No. 21-15240

**IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

KEVIN BARRY FINE ART ASSOCIATES,

Plaintiff–Appellant,

v.

SENTINEL INSURANCE COMPANY,

Defendant–Appellee.

APPEAL FROM THE U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA
HON. SALLIE KIM NO. 3:20-CV-04783

APPELLANT'S REQUEST TO CERTIFY A CONTROLLING QUESTION OF STATE LAW TO THE CALIFORNIA SUPREME COURT FOR RESOLUTION

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TO THE COURT AND ALL PARTIES OF RECORD:

In accordance with California Rule of Court 8.548, Plaintiff–Appellant Kevin Barry Fine Arts Associates ("Appellant") respectfully requests that this Court certify a controlling question of California law to the California Supreme Court for resolution, namely, whether the Policy's requirement of "direct physical loss" or "direct physical damage" encompasses the loss of the ability to access the property for its intended purpose; and at a minimum, is the provision ambiguous such that it must be read in favor of coverage?

This request is made on the grounds that the question presented could determine the outcome of this appeal, that there is no controlling California precedent on this issue, and that the issue is of acute public interest in the wake of the Coronavirus pandemic and insurers' uniform denial of COVID-19-related business-interruption insurance claims.

Defendant–Appellee Sentinel Insurance Company has indicated that it opposes this request.

DATED: May 26, 2021

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iv
INTRODUCTION AND QUESTION PRESENTED FOR CERTIFICATION 1
FACTUAL AND PROCEDURAL BACKGROUND 2
I. Factual Background 2
II. Procedural History 4
LEGAL STANDARD 5
ARGUMENT 5
I. The question presented is of acute public interest in the wake of the Coronavirus pandemic. 8
II. There is no controlling precedent as to the proper interpretation of the “direct physical loss” or “direct physical damage” provision common in insurance policies. 10
III. A decision on the question presented could determine the outcome of this appeal. 17
CONCLUSION 20
CERTIFICATE OF COMPLIANCE 22
CERTIFICATE OF SERVICE 23

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TABLE OF AUTHORITIES

Page(s)

CASES

U.S. Supreme Court

Lehman Bros. v. Schein,
416 U.S. 386 (1974) 6

U.S Court of Appeals for the Ninth Circuit

Allied Premier Ins. v. United Fin. Cas. Co.,
991 F.3d 1070 (9th Cir. 2021), *review granted*, No. S267746 (Cal. May 12, 2021) 6

Beeman v. Anthem Prescription Mgmt., LLC,
689 F.3d 1002 (9th Cir. 2012), *certified question answered*, 58 Cal.4th 329 (2013) 16, 17

Gradillas v. Lincoln Gen. Ins.,
792 F.3d 1050 (9th Cir. 2015), *review granted*, No. S227632 (Cal. Aug. 12, 2015), *review dismissed* (June 15, 2016) 6

In re K F Dairies,
224 F.3d 922 (9th Cir. 2000) 15, 17

Kilby v. CVS Pharmacy, Inc.,
739 F.3d 1192 (9th Cir. 2013), *certified question answered*, 63 Cal.4th 1 (2016) 9

Liberty Surplus Ins. Corp. v. Ledesma & Meyer Constr. Co.,
752 F.App'x 412 (9th Cir. 2018) 19

Liberty Surplus Ins. v. Ledesma & Meyer Constr. Co.,
834 F.3d 998 (9th Cir. 2016), *certified question answered*, 5 Cal.5th 216 (2018) 6, 20

Minkler v. Safeco Ins.,
399 F.App'x 230 (9th Cir. 2010) 19

Minkler v. Safeco Ins.,
561 F.3d 1033 (9th Cir. 2009), *certified question answered*,
49 Cal.4th 315 (2010) 7, 20

Parents Involved in Cmty. Sch. v. Seattle Sch. Dist., No. 1,
294 F.3d 1085 (9th Cir. 2002) 5

Pitzer Coll. v. Indian Harbor Ins.,
779 F.App'x 495 (9th Cir. 2019) 19

Pitzer Coll. v. Indian Harbor Ins.,
845 F.3d 993 (9th Cir. 2017), *certified question answered*,
8 Cal.5th 93 (2019) 6, 20

Sentry Select Ins. v. Fid. & Guar.,
455 F.3d 956 (9th Cir. 2006), *certified question answered*,
46 Cal.4th 204 (2009) 7, 19, 20

Sentry Select Ins. v. Fid. & Guar. Ins.,
326 F.App'x 997 (9th Cir. 2009) 19

Vu v. Prudential Prop. & Cas. Ins.,
172 F.3d 725 (9th Cir. 1999), *certified question answered*,
26 Cal.4th 1142 (2001) 7, 20

Vu v. Prudential Prop. & Cas. Ins.,
291 F.3d 603 (9th Cir. 2002) 19

Yahoo! Inc. v. Nat'l Union Fire Ins. of Pittsburgh,
913 F.3d 923 (9th Cir. 2019), *review granted*, No. S253593
(Cal. Mar. 27, 2019) 6

California Supreme Court

Aerojet-Gen. Corp. v. Transp. Indem.,
17 Cal.4th 38 (1997) 12

AIU Ins. v. Superior Ct.,
51 Cal.3d 807 (1990) 10, 12, 15

Safeco Ins. Co. of Am. v. Robert S.,
26 Cal.4th 758 (2001) 12

TRB Invs., Inc. v. Fireman's Fund Ins.,
40 Cal.4th 19 (2006) 10, 12, 15

Waller v. Truck Ins. Exch., Inc.,
11 Cal.4th 1 (1995) 10, 12, 15

California Court of Appeal

Am. Alt. Ins. v. Superior Ct.,
135 Cal.App.4th 1239 (2006) 12, 14

Cavalier Sportswear, Inc. v. CastlePoint Nat'l Ins.,
No. B239695, 2013 WL 3960425 (Cal. Ct. App. July 31, 2013) 16

Hughes v. Potomac Ins. of D.C.,
199 Cal.App.2d 239 (1962), *abrogated on other grounds as stated in Sabella v. Wisler*, 59 Cal.2d 21 (1963) 12, 14

In re Marriage of Shaban,
88 Cal.App.4th 398 (2001) 15

Jackson v. AEG Live, LLC,
233 Cal.App.4th 1156 (2015) 16

MRI Healthcare Ctr. of Glendale, Inc. v. State Farm Gen. Ins.,
187 Cal.App.4th 766 (2010) 13, 15, 16

Reichert v. State Farm Gen. Ins.,
212 Cal.App.4th 1543 (2012) 16

Strickland v. Fed. Ins.,
200 Cal.App.3d 792 (1988) 12, 14

Valley Casework, Inc. v. Lexington Ins.,
No. D060837, 2013 WL 3470530 (Cal. Ct. App. July 10, 2013) 16

Vardanyan v. AMCO Ins.,
243 Cal.App.4th 779 (2015) 16

California Superior Court

Best Rest Motel Inc v. Sequoia Ins.,
No. 37-2020-00015679, 2020 WL 7229856 (Cal. Super.
Sept. 20, 2020) 11

Boardwalk Ventures CA, LLC v. Century-Nat'l Ins.,
No. 20STCV27359, 2021 WL 1215892 (Cal. Super. Ct.
Mar. 18, 2021) 9, 11, 13

Goodwill Indus. of Orange Cty. v. Phila. Indem. Ins.,
No. 30-2020-01169032, 2021 WL 476268 (Cal. Super. Ct.
Jan. 28, 2021) 9, 11

Inns By the Sea v. Cal. Mut. Ins.,
No. 20CV001274, 2020 WL 5868739 (Cal. Super. Ct. Aug.
6, 2020), *appeal filed*, No. H048443 (Cal. Ct. App. 6th
Dist.) 9

*Musso & Frank Grill Co., Inc. v. Mitsui Sumitomo Ins. USA
Inc.*, No. 20STCV16681, 2020 WL 7346569 (Cal. Super.
Ct. Nov. 9, 2020) 9

*P.F. Chang's China Bistro, Inc. v. Certain Underwriters at
Lloyd's of London*,
No. 20STCV17169, 2021 WL 818659 (Cal. Super. Ct. Feb.
4, 2021) 11

Federal District Courts

French Laundry Partners, LP v. Hartford Fire Ins.,
No. 20-cv-04540, 2021 WL 1640994 (N.D. Cal. Apr. 27,
2021) 9

*Mark's Engine Co. No. 28 Rest., LLC v. Travelers Indem. Co.
of Conn.*,
492 F.Supp.3d 1051 (C.D. Cal. 2020), *appeal filed*, No. 20-
56031 (9th Cir. Oct. 6, 2020) 13

Mudpie, Inc. v. Travelers Cas. Ins.,
487 F.Supp.3d 834 (N.D. Cal. 2020), *appeal filed*, No. 20-16858 (9th Cir. Sept. 24, 2020) 10, 13

Out W. Rest. Grp. Inc. v. Affiliated FM Ins.,
No. 20-cv-06786, 2021 WL 1056627 (N.D. Cal. Mar. 19, 2021), *appeal filed*, No. 21-15585 (9th Cir. Apr. 1, 2021) 13

Susan Spath Hegedus, Inc. v. Ace Fire Underwriters Ins.,
No. 20-2832, 2021 WL 1837479 (E.D. Pa. May 7, 2021) 11, 12, 13

Water Sports Kauai, Inc. v. Fireman's Fund Ins.,
No. 20-cv-03750, 2020 WL 6562332 (N.D. Cal. Nov. 9, 2020), *appeal filed*, No. 21-15366 (9th Cir. Mar. 2, 2021) 10

STATUTES AND RULES

California Civil Code

§ 1641 12

California Code of Civil Procedure

§ 1858 12

California Rules of Court

Rule 8.548 .... 2, 2

Rule 8.548(a) .... *passim*

Rule 8.1115 16

OTHER AUTHORITIES

Christopher A. Goelz *et al.*, *Federal Ninth Circuit Civil Appellate Practice* ¶ 6:392 (Rutter April 2021) 5

https://cclt.law.upenn.edu/judicial-rulings/ 8

INTRODUCTION AND QUESTION PRESENTED FOR CERTIFICATION

As reflected in the Opening Brief of Plaintiff–Appellant Kevin Barry Fine Art Associates ("KBFA"), this appeal raises several substantive issues worthy of serious consideration by this Court. One of those issues cries out for certification to the California Supreme Court. That issue arises from the fact that many insurance policies, like KBFA's, require "direct physical loss" or "direct physical damage" to property to trigger coverage.

The question presented for certification to the California Supreme Court is: May such direct physical loss or direct physical damage encompass loss of the ability to access the property for its intended and insured purpose? At a minimum, is the provision ambiguous such that it must be read in favor of coverage?

The scope and meaning of such direct physical loss or direct physical damage provisions has become particularly salient following the Coronavirus pandemic and insurers' uniform denial of their policyholders' COVID-19 business-interruption claims. Since the pandemic, courts in California and across the country have split over the issue, and the California Supreme Court has not addressed it.

The resolution of this issue KBFA could determine the outcome of this appeal. The resolution of that issue could also affect hundreds or thousands of Californians who, like KBFA, carried business-interruption insurance policies and seek to rebuild after over a year of shelter-in-place orders occasioned by the Coronavirus pandemic.

Because the direct physical loss or damage issue presents an important and unresolved question of California state law, the resolution of which could affect a large segment of California policyholders, it should be resolved by the California Supreme Court on certification, as permitted by rule 8.548 of the California Rules of Court.

FACTUAL AND PROCEDURAL BACKGROUND

I. Factual Background

Plaintiff–Appellant Kevin Barry Fine Art Associates ("KBFA") operates art galleries in San Francisco, Los Angeles, and Las Vegas. (3-ER-513 ¶ 1, 515 ¶ 12, 301–12) KBFA purchased a business insurance policy ("Policy") from Defendant–Appellee Sentinel Insurance Co., d/b/a The Hartford ("Sentinel") that includes a "Limited Fungi, Bacteria or Virus Coverage" ("Virus Coverage" located in the "Virus Endorsement"). (3-ER-300, 336, 444–45, 514–15 ¶¶ 3, 14) The Policy also includes

Business Income, Civil Authority, Extra Expense, and "sue and labor" coverages. (3-ER-515 ¶ 15, 345–46 ¶¶ A.5.o-q, 355 ¶ E.3)

The Policy's general coverage clause provides that Sentinel "will pay for direct physical loss of or physical damage to Covered Property . . . caused by or resulting from a Covered Cause of Loss." (3-ER-336 ¶ A) "Covered Causes of Loss" are "risks of direct physical loss" unless excluded or otherwise limited by the Policy. (3-ER-337 ¶ A.3)

Similarly, while certain virus-related risks are excluded, KBFA's policy with Sentinel provided: "*We will pay for loss or damage by 'fungi', wet rot, dry rot, bacteria and virus.*" (3-ER-445 ¶ B.1.b) The Virus Endorsement defines "loss or damage" as, inter alia, "[d]irect physical loss or direct physical damage to Covered Property caused by 'fungi', wet rot, dry rot, bacteria or virus, including the cost of removal of the 'fungi', wet rot, dry rot, bacteria or virus[.]" (3-ER-445 ¶ B.1.b(1))

When the Coronavirus pandemic hit in early 2020, COVID-19 cases were reported in the immediate vicinity of KBFA's galleries, including, for example, hundreds of cases near its San Francisco gallery. (2-ER-82; *see* 3-ER-306, 519 ¶ 45) The state and local authorities issued shelter-in-place orders and orders to close

nonessential businesses like KBFA's galleries ("Closure Orders"), which prevented KBFA from operating its business. (3-ER-518–19 ¶¶ 31–41) As a result, KBFA lost business income and incurred extra expenses. (3-ER-520 ¶ 48; *see* 3-ER-345 ¶ A.5.o-p)

II. Procedural History

Sentinel denied KBFA's claim of loss under the Policy (3-ER-520 ¶¶ 49–50), and this lawsuit ensued. The district court granted Sentinel judgment on the pleadings, ruling that KBFA must show that the presence of the Coronavirus caused either a permanent dispossession or a demonstrable physical alteration to the property. (1-ER-2–14)

The district court did not reach the other questions presented—i.e., whether KBFA satisfied the remaining condition for Virus Coverage to apply, whether Sentinel's interpretation of the Virus Endorsement rendered the virus coverage illusory, and whether KBFA alternatively had coverage under the Policy's Business Interruption, Civil Authority, Extra Expense, and Sue and Labor provisions. (1-ER-3–14) This timely appeal ensued. (2-ER-16)

LEGAL STANDARD

Upon request from this Court, the California Supreme Court may decide a question of California law when "(1) [t]he decision could determine the outcome of a matter pending in the requesting court; and (2) [t]here is no controlling precedent." Cal. R. Ct. 8.548(a).

Whether to certify a question of law to a state court "'rests in the sound discretion'" of this Court. Christopher A. Goelz *et al.*, *Federal Ninth Circuit Civil Appellate Practice* ¶ 6:392 (Rutter April 2021) (citations omitted); *accord, e.g.*, *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist., No. 1*, 294 F.3d 1085, 1086 (9th Cir. 2002), *certified question answered*, 72 P.3d 151 (Wash. 2003).

California does not permit district courts to certify questions, so parties may seek certification for the first time in this Court. Rutter ¶ 6:395.1; *see* Cal. R. Ct. 8.548(a).

ARGUMENT

When a federal court is confronted with an important and unresolved issue of state law that may be determinative to an appeal, certifying the question to the state supreme court may "save time,

energy, and resources and helps build a cooperative judicial federalism." *Lehman Bros. v. Schein*, 416 U.S. 386, 391 (1974).

This Court has repeatedly recognized that certification is warranted in cases involving unresolved questions of California insurance law and with respect to issues "important to protections for California insureds." *Pitzer Coll. v. Indian Harbor Ins.*, 845 F.3d 993 (9th Cir. 2017), *certified question answered*, 8 Cal.5th 93 (2019); *see, e.g.*, *Allied Premier Ins. v. United Fin. Cas. Co.*, 991 F.3d 1070 (9th Cir. 2021) (certifying whether expired policy remained effective until insurer cancelled the corresponding certificate of insurance), *review granted*, No. S267746 (Cal. May 12, 2021); *Yahoo! Inc. v. Nat'l Union Fire Ins. of Pittsburgh*, 913 F.3d 923, 925 (9th Cir. 2019) (certifying question regarding insurer's duty to defend against a claim that the insured violated the Telephone Consumer Protection Act), *review granted*, No. S253593 (Cal. Mar. 27, 2019); *Liberty Surplus Ins. v. Ledesma & Meyer Constr. Co.*, 834 F.3d 998 (9th Cir. 2016) (certifying whether intentional conduct of contractor's employee precludes potential coverage for contractor), *certified question answered*, 5 Cal.5th 216 (2018) (ruling in favor of coverage); *Gradillas v. Lincoln Gen. Ins.*, 792 F.3d 1050 (9th

Cir. 2015) (certifying question regarding correct test to apply in determining whether an injury arose out of use of an automobile for purposes of insurance coverage and duty to defend), *review granted*, No. S227632 (Cal. Aug. 12, 2015), *review dismissed on other grounds* (June 15, 2016); *Minkler v. Safeco Ins.*, 561 F.3d 1033, 1035 (9th Cir. 2009) (certifying whether exclusion barring coverage for injuries arising from one insured's intentional tort also barred claims against co-insured who negligently failed to prevent the intentional acts of another), *certified question answered*, 49 Cal.4th 315 (2010) (ruling in favor of coverage); *Sentry Select Ins. v. Fid. & Guar.*, 455 F.3d 956 (9th Cir. 2006) (certifying question regarding appropriate test for determining whether an insured policy is excess to another commercial policy), *certified question answered*, 46 Cal.4th 204, 206–08 (2009) (ruling in the affirmative); *Vu v. Prudential Prop. & Cas. Ins.*, 172 F.3d 725 (9th Cir. 1999) (certifying question regarding equitable tolling in favor of policyholder who relied on insurer's misrepresentation regarding policy), *certified question answered*, 26 Cal.4th 1142 (2001) (ruling in favor of coverage).

For the reasons that follow, this is such a case.

I. The question presented is of acute public interest in the wake of the Coronavirus pandemic.

Policyholders across the country have filed thousands of business-interruption insurance claims, only to be met with stonewalling from their insurance companies who have across the board declined to honor or even investigate claims arising from the Coronavirus pandemic. (*See, e.g.*, 2-ER-92 [California Department of Insurance notice requiring insurers to abide by their obligations]; 3-ER-519–20 ¶ 46 [same])

Since the pandemic, courts across the country have split over whether government closure orders during the pandemic, and the presence or potential presence of Coronavirus, may satisfy the direct physical loss or direct physical damage requirements of many business-interruption policies.[1]

As of the time of this filing, among the hundreds of COVID-19 insurance cases pending in district courts in this Circuit, over fifty address this question under California law, including KBFA's case.[2]

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[1] *See* https://cclt.law.upenn.edu/judicial-rulings/ (collecting authorities); AOB Argument § I.B; *infra* Argument § II.

[2] As of May 13, 2021, a legal database Terms and Connectors search for "(coronavirus 'COVID-19') & (insurance insurer insured) & 'direct physical loss'" within the Ninth Circuit yielded 67 results, including 56

And while most of these cases are pending in federal court, many due to the insurers' removal based on diversity jurisdiction,[3] this question has also split California Superior Courts.[4] No definitive resolution of this issue in the appellate courts of California is in sight.[5]

Certification is particularly warranted here because the question presented—however it is resolved—will have a "dramatic impact on public policy in California as well as a direct impact on countless citizens of that state." *Kilby v. CVS Pharmacy, Inc.*, 739 F.3d 1192, 1196 (9th Cir. 2013), *certified question answered*, 63 Cal.4th 1 (2016).

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from California district courts. The same search without the term "direct physical loss" yielded 406 results within the Ninth Circuit.

[3] *See, e.g.*, *French Laundry Partners, LP v. Hartford Fire Ins. Co.*, No. 20-cv-04540, 2021 WL 1640994, at *1 (N.D. Cal. Apr. 27, 2021).

[4] *Compare, e.g.*, *Boardwalk Ventures CA, LLC v. Century-Nat'l Ins.*, No. 20STCV27359, 2021 WL 1215892, at *1 (Cal. Super. Ct. Mar. 18, 2021) (ruling in favor of policyholder), *and Goodwill Indus. of Orange Cty. v. Phila. Indem. Ins.*, No. 30-2020-01169032, 2021 WL 476268 (Cal. Super. Ct. Jan. 28, 2021) (same), *with Musso & Frank Grill Co., Inc. v. Mitsui Sumitomo Ins. USA Inc.*, No. 20STCV16681, 2020 WL 7346569, at *3 (Cal. Super. Ct. Nov. 9, 2020) (sustaining demurrer).

[5] *Cf. The Inns By the Sea v. Cal. Mut. Ins.*, No. 20CV001274, 2020 WL 5868739, at *1 (Cal. Super. Ct. Aug. 6, 2020) (sustaining demurrer), *appeal filed*, No. H048443 (Cal. Ct. App. 6th Dist.).

II. There is no controlling precedent as to the proper interpretation of the "direct physical loss" or "direct physical damage" provision common in insurance policies.

As Appellant's Opening Brief discusses, in theory, the question presented could be resolved by simply applying the California Supreme Court's well-established principles of insurance policy interpretation, including that the text of the policy generally controls, and ambiguous policies must be read in favor of coverage. (AOB Argument § I.B.1) *See Waller v. Truck Ins. Exch., Inc.*, 11 Cal.4th 1, 18 (1995); *TRB Invs., Inc. v. Fireman's Fund Ins.*, 40 Cal.4th 19, 27 (2006); *AIU Ins. v. Superior Ct.*, 51 Cal.3d 807, 823 (1990).

However, many courts facing COVID-19 business-interruption insurance claims—including the district court here—have forgone this text-based analysis and have concluded that the phrase "direct physical loss" or "direct physical damage" carries a specialized meaning that requires either a permanent dispossession or a distinct, demonstrable, physical alteration to the property.[6]

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[6] 1-ER-7–10; *see, e.g.*, *Water Sports Kauai, Inc. v. Fireman's Fund Ins.*, No. 20-cv-03750, 2020 WL 6562332 (N.D. Cal. Nov. 9, 2020), *appeal filed*, No. 21-15366 (9th Cir. Mar. 2, 2021); *Mudpie, Inc. v. Travelers*

By contrast, other courts have ruled that the provision is ambiguous and must be construed in favor of the policyholder and in favor of coverage. (AOB at 35–48) Multiple courts applying California law have reached this conclusion.[7] And out-of-state persuasive authorities considering similar policy provisions and applying the same interpretive principles have reached the same result. (AOB at 37–44)

This case requires the court to resolve the tension between competing lines of California authority. On the one hand, KBFA respectfully submits that its interpretation of the "direct physical loss" or "direct physical damage" provision is reasonable because it gives meaning to each term in the clause "direct physical loss" *or* "direct physical damage," and thereby avoids rendering the phrase "direct physical *loss*" surplusage, while a contrary reading would impermissibly

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Cas. Ins., 487 F.Supp.3d 834, 839 (N.D. Cal. 2020), *appeal filed*, No. 20-16858 (9th Cir. Sept. 24, 2020).

[7] *Boardwalk Ventures*, 2021 WL 1215892, at *4–6; *P.F. Chang's China Bistro, Inc. v. Certain Underwriters at Lloyd's of London*, No. 20STCV17169, 2021 WL 818659, at *7–9 (Cal. Super. Ct. Feb. 4, 2021); *Goodwill Indus.*, 2021 WL 476268, at *2–3; *Susan Spath Hegedus, Inc. v. Ace Fire Underwriters Ins.*, No. 20-2832, 2021 WL 1837479, at *2–3, *8–9 (E.D. Pa. May 7, 2021); *see also Best Rest Motel Inc v. Sequoia Ins.*, No. 37-2020-00015679, 2020 WL 7229856, at *1 (Cal. Super. Ct. Sept. 20, 2020).

write terms into the Policy that do not appear on its face. (AOB at 39–48, 57–59). If Sentinel wished to limit coverage to "total and complete" or "unrecoverable" physical loss, or physical damage that "permanently changed the condition of the property," it could have done so—yet it chose not to do so. (AOB Argument § I.B.1 & 58) *See* Cal. Civ. Code § 1641; Cal. Civ. Proc. Code § 1858; *Waller*, 11 Cal.4th at 18; *TRB Invs.*, 40 Cal.4th at 27; *AIU*, 51 Cal.3d at 823; *Safeco Ins. Co. of Am. v. Robert S.*, 26 Cal.4th 758, 763 (2001); *Aerojet-Gen. Corp. v. Transp. Indem.*, 17 Cal.4th 38, 75–76 (1997).

KBFA also relies on a well-established line of California authorities holding that a policyholder suffers direct physical loss or damage to covered property when the policyholder cannot access it for its intended and insured purpose. *See Hughes v. Potomac Ins. of D.C.*, 199 Cal.App.2d 239 (1962), *abrogated on other grounds as stated in Sabella v. Wisler*, 59 Cal.2d 21, 34 (1963); *Am. Alt. Ins. v. Superior Ct.*, 135 Cal.App.4th 1239, 1246 (2006); *Strickland v. Fed. Ins.*, 200 Cal.App.3d 792, 799 (1988); *see also Susan Spath Hegedus, Inc. v. Ace Fire Underwriters Ins.*, No. 20-2832, 2021 WL 1837479, at *2–3, *8–9 (E.D. Pa. May 7, 2021). (AOB at 40–42, 54)

On the other hand, several courts purporting to apply California law, including the district court here, have skipped over an examination of the text of the policy and whether it is ambiguous, and have instead concluded that the "direct physical loss" or "direct physical damage" provision has a specialized meaning not apparent on the face of the policy. (*See* 1-ER-7–9 [collecting authorities])

Most of those authorities have relied on a single California Court of Appeal opinion, *MRI Healthcare Ctr. of Glendale, Inc. v. State Farm Gen. Ins.*, 187 Cal.App.4th 766, 778–80 (2010), which held in the context of a personal business property insurance policy that the phrase "accidental direct physical loss to" requires a physical change in the property.[8] However, this issue has split courts, with many ruling that *MRI* does not apply to the unique circumstances presented here.[9]

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[8] *See, e.g.*, *Mark's Engine Co. No. 28 Rest., LLC v. Travelers Indem. Co. of Conn.*, 492 F.Supp.3d 1051, 1055 (C.D. Cal. 2020), *appeal filed*, No. 20-56031 (9th Cir. Oct. 6, 2020); *Out W. Rest. Grp. Inc. v. Affiliated FM Ins.*, No. 20-cv-06786, 2021 WL 1056627, at *4 (N.D. Cal. Mar. 19, 2021), *appeal filed*, No. 21-15585 (9th Cir. Apr. 1, 2021).

[9] *See Boardwalk Ventures*, 2021 WL 1215892, at *6; *Susan Spath*, 2021 WL 1837479, at *7–9; *see also Mudpie, Inc. v. Travelers Cas. Ins. Co. of Am.*, 487 F.Supp.3d 834, 839 (N.D. Cal. 2020) (distinguishing *MRI*), *appeal filed on other grounds*, No. 20-16858 (9th Cir. Sept. 24, 2020).

As set forth in Appellant's Opening Brief, *MRI* is distinguishable, among other reasons because (1) it addressed accidental loss to business *personal* property (*i.e.*, an MRI machine); (2) the *MRI* court failed to conduct a text-based analysis of the Policy and failed to consider whether the phrase "accidental direct physical loss to" business property was ambiguous; and (3) the *MRI* court's ruling, if applied to a business-interruption insurance policy in the context of a deadly viral pandemic, would be in tension with the California authorities recognizing that direct physical loss or damage provisions encompass policyholders' inability to access their business property for their intended and insured uses. *See Hughes*, 199 Cal.App.2d at 248–49; *Strickland*, 200 Cal.App.3d at 799; *Am. Alt. Ins.*, 135 Cal.App.4th at 1246. (AOB Argument § I.B.2)

In sum, there is evident tension between *Hughes*, 199 Cal.App.2d at 248–49, *Strickland*, 200 Cal.App.3d at 799, and *Am. Alt. Ins.*, 135 Cal.App.4th at 1246, on the one hand, and *MRI*, 187 Cal.App.4th at 778–80, on the other. And as noted, courts have split over whether *MRI* applies to COVID-19 business-interruption claims. (*Supra* nn. 8–9)

There is no controlling precedent on this issue. The California Supreme Court has not ruled whether it is proper to put a judicial gloss on the phrase “direct physical loss” or “direct physical damage” to covered property along the lines of *MRI* and what the district court held here. And it is doubtful that that Court would do so, given its precedents requiring the text of the policy to control, for coverage provisions to be read broadly in favor of coverage and exclusions and limitations to be read narrowly, and for ambiguous provisions to be read in favor of coverage. *See Waller*, 11 Cal.4th at 18; *TRB Invs.*, 40 Cal.4th at 27; *AIU*, 51 Cal.3d at 823. (AOB Argument § I.B)

Further, *MRI* is not controlling, either in this Court or in California appellate courts. *See In re K F Dairies*, 224 F.3d 922, 924–25 (9th Cir. 2000) (declining to apply California Court of Appeal opinions that conflicted with California Supreme Court precedent regarding the proper method of interpreting insurance contracts); *In re Marriage of Shaban*, 88 Cal.App.4th 398, 409 (2001) (explaining that there is no horizontal stare decisis in the California Court of Appeal (citing *Auto Equity Sales, Inc. v. Superior Ct.*, 57 Cal.2d 450, 455 (1962))).

Indeed, in the decade since *MRI Healthcare* issued, not a single published California appellate opinion has cited or followed *MRI*'s ruling that the phrase "accidental direct physical loss to" business property requires a change in the structure or composition of that property.[10]

And even where a California Court of Appeal case has been followed in unpublished California Court of Appeal opinions, this Court will not apply it—and may certify the question to the California Supreme Court—if there is good reason to believe that the California Supreme Court would decide the issue differently. *See, e.g.*, *Beeman v.*

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[10] *Cf. Vardanyan v. AMCO Ins.*, 243 Cal.App.4th 779, 796 (2015) (citing *MRI* regarding burden of proof); *Jackson v. AEG Live, LLC*, 233 Cal.App.4th 1156, 1172 (2015) (same, standard of review); *Reichert v. State Farm Gen. Ins.*, 212 Cal.App.4th 1543, 1547 (2012) (same, defining "accidental").

Two unpublished Court of Appeal opinions have followed *MRI Healthcare* with respect to its physical loss ruling, both in the context of personal property insurance policies. *See Valley Casework, Inc. v. Lexington Ins.*, No. D060837, 2013 WL 3470530, at *14 & n.7 (Cal. Ct. App. July 10, 2013); *Cavalier Sportswear, Inc. v. CastlePoint Nat'l Ins.*, No. B239695, 2013 WL 3960425, at *5 (Cal. Ct. App. July 31, 2013); *cf.* Cal. Rule of Court, rule 8.1115 (unpublished California Court of Appeal opinions are not precedent); *Beeman v. Anthem Prescription Mgmt., LLC*, 689 F.3d 1002, 1008–10 & n.2 (9th Cir. 2012) (unpublished California Court of Appeal opinions citable only for their existence).

Anthem Prescription Mgmt., LLC, 689 F.3d 1002, 1008–10 & n.2 (9th Cir. 2012) (certifying question to California Supreme Court despite existence of California Court of Appeal opinion that had been followed by two unpublished Court of Appeal cases), *certified question answered*, 58 Cal.4th 329 (2013) (disapproving the Court of Appeal opinions in question); *see also In re K F Dairies*, 224 F.3d at 925 (declining to apply two Court of Appeal opinions that apparently conflicted with California Supreme Court precedent, even in the absence of contrary on-point Court of Appeal authority).

In sum, "[t]here is no controlling precedent" on the question presented. Cal. R. of Ct. 8.548(a).

III. A decision on the question presented could determine the outcome of this appeal.

The Policy's "direct physical loss" or "direct physical damage" requirement applies to each of the coverages that KBFA invokes in its case against Sentinel: Virus Coverage (3-ER-336 ¶ A; *see* 3-ER-445 ¶ B.1.b); and the Business Income, Civil Authority, Extra Expense, and "sue and labor" coverages (3-ER-336 ¶ A; *see* 3-ER-515 ¶ 15, 345–46 ¶¶ A.5.o-q, 355 ¶ 3).

Here, the district court granted Sentinel's motion for judgment on the pleadings, determining that its ruling regarding the "direct physical loss" or "direct physical damage" requirement applied to each of the coverage provisions that KBFA invoked. (1-ER-3–14) Because the district court's ruling regarding the "direct physical loss" or direct physical damage issue was determinative of each coverage provision (1-ER-3–14), the district court did not reach the other questions presented—*i.e.*, whether KBFA satisfied the remaining condition for Virus Coverage to apply (AOB Argument § I.C), whether Sentinel's interpretation rendered the Virus Coverage illusory (AOB Argument § I.D), and whether KBFA alternatively had coverage under the Policy's Business Interruption, Civil Authority, Extra Expense, and "sue and labor" provisions (AOB Argument §§ II.A–D).

Because the "direct physical loss" or "direct physical damage" provision is a requirement for each of the coverages that KBFA invokes, the California Supreme Court's resolution of the question presented "could determine the outcome" of this appeal. Cal. R. of Ct. 8.548(a).

Sentinel may point out that if the California Supreme Court rules in KBFA's favor on this issue, other issues regarding the remaining

coverage provisions may still need to be adjudicated. However, the question presented nevertheless "could determine" the outcome of this case. *Id.* When the California Supreme Court answers certified questions of law in favor of policyholders, such rulings generally mean that the policyholders may proceed with their claims against the insurance company, including litigating any further disputed questions of law between the parties. *See, e.g.*, *Pitzer Coll. v. Indian Harbor Ins.*, 779 F.App'x 495, 496 (9th Cir. 2019) (following the California Supreme Court's answer of certified question, remanding to the district court for further proceedings with respect to the remaining issues not yet resolved and left open by the California Supreme Court's ruling); *Liberty Surplus Ins. Corp. v. Ledesma & Meyer Constr. Co.*, 752 F.App'x 412, 415 (9th Cir. 2018) (same); *Minkler v. Safeco Ins.*, 399 F.App'x 230, 231 (9th Cir. 2010) (same); *Sentry Select Ins. v. Fid. & Guar. Ins.*, 326 F.App'x 997, 999 (9th Cir. 2009) (same); *Vu v. Prudential Prop. & Cas. Ins.*, 291 F.3d 603, 606 (9th Cir. 2002) (same).

Yet the possibility of further litigation in the same case is not a bar to this Court requesting answers to, and the California Supreme Court answering, such questions. *See, e.g.*, *Pitzer*, 779 F.App'x 495;

Pitzer, 8 Cal.5th 93; *Liberty Surplus*, 834 F.3d 998; *Liberty Surplus*, 5 Cal.5th 216; *Minkler*, 561 F.3d 1033; *Minkler*, 49 Cal.4th 315; *Sentry Select*, 455 F.3d 956; *Sentry Select*, 46 Cal.4th 204; *Vu*, 172 F.3d 725; *Vu*, 26 Cal.4th 1142. Hence, the phrasing of the rule permitting certification of questions of law that "*could* determine the outcome" of this appeal, Cal. R. of Ct. 8.548(a) (emphasis added), not that "*necessarily will* determine" its outcome.

This requirement for certifying the question is satisfied.

CONCLUSION

The question presented could determine the outcome of this appeal, there is no controlling California precedent on this issue, and the issue is of acute public interest in the wake of the Coronavirus pandemic and insurers' uniform denial of COVID-19-related business-interruption insurance claims. KBFA respectfully requests that this Court certify the question presented to the California Supreme Court.

Dated: May 26, 2021 **HANSON BRIDGETT LLP**

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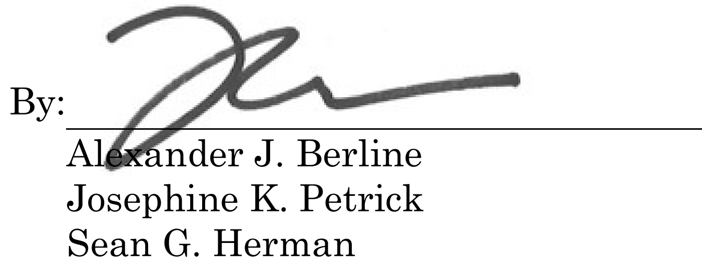
CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32 (a)(7)(C) and Ninth Circuit Rule 32-1, I certify that the foregoing Request is proportionally spaced, has a typeface of 14 points, contains 3,954 (i.e., 5,200 or fewer) words, and contains not more than 20 pages, excluding the documents listed in Federal Rules of Appellate Procedure 27(a)(2)(b) and 32(f).

DATED: May 26, 2021

HANSON BRIDGETT LLP

By: 

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CERTIFICATE OF SERVICE

In accordance with Federal Rule of Appellate Procedure 25, I hereby certify that I electronically filed this Request with the Clerk of Court for the U.S. Court of Appeals for the Ninth Circuit by using the CM/ECF system on May 26, 2021. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

DATED: May 26, 2021

HANSON BRIDGETT LLP

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