IN THE

United States Court of Appeals
For The

Eleventh Circuit

No. 21-10672

Rococo Steak, LLC,

Plaintiff-Appellant,

vs.

Aspen Specialty Insurance Company,

Defendant-Appellee.

On Appeal from the
United States District Court for the Middle District of Florida
District Court Case No. 8:20-cv-02481-VMC-SPF

APPELLANT, ROCOCO STEAK, LLC'S, INITIAL BRIEF

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CERTIFICATE OF INTERESTED PERSONS

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure and Rule 26.1 of the Eleventh Circuit Rules and Internal Operating Procedures, Plaintiff-Appellant, Rococo Steak, LLC ("Rococo"), hereby certifies that the following is a complete list of persons and entities that have an interest in the outcome of this appeal:

1. Aspen Specialty Insurance Company, appellee
2. Aspen American Insurance Company, parent company of appellee
3. Aspen Insurance Holdings Limited (AHL), parent company of Aspen (UK) Holdings Limited
4. Aspen U.S. Holdings, Inc., parent company of Aspen American Insurance Company
5. Aspen (UK) Holdings Limited, parent company of Aspen U.S. Holdings, Inc.
6. Berk, William, counsel for appellee
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9. Burns, Timothy W., counsel for appellant
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11. Caledon Concept Partners Corp., owner of appellant

12. Conrad & Scherer LLP, counsel for appellant

13. Covington, Hon. Virginia M. Hernandez, United States District Judge for the Middle District of Florida

14. Osber, Steven H., counsel for appellant

15. Ostolaza, Yvette, counsel for appellee

16. Roberts, Kyle S., counsel for appellant

17. Rococo Steak, LLC, appellant

18. Seitz, Virginia, counsel for appellee

19. Sidley Austin LLP, counsel for appellee

20. Swindoll, Alan, counsel for appellee

CORPORATE DISCLOSURE STATEMENT

Rococo Steak, LLC, is a wholly owned subsidiary of Caledon Concept Partners Corp. Neither of these entities is listed on the New York Stock Exchange and there is no publicly held company that owns 10% or more of their stock.

STATEMENT REGARDING ORAL ARGUMENT

Plaintiff-Appellant respectfully requests that this Court hold oral argument on this matter and submits that oral argument will aid in this Court's review of the timely issues in this appeal. Countless businesses across the country, and many within this Court's jurisdiction, are entirely unsure about their rights under insurance policies they purchased to cover business interruption losses. Allowing counsel to present its nuanced position at oral argument will benefit the Court and the parties in resolving the issues in this appeal.

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STATEMENT OF JURISDICTION

The district court had diversity jurisdiction over this action for breach of contract and declaratory relief under 28 U.S.C. §1332(a). (Appellant's Appendix 8 ("APP"). Appellant timely filed its notice of appeal (APP726) as to the Order dismissing the Complaint with prejudice (APP707). This Court has jurisdiction to review a final decision of a district court, such as the order disposing of Appellant's case. 28 U.S.C. §1291.

STATEMENT OF THE ISSUES

1. Like thousands of businesses across the country, Rococo Steak, LLC ("Rococo Steak") insured against business interruption losses resulting from "direct physical loss of or damage" to its property. Rococo Steak has alleged that COVID-19 and the resulting civil closure orders diminished the functional space of its property. 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, as the district court held, or whether the phrase "direct physical loss of" includes more than losses that harm the structure of the covered property?

2. Rococo Steak also alleged that COVID-19 infested its property and structurally altered the property. Even if the district court properly interpreted the term "direct physical loss of or damage" to apply 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 with prejudice—by ignoring those allegations and determining that COVID-19 does not structurally alter property surfaces and ambient air?

3. Whether this Court should certify the above questions to the Florida Supreme Court?

STATEMENT OF THE CASE

Rococo Steak alleges facts in the Complaint describing its business and the impact of COVID-19 on its property. As set forth below, the Complaint alleges the presence of COVID-19 at Rococo Steak's restaurant, the structural alteration to the restaurant's surfaces and ambient air caused by COVID-19, and the loss and diminishment and functional space of the restaurant caused by the virus.

Rococo Steak St. Petersburg

Rococo Steak is a fine dining restaurant in the downtown area of St. Petersburg, Florida (APP29 at ¶ 3).

Once able to freely welcome visitors from all over the world and provide a classy and luxurious fine dining experience to its guests, because of COVID-19, Rococo Steak has drastically reduced its business operations, made several structural alterations, changes and repairs to its property, and strictly limited the number of guests in the restaurant. Employees and restaurant guests must wear masks, remain six feet apart, and follow other social distancing measures. To do anything else would lead to the emergence or reemergence of COVID-19 at the restaurant.

The Aspen Property Insurance Policy

For the policy period October 17, 2019, through October 17, 2020, Aspen Specialty Insurance Company ("Aspen") issued a Property Insurance Policy No. PB7830619 to Rococo (the "Aspen Policy," the "Policy" or the "2019-2020 Policy") (APP29 at ¶¶ 1-3; APP41).

The Policy contains multiple coverages that apply to Rococo's losses.

The Policy at issue contains Business Interruption Coverage, Extra Expense Coverage, and Civil Authority Coverage" (APP29 at ¶¶ 29, 35, 36; APP41).

The 2019-2020 Policy contains no virus exclusion.

Unlike many policies that provide business interruption coverage, the 2019-2020 Policy does not include, and is not subject to, an exclusion for losses caused by the spread of viruses or communicable diseases. (APP29 at ¶ 27; APP41).

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

The Policy states: "[w]e will pay for direct physical loss of or damage to Covered Property at the premises described in the Declarations caused by or resulting from any covered cause of loss." (APP29 at ¶ 30; APP41).

In the Policy, Aspen agreed that it "will pay for the actual loss of Business Income you sustain due to the necessary "suspension" of your "operations" during the "period of restoration." (APP29 at ¶ 30; APP41).

Rococo Steak 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. The virus that causes COVID-19 is thought to spread mainly from person to person, 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 6 feet).

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. A scientific study investigating the stability of COVID-19 in different 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.

The presence of COVID-19 caused direct physical loss or damage to Rococo Steak's covered Property, by (i) causing direct physical loss of and/or damage to the covered premises under the Policy; (ii) damaging the property; (iii) denying access to the property; (iv) preventing

customers from physically occupying the property; (v) causing the property to be physically uninhabitable by customers; (vi) causing its function to be nearly eliminated or destroyed, and (vii) causing a suspension of business operations on the premises. (APP29 at ¶ 44).

Because of the spread or presence of COVID-19, the air in Rococo Steak has become unsafe. In addition, the functional space in the restaurant has been diminished by the spread or presence of COVID-19. For example, the restaurant lost its normal functionality and the space could not be used as it normally was for at least several months. (APP29 at ¶ 46).

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 even more obvious structural alterations, changes to repair Rococo Steak so that Plaintiff can continue its business after experiencing direct property damage which was caused by COVID-19 and to avoid imminent threat of further property damage.

SUMMARY OF THE ARGUMENT

This is an insurance coverage case—one of over fifteen hundred 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 five or six words that trigger most of the insurance coverage available under the voluminous policy: "direct physical loss of or damage." Although the words are ordinary, the impact of this Court's appellate decision on the meaning of those words will be extraordinary.

The upshot of the district court's decision in this case is that "direct physical loss or damage" requires structural alteration of the covered property. That, of course, is not what the words of the policy at issue say, but as importantly, Aspen and other insurers have known since at least the early 1960s that many courts do not agree that the term requires structural alteration. In 1962, the California Court of Appeals rejected an insurer's argument that structural alteration was a *sine qua non* to physical damage under property insurance policies.[1] It is common knowledge that insurers avidly follow court decisions and change their policy language to avoid outcomes that insurers want to avoid.[2] Here,

[1] *Hughes v. Potomac Ins. Co.*, 18 Cal. Rptr. 650, 655 (Cal. App. 1962).
[2] *E.g.*, *Queen City Farms, Inc. v. Cent. Nat. Ins. Co. of Omaha*, 64 Wash. App. 838, 860, 827 P.2d 1024 (1992), *aff'd* 126 Wash. 2d 50, 882 P.2d 703 (1994).

however, the insurance industry has left this language substantively unchanged for decades, even though insurers, including Aspen, easily could have changed the term "direct physical loss of or damage" to "structural alteration."

Similarly, insurers have known for almost two decades that viruses and diseases, including coronaviruses, infest property and stick to its surfaces and lead to claims of business interruption losses.[3] Through their drafting arm, 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. An allegation of property damage may be a point of disagreement in a particular case.

To address that concern, Aspen easily could have changed "direct physical loss of or damage" to "structural alteration," but it did not. Aspen

[3] *See* "Hotel Chain To Get Payout for SARS-Related Losses," *Business Insurance* (Nov. 2, 2003).

could have also placed the standard virus exclusion in its policy, but it did not.

Even under the district court's restrictive interpretation of the Policy, however, Rococo Steak should prevail. Rococo Steak has alleged the presence of the virus and structural alteration of the property surfaces at the restaurant. (APP29 at ¶ 44). The district court's real complaint is not that Rococo Steak has failed to plead structural alteration, but rather that it did not think COVID-19 caused such structural alteration. But, under the Federal Rules of Civil Procedure, the district court is constrained from deciding pled and disputed factual issues on a motion for summary judgment, let alone a motion to dismiss. Ultimately under our legal system, those issues are decided by a jury.

ARGUMENT

Standard of Review

This Court reviews a district court's order granting a Rule 12(b)(6) motion de novo, and [t]he allegations in the complaint must be accepted as true and construed in the light most favorable to the plaintiff."[4] To state a cognizable claim under federal notice pleading, the plaintiff is

[4] *Michel v. NYP Holdings, Inc.*, 816 F.3d 686, 694 (11th Cir. 2016).

required to provide a "short and plain statement of the claim showing that the pleader is entitled to relief."[5]

Florida Rules of Insurance Policy Interpretation

"Under Florida law, the interpretation of an insurance contract is a matter of law to be decided by the court."[6] "Florida law provides that insurance contracts are construed in accordance with the plain language of the policies as bargained for by the parties."[7] To this end, the interpreting court first examines the terms and conditions of a policy, using the plain meaning of any undefined terms. Courts have used a variety of sources to interpret the plain meaning of language, including dictionaries, case law, statutes, and other sources. "When interpreting insurance contracts, courts "may consult references commonly relied upon to supply the accepted meanings of words."[8]

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[5] Fed. R. Civ. P. 8(a)(2).
[6] *AIX Specialty Ins. Co. v. Ashland 2 Partners, LLC*, 383 F. Supp. 3d 1334, 1337 (M.D. Fla. 2019).
[7] *Ernie Haire Ford, Inc. v. Universal Underwriters Ins. Co.*, 541 F. Supp. 2d 1295, 1298 (M.D. Fla. 2008), quoting *Auto–Owners Ins. Co. v. Anderson*, 756 So. 2d 29, 34 (Fla. 2000).
[8] *Garcia v. Fed. Ins. Co.*, 969 So. 2d 288, 291–92 (Fla. 2007) (consulting Merriam Webster's Collegiate Dictionary).

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

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, an insurance policy's undefined terms "should be given their plain and unambiguous meaning as understood by the 'man-on-the-street.'"[9] These basic rules of insurance policy interpretation alone defeat Aspen's position in this case. There is nothing about the plain and ordinary meaning of the words "direct physical loss of or damage" that requires structural alteration. Far from it.

"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."[10] Not

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[9] *Harrington v. Citizens Prop. Ins. Corp.*, 54 So. 3d 999, 1001 (Fla. 4th DCA 2010) (quoting *State Farm Fire & Cas. Co. v. Castillo*, 829 So. 2d 242, 244 (Fla. 3d DCA 2002)).

[10] *Direct*, Merriam-Webster Online Dictionary, https://www.merriam-webster.com/dictionary/direct (last visited April 13, 2021).

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."[11] Simply absent from any meaning of the term "direct" is the notion that direct loss or damage requires *structural alteration* of covered property.[12]

"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."[13] 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. The district court confused the term "physical" with "structural." But those terms are not synonyms.[14] "Physical" is a word

[11] *Advance Cable Co., LLC v. Cincinnati Ins. Co.*, 788 F.3d 743, 746 (7th Cir. 2015).
[12] *Sentinel Mgmt. Co. v. N.H. Ins. Co.*, 563 N.W.2d 296 (Minn. Ct. App. 1997).
[13] *Physical*, Merriam-Webster Online Dictionary, https://www.merriam-webster.com/dictionary/physical (last visited April 13, 2021).
[14] *See Physical*, Thesaurus.com, https://www.thesaurus.com/browse/physical (last visited April 13, 2021).

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.[15]

"Loss" also carries no requirement of structural alteration. Definitions of "loss" include not only "destruction" and "ruin," but also "deprivation."[16] Synonyms for "loss" include "deprivation," "dispossession," and "impairment."[17]

Even the term "damage" does not require a physical or structural alteration. Damage is often defined simply as "loss or harm resulting from injury," but it is also defined as expense and cost.[18] Synonyms for "damage" include "contamination," "impairment," "deprivation," and "detriment"—all terms with a physical aspect, but not necessarily a structural aspect.[19] "Clearly, without qualification, the term "damage"

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

[16] *Loss*, Merriam-Webster Online Dictionary, https://www.merriam-webster.com/dictionary/loss (last visited April 13, 2021).

[17] *Loss*, Thesaurus.com, https://www.thesaurus.com/browse/loss (last visited April 13, 2021); *see also Manpower Inc.*, 2009 WL 3738099, at *5.

[18] *Damage*, Merriam-Webster Online Dictionary, https://www.merriam-webster.com/dictionary/damage (last visited April 13, 2021).

[19] *Damage*, Thesaurus.com, https://www.thesaurus.com/browse/damage (last visited April 13, 2021).

encompasses more than physical or tangible damage."[20]

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 of or damage" as a whole. Otherwise, why would insurers, including Aspen, use *both* "loss **or** damage."

Florida appellate courts have not reached a consensus that structural alteration is required to show direct physical loss or damage in the context of COVID-19. A Florida appellate court that is closely on point held that only loss of functionality is required to show "direct physical loss or damage."[21] According to the Third District Court of Appeal:

> A "loss" is the diminution of value of something, and in this case, the 'something' is the insureds' house or personal property. "Direct" and "physical" modify loss and impose the requirement that the damage be actual. Examining the plain language of the insurance policy in this case, it is clear that the failure of the drain pipe to perform its function constituted a "direct" and "physical" loss to the property within the meaning of the policy.[22]

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

[21] *See Homeowners Choice Prop. & Cas. v. Miguel Maspons*, 211 So. 3d 1067, 1069 (Fla. 3d DCA 2017).

[22] *Id*. (quoting Loss, *Black's Law Dictionary* (10th ed. 2014)).

In *Azalea, Ltd. v. Am. States Ins. Co.*, an unknown substance was released into a sewage treatment plant, which caused the treatment plant to shut down, although the structure of the plan was not visibly altered.[23] The city closed the treatment plant to conduct testing and remediation.[24] Due to the unknown substance and the order from the city requiring the plant to close, the plant could not be used for its intended purpose.[25]

A claim was made by the insured plant, the insurer denied coverage based on its incorrect position that there was no "direct physical loss to the" plant and "the structure was not damaged."[26] The insured plant filed suit against its insurer, which the trial court dismissed based on its finding that the "loss of use did not constitute direct physical loss."[27] On appeal, the First District Court of Appeal rejected the trial court's

[23] *656 So. 2d 600, 601 (Fla. 1st DCA 1995).*
[24] *Id.*
[25] *Id.*
[26] *Id.*
[27] *Id.* at 602.

rationale and reversed, stating that the rationale was "not supported by either the facts or the law."[28]

In another case from Florida's Fifth District Court of Appeal, *Widdows v. State Farm Fla. Ins. Co.*, answered the question "whether [the insurer] has an obligation to repair a plumbing abnormality under a provision in the insurance policy that covers 'accidental direct physical loss' to the property."[29] The Court concluded "that the abnormality in the pipe itself was such a 'loss'. Under the language of the policy, it was not necessary for [the insured] to establish any resulting damage from this condition."[30]

Not surprisingly, in one of the key cases holding that the COVID-19 and resulting closure orders cause direct physical loss or damage to property, the Eastern District of Virginia relied on the Third District Court of Appeal's analysis in *Maspons*—noting that it stood for the

[28] *Id.* (citing *Hughes*, 18 Cal. Rptr. 650 (Cal. Ct. App. 1962); *Western Fire Ins. Co. v. First Presbyterian Church*, 437 P.2d 52 (Colo. 1968); *Gatti v. Hanover Ins. Co.*, 601 F. Supp. 210 (E.D. Pa. 1985)).
[29] 920 So. 2d 149, 150 (Fla. 5th DCA 2006)
[30] *Id.*

proposition that loss of function constituted direct physical loss or damage.[31]

Aspen's and the District Court's reliance on *Mama Jo's Inc. v. Sparta Insurance Company*[32] for the position that there is no direct physical loss to a surface that can be cleaned is misplaced. Not only was *Mama Jo's* decided in the lower court on a motion for *summary judgment*, after a *Daubert* hearing, and after the parties had the opportunity to conduct discovery and fully develop the factual record supporting their pleadings, but that court was not faced with a contention that loss of functionality was sufficient to constitute direct physical loss or damage. Indeed, far from rejecting the Florida case law supporting the sufficiency of loss of function, the Court cites *Maspons* as authority.[33]

Further support for Appellant's position that reliance on *Mama Jo's* is misplaced is recognized in *Southern Dental*.[34] In *Mama Jo's*, a restaurant sought coverage for the costs of cleaning dust and debris at

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[31] *Elegant Massage, LLC v. State Farm Mut. Auto. Ins. Co.*, No. 2:20-CV-265, 2020 WL 7249624 (E.D. Va. Dec. 9, 2020).
[32] 823 F. App'x 868, 879 (11th Cir. 2020).
[33] *Id.* (citing *Mapsons*, 211 So. 3d at 1069).
[34] *Southern Dental Birmingham LLC v. Cincinnati Ins. Co.*, 2021 WL 1217327, at *3 (N.D. Ala. Mar. 19, 2021).

the premises that accumulated from nearby construction.[35] The Eleventh Circuit affirmed summary judgment.[36] Proceeding under Florida law, the Eleventh Circuit concluded that cleaning alone did not constitute physical loss of or damage to property.[37] Notably, the lower court, in granting summary judgment, reasoned the restaurant was not "uninhabitable or unusable . . . the restaurant remained open every day . . . and there is no evidence that dust had an impact on the operation other than requiring daily cleaning."[38] As the *Southern Dental* Court recognized, the *Mama Jo's* decision "leaves the door open" to situations, such as here, where a physical condition renders the property unsuitable for its intended use such as where a business closes "because the presence of the coronavirus and the ongoing risk the virus presented made the facility unusable."[39] Indeed, unlike in *Mama Jo's*, the threat and presence of COVID-19 at Rococo Steak caused Appellant to cease normal operations. (APP29 at ¶¶ 9, 44, 46).

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[35] 2020 WL 4782369 at *2.
[36] *Id.* at *8.
[37] *Id.*
[38] *Mama Jo's, Inc. v. Sparta Ins. Co.*, 2018 WL 3412974, at *9 (S.D. Fla. June 11, 2018).
[39] 2021 WL 1217327, at *5.

The court in *Serendipitous* distinguished *Mama Jo's* on these and other grounds:

> 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 the temporary orders were in place.
>
> *Mama Jo's*, a summary judgment opinion, does not require dismissal of the complaint in this action.[40]

No Florida appellate court has yet addressed "direct physical loss or damage" in the context of a COVID-19 business interruption insurance loss. The absence of appellate authority alone suggests that this case should be allowed to proceed past the pleading stage on this issue. Indeed, a Florida federal court recently *rejected* an insurer's motion to dismiss in a COVID-19 business interruption insurance case, emphasizing that "without any binding case law on the issue of the effects

[40] *Serendipitous, LLC et al. v. Cincinnati Ins. Co.*, No. 20-cv-008873 MHH, 2021 WL 1816960, at *6 (N.D. Ala. May 6, 2021).

of COVID-19 on insurance contracts virus exclusions, this Court finds that Plaintiff has stated a plausible claim at this juncture."[41]

Here, Rococo Steak has adequately alleged that COVID-19 and the resulting closure orders caused a loss of function and diminishment of covered property.[42]

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.[43] 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."[44]

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 rule of

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[41] *Urogynecology Specialist of Fla. LLC v. Sentinel Ins. Co., Ltd.*, No. 620CV1174ORL22EJK, 2020 WL 5939172, at *4 (M.D. Fla. Sept. 24, 2020).
[42] *E.g.*, Compl. ¶ 44.
[43] *In re Society Ins. Co. Business Interruption Protection Ins. Lit.*, MDL No. 2964, 2021 WL 679109 at *8 (N.D. Ill. Feb. 22, 2021).
[44] *Id.*

insurance policy interpretation.[45] For that reason, several courts across the country have held in the COVID-19 context "physical loss" and "physical damage" differ.[46]

Here, the District Court did not mention, let alone follow, the Florida District Courts of Appeal in *Azalea*, *Maspons*, and *Widdows*. Instead, the District Court relied on other federal district courts and magistrate court orders that it thought were instructive. (APP720). However, the majority of these district court and magistrate court orders did not address the above mentioned cases, and heavily relied—Appellant contends that this reliance was incorrect—on this Court's unpublished opinion in *Mama Jo's*.

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

The *Society* court emphasized that a plaintiff that has alleged a loss

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[45] *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); *Total Intermodal Servs. Inc. v. Travelers Prop. Cas. Co. of Am.*, 2018 WL 3829767, at *3 (C.D. Cal. July 11, 2018).

[46] *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).

of functional space or functionality has, in fact, alleged a direct physical loss of property.[47] 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.[48]

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.[49]

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[47] 2021 WL 679109 at *9.

[48] *Id.*

[49] *See Gen. Mills, Inc.*, 622 N.W.2d at 152 (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.*, 2007 WL 464715, at *8 (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 (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.").

In *Murray v. State Farm Fire & Casualty Co.*,[50] 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.**" *Sentinel Management Co. v. New Hampshire Ins. Co.*, 563 N.W.2d 296, 300 (Minn. App. 1997) (citations omitted). . . .
>
> 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.**[51]

Accordingly, events—like the presence or suspected presence of COVID-19—which make it too dangerous to use property as it was designed to be used, cause physical loss or damage to that property.[52] In

[50] 509 S.E.2d 1 (W. Va. 1998).
[51] *Id.* at 17 (emphasis added).
[52] *See also Motorists Mutual Ins. Co. v. Hardinger*, 131 F. App'x. 823, 825–27 (3d Cir. 2005) (finding that contamination of a home's water supply

a recent decision involving losses from COVID-19, the Eastern District of Virginia held that allegations of direct physical loss 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."[53]

Similarly, on multiple occasions, courts have held that infestation of covered property by microscopic entities that are harmful to human health constitutes "direct physical loss or damage." In *General Mills, Inc. v. Gold Medal Insurance Co.*,[54] 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

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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).

[53] *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).

[54] 622 N.W.2d 147, 152 (Minn. Ct. App. 2001).

that a direct physical loss had occurred because the oats' "function [was] seriously impaired."[55] The court relied on a consistent line of Minnesota cases holding that losses resulting from the infestation of property by harmful, unseen agents constitutes a direct physical loss.[56]

Similarly, the Eighth Circuit held in *Netherlands Insurance Co. v. Main St. Ingredients, LLC*,[57] 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.[58] Nonetheless, the appellate court upheld the district court's finding that "property damage is present" because the

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[55] *Id.*

[56] *See Marshall Produce Co. v. St. Paul Fire & Marine Ins. Co.*, 256 Minn. 404, 423, 98 N.W.2d 280, 293-94 (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.").

[57] 745 F.3d 909, 916–17 (8th Cir. 2014).

[58] *Id.* at 916.

oatmeal was "physically affected, as it includes instant milk that was manufactured in insanitary conditions."[59] *Netherlands* thus supports the proposition that property damage exists when the credible threat that property is 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.

Rococo Steak Has Sufficiently Pled Direct Physical Loss or Damage.

In any event, Rococo Steak has pled factual allegations that, if proven, would establish that COVID-19 caused "direct physical loss of or damage" to covered property even under the restrictive, structural-alteration-requiring definition of that term adopted by the district court. (APP29 at ¶ 44).

The Complaint alleges structural alteration of the property by the presence of the virus. (APP29 at ¶ 44). Rococo Steak has alleged that COVID-19 has denied its use of the restaurant, requiring physical repair, and causing necessary suspensions. (APP29 at ¶¶ 44, 46).

Even under Aspen's restrictive interpretation of the Policy, however, Aspen cannot prevail. Rococo Steak has alleged structural

[59] *Id.*

alteration of the Restaurant. COVID-19 was present at the Restaurant and it altered the very structure of the property surfaces (APP29 at ¶ 44) and the ambient air. Aspen's real complaint is not that Rococo Steak has failed to plead direct physical loss or damage to property, but rather that Aspen does not believe COVID-19 causes such loss or damage. But that factual question is for a jury to decide.

Rococo Steak has pled factual allegations that, if proven, would establish that COVID-19 caused "direct physical loss or damage" to covered property even under the most restrictive definition of that term in the case law cited by Aspen. The cases cited by Aspen simply require the risk of loss—the virus in this case—to be present on covered property and structurally alter the property. If this Court were to adopt that restrictive interpretation of the term, the trial court would ultimately charge the jury as follows:

- You shall find for Rococo Steak if Rococo Steak proves by a preponderance of the evidence that COVID-19 caused the Restaurant to suffer "direct physical loss or damage."
- "Direct physical loss or damage" is injury caused by a covered risk of loss that infiltrates covered property and structurally alters the covered property.
- A covered risk of loss is one that is not excluded.

The Complaint alleges facts that, if Rococo Steak presents sufficient evidence of those allegations at trial, would permit the Court to so instruct the jury and the jury to find in Rococo Steak's favor. Rococo Steak has alleged that COVID-19 has denied them use of their property, damaged the property, making the property physically uninhabitable by customers, and causing necessary suspensions. (APP29 at ¶¶ 44, 46). Rococo Steak has alleged that functional spaces in the Restaurant, could not be used for several months and to this day are functional only in a severely diminished capacity. (APP29 at ¶¶ 44, 46). Finally, Rococo Steak alleged that the presence of the disease altered the physical space and the property surfaces. (APP29 at ¶¶ 44, 46). Aspen 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 Rococo Steak has stated a claim for relief—even under Aspen's definition of direct physical loss or damage.

In *Mudpie, Inc. v. Travelers Cas. Ins. Co. of Am.*,[60] the federal district court held that a loss of functionality caused by COVID-19 was a

[60] No. 20-CV-03213-JST, 2020 WL 5525171, at *4–6 (N.D. Cal. Sept. 14, 2020).

demonstrable alteration to property. The motion to dismiss was only granted there because the plaintiffs did not allege that the loss of use of their facilities was caused by the presence of COVID-19 or that COVID-19 was on site.[61] The *Mudpie* court explained that a covered loss would have been plausible if some physical force or impetus had caused the plaintiff retail store to lose the functionality of its storefront. Because there were no allegations of a physical force which "induced a detrimental change in the property's capabilities," the plaintiff was not entitled to coverage.[62] Here, just as the *Mudpie* court suggested was sufficient, Rococo Steak alleged physical loss occasioned by the presence of COVID-19 on covered property. Rococo Steak specifically alleged that the property was directly infested with COVID-19. (APP29 at ¶ 44). If the District Court felt that the allegations in the Complaint we not specific enough, at a minimum, it should have provided Rococo Steak with leave to amend, rather than enter a dismissal with prejudice.

[61] *Id.* at *3.
[62] *Id.* at *6.

Aspen impermissibly asked the District Court to decide the factual dispute over whether COVID-19 causes structural alterations to property.

At bottom, Aspen disagrees as a factual matter that COVID-19 can alter the structure of the air, the physical space, and the property surfaces on covered property. Whether or not the defendant believes the plaintiff can actually establish facts at trial, however, is irrelevant at the motion to dismiss stage. Aspen's Motion to dismiss should have failed on the merits, as detailed below. "A motion to dismiss for failure to state a claim merely tests the sufficiency of the complaint; it does not decide the merits of the case."[63] 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 pleader is entitled to relief."[64]

When considering a motion to dismiss, the court must "accept as true the facts as set forth in the complaint and draw all reasonable inferences in the plaintiff's favor."[65]

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[63] *Aguila v. Corp. Caterers II, Inc.*, 199 F. Supp. 3d 1358, 1359 (S.D. Fla. 2016), aff'd sub nom, 683 F. App'x 746 (11th Cir. 2017).
[64] Fed. R. Civ. P. 8(a)(2).
[65] *Randall v. Scott*, 610 F.3d 701, 705 (11th Cir. 2010); *Bailey v. Wheeler*, 843 F.3d 473, 482 (11th Cir. 2016).

The presence of COVID-19 constitutes direct physical loss or damage to property, even if that term requires a structural alteration. Rococo Steak pled that COVID-19 was present at the property, and though unseen, the particles of COVID-19 structurally alter property surfaces and ambient air in a manner that causes loss and damage by rendering affected premises dangerous to human health. Courts around the country have held that infestation of covered property by microscopic entities that are harmful to human health constitutes "direct physical loss or damage."[66]

Aspen, and the district court for that matter, may believe that COVID-19 can just be wiped away, leaving no structural alteration in its place. But that belief is contradicted by the facts alleged in the Complaint and significant scientific evidence, making structural

[66] *See U.S. Fidelity & Guaranty Co. v. Wilkin Insulation Co.*, 578 N.E.2d 926, 931 (Ill. 1991) (asbestos fibers); *General Mills, Inc. v. Gold Medal Ins. Co.*, 622 N.W.2d 147, 152 (Minn. Ct. App. 2001) (unapproved pesticide); *Netherlands Ins. Co. v. Main St. Ingredients, LLC*, 745 F.3d 909, 916–17 (8th Cir. 2014) (salmonella infestation); *Stack Metallurgical Services, Inc. v. Travelers Indem. Co. of Connecticut*, 2007 WL 464715, *6–9 (D. Or. Feb. 7, 2007) (lead particles); *Prudential Property and Cas. Ins. Co. v. Lillard-Roberts*, 2002 WL 31495830, at *7–10 (mold); *see Columbiaknit Inc. v. Affiliated FM Ins. Co.*, 1999 WL 619100, at *6 (microbial mold and fungi).

alteration a quintessential jury issue. Rococo Steak alleged that the presence of COVID-19 has necessitated extra expenses—much more than the simple wiping of surfaces—to eliminate the harm from the virus. (APP29 at ¶¶ 44, 46). There is substantial support for this position in the scientific literature. The World Health Organization expressly recognizes that COVID-19 transforms everyday surfaces into fomites, making them transmission vehicles for disease.[67] Studies have demonstrated that COVID-19 is "much more resilient to cleaning than other respiratory viruses tested."[68] A decontaminant may or may not be efficacious depending on the type of decontaminant and the contact time of the decontaminant on the property surface.[69] And, the interaction of the decontaminant with the virus may make it difficult to test whether the decontaminant has actually eliminated the virus.[70]

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[67] World Health Organization, *Transmission of SARS-CoV-2: Implications for Infection Prevention Precautions* (July 9, 2020), https://www.who.int/news-room/commentaries/detail/transmission-of-sars-cov-2-implications-for-infection-prevention-precautions.

[68] Nevio Cimolai, *Environmental and Decontamination Issues for Human Coronaviruses and Their Potential Surrogates*, 92 J. of Med. Virology 11, 2498–510 (June 21, 2020), https://doi.org/10.1002/jmv.26170.

[69] *Id.*

[70] *Id.*

Rather than test the sufficiency of the Complaint, the District Court decided the case on the merits at the motion to dismiss stage, inappropriately making factual determinations.

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.[71]

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.[72]

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[71] *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.").

[72] *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.*

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 MORE THAN LOSSES THAT HARM THE STRUCTURE OF THE COVERED PROPERTY?

CONCLUSION

For the foregoing reasons, this Court should reverse the district court's dismissal of Rococo Steak's Complaint.

Dated: May 18, 2021

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

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CERTIFICATE OF COMPLIANCE

The undersigned attorney hereby certifies that this brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B) and Eleventh Circuit Rule 28-1. This brief contains 8,789 words and uses a Century Schoolbook 14 point font.

s/Kyle S. Roberts

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on May 18, 2021, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will send a Notice of Electronic Filing to all counsel of record.

s/Kyle S. Roberts