No. 21-1268

In the United States Court of Appeals For the Fourth Circuit

Skillets, LLC d/b/a Skillets Restaurant; Good Breakfast, LLC d/b/a Skillets Restaurant; and Skillet Holdings, LLC,

Plaintiff-Appellants,

v.

Colony Insurance Company,

Defendant-Appellee.

Appeal from the United States District Court
for the Eastern District of Virginia, Richmond Division
The Honorable Henry E. Hudson, Judge Presiding.

BRIEF OF PLAINTIFF-APPELLANTS SKILLETS, LLC, GOOD BREAKFAST, LLC, AND SKILLETS HOLDINGS, LLC

LISA SARAH BROOK
EDWARD KYLE MCNEW
MICHIEHAMLETT PLLC
310 4th Street NE
Charlottesville, Virginia 22902
(434) 951-7200

TIMOTHY W. BURNS
BRIAN P. CAWLEY
BURNS BOWEN BAIR LLP
One South Pinckney Street, Suite 930
Madison, Wisconsin 53703
(608) 286-2302

ADAM J. LEVITT
KENNETH ABBARNO
DICELLO LEVITT GUTZLER LLC
10 North Dearborn Street, Sixth Floor
Chicago, Illinois 60602
(312) 214-7900

W. MARK LANIER
THE LANIER LAW FIRM, P.C.
10940 West Sam Houston Pkwy. N.,
Suite 100
Houston, Texas
(713) 659-5200

Attorneys for Plaintiff-Appellants
Skillets, LLC at al.

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

DISCLOSURE STATEMENT

- In civil, agency, bankruptcy, and mandamus cases, a disclosure statement must be filed by **all** parties, with the following exceptions: (1) the United States is not required to file a disclosure statement; (2) an indigent party is not required to file a disclosure statement; and (3) a state or local government is not required to file a disclosure statement in pro se cases. (All parties to the action in the district court are considered parties to a mandamus case.)
- In criminal and post-conviction cases, a corporate defendant must file a disclosure statement.
- In criminal cases, the United States must file a disclosure statement if there was an organizational victim of the alleged criminal activity. (See question 7.)
- Any corporate amicus curiae must file a disclosure statement.
- Counsel has a continuing duty to update the disclosure statement.

No. 21-1268 Caption: Skillets, LLC, et al. v. Colony Insurance Company

Pursuant to FRAP 26.1 and Local Rule 26.1,

Skillets, LLC d/b/a Skillets Restaurant
(name of party/amicus)

who is appellant, makes the following disclosure:
(appellant/appellee/petitioner/respondent/amicus/intervenor)

1. Is party/amicus a publicly held corporation or other publicly held entity? ☐ YES ☑ NO

2. Does party/amicus have any parent corporations? ☐ YES ☑ NO
If yes, identify all parent corporations, including all generations of parent corporations:

3. Is 10% or more of the stock of a party/amicus owned by a publicly held corporation or other publicly held entity? ☐ YES ☑ NO
If yes, identify all such owners:

4. Is there any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation? ☐YES ☑NO
If yes, identify entity and nature of interest:

5. Is party a trade association? (amici curiae do not complete this question) ☐YES ☑NO
If yes, identify any publicly held member whose stock or equity value could be affected substantially by the outcome of the proceeding or whose claims the trade association is pursuing in a representative capacity, or state that there is no such member:

6. Does this case arise out of a bankruptcy proceeding? ☐YES ☑NO
If yes, the debtor, the trustee, or the appellant (if neither the debtor nor the trustee is a party) must list (1) the members of any creditors' committee, (2) each debtor (if not in the caption), and (3) if a debtor is a corporation, the parent corporation and any publicly held corporation that owns 10% or more of the stock of the debtor.

7. Is this a criminal case in which there was an organizational victim? ☐YES ☑NO
If yes, the United States, absent good cause shown, must list (1) each organizational victim of the criminal activity and (2) if an organizational victim is a corporation, the parent corporation and any publicly held corporation that owns 10% or more of the stock of victim, to the extent that information can be obtained through due diligence.

Signature: /s/ Adam J. Levitt Date: 3/19/2021

Counsel for: Skillets, LLC

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UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

DISCLOSURE STATEMENT

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- Counsel has a continuing duty to update the disclosure statement.

No. 21-1268 Caption: Skillets, LLC, et al. v. Colony Insurance Company

Pursuant to FRAP 26.1 and Local Rule 26.1,

Good Breakfast, LLC d/b/a Skillets Restaurant
(name of party/amicus)

who is appellant, makes the following disclosure:
(appellant/appellee/petitioner/respondent/amicus/intervenor)

1. Is party/amicus a publicly held corporation or other publicly held entity? ☐ YES ☑ NO

2. Does party/amicus have any parent corporations? ☐ YES ☑ NO
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Signature: Adam J. Levitt Date: 3/19/2021

Counsel for: Good Breakfast, LLC

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UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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No. 21-1268 Caption: Skillets, LLC, et al. v. Colony Insurance Company

Pursuant to FRAP 26.1 and Local Rule 26.1,

Skillets Holdings, LLC
(name of party/amicus)

who is appellant, makes the following disclosure:
(appellant/appellee/petitioner/respondent/amicus/intervenor)

1. Is party/amicus a publicly held corporation or other publicly held entity? ☐ YES ☑ NO

2. Does party/amicus have any parent corporations? ☐ YES ☑ NO
If yes, identify all parent corporations, including all generations of parent corporations:

3. Is 10% or more of the stock of a party/amicus owned by a publicly held corporation or other publicly held entity? ☐ YES ☑ NO
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If yes, the United States, absent good cause shown, must list (1) each organizational victim of the criminal activity and (2) if an organizational victim is a corporation, the parent corporation and any publicly held corporation that owns 10% or more of the stock of victim, to the extent that information can be obtained through due diligence.

Signature: /s/ Adam J. Levitt Date: 3/19/2021

Counsel for: Skillets Holdings, LLC

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

TABLE OF AUTHORITIES
(continued)

Page(s)

Cases

TABLE OF AUTHORITIES
(continued)

Page(s)

Cases

TABLE OF AUTHORITIES
(continued)

Page(s)

Cases

TABLE OF AUTHORITIES
(continued)

Page(s)

Cases

Statutes

Other Authorities

JURISDICTIONAL STATEMENT

On November 13, 2020, Plaintiff-Appellants Skillets, LLC, Good Breakfast, LLC, and Skillets Holdings, LLC ("Plaintiffs" or "Skillets") filed their Second Amended Class Action Complaint ("Amended Complaint")[1] against Defendant-Appellee Colony Insurance Company ("Defendant" or "Colony"). Defendant moved to dismiss under Federal Rule of Civil Procedure 12(b)(6) (the "Motion to Dismiss").[2] The United States District Court for the Eastern District of Virginia had subject-matter diversity jurisdiction over the case under 28 U.S.C. § 1332(d)(2). The Skillets Plaintiffs are limited liability companies with their principal place of business in Bonita Springs, Florida. Defendant Colony is a corporation organized under the laws of the State of Virginia with its principal place of business in Richmond, Virginia. Additionally, the Class consists of at least 100 members, the amount in controversy exceeds $5 million, exclusive of interest and costs, and no relevant exceptions apply to this action.

On March 10, 2021, the district court granted the Motion to Dismiss without leave to amend.[3] That same day, Skillets filed a timely notice of appeal under Federal Rules of Appellate Procedure 3(a) and 4(a)(1)(A).[4] This Court has

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[1] App. A8–A45 [hereinafter "Am. Compl."].

[2] App. A174–A175.

[3] App. A240, Order; App. A222–A239, *Skillets, LLC et al. v. Colony Insurance Company*, No. 3:20-cv-678-HEH, 2021 WL 926211, at *7 (E.D. Va. Mar. 10, 2021) [hereinafter "Memo. Opinion"].

[4] App. A241–A244.

jurisdiction under 28 U.S.C. § 1291 and 28 U.S.C. § 1294 because the appeal is from a final order or judgment that disposes of all of Skillets' claims.

STATEMENT OF THE ISSUES

1. Like thousands of businesses across the country, Skillets insured against business income losses resulting from "direct physical loss or damage" to its property. Skillets has alleged that COVID-19 and the resulting civil closure orders diminished the functional space of its properties, nine Skillets restaurant locations in Southwest Florida ("Skillets Restaurants"), by preventing them from using spaces in their restaurants for several months. Did the District Court err by interpreting "direct physical loss of or damage to" as requiring structural alteration to property, rather than the diminishment and loss of use or functional space?

2. Skillets also has alleged that COVID-19 infested its property and structurally altered property surfaces and ambient air, making those surfaces and ambient air unsafe and harmful to human health. Even if the District Court properly interpreted the term "direct physical loss of or damage to" as applying only to property that is structurally altered, did the District Court err and impermissibly invade the province of the jury—in granting the Motion to Dismiss—by ignoring those allegations and determining that COVID-19 does not structurally alter property surfaces and ambient air?

STATEMENT OF THE CASE

Skillets alleges facts in the Amended Complaint describing its business and the impact of COVID-19 on its property—the Skillets Restaurants. Although not

apparent from the short summary of those allegations in the District Court's Memorandum Opinion and Order, as set forth below, the Amended Complaint alleges the presence of COVID-19 at the Skillets Restaurants, the structural alteration to the Restaurants' property's surfaces and ambient air caused by COVID-19, and the loss and diminishment of the functional space of the Restaurants caused by COVID-19.

A. The Skillets Restaurants

The Skillets Restaurants are a locally and family-owned chain of casual breakfast, brunch, and lunch restaurants in Southwest Florida, proudly established by the husband-and-wife team of Ross and Noreen Edlund in 1995. Since its founding, Skillets' mission has been to create delicious, diverse, and nutritious meals for each guest every day. To that end, Skillets uses premium, high-end ingredients, such as thick-cut Smokehouse bacon, house-roasted corned beef hash, fresh-squeezed Kennesaw citrus, carefully selected seasonal berries, private label Guatemalan coffee beans, PG Tips imported English tea, locally sourced dairy products from the Daikin family-operated dairy, and the highest quality steel-cut oats and grits. And, given co-owner Ross Edlund's experience as a baker, Skillets' breads, scones, and biscuits are all house-baked using his very own recipes; their pancake and waffle batters are also Ross's creations and are always made from scratch. Further setting Skillets apart is their excellent service, which exudes a

passion to please. In fact, many of their 319 employees have worked with Skillets for 20 years.[5]

Once able to freely welcome guests and provide them with a delicious, quaint, and wholesome dining experience, because of COVID-19, Skillets has drastically reduced its business operations. The functional spaces in the Skillets Restaurants have been structurally altered and diminished by the threat, spread, and/or presence of COVID-19. Skillets has thus been forced to make other significant structural alterations, changes, and repairs to its property, including the use of traffic barriers, signs, and table tents, in addition to the implementation of advanced sterilization and other protective measures. Employees and restaurant guests must wear masks, remain six feet apart, and follow other social distancing measures. To do anything else would materially increase the likelihood of the persistence or reemergence of COVID-19 at the Skillets Restaurants. Until COVID-19 was brought slightly under control, even such limited use as this was not possible.[6]

B. The Colony Property Insurance Policy

For the policy period December 28, 2019, through December 28, 2020, Colony issued Policy No. 101 CP 0113119-01 to Skillets (the "Colony Policy" or the "Policy"),[7] including Specialty Property Coverage through a Business Income (and

[5] *See* App. A8–9, Am. Compl. ¶ 1.

[6] App. A10–A11, Am. Compl. ¶¶ 9–13.

[7] App. A46–A173 [hereinafter "Policy"].

Extra Expense) Policy, as set forth in Colony's Business Income (and Extra Expense) Form ("Business Income Form").[8]

1. The Policy contains multiple coverages that apply to Skillets' losses.

Colony's Business Income Form provides coverage under an array of circumstances, including: (1) "Business Income" coverage, which promises to pay for loss due to the necessary suspension of Skillets' operations following loss of or damage to property up to the time that business operations are resumed; (2) "Civil Authority" coverage, which promises to pay for actual loss of Business Income and necessary Extra Expense caused by the action of a civil authority that prohibits access to the described premises; (3) "Extended Business Income" coverage for additional loss of Business Income sustained after business operations are resumed and until the earlier of either (a) business income returns to the previous level had no physical loss or damage occurred, or (b) thirty days; and (4) "Extra Expense" coverage, which promises to pay the expense incurred to minimize the suspension of business and to continue operations.[9] Colony's Business Income Form also includes a section entitled "Duties in the Event of Loss or Damage," which mandates that Colony's insured "must see that the following is done in the event of loss or damage to Covered Property": "Take all reasonable steps to protect the Covered Property from further damage, and keep a record of your expenses necessary to protect the

[8] App. A79–A87, Policy Form CP 00 30 06 07, Business Income (and Extra Expense) Coverage Form [hereinafter "Business Income Form"].

[9] App. A79–A80, Policy, Business Income Form §§ A(1), (2), (5)(a), (c).

Covered Property, for consideration in the settlement of the claim."[10] This type of coverage has historically been known as "sue and labor" coverage or a "sue and labor" provision, and property policies have long provided coverage for these types of expenses.

2. The Policy contains no exclusions or limitations that bar coverage.

The Policy is an "all-risk" property damage policy, which covers all risks of loss except those expressly and specifically excluded. Pursuant to the Policy, Colony agreed to cover and pay for all "direct physical loss" unless the loss is "[e]xcluded" or "[l]imited."[11]

Although the Policy expressly excludes coverage for a myriad of causes—e.g., "Pollution," "Asbestos," "Benzene," "Lead," Silica or Silica-Related Dust"—the Policy does not contain an exclusion barring coverage for the loss and damage suffered by Skillets as a result of COVID-19 and the Closure Orders. Notably absent from the Policy is a "virus exclusion," or an exclusion for losses caused by the spread of viruses or communicable diseases, despite such exclusions becoming increasingly common in policies that provide business interruption insurance.[12]

3. The Policy applies to direct physical loss of or damage to insured property.

The Business Income Form of the Policy provides coverage for "actual loss of Business Income" due to "the necessary 'suspension' of [Skillets'] 'operations' during

[10] App. A83, Policy, Business Income Form § C(2).

[11] App. A90, Policy, Causes of Loss – Special Form § A.

[12] App. A10, Am. Compl. ¶ 8.

the 'period of restoration,'" where the "suspension" of the insured's operations is caused by "direct physical loss of or damage to property" at the insured premises.[13] The Policy defines "suspension" as "[t]he slowdown or cessation of [Skillets'] business activities," and "Operations" means Skillets' "business activities occurring at the described premises."[14] The "period of restoration" begins either (1) 72 hours after the direct physical loss or damage (for Business Income Coverage), or (2) immediately after the direct physical loss or damage (for Extra Expense Coverage), and ends on the earlier of (1) the date the premises should be "repaired, rebuilt or replaced with reasonable speed and similar quality," or (2) "the date when the business is resumed at a new permanent location."[15]

In the Policy, Colony also agreed to pay necessary Extra Expense that its insureds incur during the "period of restoration" that the insureds would not have incurred if there had been no direct physical loss of or damage to the described premises.[16] "Extra Expense means necessary expenses [its insureds] incur during the period of restoration that [they] would not have incurred if there had been no direct physical loss or damage to property caused by or resulting from a Covered Cause of Loss."[17]

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[13] App. A79, Policy, Business Income Form § A(1).

[14] App. A87, Policy, Business Income Form §§ F(2), (6).

[15] App. A87, Policy, Business Income Form § F(3).

[16] App. A79, Policy, Business Income Form § A(2).

[17] App. A79, Policy, Business Income Form § A(2).

Colony's Business Income Form also provides "Extended Business Income" coverage for additional loss of Business Income sustained after business operations are resumed and until the earlier of either (a) business income returns to the previous level had no physical loss or damage occurred, or (b) thirty days.[18]

C. Skillets Has Suffered Direct Physical Loss or Damage Caused by COVID-19 and Civil Closure Orders

According to the CDC, "COVID-19 is caused by a coronavirus called SARS-CoV-2. Coronaviruses are a large family of viruses that are common in people and [many] different species of animals, including camels, cattle, cats, and bats. Rarely, animal coronaviruses can infect people and then spread between people."[19] "The virus that causes COVID-19 is thought to spread mainly from person to person, and mainly through respiratory droplets produced when an infected person coughs or sneezes. These droplets can land in the mouths or noses of people who are nearby or possibly be inhaled into the lungs. Spread is more likely when people are in close contact with one another (within about six feet)."[20]

"It may be possible that a person can get COVID-19 by touching a surface or object that has the virus on it and then touching their own mouth, nose, or possibly their eyes."[21] A scientific study investigating the stability of COVID-19 in different

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[18] App. A81, Policy, Business Income Form § A(5)(c).

[19] App. A20, Am. Compl. ¶ 41 (citing *Coronavirus Disease 2019 Basic*, CDC, https://www.cdc.gov/coronavirus/2019-ncov/faq.html#Coronavirus-Disease-2019-Basics (last visited June 10, 2021)).

[20] *Id.*

[21] App. A20–A21, Am. Compl. ¶ 42 (citing *How COVID Spreads*, CDC, https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/how-covid-spreads.html) (last visited June 10, 2021)).

environmental conditions found that, following COVID-19 infestation, the virus could be detected hours later for tissues and paper, days later for wood, cloth, and glass, or even a week later for stainless steel and plastic.[22] In fact, a study published by the *New England Journal of Medicine* notes that COVID-19 can remain in the air for up to three hours, and can remain on surfaces for varying periods of time:

- On copper: Up to 4 hours;
- On cardboard: Up to 24 hours;
- On plastic: 2 to 3 days; and
- On stainless steel: 2 to 3 days.[23]

Accordingly, Skillets pled that: "The threat and presence of COVID-19 caused 'direct physical loss of or damage to' each 'Covered Property' under the Plaintiffs' and Class Members' policies, by: (i) impairing the function of, infesting, causing loss and damaging the Covered Property; (ii) denying use of and damaging the Covered Property; (iii) structurally altering the air, surface, and the character of the Covered Property and thus requiring physical repair and/or alterations to the Covered Property; and/or (iv) causing necessary suspension of operations during a period of restoration."[24]

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[22] App. A20–A21, Am. Compl. ¶ 42 (citing Alex W.H. Chin, et al., *Stability of SARS-CoV-2 in different environmental conditions*, The Lancet Microbe (April 2, 2020), https://doi.org/10.1016/S2666-5247(20)30003-3.

[23] Zurich, *RiskTopics: Cleaning and disinfecting plans during COVID-19 outbreak* (May 2020), https://www.zurichna.com/-/media/project/zwp/zna/docs/riskeng/covid/zurich-risk-topic-cleaning-and-disinfecting-during-covid-19-outbreak.pdf (citing van Doremalen et al., *Aerosol and Surface Stability of SARS-CoV-2 as Compared with SARS-CoV-1*, 382 N. England J. Med. 1564 (Apr. 16, 2020), available at https://www.nejm.org/doi/full/10.1056/NEJMc2004973).

[24] App. A22, Am. Compl. ¶ 52.

Because of the spread or presence of COVID-19, the air in the Skillets Restaurants has become unsafe.[25] In addition, the functional space in the Restaurants has been diminished by the spread or presence of COVID-19. For example, the dining rooms lost their normal functionality, and the space could not be used for dine-in customers for over a month and could only be used in a severely limited manner in subsequent weeks.[26]

Skillets took significant steps to repair the physical loss or damage, including the harm to the air inside covered property and the infestation on the surface of covered property caused by COVID-19. These measures included installing traffic barriers, signs, and table tents, implementing advanced sterilization and other protective measures, and restructuring the dining rooms to promote social distancing and curb the threat of infection.[27] Thus, because the spread and presence of COVID-19 altered the structure of the air, the physical space, and property surfaces, there have been many obvious structural alterations, changes and/or repairs made to Skillets Restaurants.[28] These alterations were necessary for Skillets to continue its business after experiencing direct property damage which was caused by COVID-19 and to mitigate the threat of further property damage.[29]

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[25] App. A11–A12, A22, Am. Compl. ¶¶ 15, 52.

[26] App. A11, Am. Compl. ¶¶ 12–13.

[27] App. A11, A22, Am. Compl. ¶¶ 13, 54.

[28] App. A11, A22–A23, Am. Compl. ¶¶ 13, 52, 54–55.

[29] App. A22, Am. Compl. ¶¶ 52, 54.

SUMMARY OF THE ARGUMENT

This is an insurance coverage case—one of more than 1,500 such cases filed in courts around the country seeking recovery under property insurance policies for business interruption losses caused by COVID-19 and the resulting civil closure orders. Like most of the other COVID-19 insurance lawsuits, this case and the District Court's decision hinge on six or seven words that trigger most of the insurance coverage available under the voluminous policy: "direct physical loss of or damage to." Although the words are ordinary, the impact of this Court's appellate decision on the meaning of those words will be extraordinary.

Here, Skillets' insurer, Defendant-Appellee Colony, like countless insurers across the country, has manufactured reasons to deny coverage for Skillets' devastating losses. Colony has argued for—and the District Court agreed with—an interpretation of key language in the Policy that does not comport with the plain meaning of that language. By finding that the phrase "direct physical loss of or damage to property" requires "structural alteration" in order to trigger coverage, the District Court imposed a requirement for coverage that is not derived from the language of the Policy itself.[30]

Not only is "structural alteration" a requirement that is definitively *not* in the Policy, but Colony and other insurers have known—since at least the early 1960s—that many courts do not agree that "direct physical loss of or damage to property" requires structural alteration. Indeed, as far back as 1962, the California Court of

[30] App. A238, Memo. Opinion at 17.

Appeals rejected an insurer's argument that structural alteration was the *sine qua non* of physical damage under property insurance policies.[31] It is common knowledge that insurers avidly follow court decisions and change their policy language to avoid outcomes that insurers want to avoid.[32] Here, however, the insurance industry has left this language substantively unchanged for decades, even though insurers, including Colony, easily could have changed the term "direct physical loss or damage" to "structural alteration." They did not do so.

Similarly, insurers have known for almost two decades that viruses and diseases, including coronaviruses, infest property and stick to their surfaces and lead to claims of business interruption losses.[33] Through the insurance industry's drafting arm, Insurance Services Offices, Inc. ("ISO"), insurers communicated that concern to regulators when preparing a so-called "virus" exclusion to be placed in some insurance policies, but not others:

> Disease-causing agents may render a product impure (change its quality or substance), or enable the spread of disease by their presence on interior building surfaces or the surfaces of personal property. When disease-causing viral or bacterial contamination occurs, potential claims involve the cost of replacement of property (for example, the milk), cost of decontamination (for example, interior building surfaces), and business interruption (time element) losses. Although building and personal property could arguably become contaminated (often temporarily) by such viruses and bacteria, the nature of the property itself would have a bearing on whether there is actual property damage.

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[31] *Hughes v. Potomac Ins. Co.*, 18 Cal. Rptr. 650, 655 (Cal. App. 1962).

[32] *E.g.*, *Queen City Farms, Inc. v. Cent. Nat. Ins. Co. of Omaha*, 827 P.2d 1024, 1036 (Wash. Ct. App. 1992), *aff'd* 882 P.2d 703 (Wash. 1994).

[33] *See* Gavin Souter, *Hotel chain to get payout for SARS-related losses, Business Insurance* (Nov. 2, 2003), https://www.businessinsurance.com/article/20031102/story/100013638/hotel-chain-to-get-payout-for-sars-related-losses.

> An allegation of property damage may be a point of disagreement in a particular case.[34]

To address that concern, Colony easily could have changed "direct physical loss or damage" to "structural alteration." Again, it did not do so.

Even under the District Court's restrictive interpretation of the Policy, however, Skillets should prevail. Skillets has alleged the presence of the virus and structural alteration of the ambient air and property surfaces at the Skillets Restaurants.[35] The District Court's real complaint is not that Skillets has failed to plead structural alteration, but rather that it does not think COVID-19 causes such structural alteration. But, under the Federal Rules of Civil Procedure, the District Court is constrained from deciding well-pled and disputed factual issues on a motion for summary judgment, let alone on a motion to dismiss. Ultimately, under our legal system, those issues are decided by a jury. Here, the District Court's invasion of the jury's province, standing alone, mandates reversal.

ARGUMENT

A. Standard of Review

This Court reviews "de novo a district court's ruling on a motion to dismiss for failure to state a claim" and construes "all facts in the light most favorable to the plaintiff."[36] To state a cognizable claim under federal notice pleading, the plaintiff is required to provide a "short and plain statement of the claim showing that the

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[34] App. A16, Am. Compl. ¶ 32.

[35] App. A10–A12, A22–A23, Am. Compl. ¶¶ 11, 15, 52–52, 55.

[36] *Buscemi v. Bell*, 964 F.3d 252, 262 (4th Cir. 2020).

pleader is entitled to relief."[37] When considering a motion to dismiss, the district court should "assume as true all its well-pleaded facts and draw all reasonable inferences in favor of the plaintiff.[38] The purpose of a Rule 12(b)(6) motion is to "test the sufficiency of a complaint," not to "resolve contests surrounding the facts, the merits of a claim or the applicability of defenses."[39] Moreover, a lower court's interpretation of an insurance policy is question of law, subject to de novo review.[40]

B. Rules of Insurance Policy Interpretation

As Professor Farnsworth pointed out in his landmark treatise on Contract Law, "[m]ost of what we usually think of as 'contract law' consists of a legal framework within which parties may create their own rights and duties by agreement."[41] And, "society confers upon contracting parties wide power to shape their relationship. In this country more than in most, parties tend to take advantage of their power to define their relationships by written agreements that are detailed and prolix."[42] The various state laws provide the framework for the relationship, governing, for example, what constitutes offer and acceptance in forming the contract or what type of mistake can avoid the contract, but these framework issues will not be litigated in this case. Insurance coverage cases hinge

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[37] Fed. R. Civ. P. 8(a)(2).

[38] *Nanni v. Aberdeen Marketplace, Inc.*, 878 F.3d 447, 452 (4th Cir. 2017).

[39] *King v. Rubenstein*, 825 F.3d 206, 214 (4th Cir. 2016).

[40] *Penzer v. Transportation Ins. Co.*, 29 So. 3d 1000, 1005 (Fla. 2010).

[41] 2 E. Allan Farnsworth, *Farnsworth on Contracts* 218 (3d ed. 2004).

[42] *Id.*

on what the insurance policy says.[43]

Of course, rules of interpretation are rules of law, but neither party broached a conflict between Florida rules of insurance policy interpretation and the rules of Virginia or any other state with a substantial interest in this matter, so the District Court looked to Florida law for the rule of decision.[44] In diversity cases, district courts apply the choice of law rules of the state in which they sit,[45] and under Virginia law, the state where an insurance policy is written and delivered—here, Florida—controls issues as to its coverage.[46]

"Florida law provides that insurance contracts are construed in accordance with the plain language of the policies as bargained for by the parties."[47] To this end, the interpreting court first examines the terms and conditions of a policy, using the plain meaning of any undefined terms. Courts use a variety of sources to ascertain plain meaning, including dictionaries, case law, statutes, and other

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[43] *See Taurus Holdings, Inc. v. U.S. Fidelity and Guar. Co.*, 913 So. 2d 528, 537 (Fla. 2005) ("[T]he language of the policy is the most important factor.").

[44] Given the similarities between Virginia and Florida insurance policy interpretation laws, *see infra* footnotes 47–52, it is equally appropriate to apply the law of Virginia in this matter. *See, e.g.*, *X-It Products, LLC v. Walter Kidde Portable Equipment, Inc.*, 227 F. Supp. 2d 494, 524–25 (E.D. Va. 2002) (declining to engage in conflict of laws analysis for issues where "the results are the same" under either jurisdiction's law); *Equitable Trust Co. v. Bratwursthaus Mgmt. Corp.*, 514 F.2d 565, 568–69 (4th Cir. 1975) (applying both Virginia and Maryland law in finding that "[t]he application of the same rules of interpretation in Virginia which are applicable in Maryland would not cause us to reach a different result").

[45] *Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487, 496 (1941).

[46] *Resource Bankshares Corp. v. St. Paul Mercury Ins. Co.*, 407 F.3d 631, 635–36 (4th Cir. 2005).

[47] *Auto-Owners Ins. Co. v. Anderson*, 756 So. 2d 29, 34 (Fla. 2000); *see also Erie Ins. Exch. v. EPC MD 15, LLC*, 822 S.E.2d 351, 354 (Va. 2019) ("Virginia courts 'interpret insurance policies . . . in accordance with the intentions of the parties gleaned from the words they have used in the document.'").

sources.[48] "When interpreting insurance contracts, [courts] may consult references commonly relied upon to supply the accepted meanings of words."[49] But, ambiguous provisions are strictly construed against the insurer.[50] Policy language is ambiguous "if the language 'is susceptible to more than one reasonable interpretation, one providing coverage and the other limiting coverage.'"[51] Finally, although the policyholder has the burden of proving coverage as an initial matter, the insurer has the burden to prove a policy exclusion applies.[52]

C. "Direct Physical Loss or Damage" Is Not Limited to Structural Alteration

1. *The ordinary meaning of "direct physical loss or damage" encompasses more than structural alteration of property.*

The terms "direct," "physical," "loss," "physical loss" and "physical damage" are not defined within the Policy. In Florida, when terms in an insurance policy are undefined, those terms should be given their "plain and ordinary meaning, and courts may look to legal and non-legal dictionary definitions to determine such

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[48] *See, e.g.*, *Garcia v. Fed. Ins. Co.*, 969 So. 2d 288, 291–92 (Fla. 2007).

[49] *Id.* (consulting Merriam Webster's Collegiate Dictionary); *see also Gov't Employees Ins. Co. v. Macedo*, 228 So. 3d 1111, 1113 (Fla. 2017); *see also Craig v. Dye*, 526 S.E.2d 9, 12 (Va. 2000) ("To answer this inquiry, we look to the definitions of these terms.") (citing Webster's Third New International Dictionary).

[50] *Wash. Nat'l Ins. Corp. v. Ruderman*, 117 So. 3d 943, 952 (Fla. 2013); *see also PBM Nutritionals, LLC v. Lexington Ins. Co.*, 724 S.E.2d 707, 713 (Va. 2012) ("Where two constructions are equally possible, that most favorable to the insured will be adopted.").

[51] *Wash. Nat'l Ins. Corp.*, 117 So. 3d at 948 (quoting *State Farm Mut. Auto. Ins. Co. v. Menendez*, 70 So. 3d 566, 570 (Fla. 2011); *see also Virginia Farm Bureau Mut. Ins. Co. v. Williams*, 677 S.E.2d 299, 302 (Va. 2009) ("[I]f disputed policy language is ambiguous and can be understood to have more than one meaning, we construe the language in favor of coverage and against the insurer.").

[52] *U.S. Concrete Pipe Co. v. Bould*, 437 So. 2d 1061, 1065 (Fla. 1983); *see also TravCo Ins. Co. v. Ward*, 736 S.E.2d 321, 325 (Va. 2012) ("We have therefore long held that the burden is upon the insurer to prove that an exclusion of coverage applies.").

meaning."[53] Courts may not, however, "rewrite contracts, add meaning that is not present, or otherwise reach results contrary to the intention of the parties."[54] Here, there is *nothing* about the plain and ordinary meaning of the words "direct physical loss or damage" that requires structural alteration.

"Direct," when used as an adjective, is often defined as something "characterized by close logical, causal, or consequential relationship" or something "marked by absence of an intervening agency, instrumentality, or influence" or something "proceeding from one point to another in time or space without deviation or interruption."[55] Not surprisingly, courts have held that "common sense suggests that [direct] is meant to exclude situations in which an intervening force plays some role in the damage."[56] Likewise, other jurisdictions have held that the term "direct" in an all-risk insurance policy means to exclude "consequential and intangible damages such as loss in value."[57] Simply absent from *any* meaning of the term "direct" is the notion that direct loss or damage requires *structural alteration* of covered property.[58]

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[53] *Botee v. Southern Fidelity Ins. Co.*, 162 So. 3d 183, 186 (Fla. App. 2015).

[54] *Intervest Const. of Jax, Inc. v. General Fidelity Ins. Co.*, 133 So.3d 494, 497 (Fla. 2014).

[55] *Direct*, Merriam-Webster Online Dictionary, https://www.merriam-webster.com/dictionary/direct (last visited June 10, 2021).

[56] *Advance Cable Co., LLC v. Cincinnati Ins. Co.*, 788 F.3d 743, 746 (7th Cir. 2015).

[57] *Ashland Hosp. Corp. v. Affiliated FM Ins. Co.*, No. CIV.A. 11-16-DLB-EBA, 2013 WL 4400516, at *5 (E.D. Ky. Aug. 14, 2013) (holding that the damage to plaintiff's data network caused by overheating is "direct" because "the harm flows immediately or proximately from the heat exposure"); *see also Prudential Property & Cas. Ins. Co. v. Lillard-Roberts,* No. CV-01-1362-ST, 2002 WL 31495830, at *8 (D. Or. June 18, 2002); *Columbiaknit, Inc. v. Affiliated FM Ins. Co.*, No. Civ. 98-434-HU, 1999 WL 619100 (D. Or. Aug. 4, 1999).

[58] *Sentinel Mgmt. Co. v. N.H. Ins. Co.*, 563 N.W.2d 296 (Minn. Ct. App. 1997).

"Physical," too, does not suggest any requirement for structural alteration. Pertinent definitions of "physical" make clear the term describes something "having material existence" or something "perceptible especially through the senses."[59] Many "physical" losses do not require structural change. An event or condition that prevents persons from inhabiting or operating a room in their home or business is no less "physical" of a loss under these definitions than an event that destroys that room. Here, the District Court conflated the term "physical" with "structural," erroneously basing its analysis on the latter, which, again, does not appear anywhere in the Policy. But those terms are not synonymous.[60] "Physical" is a word of much greater breadth and denotes a much broader sphere than "structural." Physical loss may take place even if the structure of covered property remains unchanged.[61]

"Loss" also carries no requirement of structural alteration. Definitions of "loss" include not only "destruction" and "ruin," but also "deprivation."[62] Synonyms for "loss" include "deprivation," "dispossession," and "impairment."[63]

Even the term "damage" does not require a physical or structural alteration.

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[59] *Physical*, Merriam-Webster Online Dictionary, https://www.merriam-webster.com/dictionary/physical (last visited June 10, 2021).

[60] *See Physical*, Thesaurus.com, https://www.thesaurus.com/browse/physical (last visited June 10, 2021).

[61] *See Manpower Inc. v. Ins. Co. of the State of Pa.*, 2009 WL 3738099, at *5 (E.D. Wis. Nov. 3, 2009).

[62] *Loss*, Merriam-Webster Online Dictionary, https://www.merriam-webster.com/dictionary/loss (last visited June 10, 2021).

[63] *Loss*, Thesaurus.com, https://www.thesaurus.com/browse/loss (last visited June 10, 2021); *see also Manpower Inc.*, 2009 WL 3738099, at *5.

Damage is often defined simply as "loss or harm resulting from injury," but it is also defined as expense and cost.[64] Synonyms for "damage" include "contamination," "impairment," "deprivation," and "detriment"—all terms with a physical aspect, but not necessarily a structural aspect.[65] "Clearly, without qualification, the term 'damage' encompasses more than physical or tangible damage."[66]

But even if the term "damage" did suggest a requirement of structural alteration, that would only drive home the lack of such a requirement in the term "direct physical loss or damage" as a whole. Otherwise, why would insurers, including Colony, use *both* "loss *or* damage"?

The federal district court overseeing the first of two multi-district litigations concerning COVID-19 business interruption insurance, *In re Society Insurance Co. Business Interruption Protection Insurance Litigation*, examined precisely this issue.[67] In rejecting the insurer's argument, the court emphasized the distinction: "It would be one thing if coverage were limited to direct physical 'damage.' But coverage extends to direct physical 'loss' of' property as well."[68] If "damage" were given a structure-altering meaning, "loss" would have to be given a meaning not

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[64] *Damage*, Merriam-Webster Online Dictionary, https://www.merriam-webster.com/dictionary/damage (last visited June 10, 2021).

[65] *Damage*, Thesaurus.com, https://www.thesaurus.com/browse/damage (last visited June 10, 2021).

[66] *Dundee Mut. Ins. Co. v. Marifjeren*, 587 N.W.2d 191, 194 (N.D. 1998) (quoting *Black's Law Dictionary* 389 (6th ed. 1990)).

[67] *In re Society Ins. Co. Business Interruption Protection Ins. Lit.*, MDL No. 2964, 2021 WL 679109 at *8 (N.D. Ill. Feb. 22, 2021).

[68] *Id.*

carrying that requirement. Otherwise, loss would be rendered redundant and thus violate a cardinal rule of insurance policy interpretation.[69] For that reason, several courts across the country have held in the COVID-19 context "physical loss" and "physical damage" differ.[70]

The district court's decision in *Society* is squarely consistent with the Seventh Circuit's decision in *Advance Cable Co., LLC v. Cincinnati Insurance Co.*[71] There, the court recognized that the term "direct physical loss or damage" encompassed a broad swath of injury, including loss of functionality and cosmetic damage, and certainly was not limited to structural alteration.

More recently, and in the context of a COVID-19 business interruption claim, the United States District Court for the Eastern District of Virginia[72] identified a

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[69] *Southern-Owners Ins. Co. v. Easdon Rhodes & Associates LLC*, 872 F.3d 1161, 1167 (11th Cir. 2017) ("Florida law tells us we must give each term and provision in an insurance policy operative effect and that we must avoid construction rendering particular phrases mere surplusage."); *see also Washington Nat. Ins. Corp. v. Ruderman*, 117 So. 3d 943, 948 (Fla. 2013) ("In construing insurance contracts, courts should read each policy as a whole, endeavoring to give every provision its full meaning and operative effect.") (internal quotation omitted); *see also Nautilus Grp., Inc. v. Allianz Global Risks US*, 2012 WL 760940, at *7 (W.D. Wash. Mar. 8, 2012); *Total Intermodal Servs. Inc. v. Travelers Prop. Cas. Co. of Am.*, 2018 WL 3829767, at *3 (C.D. Cal. July 11, 2018).

[70] *See, e.g.*, *Derek Scott Williams PLLC v. Cincinnati Ins. Co.*, 2021 WL 767617, at *4 (N.D. Ill. Feb. 28, 2021) ("In short, 'loss'—as used in the policy definition . . .—cannot simply mean 'damage.'"); *Kingray Inc. v. Farmers Grp. Inc.*, 2021 WL 837622, at *8 (C.D. Cal. Mar. 4, 2021) ("Defendant's interpretation of the contract requires 'loss' to share a meaning with 'damage,' which violates the canon that every word be given meaning."); *Susan Spath Hegedus, Inc. v. ACE Fire Underwriters Ins. Co.*, 2021 WL 1837479, at *9 (E.D. Pa. May 7, 2021) ("If 'direct physical loss' in this Policy were synonymous with damage, then the disjunctive language of the Business Income Additional Coverage—'direct physical loss of or damage to'—would be redundant.").

[71] 788 F.3d 743 (7th Cir. 2015).

[72] As discussed, *supra* footnotes 44, 47–52, Virginia and Florida law governing insurance policy interpretation are effectively the same, and case law applying Virginia law is thus

"Spectrum of Legal Definitions" for the phrase "direct physical loss," which includes "structural damage to the property" but also "when a plaintiff cannot physically use his or her covered property, even without tangible structural destruction, if a plaintiff can show a distinct and demonstratable physical alteration to the property."[73] The court subsequently denied the insurers' motion to dismiss, highlighting the fact that the insurers "were fully aware of cases that interpreted intangible damage as a 'direct physical loss'" but nonetheless failed to "explicitly include 'structural damage' in the language" of the policy.[74]

Likewise, had Colony wished to dispel the apparent ambiguity in the phrase "direct physical loss or damage," it was well within Colony's purview, as the drafter of the Policy, to explicitly include a "structural alteration" requirement.[75] But it did not.

2. Numerous courts have held that a property's loss of functionality or its infestation with harmful substances is direct physical loss or damage.

Colony and the District Court relied heavily upon the 11th Circuit's ruling in *Mama Jo's Inc. v. Sparta Insurance Co.*[76] to support the position that the Policy's

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instructive to how this court should rule. *See, e.g.*, *Equitable Trust Co. v. Bratwursthaus Mgmt. Corp.*, 514 F.2d 565, 568–69 (4th Cir. 1975) (applying both Virginia and Maryland law where result would be the same).

[73] *Elegant Massage, LLC v. State Farm Mut. Auto. Ins. Co.*, 2020 WL 7249624, *7–10 (E.D. Va. 2020).

[74] *Id.* at *9.

[75] *See Auto-Owners Inc. Co. v. Anderson*, 756 So. 2d 29, 34 (Fla. 2000); *see also Resource Bankshares Corp. v. St. Paul Mercury Ins. Co.*, 407 F.3d 631. 637 (4th Cir. 2005) ("Because insurance companies typically draft their policies without the input of the insured, the *companies bear the burden of making their contracts clear*.").

[76] 823 Fed. App'x 868 (11th Cir. 2020).

requirements of "direct physical loss of or damage to" property cannot be satisfied by the loss of functionality or the infestation of harmful substances,[77] but *Mama Jo's* is procedurally and factually distinguishable from this case. Procedurally, *Mama Jo's* was decided at the summary judgment stage, after the court evaluated multiple experts under *Daubert* and thoroughly considered their testimony.[78] Indeed, in many cases (including others relied upon by Colony),[79] courts wait until the summary judgment stage before determining the impact of matter on insured property, given the fact-intensive nature of such inquiries.[80]

Moreover, as recent case law within the 11th Circuit highlights, there are significant factual distinctions between the cause of loss at issue in *Mama Jo's* and cause of loss in the COVID-19 context.[81] In *Southern Dental Birmingham LLC*, the insurer similarly relied upon *Mama Jo's* and attempted to analogize the "dust and debris generated by" road construction to the presence and threat of COVID-19.[82]

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[77] *See* App. A184, A194, Hearing Transcript at 9, 19, 23; *see* App. A232–A233, Memo. Opinion at 11–12.

[78] *Mama Jo's*, 823 Fed. App'x at 875–78.

[79] *See, e.g.*, *MRI Healthcare Center of Glendale, Inc. v. State Farm General Ins. Co.*, 115 Cal. Rptr. 3d 27, 36–39 (Cal. Ct. App. 2010) (finding "physical loss" to the insured's machinery after considering evidence and testimony from, among others, an "engineering specialist").

[80] *See, e.g.*, *Universal Image Prods., Inc. v. Federal Ins. Co.*, 475 Fed. App'x 569, 574 (6th Cir. 2012) (relying on expert testimony and lack thereof in affirming district court's grant of summary judgment); *Mastellone v. Lightening Rod Mut. Ins. Co.*, 884 N.E.2d 1130, 1144 (Ohio Ct. App. 2008) (relying *exclusively* on insurer's three experts in affirming district court's grant of summary judgment).

[81] *Southern Dental Birmingham LLC v. Cincinnati Ins. Co.*, 2021 WL 1217327 (N.D. Ala. Mar. 19, 2021); *Serendipitous, LLC/Melt v. Cincinnati Ins. Co.*, 2021 WL 1816960 (N.D. Ala. May 6, 2021).

[82] *Southern Dental*, 2021 WL 1217327, at *5.

The court, however, rejected the insurer's comparison, emphasizing that the restaurant in *Mama Jo's* "remained open for ordinary operations in spite of the dust and debris" whereas the plaintiff in *Southern Dental* "had to close its facility because the presence of the coronavirus and the ongoing risk the virus presented made the facility unusable."[83] Similarly, in *Serendipitous, LLC*, the court found that the insured restaurants had distinguished their case from *Mama Jo's* by alleging that "they had to close entirely when employees tested positive for COVID-19,"[84] allegations virtually identical to those at issue here.[85] In both *Southern Dental* and *Serendipitous, LLC*, the court did not find *Mama Jo's* to be binding and relied instead on the plain meaning of key policy language in holding that dismissal was not appropriate where, as here, the plaintiff had alleged that COVID-19 had "impaired the Property's ordinary use"[86] or "deprived the [insured] of the use of their property."[87]

The court in *Society* reached the same conclusion.[88] In one of the most well-reasoned exegeses of the phrase "direct physical loss of and damage to" in the

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[83] *Id.*

[84] *Serendipitous, LLC/Melt*, 2021 WL 1816960, at *6.

[85] App. A15–A16, Am. Compl. ¶ 52–56.

[86] *Southern Dental*, 2021 WL 1217327, at *3, 6 ("[The policyholder] alleges that its patients and employees tested positive for the coronavirus; construed in the light more favorable to [the policyholder], this allegation supplements its allegation that the coronavirus was present that the Property.").

[87] *Serendipitous, LLC/Melt*, 2021 WL 1816960, at *6.

[88] *In re Society Ins. Co. Business Interruption Protection Ins. Lit.*, MDL No. 2964, 2021 WL 679109 at *8 (N.D. Ill. Feb. 22, 2021). Messrs. Burns, Lanier, and Levitt also serve as Plaintiffs' Co-Lead Counsel in *Society*.

COVID-19 context, the *Society* court emphasized that a plaintiff who has alleged a loss of functional space or functionality has, in fact, alleged a direct physical loss of property.[89] In explaining how the shutdown orders impose a physical limit, the court wrote that:

> [A] reasonable jury can find that the Plaintiffs did suffer a "physical" loss of property on their premises. First, viewed in the light most favorable to the Plaintiffs, the pandemic-caused shutdown orders do impose a *physical* limit: the restaurants are limited from using much of their physical space. It is not as if the shutdown orders imposed a *financial* limit on the restaurants by, for example, capping the dollar-amount of daily sales that each restaurant could make. No, instead the Plaintiffs cannot use (or cannot fully use) the physical space.[90]

Indeed, a later ruling in the same district recently echoed the *Society* court's ruling, emphasizing that "a reasonable factfinder could find that the term 'physical loss' is broad enough to cover, as [the policyholder] argues, a deprivation of the use of its business premises."[91] Just so here.

Courts also have routinely held that properties sustain "direct physical loss or damage" when they lose habitability or functionality, including commercial

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[89] 2021 WL 679109 at *9.

[90] *Id.*

[91] *Derek Scott Williams PLLC v. Cincinnati Ins. Co.* No. 20 C 2806, 2021 WL 767617, at *4 (N.D. Ill. Feb. 28, 2021) (emphasis in original).

functionality.[92] For instance, in *Murray v. State Farm Fire & Casualty Co.*,[93] the policyholder sought coverage for "direct physical loss to the property" when the policyholder's home was rendered uninhabitable by the threat of falling rocks. The court rejected the insurance companies' argument that structural alteration was required:

> The policies in question provide coverage against "sudden and accidental loss" and "accidental direct physical loss" to property. "'Direct physical loss' provisions require only that a covered property be injured, not destroyed. *Direct physical loss also may exist in the absence of structural damage to the insured property*."
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> . . . .
>
> We therefore hold that an insurance policy provision providing coverage for a "sudden and accidental" loss or an "accidental direct physical loss" to insured property requires only that the property be damaged, not destroyed. *Losses covered by the policy, including those rendering the insured property unusable or uninhabitable, may exist in the absence of structural damage to the insured property*.[94]

Accordingly, events—like the presence or suspected presence of COVID-19—that make it too dangerous to use property as it was designed to be used, cause

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[92] *See Gen. Mills, Inc. v. Gold Medal Ins. Co.*, 622 N.W.2d 147, 152 (Minn. Ct. App. 2001) (holding that a direct physical loss had occurred when an insured's property—cereal oats—was infested by an unapproved pesticide because "function [was] seriously impaired"); *Stack Metallurgical Services, Inc. v. Travelers Indem. Co. of Conn.*, 2007 WL 464715, at *8 (D. Or. 2007) (holding that industrial furnace sustained "direct physical loss or damage" when contamination prevented it from being used for ordinary commercial purposes); *Gregory Packaging, Inc. v. Travelers Prop. Cas. Co. of Am.*, 2014 WL 6675934, at *6 (D.N.J. Nov. 25, 2014) (holding that the discharge of ammonia gas inflicted direct physical loss of or damage to an insured's facility because it "physically transformed" the facility's air, leaving it "unfit for normal human occupancy and continued use").

[93] 509 S.E.2d 1 (W. Va. 1998).

[94] *Id.* at 17 (quoting *Sentinel Mgmt. Co. v. New Hampshire Ins. Co.*, 563 N.W.2d 296, 300 (Minn. Ct. App. 1997)) (emphasis added).

physical loss or damage to that property.[95] In a recent decision involving losses from COVID-19, the United States District Court in the Eastern District of Virginia held that allegations of direct physical loss were sufficient because "while the []Spa was not structurally damaged, it is plausible that Plaintiff[] experienced a direct physical loss when the property was deemed uninhabitable, inaccessible, and dangerous to use by the Executive Orders."[96]

Similarly, courts have held on multiple occasions that the infestation of covered property by microscopic particles that are harmful to human health constitutes "direct physical loss or damage." In *General Mills, Inc. v. Gold Medal Insurance Co.*,[97] the insured's property, cereal oats, was infested by an unapproved pesticide, rendering the insured unable to lawfully distribute its products. The Minnesota Court of Appeals held that a direct physical loss had occurred because the oats' "function [was] seriously impaired."[98] The court relied on a consistent line

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[95] *See also Motorists Mut. Ins. Co. v. Hardinger*, 131 F. App'x. 823, 825–27 (3d Cir. 2005) (finding that contamination of a home's water supply that rendered the home uninhabitable to constitute "direct physical loss"); *Essex v. BloomSouth Flooring Corp.*, 562 F.3d 399, 406 (1st Cir. 2009) (finding that an unpleasant odor rendering property unusable constituted physical injury to the property); *TRAVCO Ins. Co. v. Ward*, 715 F. Supp. 2d 699, 709 (E.D. Va. 2010), *aff'd*, 504 F. App'x. 251 (4th Cir. 2013) (finding "direct physical loss" where a home was "rendered uninhabitable by the toxic gases" released by defective drywall).

[96] *Elegant Massage, LLC v. State Farm Mut. Auto. Ins. Co.*, No. 2:20-CV-265, 2020 WL 7249624 (E.D. Va. Dec. 9, 2020); *see also Cherokee Nation v. Lexington Ins. Co.*, No. CV-20-150, 2021 WL 506271 (D. Okla. Jan. 28, 2021); *Henderson Road Restaurant Systems v. Zurich American Ins. Co.*, No. 1:20 CV 1239, 2021 WL 168422, at *12 (N.D. Ohio Jan. 19, 2021).

[97] 622 N.W.2d 147, 152 (Minn. Ct. App. 2001).

[98] *Id.*

of Minnesota cases holding that losses resulting from the infestation of property by harmful, unseen agents constitutes a direct physical loss.[99]

In *Netherlands Insurance Co. v. Main Street Ingredients, LLC*,[100] the Eighth Circuit held that instant oatmeal products recalled due to potential salmonella infestation sustained property damage under a general liability policy, even though it was not certain that the products actually contained salmonella. There, the parties agreed that there was no factual finding that either the dried milk or instant oatmeal actually contained salmonella.[101] Nonetheless, the appellate court upheld the district court's finding that "property damage is present" because the oatmeal was "physically affected, as it includes instant milk that was manufactured in insanitary conditions."[102] *Netherlands* thus supports the proposition that property damage exists when the credible threat of property being infested with harmful agents—even with no factual finding that it actually *was* so infested—leads it to become legally unusable for its intended purpose.

The foregoing case law illustrates the numerous circumstances, both in the COVID-19 context and elsewhere, in which courts have interpreted the meaning of

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[99] *See Marshall Produce Co. v. St. Paul Fire & Marine Ins. Co.*, 98 N.W.2d 280, 293–94 (Minn. 1959) (holding that it was not necessary that a merchant's food items, which were rejected by the government due to exposure to smoke from a nearby fire, be "intrinsically damaged so long as [their] value was impaired in order to support a claim for either loss or property damage"); *Sentinel,* 563 N.W.2d at 300–01 ("Although asbestos contamination does not result in tangible injury to the physical structure of a building, a building's function may be seriously impaired or destroyed and the property rendered useless by the presence of contaminants.").

[100] 745 F.3d 909, 916–17 (8th Cir. 2014).

[101] *Id.* at 916.

[102] *Id.*

"direct physical loss or damage" (or similar language) in a policy to reasonably encompass the diminishment of functional space of a business due to the presence or threat of unperceived agents. At minimum, the case law surrounding the phrase "direct physical loss or damage" demonstrates an ambiguity that has existed for decades but that Colony, as the Policy's drafter, failed to remedy.[103]

Thus, Skillets urges this Court to adopt the reasoning in *Society* and similar cases in holding that "direct physical loss or damage" reasonably encompasses the diminishment of functional space of a business caused by COVID-19 and the resulting closure orders. Alternatively, Skillets requests that this Court recognize the ambiguity in the Policy and, in conformity with Florida rules of insurance policy interpretation, construe the ambiguous provision "liberally in favor of the insured and strictly against the drafter who prepared the policy."[104]

3. The "Period of Restoration" provision does not suggest that structural alteration is required because that provision simply limits the amount time for which an insured can claim lost revenues.

Colony erroneously relied on the Policy's "Period of Restoration" provision to buttress its structural alteration argument, but that provision does not carry such weight.[105] The "Period of Restoration" provision states that the Policy provides coverage for Business Income losses "due to the necessary 'suspension' of [Skillets']

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[103] *See Resource Bankshares Corp. v. St. Paul Mercury Ins. Co.*, 407 F.3d 631. 637 (4th Cir. 2005) ("Because insurance companies typically draft their policies without the input of the insured, the *companies bear the burden of making their contracts clear*.") (emphasis added).

[104] *Auto-Owners Inc. Co. v. Anderson*, 756 So. 2d 29, 34 (Fla. 2000); *see also Taurus Holdings, Inc. v. U.S. Fidelity & Guar. Co.*, 913 So.2d 528, 532 (Fla. 2005).

[105] *See* App. A87, Policy, Business Income Form § F(3).

'operations' during the 'period of restoration,'" which starts "72 hours after the time of direct physical loss or damage" and "[e]nds on the earlier of: (1) "The date when the property at the described premises should be repaired, rebuilt or replaced with reasonable speed and similar quality; or (2) The date when business is resumed at a new permanent location."[106]

Contrary to Colony's assertions, nothing in these provisions suggests that the physical loss of covered property *requires* there to be a structural alteration that had to be repaired, rebuilt, or replaced in order to trigger coverage under the Policy. The clear meaning of those provisions is to require that, in the event there is some repair, rebuilding, or replacement of damaged property, it be performed "with reasonable speed."[107] The language is intended to prevent slow workmanship or intentional delay from increasing an insurer's payment of lost business income. It simply does not constitute any definition of what the Policy means by physical loss of covered property.

Furthermore, the fact that the Period of Restoration can end on the date "when business is resumed at a new permanent location" clearly contemplates that there might not be any repair, rebuilding, or replacement of property.[108] Thus, the "Period of Restoration" provision contemplates a meaning of "direct physical loss or damage" that encompasses the loss of function of covered property in the absence of

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[106] App. A79, Policy, Business Income Form § A(1); App. A87, Policy, Business Income Form § F(3).

[107] *See* App. A87, Policy, Business Income Form § F(3)(b)(1).

[108] *See* App. A87, Policy, Business Income Form § F(3).

structural alteration. No reasonable policyholder would expect for the Period of Restoration—which establishes the quantifiable duration of business income coverage—to include a requirement that covered property must be structurally altered.

In *Society,* the district court recently—and correctly—addressed this exact issue.[109] The court rejected the insurer's argument, holding that there was nothing in the provision that required structural alteration of property:

> First and foremost, the "Period of Restoration" describes a time period during which loss of business income will be covered, rather than an explicit definition of coverage. Instead, the explicit definition of coverage is that direct physical "loss of" property is covered—not just "damage to" property, as explained earlier. Second, the limit on the Period of Restoration does include the words "repaired" and "replaced," that is, the restoration period ends when the property at the premises is "repaired" or "replaced." There is nothing inherent in the meanings of those words that would be inconsistent with characterizing the Plaintiffs' loss of their space due to the shutdown orders as a physical loss.[110]

The *Society* court went on to emphasize that mitigation efforts may include the "repair" of ventilation systems or the "replacement" of space that fit the policy language—similar to the types of mitigation measures that Skillets implemented here.[111] Just as in *Society,* the Period of Restoration at issue in the Policy is consistent with interpreting direct physical loss of property to include the loss of

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[109] *In re Society Ins. Co. Business Interruption Protection Ins. Lit.*, MDL No. 2964, 2021 WL 679109 at *9–10 (N.D. Ill. Feb. 22, 2021).

[110] *Id.* at *9.

[111] App. A22, Am. Compl. ¶ 54 ("[T]he Plaintiffs' physical properties are altered and damaged and have become unsafe, *necessitating repairs* such as the use of traffic barriers, signs, and table tents, as well as the implementation of advanced sterilization and other protective measures.") (emphasis added).

function and diminishment of functional space of the covered property imposed by COVID-19 and the closure orders.

Because "direct physical loss or damage" encompasses loss of function and habitability of property, the District Court erred in dismissing the Amended Complaint, which adequately alleges a loss of function of the Skillets Restaurants caused by COVID-19 and the resulting closure orders. At the very least, and as held by the district court in *Society*, the term is genuinely and reasonably in dispute, such that a reasonable jury could find in Skillets' favor under the Amended Complaint's Allegations.

D. Skillets Has Sufficiently Pled Direct Physical Loss or Damage

In any event, Skillets has pled factual allegations that, if proven, would establish that COVID-19 caused "direct physical loss or damage" to covered property even under the restrictive, structural-alteration-requiring definition of that term that the District Court adopted here.[112]

The Amended Complaint alleges structural alteration of the Skillets Restaurants by the presence of the virus.[113] Skillets has alleged that COVID-19 has denied them use of the Skillets Restaurants, requiring physical repair and causing necessary suspensions.[114] Skillets has further alleged that functional spaces in the Restaurants could only be used at a severely diminished capacity, with the dining rooms being entirely closed to customers for over a month and only reopening on a

[112] App. A10–A11, A22–A23, Am. Compl. ¶¶ 11–13, 54–55.

[113] App. A10–A11, A22–A23, Am. Compl. ¶¶ 11–13, 54–55.

[114] App. A11, A22, Am. Compl. ¶¶ 13, 52, 54.

limited basis after significant alterations were made to the dining rooms and surrounding areas.[115] Moreover, Skillets has alleged that business operations were severely impacted and substantial repairs and refurbishment of the facilities had to be undertaken to make the Restaurants safe for both its customers and employees.[116] Finally, and critically, Skillets has alleged the presence of COVID-19 altered the structure of the air, the physical space, and the property surfaces at the Skillets Restaurants:

> The threat and presence of COVID-19 caused "direct physical loss of or damage to" each "Coverage Property" . . . by: (i) impairing the function of, infesting, causing loss and damaging the Covered Property; (ii) denying use of an damaging the Coverage Property; (iii) structurally altering the air, surface, and the character of the Covered Property and thus requiring physical repair and/or alterations to the Covered Property; and/or (iv) causing necessary suspension of operations during a period of restoration.
>
> . . . .
>
> In addition, the functional space in the building has been structurally altered and diminished by the threat, spread, and/or presence of COVID-19. For example, the dining rooms have lost their normal functionality and their space has been diminished.[117]

The District Court erroneously minimized and questioned the presence of COVID-19 at the Skillets Restaurants, characterizing Skillets' allegations of the virus's presence as "conclusory, and largely speculative."[118] But the District Court's characterization of the allegations in Skillets' complaint was improper, both because

[115] App. A11, A22–A23, Am. Compl. ¶¶ 13, 54–55.

[116] App. A11, A22–A23, Am. Compl. ¶¶ 13, 53–55.

[117] App. A22–A23, Am. Compl. ¶¶ 54–55.

[118] App. A233, Memo. Opinion at 12.

it impermissibly invades the province of the jury by answering a question of fact[119] and because it neglects the weight of the well-pled allegations in Skillets' complaint.[120] Indeed, courts have found similar facts to be sufficient in establishing, at the motion to dismiss stage, that COVID-19 was present on the insured property.[121]

Colony may very well contest these factual claims or argue before a jury that circumstances demanding massive refurbishment and repair do not constitute damage to property, but Skillets has stated a claim for relief—even under the District Court's definition of direct physical loss or damage.

CONCLUSION

This Court should reverse the District Court's dismissal and remand for further proceedings consistent with its opinion.

Dated: June 10, 2021

Respectfully submitted,

/s/ Lisa S. Brook

Lisa S. Brook
Attorney for Plaintiff-Appellants

[119] In evaluating a motion to dismiss, a court must "construe factual allegations in the non-moving party's favor" and "treat them a true," so long as the complaint provides "enough facts to state a claim to relief that is plausible on its face." *Robinson v. American Honda Motor Co., Inc.*, 551 F.3d 218, 222 (4th Cir. 2009).

[120] *See, e.g.*, A22, Am. Compl. ¶ 53 ("At least 41 of Plaintiffs' employees across their nine locations tested positive for COVID-19.").

[121] *E.g.*, *Southern Dental Birmingham LLC v. Cincinnati Ins. Co.*, 2021 WL 1217327, at *3 (N.D. Ala. Mar. 19, 2021) (finding that the policyholder "has alleged the actual 'presence of COVID-19' at the Property" based on allegations that "its patients and employees tested positive for the coronavirus" and that "the coronavirus was 'present throughout Alabama'").

LISA SARAH BROOK
EDWARD KYLE MCNEW
MICHIEHAMLETT PLLC
310 4th Street NE
Charlottesville, Virginia 22902
(434) 951-7200

TIMOTHY W. BURNS
BRIAN P. CAWLEY
BURNS BOWEN BAIR LLP
One South Pinckney Street, Suite 930
Madison, Wisconsin 53703
(608) 286-2302

ADAM J. LEVITT
KENNETH ABBARNO
DICELLO LEVITT GUTZLER LLC
10 North Dearborn Street, Sixth Floor
Chicago, Illinois 60602
(312) 214-7900

W. MARK LANIER
THE LANIER LAW FIRM, P.C.
10940 West Sam Houston Pkwy. N.,
Suite 100
Houston, Texas
(713) 659-5200

REQUEST FOR ORAL ARGUMENT

Plaintiff-Appellant Skillets respectfully requests oral argument because, in Skillets' view, oral argument would be helpful to the Court in resolving the important contract and insurance issues raised in this appeal that have serious implications beyond the parties themselves.

CERTIFICATE OF COMPLIANCE

This document complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B) and Circuit Rule 32, because this document contains 9,204 words, excluding the parts of the document exempted by Fed. R. App. P. 32(f).

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Dated: June 10, 2021

/s/ Lisa S. Brook

Lisa S. Brook
Attorney for Plaintiff-Appellants

CERTIFICATE OF SERVICE

I hereby certify that on June 10, 2021, the Brief of Plaintiff-Appellants Skillets was filed with the Clerk of the Court for the United States Court of Appeals for the Fourth 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/ Lisa S. Brook

Lisa S. Brook
Attorney for Plaintiff-Appellants