no resemblance to the cases cited by Bel Air in which courts have deemed certification appropriate. In *McKesson*, the Supreme Court found certification necessary because a dispute required the federal court to "venture[]" into an "uncertain … area of tort law … laden with value judgments and fraught

with implications for First Amendment rights," 141 S. Ct. at 51—a far cry from the standard contractual interpretation called for in this case. Similarly, in *Anderson v. United States*, 669 F.3d 161 (4th Cir. 2011), this Court certified questions in a case that posed a novel question concerning interpretation of a Maryland statute, where prior Maryland Court of Appeals precedent was conflicting. *Id.* at 162. No similar conflict in Maryland case law poses any obstacle to the task before the Court in this appeal. This Court's unpublished decision in *Travco Ins. Co. v. Ward*, 468 F. App'x 195 (4th Cir. 2012), is also inapposite. This Court did not certify the contract interpretation questions there simply because there was no binding state court decision directly on point, but because the questions at issue were both of "exceptional importance" and "sufficiently unsettled" that certification was appropriate. *Id.* at 201. By contrast, as the district court's analysis shows, and as Great Northern's response brief on the merits will further detail, the questions here can be easily adjudicated based on settled interpretive principles and extensive guidance from similar decisions in other jurisdictions.

B. This Court's Opinion Will Provide The Necessary Guidance To Lower Courts

Bel Air insists that a decision from the Maryland Court of Appeals is needed in order to provide guidance to other courts and stem the tide of COVID-19 coverage litigation. Bel Air is mistaken: this Court's opinion will provide more than adequate guidance for courts in other cases.

As the Supreme Court has made clear, "[o]ur system of cooperative judicial federalism presumes federal and state courts alike are competent to apply federal and state law." *McKesson*, 141 S. Ct. at 51 (internal quotation marks omitted). This Court's interpretation of Maryland law will provide controlling precedent for lower courts in this Circuit and persuasive precedent for courts elsewhere. *See, e.g.*, *Benedict v. Hankook Tire Co. Ltd*., 295 F. Supp. 3d 632, 645 (E.D. Va. 2018) ("Of course, this Court must adhere to Fourth Circuit interpretations of Virginia law absent an intervening decision by the Supreme Court of Virginia or a change in Fourth Circuit law made en banc."); *St. Paul Travelers v. Payne*, 444 F. Supp. 2d 519, 523 (D.S.C. 2006) ("It is unnecessary for a district court to certify a question of law to a state court where, as here, the district court's supervisory court of appeals has already determined the issue of unsettled state law."); *cf. Derflinger v. Ford Motor Co*., 866 F.2d 107, 110 (4th Cir. 1989) ("Simply stated, stare decisis requires that we follow our earlier determination as to the law of a state in the absence of any subsequent change in the state law." (internal quotation marks and citation omitted)). Plainly, this Court can provide the clarifying effect of an appellate decision without calling upon the Maryland Court of Appeals.

C. Certification Would Result In Unwarranted Delay

According to Bel Air, certification would lead to a more efficient resolution of this appeal. Mot. 21-22. As support for that tenuous proposition, Bel Air plucks

out of context the Supreme Court's statement in *Arizonans for Official English v. Arizona*, 520 U.S. 43 (1997), that certification "allows a federal court faced with a novel state-law question to put the question directly to the State's highest court, reducing the delay, cutting the cost, and increasing the assurance of gaining an authoritative response." Mot. 22 (citing *Arizona*, 520 U.S. at 76). The *Arizona* Court, however, was comparing certification to "*Pullman* abstention," a procedure the Court described as "protracted and expensive in practice," because it "entailed a full round of litigation in the state court system before any resumption of proceedings in federal court." *Arizona*, 520 U.S. at 76. Bel Air also relies (Mot 22) on another case that compared the certification process favorably to *Pullman* abstention, explaining that "while some delay from certification is inevitable … *Pullman* abstention—the other course available here—would take even longer." *Osterweil v. Bartlett*, 706 F.3d 139, 144-45 (2d Cir. 2013).

These cases show only that certification is less inefficient and cumbersome than *Pullman* abstention. But this case does not involve *Pullman* abstention. It instead involves an ordinary decision on the merits by a federal court sitting in diversity. And it is beyond dispute that certification "entails more delay and expense than would an ordinary decision of the state question on the merits by the federal court." *Lehman Bros. v. Schein*, 416 U.S. 386, 394 (1974) (Rehnquist, J., concurring); *see McKesson*, 141 S. Ct. at 51 ("state certification procedures … can

prolong the dispute and increase the expenses incurred by the parties"). The certification process would add many months (at minimum) to the resolution of this appeal. Bel Air cannot rely on efficiency concerns to justify its proposed detour to the Maryland Court of Appeals.

D. Bel Air's Certification Request Is Overbroad

In addition to being unjustified, Bel Air's motion for certification is overbroad. Bel Air seeks certification of the question whether "the Acts and Decisions exclusion in the Great Northern policy exclude[s] all coverage under the … Business Income and Extra Expense and Civil Authority portions of the policy." Mot. 2. Great Northern reserved its rights under the Acts or Decisions exclusion, but it did not deny coverage on that basis. JA346. Nor did the district court rely on the Acts or Decisions exclusion in determining that there was no coverage under the Policy. JA490 n.8 ("This Court need not consider the applicability of the Acts Or Decision exclusion in this case, as there is no coverage under the plain language of the allegedly applicable provisions."). This question is thus not "determinative of an issue in [the] pending litigation," Md. Code Ann., Cts. & Jud. Proc. § 12-603, and is inappropriate for certification.

CONCLUSION

For the foregoing reasons, the motion to certify should be denied.

Dated: June 17, 2021

Respectfully submitted,

By: s/ *Jonathan D. Hacker*

JONATHAN D. HACKER
BRADLEY N. GARCIA
O'MELVENY & MYERS LLP
1625 Eye St. NW
Washington, DC 20006
(202) 383-5300

GABRIELA RICHEIMER
M. ADDISON DRAPER
CLYDE & CO US LLP
1775 Pennsylvania Ave. NW
Washington, DC 20006
(202) 747-5100

Counsel for Defendant-Appellee
Great Northern Insurance Company

CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the requirements of Fed. R. App. P. 32(a)(5) and (6) because it has been prepared in 14-point Times New Roman, a proportionally spaced font, and that it complies with the type-volume limitation of Fed. R. App. P. 27(D)(2)(A), because it contains 3,850 words, excluding the parts exempted by Rule 32(f).

/s/ *Jonathan D. Hacker*
Jonathan D. Hacker

Counsel for Defendant-Appellee
Great Northern Insurance Company

CERTIFICATE OF SERVICE

I hereby certify that, on this 17th day of June, 2021, I electronically filed the foregoing with the Clerk of the Court using the appellate CM/ECF system. All participants are registered CM/ECF users, and will be served by the appellate CM/ECF system.

/s/ *Jonathan D. Hacker*
Jonathan D. Hacker

Counsel for Defendant-Appellee
Great Northern Insurance Company