NO. 21-10992

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

TOWN KITCHEN, LLC,

Appellant,

vs.

CERTAIN UNDERWRITERS AT LLOYD'S, LONDON KNOWN AS SYNDICATE ENH 5151, NEO 2468, XLC 2003, TAL 1183, TRV 5000, AGR 3268, ACS 1856, NVA 2007, HDU 382, PPP 1980, AMA 1200 ASC 1414 and VSM 5678, INDIAN HARBOR INSURANCE COMPANY, and HDI GLOBAL SPECIALTY SE,

Appellees.

Appeal from the United States District Court
for the Southern District of Florida, Miami Division
Case No. 1:20-CV-22832-FAM

INITIAL BRIEF OF APPELLANT

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CERTIFICATE OF INTERESTED PERSONS
AND CORPORATE DISCLOSURE STATEMENT

In compliance with Fed. R. App. P. 26.1, 11th Cir. R. 26.1-1, and 11th Cir. R. 26.1-3, Town Kitchen, LLC, through undersigned counsel, hereby certifies that the following persons and entities may have an interest in the outcome of this case:

American International Group, Inc. ("AIG")– Parent company of Talbot 2002 Underwriting Capital Ltd.

AprilGrange Ltd. – Corporate member of Lloyd's Syndicate TRV 5000

Argo (No. 604) Limited – Underwriting member of Lloyd's Syndicate AMA 1200

Argo Group International Holdings, Ltd. ("ARGO") – Parent company of Argo (No. 604) Limited

Ascot Group – Parent company of Ascot Underwriting

Ascot Underwriting – Managing agency for Lloyd's Syndicate ASC 1414

Asta Capital Ltd. – Parent company of Asta Managing Agency Ltd.

Asta Managing Agency Ltd. – Managing agent of Lloyd's Syndicate PPP 1980

AXA S.A. – Parent company of Catlin Syndicate Ltd. and Indian Harbor Insurance Company

AXIS Capital Holdings Limited ("AXS") – Parent company of AXIS Corporate Capital UK II Limited

AXIS Corporate Capital UK II Limited (formerly Novae Corporate Underwriting Limited) – Capital provider of Lloyd's Syndicate NVA 2007

Beloff, Jonathan – Member of Town Kitchen LLC

Benzadon, Emilio – Member of Town Kitchen LLC

Burstein, Robert – Member of Town Kitchen LLC

Canada Pension Plan Investment Board – Parent company of Ascot Group

Catlin (North American) Holdings Limited –Parent company of Catlin Syndicate Ltd.

Catlin Syndicate Ltd. – Corporate capital provider of Lloyd's Syndicate XLC 2003

Centered Investments LLC – Member of Town Kitchen LLC

CNA Financial Corporation – Parent company of Hardy Underwriting Limited

Criden, Michael E. – Counsel for Appellant and Member of Town Kitchen LLC

De Molina, Raul – Member of Town Kitchen LLC

Endurance Specialty Holdings Ltd. – Manager of Lloyd's Syndicate ENH 5151

EXEL Holdings Limited – Parent company of Catlin Syndicate Ltd. and Indian Harbor Insurance Company

Exor Nederland N.V. ("EXXRF") – Parent company of PartnerRe Ltd.

F&G UK Underwriters Ltd. – Corporate member of Lloyd's Syndicate TRV 5000

Feldman, Robert – Member of Town Kitchen LLC

Feldman, Theodore – Member of Town Kitchen LLC

Fialkow, Jonathan – Member of Town Kitchen LLC

Fisher, Randy – Member of Town Kitchen LLC

GAI Holding Bermuda Ltd. – Parent company of GAI Indemnity, Ltd. and Neon Capital Limited

GAI Indemnity, Ltd. – Corporate member of Lloyd's Syndicate NEO 2468

Gilbert, Mark – Member of Town Kitchen LLC

Gilbert, Robert – Member of Town Kitchen LLC

Gomez, Alvaro – Member of Town Kitchen LLC

Greenwald, Allen – Member of Town Kitchen LLC

Grossman, Lindsey C. – Counsel for Appellant

Group LX, Inc. – Member of Town Kitchen LLC

Halpern, Jay – Member of Town Kitchen LLC

Hannover Re SE – Parent company of HDI Global Specialty SE

Hannover Ruck SE ("HVRRY") – Parent company of Inter Hannover (No. 1) Ltd.

Hardy Underwriting Limited – Capital provider of Lloyd's Syndicate HDU 382

Harnick, Steven – Member of Town Kitchen LLC

HDI Global SE – Parent company of HDI Global Specialty SE

HDI Global Specialty Holding GmbH – Owner of HDI Global Specialty SE

HDI Global Specialty SE - Appellee

Herrera, Humberto – Member of Town Kitchen LLC

Hoffman, Richard – Member of Town Kitchen LLC

Homestead Property Inv. LLC – Member of Town Kitchen LLC

Indian Harbor Insurance Company – Appellee

Inter Hannover (No. 1) Ltd. – Underwriting member of Lloyd's Syndicate AGR 3268

Janette, Adam – Member of Town Kitchen LLC

Janette, John – Member of Town Kitchen LLC

Kaskel, William – Member of Town Kitchen LLC

Kates, Barry – Member of Town Kitchen LLC

Kenward, Scott – Member of Town Kitchen LLC

Lavenham Underwriting Limited – Corporate member of Lloyd's Syndicate NEO 2468

Lloyd's Syndicate ACS 1856 – Appellee

Lloyd's Syndicate AGR 3268 – Appellee

Lloyd's Syndicate AMA 1200 – Appellee

Lloyd's Syndicate ASC 1414 – Appellee

Lloyd's Syndicate ENH 5151 – Appellee

Lloyd's Syndicate HDU 382 – Appellee

Lloyd's Syndicate NEO 2468 – Appellee

Lloyd's Syndicate NVA 2007 – Appellee

Lloyd's Syndicate PPP 1980 – Appellee

Lloyd's Syndicate TAL 1183 – Appellee

Lloyd's Syndicate TRV 5000 – Appellee

Lloyd's Syndicate VSM 5678 – Appellee

Lloyd's Syndicate XLC 2003 – Appellee

Love, Kevin B. – Counsel for Appellant

Lurie, Brandon – Member of Town Kitchen LLC

Mabi Oceans 11, LLC – Member of Town Kitchen LLC

Martin, Douglas – Member of Town Kitchen LLC

Mazer, Jason S. – Counsel for Appellant

Mermell, Cliff – Member of Town Kitchen LLC

Miester, Michael – Member of Town Kitchen LLC

Miller, Deborah – Member of Town Kitchen LLC

Miller, Mathew – Member of Town Kitchen LLC

Mora, Javier – Member of Town Kitchen LLC

Moreno, Hon. Federico A. – United States District Judge

Moret, David – Member of Town Kitchen LLC

Mullen, John D. – Counsel for Appellees

Neon Capital Limited – Parent company of Lavenham Underwriting Limited and Sampford Underwriting Limited

Nussbaum, Linda P. – Counsel for Appellant

PartnerRe Corporate Ltd. – Underwriting member of Lloyd's Syndicate AGR 3268

PartnerRe Ltd. ("PREPRH") – Parent company of PartnerRe Corporate Ltd.

Pill, Jason A. – Counsel for Appellees

Pine Brook Partners – Manager of Quantum Strategic Partners Ltd.

Quantum Strategic Partners Ltd. – Capital provider for Vibe Syndicate Management Ltd.

Rozansky, Glenn – Member of Town Kitchen LLC

Sampford Underwriting Limited – Corporate member of Lloyd's Syndicate NEO 2468

Schiff, Steven – Member of Town Kitchen LLC

Schwartz, Gerald – Member of Town Kitchen LLC

Schwartz, Howard – Member of Town Kitchen LLC

SCOR SE ("SCR") – Parent company of SCOR Underwriting Limited

SCOR Underwriting Limited – Underwriting member of Lloyd's Syndicate AGR 3268

Serure, Alan – Member of Town Kitchen LLC

Sompo Holdings Inc. ("SMPNY") – Parent company of Sompo International Holdings Ltd.

Sompo International Holdings Ltd. – Parent company of Endurance Specialty Holdings Ltd.

Soros Fund Management LLC - Manager of Quantum Strategic Partners Ltd.

Talanx AG ("TLX") - Majority owner of Hannover Re SE and parent company of HDI Global SE

Talbot 2002 Underwriting Capital Ltd. – Corporate member of Lloyd's Syndicate TAL 1183

The Travelers Companies, Inc. ("TRV") – Parent company of Travelers Syndicate Management Limited

Thorpe, Michael – Member of Town Kitchen LLC

Three Stooges LLP – Member of Town Kitchen LLC

Town Kitchen LLC – Appellant

Town Kitchen Management Inc. - Managing Member of Town Kitchen LLC

Travelers Syndicate Management Limited – Manager of Lloyd's Syndicate

TRV 5000

Van Schoyck, Sarah B. – Counsel for Appellees

Vibe Syndicate Management Ltd. – Managing agent of Lloyd's Syndicate

VSM 5768

Widom, Mitch – Member of Town Kitchen LLC

Wolofsky, Howard – Member of Town Kitchen LLC

X.L. America, Inc. – Parent Company of Indian Harbor Insurance Company

XL Bermuda Limited – Parent company of Catlin Syndicate Ltd. and Indian Harbor Insurance Company

XL Financial Holdings (Ireland) Limited – Parent Company of Indian Harbor Insurance Company

XL Group Limited – Parent company of Catlin Syndicate Ltd. and Indian Harbor Insurance Company

XL Reinsurance America Inc. – Parent Company of Indian Harbor Insurance Company

XL Specialty Insurance Company – Parent Company of Indian Harbor Insurance Company

XLIT Limited – Parent company of Catlin Syndicate Ltd.

XLIT Ltd. – Parent Company of Indian Harbor Insurance Company

Statement Regarding Oral Argument

Appellant requests oral argument pursuant to 11th Cir. R 28-1(c). Oral argument is warranted because this case affects like-situated Florida insureds whose "All-Risk" commercial insurance policies provide coverage for business interruption losses caused by direct physical loss of or damage to property and whether under Florida Law the phrase "Direct Physical Loss of" includes the inability to use property for its intended purpose due to a non-excluded physical cause. Appellant respectfully suggests that oral argument will help this Court resolve this important issue.

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Statement of Jurisdiction

I. Basis for the District Court's Subject Matter Jurisdiction

The district court exercised jurisdiction over this action based on 28 U.S.C. § 1332(d)(2), because it was brought as a class action, Town Kitchen, LLC and Defendants Certain Underwriters at Lloyd's, London ("Lloyd's"), Indian Harbor Insurance Company ("Indian Harbor") and HDI Global Specialty SE ("HDI") are citizens of different states and/or countries, and the aggregate amount in controversy exceeds $5,000,000 exclusive of interest and costs.

II. Basis for Appellate Jurisdiction in the Eleventh Circuit Court of Appeals

This court has jurisdiction under 28 U.S.C. § 1291 because this appeal is from a final decision of the district court dated February 26, 2021, dismissing Town's entire complaint.[1]

III. Timeliness of Appeal

On February 26, 2021, the district court entered an order dismissing Town Kitchen, LLC's claims against Defendants Lloyd's, Indian Harbor and HDI. Order, DE 38, Appx 519-532. Town Kitchen, LLC's Notice of Appeal was timely filed on March 25, 2021. Notice of Appeal, DE 39, Appx 533-551.

[1] Order Granting Motion to Dismiss ("Order"), DE 38, Appx 519-532.

IV. Verification of Appeal from Final Order

The Plaintiff-Appellant verifies that this appeal is taken from a final order of the United States District Court for the Southern District of Florida.

I. INTRODUCTION

Plaintiff-Appellant, Town Kitchen, LLC ("Town"), sued the Defendants for failing to cover losses incurred due to COVID-19 and the resulting stay- at-home orders. The Policy at issue provides coverage for "all risks" of "direct physical loss of or damage to property." Thus, the question is whether the actual or imminent presence of COVID-19 in Town's restaurant or the resulting stay-at-home orders caused either "direct physical loss of" property or "damage to" property as those phrases must be construed under Florida law. Town pleaded, and argued below, that it suffered both.

According to the district court, however,:

> "Business closure due to the spread of COVID-19 nor the potential presence of the virus physically at the restaurant is 'direct physical loss of or damage to' the premises. The harm from COVID-19 stems from having living, breathing humans being inside one's business – it is not damage done to the physical business itself, it is damage done to other living, breathing human beings. To the extent it *is* a physical harm such as COVID-19 particles present on surfaces in the restaurant, those can easily be cleaned."[2]

Both of those rulings are wrong, and each independently requires reversal.

First, the district court did not properly apply Florida's settled rules of insurance policy construction when considering whether COVID-19 and the stay-at-home orders caused "direct physical loss of" property. Florida law requires courts

[2] Order, D.E. 38 at 13-14, Appx 531-532.

to construe ambiguous insurance policy language in favor of the policyholder. Policy language is ambiguous if it is susceptible to more than one reasonable interpretation. So long as the policyholder articulates a reasonable interpretation providing coverage, that interpretation controls - - even where the carrier's interpretation of the disputed language is also reasonable. As argued below, "direct physical loss of" property is reasonably understood to include the inability to use one's premises for its intended purpose due to a non-excluded physical force. Even though the district court acknowledged the reasonableness of Town's interpretation, it nevertheless adopted the Insurer's competing interpretation that "direct physical loss of" property requires Town to establish an "actual change in" or "structural alteration of" insured property.

Second, the district court also erred by making a fact determination at the motion to dismiss stage. Even accepting the district court's incorrect "structural alteration" standard to trigger coverage, how COVID-19's deadly droplets attach to surfaces and spread the disease by contact and human respiration is a question of fact. Town appropriately pleaded that the COVID-19 pandemic caused damage to the surfaces and air within its restaurant, rendering it unsafe for dine-in operation. The district court was wrong to summarily determine that "[a]t this point in the

pandemic, it is widely accepted that life can go on with hand sanitizer and disinfecting wipes."[3]

Had the district court appropriately determined that Town alleged "direct physical loss of or damage to" its restaurant, it would have then evaluated the applicability of any exclusions. Town's policy does not contain a standard exclusion for loss caused by virus or communicable disease.[4] Because no exclusion bars coverage, the district court committed reversible error by dismissing Town's complaint.

II. STATEMENT OF THE CASE

Town - - a popular restaurant and bar in South Miami - - had to suspend its operations due to the COVID-19 pandemic. Like Town, many business owners have looked to their "all-risk" insurance policies to cover these unexpected financial losses. Unlike Town, the overwhelming majority of U.S. businesses purchased a

[3] Order, D.E. 38 at 12, Appx 530.

[4] The Insurance Services Office ("ISO") has offered its standard "Exclusion of Loss Due to Virus or Bacteria" since 2006 ("Virus Exclusion"). The text reads, in relevant part, "We will not pay for loss or damage caused by or resulting from any virus, bacterium or other microorganism that induces or is capable of inducing physical distress, illness or disease." Town's policy is written on an ISO form but it does not contain the Virus Exclusion. D.E. 6-1, Appx 33-145.

policy that expressly excludes loss caused by or resulting from any virus or communicable disease.[5] Town's all-risk Policy has no such exclusion.

Town accordingly sought coverage under the following policy provisions:

Coverage	Policy Language	Citation
Business Income	We will pay for the actual loss of Business Income you sustain due to the necessary "suspension" of your "operations" during the "period of restoration." The "suspension" must be caused by direct physical loss of or damage to property at premises which are described in the Declarations and for which a Business Income Limit of Insurance is shown in the Declarations. The loss or damage must be caused by or result from a Covered Cause of Loss.	Am. Compl., DE 6 at 5 ¶16, Appx 013; Policy at DE 16-1, Appx 078.
Extra Expense	b. Extra Expense means necessary expenses you incur during the "period of restoration" that you 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. We will pay Extra Expense (other than the expense to repair or replace property) to: (1) Avoid or minimize the "suspension" of business and continue operations at the described premises or . . . (2) Minimize the "suspension" of business if you cannot continue "operations."	Am. Compl., DE 6 at 6-7 ¶22, Appx 014-015; Policy at DE 16-1, Appx 078-079.

[5] According to the National Association of Insurance Commissioners ("NAIC"), approximately **82%** of all commercial property policies sold in the U.S. contain such an exclusion. *See* COVID-19 Property & Casualty Insurance Business Interruption Data Call, Part 1, Premiums and Policy Information, June 2020. D.E. 16, at 2 n.2, Appx 413 & 443-446.

Civil Authority	When a Covered Cause of Loss causes damage to property other than property at the described premises, we will pay for the actual loss of Business Income you sustain caused by action of civil authority that prohibits access to the described premises, provided that both of the following apply: Access to the area immediately surrounding the damaged property is prohibited by civil authority as a result of the damage, and the described premises are within that area but are not more than one mile from the damaged property[6]; and The action of civil authority is taken in response to dangerous physical conditions resulting from the damage or continuation of the Covered Cause of Loss that caused the damage, or . . .	Am. Compl., DE 6 at 7 ¶23, Appx 015; Policy at Appx 079.

Defendants' Policy promises to pay for business income lost due to the necessary suspension (defined to mean cessation *or* slowdown) of Town's operations resulting from "direct physical loss of **or** damage to" insured property. The Insurers chose to not define the critical phrases "direct physical loss of" or "damage to" property. The use of the disjunctive confirms, however, that "direct physical loss of" and "damage to" cannot be afforded the same meaning. Since "damage to" property would certainly include structural alteration, the "direct

[6] Pursuant to CP 01 25 02 12 "Florida Changes" at p. 2 of 3, "with respect to described premises location in Florida, such one-mile radius does not apply."

physical loss of" property must mean something else. And indeed it does. Florida's intermediate appellate courts have held that the phrase "direct physical loss" is reasonably interpreted to mean harm that actually reduces the value, usefulness or functionality of something material. Permanent structural alteration of covered property is not a necessary element of "physical loss."

Because Florida law requires this Court to accord undefined policy terms their least restrictive meaning, Town's necessary suspension of dine-in operations because of the viral pandemic qualifies as "direct physical loss." Both the presence and imminent threat of a contagious and dangerous virus in, on and around the insured property such that it cannot be operated safely satisfies the physicality requirement. Had the Insurers intended to limit coverage to structural damage, they could have easily done so in plain terms. They did not.

Town also appropriately alleged its entitlement to the limited *additional* civil authority coverage. Town specifically alleged that the ubiquity of the virus throughout Miami-Dade County caused damage to surrounding properties, and that the government issued orders prohibiting patrons from accessing Town's restaurant and bar to curb the continued spread of the harmful virus.

The Policy thus covers Town's business income, civil authority and extra expense losses, unless the carriers can prove that a policy exclusion unambiguously applies. Insurers are responsible for stating clearly and specifically what risks are

excluded from all-risk coverage. These Insurers elected to not exclude losses arising out of pandemics and deliberately chose to not include ISO standard form CP 01 40 07 06, "Exclusion for Loss Due to Virus or Bacteria."[7]

Nor does the Policy's standard "pollution exclusion" accomplish the same result. First, the Insurers did not establish that the COVID-19 pandemic is a "pollutant" as defined by the Policy. And they cannot. COVID-19 is caused by a virus. The term virus appears nowhere in the exclusion. Second, a virus does not discharge, disperse, seep, migrate, release, or escape. Those are environmental terms of art inapplicable to a virus. Regardless, clearer language was certainly available to these Insurers had they actually intended to exclude loss caused by or resulting from a virus.

Town's Insurers wrongly denied its claim. Even though the words "structural alteration" appear nowhere in the policy's insuring agreement, the district court accepted the Insurers' invitation into reversible error by rejecting Town's reasonable interpretation of "direct physical loss of or damage to" property. This timely appeal followed.

[7] DE 16 at 3, Appx 414; The text of this exclusion is attached at DE 16-2, Appx 448. *See also* Am. Compl., DE 6 ¶¶14-15, Appx 013.

III. SUMMARY OF THE ARGUMENT

Town pleaded covered business income losses because COVID-19 caused both "direct physical loss of" and "damage to" its restaurant. The district court, in dismissing Town's complaint, ruled that COVID-19 and the resulting stay-at-home orders cannot cause either "direct physical loss of" property or "damage to" property. Both of those rulings independently constitute reversible error.

"Direct physical loss of or damage to" is disjunctive, so Florida law requires "loss" to be accorded a different meaning from "damage." Town argued below that "physical loss of" property is reasonably understood to encompass the inability to use property for its intended purpose due to some non-excluded physical cause. Town alleged that the actual (or imminent) presence of COVID-19 in the restaurant and the resulting stay-at-home orders issued to curb the pandemic deprived it from using its business property as a dine-in restaurant.

The district court instead accepted the carriers' contention that business income coverage is only triggered where property is structurally altered.[8] In so doing, the district court impermissibly equated physical loss with physical damage. And, the district court failed to adopt Town's interpretation of the policy language even though it acknowledged it to be reasonable.

[8] Order, DE 38 at 5, Appx 523.

> "Although the court later holds the policy does not cover Plaintiff's claims, **it is reasonable to understand the 'direct physical loss or damage to the premises' language as covering COVID-19 harms**. Several state and federal courts (although none in Florida) have found that way and it would be wrong to say those decisions were wholly irrational." [9]

The district court's analysis should have ended there; it was bound by settled Florida law to adopt Town's reasonable interpretation.

The district court compounded its error by also determining that Town's restaurant was not "damage[d]." Even accepting the district court's incorrect "structural alteration" standard for coverage, it was not permitted to reach a factual conclusion at the motion to dismiss stage. Town properly pleaded that COVID-19 was actually or substantially certain to be present on its property. Town also pleaded that the virus rendered indoor dining unsafe because it is spread through contact and human respiration which, during a pandemic, means that the harmful virus is present. Those factual allegations, required to be accepted as true, establish that COVID-19 caused a deleterious physical change to the air and surfaces inside Town's restaurant.

Despite those allegations, and the district court's recognition that COVID-19 particles present on surfaces can constitute a physical harm, it nevertheless dismissed Town's complaint because those droplets "can be easily cleaned."[10] First, that is not

[9] *Id.* (emphasis added).
[10] Order, DE 38 at 14, Appx 532.

an appropriate factual determination for a district court to make when considering a motion to dismiss. Second, it ignores the reality of a pandemic and the factual allegations of property damage in Town's complaint. Finally, the district court contradicted its own observation that "even if a cleaning crew Lysol-ed every inch of the restaurant, it could still not host indoor dining at full capacity."[11]

Although the district court did not address it, Town last demonstrates that the Policy's pollution exclusion does not apply.

IV. ARGUMENT

Standard of Review

This Court reviews the grant of a Rule 12(b)(6) motion to dismiss *de novo*. *PBT Real Est., LLC v. Town of Palm Beach*, 988 F.3d 1274, 1286 (11th Cir. 2021). "In doing so, we accept the allegations in the complaint as true and draw all reasonable inferences in the plaintiff's favor." *Id*. A court considering a Rule 12(b) motion is generally limited to the facts alleged in the complaint or contained in documents that are either attached to the complaint or referred to in the complaint and central to the claim. *See Wilchombe v. TeeVee Toons, Inc.*, 555 F.3d 949, 959 (11th Cir. 2009).

[11] Order, DE 38 at 8-9, Appx. 526-527.

To avoid dismissal, the complaint must allege facts that, if accepted as true, "state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). A claim for relief is plausible if the complaint contains factual allegations that allow "the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

Town's policy covers economic losses caused by or resulting from "direct physical loss of or damage to property." Based on the disjunctive "or," "direct physical loss" must mean something different from "damage." One reasonable interpretation that gives "direct physical loss" independent meaning is that it includes loss of functionality of that property (as opposed to "damage," which arguably requires a physical alteration). Even though the district court expressly recognized that the policy can be reasonably understood that way, it instead ruled that both "direct physical loss of" and "damage to" property require a structural alteration. That was reversible error.

A. The District Court Committed Reversible Error by Failing to Adopt Town's Reasonable Interpretation of "direct physical loss of or damage to" Property.

1. The District Court Did Not Properly Apply Florida Law.

State law governs the interpretation of an insurance policy. Federal courts must apply "the substantive law of the forum state in a diversity case, unless federal constitutional or statutory law requires a contrary result." *Galindo v. ARI Mut. Ins.*

Co., 203 F.3d 771, 774 (11th Cir. 2000).

To determine state law, federal courts look first to decisions from the state supreme court. *Id*. at 775. If the state supreme court has not clearly answered the question, federal courts must make an "*Erie* guess" about how that court would rule. *Perkins v. Hartford Ins. Grp.*, 932 F.2d 1392, 1395 (11th Cir. 1991).[12] And when making an *Erie* guess, "federal courts follow decisions of intermediate appellate courts in applying state law." *Galindo*, 203 F.3d at 775. Intermediate appellate decisions are especially persuasive in Florida because they "represent the law of Florida unless and until they are overruled by [the Florida Supreme] Court." *Pardo v. State*, 596 So. 2d 665, 666 (Fla. 1992) (quoting *Stanfill v. State*, 384 So. 2d 141, 143 (Fla. 1980)).

But the district court went awry by not considering opinions from Florida's Supreme Court or intermediate appellate decisions. Instead, the district court relied on non-precedential decisions to hold that, as a matter of Florida law, COVID-19 does not cause either physical loss of or damage to property.

By looking to only an unpublished Eleventh Circuit case and other district court orders, the trial court did more than just ignore the technicalities of making a competent *Erie* guess; doing so resulted in an order that violated substantive Florida

[12] *See also, Erie R.P. Co. v. Tompkins*, 304 U.S. 64, 78 (1938).

law in at least three ways. First, the district court contravened settled Florida law that a policyholder need only articulate a reasonable interpretation that provides coverage. Second, the district court failed to recognize that, under Florida law, "direct physical loss of" property had to mean something different from "damage." And third, the district court failed to adopt Town's reasonable interpretation that "direct physical loss of" property encompasses the inability to use property for its intended purpose due to some non-excluded physical cause.

2. Town Need Only Articulate a Reasonable Interpretation that Affords Coverage.

The district court failed to follow a fundamental Florida rule of insurance policy construction: if the policyholder advances a reasonable interpretation providing coverage, the court must not undertake any further inquiry, and the policyholder's interpretation controls. Florida's rules of construction were not developed out of whole cloth, but rather with the understanding that insurance policies are aleatory contracts of adhesion and do not permit the policyholder to secure substitute performance in the event of a breach. Unlike a broken promise to deliver a specified number of apples for an agreed-upon price, an insurance policyholder cannot simply buy replacement apples and sue the breaching party for the difference in price. Insurance policyholders pay premiums up front in exchange for the peace of mind that they will be indemnified for covered loss in the event a

fortuitous risk occurs. Once the policyholder's home has burned to the ground, there is no other insurance carrier that will insure against that risk.[13] That is why it is universally recognized that insurance is imbued with the public trust, and special rules of contract interpretation demand that insurance policies be written clearly and construed by courts as they would be reasonably understood by an ordinary layperson. The district court failed in this required endeavor.

Under Florida law, interpretation of an insurance contract is a question of law for the court. *Dahl-Eimers v. Mut. of Omaha Life Ins. Co.*, 986 F.2d 1379, 1381 (11th Cir. 1993). "In searching for meaning in an insurance contract under Florida law 'courts should read each policy as a whole, endeavoring to give every provision its full meaning and operative effect.'" *Ruderman ex rel. Schwartz v. Wash. Nat'l*

[13] The relationship between an insurance company and its consumer policyholder is perhaps the best example of the relational contract of dependence and inequality. … The insurance contract is distinctive because, as a contract that transfers risk, performance may never be required if the risk insured against never comes to pass . . . Unlike many other contracts, because the performances are sequential, the insured cannot withhold its own performance to give the company an incentive to pay because that performance, the payment of the premium, has already occurred. Also, unlike many other contracts, once the loss has occurred, the insured cannot produce a substitute performance through another contract; a buyer whose seller breaches the duty to deliver contracted goods can measure its performance by the difference between the contract price and the market price or the cover price, but the insured cannot purchase alternative insurance against a risk that has already come to pass. Jay M. Feinman, *The Insurance Relationship as Relational Contract and the Fairly Debatable Rule for the First-Party Bad Faith*, 46 San Diego L. Rev. 553, 557-559 (2009).

Ins. Corp., 671 F.3d 1208, 1211 (11th Cir. 2012) ("*Schwartz*") (quoting *Auto-Owners Ins. Co. v. Anderson*, 756 So. 2d 29, 34 (Fla. 2000)).

But even considering "every provision," insurance policies are not always clear. If the "relevant policy language is susceptible to more than one reasonable interpretation, one providing coverage and the [other] limiting coverage, the insurance policy is considered ambiguous." *Id.* Importantly, under Florida law, "[a]mbiguous policy provisions are interpreted liberally in favor of the insured and strictly against the drafter who prepared the policy." *Auto-Owners*, 756 So. 2d at 34; *see also Prudential Prop. & Cas. Ins. Co. v. Swindal*, 622 So. 2d 467, 470 (Fla. 1993) (same); *Wash. Nat'l Ins. Corp. v. Ruderman*, 117 So. 3d 943, 949–50 (Fla. 2013) (collecting cases).

Florida law is clear that a policyholder need only supply a reasonable interpretation of the policy language that affords coverage. If the policyholder and insurer both supply reasonable interpretations of a policy, then that policy is ambiguous. *Schwartz*, 671 F.3d at 1211. And because an ambiguous policy must be interpreted in favor of coverage, the policyholder's interpretation must prevail. *Auto-Owners*, 756 So. 2d at 34. An insurance carrier, on the other hand, must show that its interpretation is the only reasonable one; if it cannot make that showing, then the policy is ambiguous and must be interpreted in favor of coverage.

3. Under Florida Law, the Phrase "Physical Loss of" Must Be Given Independent Meaning from "Damage."

Because Town's policy explicitly insures against "all risks of direct physical loss of or damage to" property, Florida law requires courts to give both words independent meaning. First, the word "or" is disjunctive, so the phrases on either side of the word "or" must be construed as alternatives. *See Landrum v. Allstate Ins. Co.*, 811 F. App'x 606, 609 (11th Cir. 2020) ("Use of the disjunctive 'or' in the policy 'indicates alternatives and requires that those alternatives be treated separately[.]'") (quoting *Quindlen v. Prudential Ins. Co. of Am.*, 482 F.2d 876, 878 (5th Cir. 1973), and citing Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts*, 116 (2012) ("Under the conjunctive/disjunctive canon, ... *or* creates alternatives.")).[14]

Second, courts must give each of those phrases different meanings because failing to do so would violate the well-worn surplusage canon. *Premier Ins. Co. v. Adams*, 632 So. 2d 1054, 1057 (Fla. 5th DCA 1994) ("[A]n interpretation which gives a reasonable meaning to all provisions of a contract is preferred to one which

[14] *See also Beach Towing Svcs. v. Sunset Lane Assocs., LLC,* 278 So. 3d 857, 867 (Fla. 3d DCA 2019) ("[T]he Florida Supreme Court has explained that … the word 'or' is a disjunctive participle that marks an alternative.'") (citation omitted); *Crown Life Ins. Co. v. Garcia*, 424 So. 2d 893, 894 n.1 (Fla. 3d DCA 1982); *accord Royal Ins. Co. v. Latin Am. Aviation Servs., Inc.*, 210 F.3d 1348, 1350–51 (11th Cir. 2000); *Prudential Ins. Co. of Am. v. Bellar*, 391 So. 2d 737 (Fla. 4th DCA 1980).

leaves a part useless or inexplicable."); *Arawak Aviation, Inc. v. Indem. Ins. Co. of N. Am.*, 285 F.3d 954, 958 (11th Cir. 2002) ("On the other hand, the efficient cause doctrine cannot be incorporated into an insurance policy if doing so would render part of the policy meaningless.") (citing *Adams*, 632 So. 2d at 1057); *S.-Owners Ins. Co. v. Easdon Rhodes & Assocs., LLC*, 872 F. 3d 1161, 1166 (11th Cir. 2017) ("[Courts] must avoid construction rendering particular phrases mere surplusage.").

Third, "[w]ords and phrases in an insurance policy, when not specifically defined therein, 'must be given their everyday meaning and read in light of the skill and experience of ordinary people.'" *Siegle v. Progressive Consumers Ins. Co.*, 788 So. 2d 355, 359–60 (Fla. 4th DCA 2001), *aff'd*, 819 So. 2d 732 (Fla. 2002) (quoting *Lindheimer v. St. Paul Fire & Marine Ins. Co.*, 643 So. 2d 636, 638 (Fla. 3d DCA 1994)).

The district court ran afoul of these bedrock interpretive principles by collapsing both "direct physical loss of" and "damage to" property into a single concept: "structural alteration." That was legal error.

4. Under Florida Law, "Direct Physical Loss" is Reasonably Interpreted to Encompass the Inability to Use Town's Restaurant For Its Intended Purpose As a Result of a Non-Excluded Physical Cause.

As this Court can readily discern, the Policy does not define the critical phrase "direct physical loss of or damage to" property. Had Defendants intended that phrase

to mean only structural damage, they could have expressly said so.[15] They chose not to do so, however, and cannot now give the undefined phrase such a narrow interpretation.[16]

Fortunately, Florida's settled rules of insurance policy interpretation assist this Court by requiring coverage grants to be construed in the broadest possible manner to effect the greatest extent of coverage. This Court must also endeavor to give effect to every word. The use of the disjunctive "or" indicates that a "loss of" property is distinct from "damage to" property. Physical "damage to" property obviously includes fortuitous losses where property is structurally altered like, for example, a roof blowing off during a hurricane. In order to determine the terms' common usage or ordinary meaning, courts within this circuit often turn to dictionary definitions for guidance.[17] *Damage,* according to Merriam-Webster, is

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[15] The Insurers included such a definition of "structural damage" within the endorsement applicable to Catastrophic Ground Cover Collapse. *See* (CP 01 25 02 12, p. 3 of 3.) [ECF 6-1 at p. 88].

[16] *See State Farm Mut. Auto Ins. Co. v. Pridgen*, 498 So. 2d 1245, 1247 n.3 (Fla. 1986) (undefined terms are interpreted liberally in favor of the insured).

[17] *See Hirsch v. Jupiter Golf Club LLC*, 232 F. Supp. 3d 1243,1251 (S.D. Fla. 2017) (citing *CBS Inc. v. PrimeTime 24 Joint Venture*, 245 F.3d 1217, 1223 (11th Cir. 2001); *see also Gov't Employees Ins. Co. v. Macedo*, 228 So. 3d 1111, 1113 (Fla. 2017) ("When a term in an insurance policy is undefined, it should be given its plain and ordinary meaning, and courts may look to legal and non-legal dictionary definitions to determine such a meaning.") (citation omitted).

"loss or harm resulting from injury to person, property, or reputation."[18] "Loss," on the other hand, means "the act of losing possession."[19] *See also* Black's Law Dictionary (11th ed. 2019) (Loss: "an undesirable outcome of a risk; the disappearance or diminution of value usu[ally] in an unexpected or relatively unpredictable way.").

Finally, the Policy specifies that either the "loss of" or "damage to" property must be caused by or result from something physical and direct.[20] The terms "physical" and "direct" are also not defined by the Policy. "Physical" means "having material existence" or "of or relating to material things."[21] Direct means "characterized by close logical, causal or consequential relationship."[22]

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[18] https://www.merriam-webster.com/dictionary/damage (last visited September 16, 2020).

[19] https://www.merriam-webster.com/dictionary/loss (last visited September 16, 2020).

[20] "The loss or damage must be caused by or result from a Covered Cause of Loss." (CP 00 30 10 12, p.1 of 9) [ECF 6-1 at pg. 46]. "Covered Causes of Loss means direct physical loss unless the loss is excluded or limited in this policy." (CP 10 30 09 17, p.1 of 10) [ECF 6-1 at p. 60].

[21] https://www.merriam-webster.com/dictionary/physical (last visited September 16, 2020).

[22] https://www.merriam-webster.com/dictionary/direct (last visited September 16, 2020).

Taken together, "direct physical loss of or damage to" property is reasonably interpreted to include "the diminution in value of something material," "harm that actually reduces value or usefulness," or "actual loss of possession."[23] Consequently, the temporary loss of functionality of one's property due to something physical qualifies as "direct physical loss." COVID-19's virus-containing droplets surely have "material existence." Although these droplets may be imperceptible to the naked eye, they can be seen under a microscope, are spread through the air we breathe and attach to surfaces and objects.[24] Indeed, Town pleaded that the two primary modes of COVID-19 transmission are via respiratory droplets from breathing and touching surfaces to which the virus adheres.[25] COVID-19 causes "loss or damage" because it remains for a time in the air and on surfaces, is continually spread each time an infected person talks, coughs, sneezes or breathes,

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[23] Florida courts agree. *See Homeowners Choice Prop. & Cas. v. Maspons*, 211 So. 3d 1067, 1069 (Fla. 3d DCA 2017) (construing "direct physical loss" to include the failure of a drain pipe to perform its function because it diminished the value of the insured home).

[24] William P. Hanage, *It's a Wildfire, Not a Wave*, MEDSCAPE (July 7, 2020); WHO Director-General's Opening Remarks (March 16, 2020) ("You cannot fight a fire blindfolded. And we cannot stop this pandemic if we don't know who is infected."); Zeynep Tufecki, *et al.*, *The Real Reason to Wear a Mask*, THE ATLANTIC (Mar. 12, 2020) ("Think of the coronavirus pandemic as a fire ravaging our cities and towns that is spread by infected people breathing out invisible embers every time they speak, cough, or sneeze.").

[25] Am. Compl., DE 6 at 13 ¶ 43, Appx. 021.

and renders property unfit and unsafe for occupancy. *Id.* Simply put, Town more than adequately alleged that the presence (and imminent threat) of COVID-19 caused its business income loss because the dine-in restaurant and bar could not safely be operated for its insured purpose.[26] And, importantly, the district court expressly recognized that Town's interpretation is reasonable and has been endorsed in the COVID-19 context by [a growing number of courts].[27]

5. Courts Within Florida and Elsewhere Have Found Loss of Functionality to be "Direct Physical Loss."

Florida appellate courts have certainly not concluded that structural alteration is required to show physical loss or damage to property. Indeed, numerous courts in

[26] Am. Compl., DE 6 at 13-14 ¶¶ 43-46.

[27] *See, e.g., Urogynecology Specialist of Fla., LLC v. Sentinel Ins. Co., Ltd.*, 489 F. Supp. 1297, 1303 (M.D. Fla. 2020); *MacMiles, LLC v. Erie Ins. Exch.*, No. GD-20-7753 (C.P. Allegheny Cty. May 25, 2021); *Susan Spath Hegedus, Inc. v. ACE Fire Underwriters Ins. Co.*, No. 2:20-cv-02832, 2021 WL 1837479 (E.D. Pa May 7, 2021); *Serendipitous, LLC v. The Cincinnati Ins. Co.*, No. 2:20-cv-00873, 2021 WL 1816960 (N.D. Ala. May 6, 2021); *In re: Society Ins. Co. Business Interruption Protection Ins. Lit.*, 2021 WL 679109, at *8 (N.D. Ill. Feb. 22, 2021); *Cherokee Nation v. Lexington Ins. Co*., No. CV-20-150 (Okla. Dist. Ct. Cherokee Cnty. Jan 29, 2021); *McKinley Dev. Leasing, et al. v. Westfield Ins. Co.*, No. 2020-cv-00815 (Ohio Ct. Com. Pl. Feb. 9, 2021); *Henderson Rd. Rest. Sys., Inc. v. Zurich Am. Ins. Co.*, No. 20-cv-1239, 2021 WL 168422 (N.D. Ohio Jan. 19, 2021); *Perry St. Brewing Co., LLC v. Mut. of Enumclaw Ins. Co.*, No. 20-2-02212-32 (Wash. Super. Ct. Spokane Cnty. Nov. 23, 2020); *N. State Deli, LLC v. Cincinnati Ins. Co.*, No. 20-cv-02569, 2020 WL 6281507 at *7-8 (N.C. Super. Ct. Oct. 9, 2020); *Blue Springs Dental Care, LLC v. Owners Ins. Co.*, 488 F.Supp. 3d 867 (W.D. Mo. 2020); *Derek Scott Williams PLLC v. Cincinnati Ins. Co.*, 2021 WL 767617 (N.D. Ill. Feb. 28, 2021).

Florida and nationwide have held that "direct physical loss" is **not** limited to structural damage, and includes the inability of property to be used for its intended purpose. The First District in *Azalea, Ltd. v. Amer. States Ins. Co.*, 656 So. 2d 600 (Fla. 1st DCA 1995) construed a substantively identical insuring agreement in a commercial property policy. In that case, some unknown substance was dumped into a mobile home park's on-site sewage treatment facility. *Id.* at 601. The substance turned out to be nonhazardous, but the City of Jacksonville prohibited Azalea from using the treatment facility until that could be confirmed. *Id*. In denying coverage for the cleanup cost, the insurance carrier similarly argued that there was no direct physical loss to the sewage treatment facility. *Id*. Even though there was no structural damage, the First District rejected the carrier's argument. *Id*. at 602. The system had to be drained, cleaned and the residue removed so that the treatment facility could properly function. *Id*. at 601-602.

In reaching its decision, the First District cited with approval to *Hughes v. Potomac Ins. Co.,* 199 Cal. App. 2d 239, 18 Cal. Rptr. 650 (Cal. Ct. App. 1962). *Hughes* involved no damage to insured property at all. Rather, a landslide occurred depriving the insured home of subjacent and lateral support essential to its stability. Even though the home suffered no structural damage, the court found that common sense required that the policy not be interpreted so as to deny coverage for a dwelling rendered useless. *See also Three Palms Pointe, Inc. v. State Farm Fire & Cas. Co.*,

250 F. Supp. 2d 1357, 1364 (M.D. Fla. 2003), *aff'd*, 362 F.3d 1317 (11th Cir. 2004) ("*Azalea* stands for the proposition that under Florida law 'direct physical loss' includes more than losses that harm the structure of the covered property."); *Maspons*, 211 So. 3d at 1069 ("direct physical loss" means "actual diminution in value of the insured's home or personal property" and holding that, absent any structural damage, the failure of a drain pipe to perform its function diminishes the value or usefulness of the home and is therefore a "direct physical loss").[28]

The *Azalea* court also cited with approval to *Western Fire Ins. Co. v. First Presbyterian Church*, 437 P.2d 52 (Colo. 1968). That court held, in the absence of any structural damage, that plaintiff suffered "direct physical loss" where gasoline infiltrated soil around and under the church, rendering use of the building dangerous. *Id*. at 55. The district court was bound to follow these decisions in making its "Erie guess." It did not.

Nor are these Florida interpretive decisions outliers. Numerous other courts have held that loss of functionality due to some actual or threatened physical force constitutes "direct physical loss." *See, e.g., Port Auth. of N.Y. & N.J. v. Affiliated FM Ins. Co.*, 311 F.3d 226, 236 (3d Cir. 2002) ("physical loss or damage" occurs

[28] *See also Vazquez v. Citizens Prop. Ins. Corp.*, 304 So. 3d 1280 (Fla. 3d DCA 2020); *Widdows v. State Farm Fla. Ins. Co.*, 920 So. 2d 149, 150 (Fla. 5th DCA 2006) (finding failure of pipe to function despite no structural damage or alternation to property constitutes "physical loss").

where release of asbestos "nearly eliminated or destroyed" the property's function, rendering the structure "useless or uninhabitable," or "*if there exists an imminent threat of the release of a quantity of asbestos fibers that would cause such loss of utility.")* (emphasis supplied); *Gregory Packaging, Inc. v. Travelers Prop. Cas. Co. of Am.*, 2014 WL 6675934, at *6 (D.N.J. Nov. 25, 2014) (ammonia discharge inflicted "direct physical loss of or damage to" packaging facility where ammonia levels rendered the facility unfit for occupancy); *TRAVCO Ins. Co. v. Ward*, 715 F. Supp. 2d 699, 708 (E.D. Va. 2010), *aff'd*, 504 F. App'x 251 (4th Cir. 2013) ("The majority of cases appear to support Defendant's position that physical damage to the property is not necessary, at least where the building in question has been rendered unusable by physical forces."), *Hampton Foods, Inc. v. Aetna Cas. & Sur. Co*., 787 F.2d 349, 352 (8th Cir. 1986) (policyholder could claim business income coverage where risk of collapse necessitated abandonment of grocery store).[29] And, courts

[29] *See also, e.g., Murray v. State Farm Fire & Cas. Co.*, 509 S.E.2d 1, 17 (W. Va. 1998) (where home became uninhabitable under threat of impeding rockslide, covered losses could exist in the absence of structural damage); *Matzner v. Seaco Ins. Co.*, 1998 WL 566658, at *3-4 (Mass. Sup. Ct. Aug. 12, 1998) (concluding that carbon monoxide infiltration without any structural damage to building constituted direct physical loss); *Sentinel Mgmt. Co. v. New Hampshire Ins. Co.*, 563 N.W.2d 296, 300 (Minn. Ct. App. 1997) (without any structural damage, asbestos fibers may constitute direct physical loss where property is injured, impaired or rendered useless by their presence); *Motorists Mut. Ins. Co. v. Hardinger*, 131 F. Appx. 823 (3d Cir. 2005*); Zurich Amer. Ins. Co. v. Cutrale Citrus Juices USA, Inc.*, 2002 WL 1433728 (M.D. Fla. 2002) (no requirement that Insured property be rendered unusable; diminution in value is sufficient).

have also found "physical loss" from the presence of microscopic asbestos fibers, bacteria and noxious odors - - none of which cause structural damage. The fact that these conditions can be cleaned is of no moment, just as property that can be repaired has nevertheless suffered physical loss or damage.[30]

The federal district court overseeing one of the two multi-district litigations concerning COVID-19 business interruption insurance, *In re Society Ins. Co. Business Interruption Protection Ins. Lit.*, examined this precise issue.[31] 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."[32] If "damage" were given a structure-altering meaning, "loss" would have to be given a meaning not carrying that requirement. Otherwise, loss would be rendered redundant and thus violate a cardinal

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[30] *See Brand Mgmt., Inc. v. Maryland Cas. Co.*, 2007 WL 1772063, at *1 (D. Colo. June 18, 2007) (noting, where a sushi manufacturer closed for fifteen days to disinfect its premises after discovery of listeria contamination, that insurance company voluntarily paid the Business Income claim during the period in which the premises was cleaned and sanitized); *Mellin v. N. Sec. Ins. Co.*, 115 A.3d 799, 805 (N.H. 2015) (evidence that pervasive odor of cat urine rendered the condominium temporarily or permanently unusable or uninhabitable may support a finding of direct physical loss); *Farmers Ins. Co. v. Trutanich*, 858 P.2d 1332, 1335 (Ore. App. 1993) (noting that residue from cooking methamphetamine could be cleaned, but courts have nevertheless found the odor to constitute physical loss).

[31] *In re Society Ins. Co. Business Interruption Protection Ins. Lit.*, 2021 WL 679109, at *8 (N.D. Ill. Feb. 22, 2021).

[32] *Id.*

rule of insurance policy interpretation.[33]

For that reason, several courts across the country have held in the COVID-19 context "physical loss" and "physical damage" differ.[34]

The *Society* court emphasized that a plaintiff that has alleged a loss of functional space or functionality has, in fact, alleged a direct physical loss of property.[35] In explaining how the shutdown orders impose a physical limit, that court stated:

> [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.[36]

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[33] *Id.*; *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).

[34] *See Blue Springs Dental Care, LLC v. Owners Ins. Co.*, 2020 WL 5637963, at *5, n.6 (W.D. Mo. Sept. 21, 2020); *Studio 417, Inc. v. Cincinnati Ins. Co.*, 2020 WL 4692385, at *5 (W.D. Mo. Aug. 12, 2020); and *Derek Scott Williams PLLC v. Cincinnati Ins. Co.*, 2021 WL 767617 (N.D. Ill. Feb. 28, 2021).

[35] 2021 WL 679109, at *9.

[36] *Id.* at 21.

Just so here.

Courts also have routinely held that properties sustained "direct physical loss or damage" when they lose habitability or functionality, including commercial functionality.[37] Here, the district court was wrong to ignore the hazardous and easily transmissible nature of COVID-19 by dismissively suggesting that it can be eliminated with "Lysol and a rag."[38] During a pandemic, the harmful virus cannot be eliminated because it will continually spread when Town's property is used for its intended purpose as a dine-in restaurant and bar. Accordingly, fortuitous events – like the presence or suspected presence of COVID-19 – which make it too dangerous to use property as it is designed and insured to be used, cause physical loss or damage to property.[39]

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[37] *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 Indemnity Co. of Connecticut*, 2007 WL 464715, at *8 (D. Or. Feb. 7, 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 Property 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").

[38] Order, DE 38 at 12, Appx 530.

[39] *See also Motorists Mutual Ins. Co. v. Hardinger*, 131 F. App'x. 823, 825-27 (3d Cir.

B. The District Court Improperly Concluded on a Motion to Dismiss that COVID-19 Does Not Damage Property.

In addition to pleading that it suffered a "loss," Town alternatively pleaded that COVID-19 "damage[d]" its property. The district court rejected that argument too, ruling that property which merely needs to be cleaned has not suffered physical loss or damage.

Even assuming *arguendo* that the district court was correct to require a "change in structure to property," dismissal was still inappropriate. Town properly pleaded that COVID-19 "damage[d]" its property by attaching itself to surfaces and infecting the air, rendering the property unusable. Thus, a factual dispute exists as to whether COVID-19 causes damage to property. Instead of allowing the parties to proceed to discovery and present fact and expert testimony, the district court summarily declared that " . . . coronavirus particles damage lungs, they do not damage buildings."[40] That was both factual and legal error, and the district court's order dismissing the complaint should be reversed.

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); *Ward*, 715 F.Supp. at 709 (finding "direct physical loss" where a home was "rendered uninhabitable by the toxic gases" released by defective drywall).

[40] Order, DE 38 at 8, Appx. 526.

1. Town Pleaded That COVID-19 Damaged Its Property.

Town appropriately pleaded that COVID-19 damaged its property. To survive a motion to dismiss, a plaintiff need only allege "sufficient factual matter" that, "accepted as true," states a "plausible" claim. *Ashcroft*, 556 U.S. at 678 (2009). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." And courts must accept factual allegations as true if they rise "above the speculative level." *Twombly*, 550 U.S. at 555 (2007).

It is true that *Twombly* and *Iqbal* do not require courts to accept bare legal conclusions. *See Dusek v. JPMorgan Chase & Co.*, 832 F.3d 1243, 1246 (11th Cir. 2016) ("In deciding a Rule 12(b)(6) motion to dismiss, the court must accept all factual allegations in a complaint as true and take them in the light most favorable to plaintiff, . . . but '[l]egal conclusions without adequate factual support are entitled to no assumption of truth.'" (internal citations omitted). But Town's allegation that COVID-19 damaged its property was not a bare legal conclusion. [41]

[41] CDC guidance states that there is little evidence to suggest that routine use of disinfectants can prevent the transmission of the Coronavirus from fomites in community settings. Indeed, the CDC concluded that according to a more quantitative microbial risk assessment study, "surface disinfection once- or twice-per-day had little impact on reducing estimated risks" of Coronavirus transmission. *Science Brief: SARS-CoV-2 and Surface (Fomite) Transmission for Indoor Community Environments*, CDC (updated Apr. 5, 2021), https://www.cdc.gov/coronavirus/2019-ncov/more/science-and-research/surface-

"[A]lthough 'the line between facts and conclusions is often blurred,' facts are typically 'susceptible to objective verification' while conclusions most often amount to 'inferences from the underlying facts.'" *Adinolfe v. United Techs. Corp.*, 768 F.3d 1161, 1173 (11th Cir. 2014) (quoting *Dartmouth Review v. Dartmouth Coll.*, 889 F.2d 13, 16 (1st Cir. 1989), overruled on other grounds by *Educadores Puertorriquenos en Accion v. Hernandez*, 367 F.3d 61 (1st Cir. 2004)).

Town pleaded these facts:[42]

> 24. In or around December 2019, the first case of COVID-19 or the novel Coronavirus was reported. According to the World Health Organization, COVID-19 is "an infectious disease caused by a newly discovered coronavirus."[43] COVID-19 can be transmitted from person to person, but can also be acquired after touching contaminated objects.
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> 25. According to the Center for Disease Control ("CDC"), "everyone is at risk for getting COVID-19." A person may become infected by (1) coming into close contact (about 6 feet) with a person who has COVID-19; (2) respiratory droplets when an infected person talks, sneezes, or coughs; and/or (3) touching surfaces or objects that have the virus on them, and then touching his or her mouth, eyes, or nose. *See* https:www.cdc.gov.coronavirus/2019-

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transmission.html (last visited June 13, 2021); A *Journal of Hospital Infection* article citing studies revealing that human coronaviruses can persist on inanimate surfaces like metal, glass, or plastic for up to nine days. G. Kampf et al., *Persistence of coronaviruses on inanimate surfaces and their inactivation with biocidal agents*, J. HOSP. INFECTION 104, 246-51 (Jan. 31, 2020), https://www.journalofhospitalinfection.com/action/showPdf?pii=S0195-6701%2820%2930046-3 (last visited June 13, 2021).

[42] Am. Compl., DE 6 at 7-9 ¶¶ 24-27, Appx 15-17; Am. Compl., DE 6 at 13-14 ¶¶ 43, 45, 46, Appx 21-22.

[43] https://www.who.int/health-topics/coronavirus#tab=tab_1.

ncov/faq.html; *see also* Miami-Dade County Emergency Order 05-20 attached as Exhibit B.

26. The time from exposure (infection) to the development of COVID-19 symptoms – the incubation period – can be up to fourteen days.[44] During this period, those infected can be contagious and transmit the disease before they show any symptoms or have any reason to believe they are sick.[45] Asymptomatic carriers may also transmit the virus. *Id*. At least 44% of all infections occur from people without any symptoms. *See* https: www.nature.com/articles/s41591-020-0869-5.

27. Studies from the National Institutes of Health support that the virus may be detected in aerosols for up the three hours, on plastic and stainless steel for up to three days, and on cardboard for twenty-four hours. *See* https://www.nih.gov/news-events/nih-research-matters/study-suggests-new-coronavirus-may-remain-surfaces-days.

43. COVID-19 has caused and continues to cause direct physical loss of or damage to Town, because the restaurant is unusable for its intended purpose or unsafe for normal human occupancy or continued use. The restaurant was insured to be used as a dine-in facility, bar, and event space. Because the highly contagious and deadly COVID-19 is physical, spread by human-to-human contact, aerosol, and surface contamination, Town can no longer serve its intended use, has suffered physical loss or damage, and has sustained a necessary suspension of its operations.

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[44] *See* https://www.who.int/docs/default-source/coronaviruse/situation-reports/20200402-sitrep-73-covid-19.pdf?sfvrsn=5ae25bc7_4#:~:text= The%20 incubation%20period%20for%20COVID,occur%20before% 20symptom%20onset (last viewed on July 9, 2020); *see also* https://www.cdc.gov/coronavirus/2019-ncov/hcp/faq.html (last viewed on July 9, 2020.

[45] *See* https://www.who.int/docs/default-source/coronaviruse/situation-reports/20200402-sitrep-73-covid- 19.pdf?sfvrsn=5ae25bc7_4#:~:text=The %20incubation%20period%20for%20COVID,occur%20before% 20symptom% 20onset (last viewed on July 9, 2020).

> 45. Moreover, the imminent threat of the presence of COVID-19 in and around the area immediately surrounding Town resulted in a direct physical loss of or damage to property, such that the continuation of business operations as normal would certainly and unavoidably cause physical loss of or damage to the Property, and/or cause further physical loss of or damage to the Property.
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> 46. As there is no method to test for the presence of COVID-19 on surfaces, as many of those afflicted with COVID-19 are asymptomatic yet able to transmit the virus, and as Town's employees and guests were so numerous, including visitors from other COVID-19 "hot spots," it is statistically certain that the virus was in and on the Property and was and continues to be on surrounding properties, and physical loss or damage must thus be presumed.

Those facts, if the district court had correctly accepted them as true, establish that COVID-19 caused a change to property then in a satisfactory state. These allegations, in other words, provide more than mere speculation that COVID-19 harms property. *See Twombly*, 550 U.S. at 555.

This Court considered a similar question in *Adinolfe*, where it reversed a Rule 12(b)(6) dismissal of two toxic tort actions. 768 F.3d at 1173-75. In that case, the following factual allegations were enough to state a claim: the defendant "generated and released or discharged contaminants into the soil, surface water, and groundwater," *id*. at 1172; the contaminants migrated from where they were dumped to the plaintiffs' neighborhood, *id*. at 1172–73; and the contaminants were found on the plaintiffs' property, where there was a cancer cluster, *id*. at 1173. Those allegations "set forth facts that amount to substantially 'more than labels and

conclusions' concerning the matter of contamination." *Id*. (citing *Twombly*, 550 U.S. at 554).

Like the plaintiffs in *Adinolfe*, Town pleaded that COVID-19 invaded its restaurant. And like the plaintiffs in *Adinolfe*, Town pleaded that COVID-19 rendered its property unusable. That is enough. By requiring more of Town at the motion to dismiss stage, the district court improperly imposed a heightened pleading standard. *See Twombly*, 550 U.S. at 570 ("[W]e do not require heightened fact pleading of specifics, but only enough facts to state a claim to relief that is plausible on its face."). Deciding at the motion to dismiss stage that COVID-19 does not damage property is tantamount to the district court in *Adinolfe* deciding at the motion to dismiss stage that the substance at issue did not cause cancer.

The district court's job in ruling on a Rule 12(b)(6) motion was not to determine whether Town proved its case. It was merely to assess whether Town's complaint properly pleaded that COVID-19 damaged its property, which it did. The district court was not entitled to resolve this question of fact on a Motion to Dismiss. *See, e.g.*, *Page v. Postmaster Gen. & Chief Exec. Officer of U.S. Postal Serv.*, 493 F. App'x 994, 995 (11th Cir. 2012); *see also Chappell v. Goltsman*, 186 F.2d 215, 218 (5th Cir. 1950); *cf. Lawrence v. Dunbar*, 919 F.2d 1525, 1529-31 (11th Cir. 1990) (the existence of disputed material facts precludes the district court from granting a motion to dismiss). Although Town need not prove that COVID-19

causes "structural alteration" at the motion to dismiss stage, it should have at least been given the opportunity to do so.[46]

Mama Jo's Inc. v. Sparta Insurance Co., 823 F. App'x 868, 870 (11th Cir. 2020), which the district court used as its basis for ruling that COVID-19 does not damage property, is fundamentally inapplicable. In *Mama Jo's*, the plaintiff claimed that dust and debris from nearby road construction damaged its property. *Id.* at 871. The plaintiff first filed a claim only for the costs of cleaning and painting and for the loss of income due to lower than expected sales. *Id.* at 879. It later amended its claim to include "damage to the awning, retractable roof systems, HVAC, audio, and lighting systems." *Id*. at 872. The case proceeded to discovery, where three experts testified that the dust damaged the property. *Id.* The district court considered and rejected these experts as unreliable, and it concluded that "without expert testimony, [the plaintiff] could not prove that construction dust and debris" damaged its "awnings, retractable roof, HVAC system, railings, and audio and lighting system." *Id.* at 874–75. On appeal, this Court affirmed the district court's decision to exclude the experts.

[46] The WHO's description of fomite transmission of COVID-19 expressly recognizes this physical alteration of property, describing viral droplets as "creating fomites (contaminated surfaces)" (emphasis added). *Transmission of SARS-CoV-2: implications for infection prevention precautions*, WHO (July 9, 2020), https://www.who.int/news-room/commentaries/detail/transmission-of-sars-cov-2-implications-for-infection-prevention-precautions (last visited June 13, 2021).

As an initial matter, *Mama Jo's* is best understood as a "no evidence" case, and any discussion about "physical loss or damage" is accordingly *dictum*. Moreover, this Court's unpublished observation that a "structure that merely needs to be cleaned" has not suffered a direct physical loss - conflicts with controlling Florida precedent. *See Azalea*, 656 So. 2d at 601 (ruling that an unknown substance that adhered to a wastewater tank, requiring it to be cleaned, caused direct physical loss or damage). Even setting that aside, and accepting the reasoning of *Mama Jo's* as correct, that case is still distinguishable from this one. The district court rejected expert testimony that the construction dust damaged the plaintiff's property, and therefore there were no fact issues to resolve on summary judgment. *Mama Jo's*, 823 F. App'x at 878. In this case, Town was never afforded the opportunity to adduce evidence that the ubiquity of the virus rendered Town's restaurant unsafe and unfit for human occupancy just like the asbestos fibers, chemical fumes, noxious odors and bacteria found by courts to constitute physical loss or damage to property.

In finding that the presence of Coronavirus constitutes physical loss, the Northern District of Alabama addressed this key distinction between Coronavirus and nonlethal, surface-only substances (e.g., dust), making clear that *Mama Jo's* does not apply to the Coronavirus:

> But the restaurants have alleged that they had to close entirely when employees tested positive for COVID-19. That distinguishes this case from *Mama Jo's*. And the highly contagious nature of COVID-19 caused civil

> authorities to temporarily limit capacity in restaurants to prevent the spread of the physical but invisible virus in restaurants. Cleaning was only one precaution for COVID-19; physical distancing was another, and that distancing, allegedly by civil order and not by choice, deprived the restaurants of the use of their property, i.e. their tables and seating, while temporary orders were in place.

Serendipitous, LLC v. Cincinnati Ins. Co., 2021 WL 1816960 (N.D. Ala. May 6, 2021), at *17 (noting "Mama Jo's, a summary judgment opinion, does not require dismissal of the complaint in this action.").

The district court made an improper factual determination at the motion to dismiss stage, and the order dismissing Town's complaint should be reversed.

C. The "Pollution Exclusion" Does Not Bar Town's Claim.

Even though the district court did not reach the issue, we write to dispel any notion that Town's claim is barred by the policy's "pollution exclusion." The Insurers argued below that the virus that causes COVID-19 is a "pollutant."[47] In support of this contention, they relied extensively on *Nova Cas. Co. v. Waserstein*,

[47] This argument would be a non-starter in many jurisdictions because the "pollution exclusion" has been interpreted to apply only to claims involving "traditional environmental and industrial pollution." Florida chose not to interpret the exclusion that narrowly in a chemical release case because the terms "environmental" and "industrial" are not found in the exclusion. *See Deni Assocs. of Fla., Inc. v. State Farm Fire & Cas. Ins. Co*., 711 So. 2d 1135, 1140-41 (Fla. 1998). Florida's high court was careful to expressly limit its holding to the facts of two cases involving liability claims for the release of chemical fumes from an ammonia spill and the spraying of a pesticide when applying the pollution exclusion in a CGL policy. *Id*.

424 F. Supp. 2d 1325 (S.D. Fla. 2006). That case concerned a pollution exclusion that similarly defined "pollutant" to mean "any solid, liquid, gaseous or thermal irritant or contaminant, including smoke, vapor, soot, fumes, acids, alkalis, chemicals and waste." In *Waserstein*, the liability claim resulted from exposure to, among other things, "living organisms," "microbial populations," or "microbial contaminants," and the court concluded that the pollution exclusion unambiguously applied. *Id*. at 1329.

Waserstein is distinguishable in at least two important respects. First, it was a decision reached on summary judgment. Second, *Waserstein* did not involve a communicable virus, a pandemic or even first-party coverage. Rather, it considered an exclusion within a liability policy concerning other harmful substances that were negligently released and dispersed throughout a building.[48]

Moreover, at least one other federal court applying Florida law has correctly rejected the reasoning of *Waserstein*. *See Westport Ins. Corp. v. VN Hotel Group, LLC*, 761 F. Supp. 2d 1337, 1344 (M.D. Fla. 2010). In *VN Hotel*, the district court "respectfully disagree[d] with [*Waserstein*'s] conclusion" that "living organisms,

[48] *See U.S. Fire Ins. Co. v. J.S.U.B., Inc.*, 979 So. 2d 871, 882–83 (Fla. 2007) (explaining that "whether a decision is binding on another is dependent upon there being similar facts and legal issues" and that "where the [insurance] policies and underlying facts are different, then a previous decision should not be binding").

microbial populations, microbial contaminants, and indoor allergens" are pollutants. *Id*. As that court succinctly explained, the reasoning "in *Waserstein* would permit any living organism with a contaminating effect - including bacteria, insects, rodents, and the like - to be 'pollutants' triggering the Pollution Exclusion." *Id*. Such a result, the court reasoned, would be "too far afield from the enumerated examples of 'pollutants' - smoke, vapor, soot, fumes, acids, alkalis, chemicals, and waste[.]" *Id*. Therefore, the district court ruled that the carrier had a duty to defend its policyholder against claims arising out of exposure to Legionnaire bacteria because they were *not* barred by the pollution exclusion. This Court affirmed in an unpublished opinion. *See Westport Ins. Corp. v. VN Hotel Group*, *LLC*, 513 Fed. Appx. 927, 931-32 (11th Cir. 2013) (Legionella bacteria not a "pollutant" because it would render separate exclusion for fungi/bacteria meaningless).

Town's Policy also has a separate exclusion for "'fungus', wet rot, dry rot or bacteria." It bars coverage for any loss or damage caused directly or indirectly by "Presence, growth, proliferation, spread or any activity of 'fungus', wet or dry rot or bacteria." (CP 10 30 09 17, p3 of 10) [ECF 6-1 at pg. 62]. Because bacteria is not a "pollutant," it would be a strained interpretation indeed to conclude that virus somehow qualifies. Truer still, if the Insurers actually intended to exclude loss due to virus or communicable disease, they could have done so specifically by including the standard ISO exclusion.

Importantly, the *Waserstein* court acknowledged that the interpretive canon of *ejusdem generis* likely compelled the conclusion that the microbial populations at issue were insufficiently similar to the enumerated contaminants and irritants to trigger the exclusion. As relevant here, this canon provides that the general word "pollutant" must be construed to refer to things of "the same kind or species as those [things] specifically enumerated." *Green v. State*, 604 So. 2d 471, 473 (Fla. 1992). In other words, "pollutant" must be construed to refer to things of the same kind as smoke, vapor, soot, fumes and so on. And because all the enumerated things here are fundamentally dissimilar from a virus - among other things, they are not transmitted and spread by humans - neither the term "pollutant" nor "solid, liquid, gaseous, or thermal irritant or contaminant" can reasonably be construed to refer to viruses. But, the *Waserstein* court bemoaned its perceived inability to use the canon as an interpretive tool. *Waserstein*, 424 F.Supp.2d at 1336 ("Under Florida law, a court is not permitted to use the rule of *ejusdem generis* to discern the plain language of a contract. It may only use the rule to construe the contract *after* it determines that the plain language is ambiguous.") (citation omitted).

Whether or not that was an accurate statement of law in 2006, it is certainly not correct today. Both the Florida Supreme Court and this Court have determined that nothing forecloses a Florida court from employing *ejusdem generis* to discern the meaning of an insurance policy's plain language. *Fayad v. Clarendon Nat. Ins*

Co., 889 So.2d 1082, 1088-90 (Fla. 2005) (employing *ejusdem generis* to conclude that "Earth Movement" exclusion applied only to those caused by natural events and not man-made events); *St. Luke's Cataract & Laser Institute, P.A. v. Zurich Amer. Ins. Co*., 506 F. App'x. 970, 977, n. 10 (11th Cir. 2013) ("Our narrow reading of this exclusion is consistent with Florida law's directive that we apply *ejusdem generis* to such provisions. We stress that our decision is based upon the 'plain language of the policy,' *see* Fayad, 899 So. 2d at 1086, as clarified through ordinary rules of contract construction, and not on the rule that ambiguous exclusionary provisions must be construed in favor of the insured.").

To the extent that there is a tension between the interpretation of "pollutant" in the two cases, *VN Hotel* is more persuasive. Expanding the pollution exclusion to "any . . . irritant," no matter how dissimilar to smoke, vapor, soot, fumes, chemicals and so on, would not comport with the plain language of the exclusion and render it absurdly overbroad. *See Gustafson v. Alloyd Co., Inc*., 513 U.S. 561, 574 (1995) (applying the interpretive rule *noscitur a sociis* - - a word is known by the company it keeps - - to avoid ascribing to one word an overbroad meaning). And even if the interpretation in *Waserstein* were reasonable, so too is that of *VN Hotel*.[49]

[49] Consistent with the reasoning of *VN Hotel*, other courts have similarly held that standard pollution exclusions do not apply to virus and/or bacteria. *See*, *e.g.*, *Keggi v. Northbrook Prop. & Cas. Ins.*, 199 Ariz. 43, 13 P.3d 785 (Ariz. App. 2000)

Competing reasonable interpretations render the exclusion ambiguous as applied to a virus.

It also bears emphasis that the pollution exclusion encompasses *only* loss or damage caused by the "[d]ischarge, dispersal, seepage, migration, release, or escape of 'pollutants.'" Those terms make sense as applied to the enumerated examples. In other words, chemicals, smoke and fumes regularly seep, migrate and escape. *See Landrum*, 811 F. App'x at 609 (examining definitions of "seepage" and "leakage"). But the terms are inapposite to Town's loss, which was not caused by the discharge, dispersal, seepage, migration, release, or escape of *anything*, let alone a "pollutant." It would be a strained reading of the policy language to say that the virus "migrated," "seeped," or "escaped." And, the Insurers have certainly not satisfied their burden to prove that the virus did so. Therefore, these terms are also ambiguous as applied to the facts here and must be construed strictly against the Insurers.[50] And, again, these carriers could have clearly excluded loss caused by or resulting from virus or

(holding that water-borne bacteria are not "pollutants"); *Motorists Mutual Ins. v. Hardinger*, 131 F. App'x 823, 827 (3d Cir. 2005) (Ambro, J., concurring).

[50] *See Fayad*, 899 So.2d at 1090 ("Because any exclusion must be strictly construed against the drafter and because any ambiguity in policy language must be liberally construed in favor of the insured, Clarendon's attempt to limit coverage based on the provisions of the policy must fail. If Clarendon had intended to exclude damage from earth movement caused by man-made events from coverage as it now contends, it could have done so clearly and unambiguously.").

communicable disease if that had been their intention.[51]

D. Certification to the Florida Supreme Court is Appropriate

Because there is no controlling Florida Supreme Court case on the pure legal question of whether loss of use or loss of functionality constitutes a "direct physical loss of" covered property, this Court would benefit from the Florida Supreme Court's resolution of the issue.[52]

As this Court has explained, where there is "an unsettled issue of Florida law as to insurance policy coverage [that] controls the disposition of [a] case," and a "pure legal question of the interpretation of widely used language in commercial liability insurance is at issue[,]" certification of a "question to the state supreme court to avoid making unnecessary *Erie* guesses and to offer the state court the opportunity to interpret or change existing law" is appropriate.[53]

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[51] DE 16 at 3, Appx 414; DE 6-1, Appx 33-145.

[52] *See Brinson v. Providence Cnty. Corr.*, 785 F. App'x 738, 740-41 (11th Cir. 2019) (recognizing that "the views of the state's highest court with respect to state law are binding on the federal courts"); *Riley v. Kennedy*, 553 U.S. 406, 425 (2008) ("A State's highest court is unquestionably the ultimate expositor of state law.")

[53] *Penzer v. Transp. Ins. Co.*, 545 F.3d 1303, 1311 (11th Cir. 2008), *certified question answered*, 29 So. 3d 1000 (Fla. 2010) (quoting *Tobin v. Mich. Mut. Ins. Co.*, 398 F.3d 1267, 1274 (11th Cir. 2005)); *see also Pruco Life Ins. Co. v. Wells Fargo Bank, N.A.*, 780 F. 3d 1327, 1336 (11th Cir. 2015), *certified question answered*, 200 So. 3d 1202 (Fla. 2016) ("When substantial doubt exists about the answer to a material state law question upon which the case turns, our case law indicates that it is appropriate to certify the particular question to the state supreme

Accordingly, this Court should certify the following question to the Florida Supreme Court under Article V, Section 3(B)(6) of the Florida Constitution:

> WHETHER, UNDER FLORIDA LAW, AN "ALL-RISK" COMMERCIAL INSURANCE POLICY THAT PROVIDES COVERAGE FOR BUSINESS INTERRUPTION LOSSES CAUSED BY "DIRECT PHYSICAL LOSS OF OR DAMAGE TO PROPERTY" REQUIRES ACTUAL STRUCTURAL ALTERATION, OR WHETHER THE PHRASE "DIRECT PHYSICAL LOSS OF" INCLUDES THE INABILITY TO USE PROPERTY FOR ITS INTENDED PURPOSE DUE TO SOME NON-EXCLUDED PHYSICAL CAUSE.

V. CONCLUSION

For the foregoing reasons, this Court should reverse the district court's order dismissing Town's complaint or certify the above question to Florida's Supreme Court.

Respectfully submitted this 17th day of June, 2021.

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court in order to avoid making unnecessary state law guesses and to offer state court the opportunity to explicate state law.")

CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the requirements of Fed. R. App. P. 32(a)(5) and (6) because it has been prepared in 14-point Times New Roman, a proportionally spaced font, and that it complies with the type-volume limitations of Fed. R. App. P.32(f) because it contains 10,912 words, excluding the parts exempted by Rule 32(f), according to the count of Microsoft Word.

/s/ Jason S. Mazer

CERTIFICATE OF SERVICE

I hereby certify that on June 17, 2021, I electronically filed the foregoing brief with the Clerk of this Court using the appellate CM/ECF system. The participants in the case are registered CM/ECF users and service will be accomplished by the appellate CM/ECF system.

/s/ Jason S. Mazer