NO. 20-14156-BB

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

HENRY'S LOUISIANA GRILL, INC. AND

HENRY'S UPTOWN LLC,

Plaintiffs-Appellants,

v.

ALLIED INSURANCE COMPANY OF AMERICA,

Defendant-Appellee.

Appeal from the United States District Court for the
Northern District of Georgia
Hon. Thomas W. Thrash, Jr., District Judge
Case No. 1:20-cv-02939-TWT

Appellant's Opening Brief

JAMES J. LEONARD
BARNES & THORNBURG LLP
3475 PIEDMONT ROAD, NE, SUITE 1700
ATLANTA, GEORGIA 30305-2954
TELEPHONE: (404) 846-1693
FACSIMILE: (404) 264-4033

Attorney for Plaintiffs-Appellants,
HENRY'S LOUISIANA GRILL, INC. and
HENRY'S UPTOWN LLC

CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT (FRAP 26.1)

Pursuant to FRAP 26.1 and Eleventh Circuit Rule 26.1-2(a), counsel for Appellants Henry's Louisiana Grill, Inc. and Henry's Uptown LLC ("Appellants") hereby certify that the following is a list of all trial judges, attorneys, persons, associations of persons, firms, partnerships, or corporations that have an interest in the outcome of this appeal, including subsidiaries, conglomerates, affiliates, parent corporations, any publicly held corporation that owns 10% or more of the party's stock, and other identifiable legal entities related to a party:

Allied Insurance Company of America Appellee

Barnes & Thornburg, LLP – Counsel for Appellants

Chandler, Henry – owner of Appellants Henry's Louisiana Grill, Inc. and Henry's Uptown LLC

Chandler, Claudia – owner of Appellants Henry's Louisiana Grill, Inc. and Henry's Uptown LLC

Freeman Mathis & Gary, LLP – Counsel for Appellee Allied Insurance Company of America

Henry's Louisiana Grill, Inc. –Appellant

Henry's Uptown LLC –Appellant

Leonard, James J. – Counsel for Appellants

Savrin, Philip W. – Counsel for Appellee

Bingham, W. Shawn – Counsel for Appellee

Thrash, Jr., Thomas W., Judge – see below

REQUEST FOR ORAL ARGUMENT

Plaintiffs-Appellants, Henry's Louisiana Grill, Inc. and Henry's Uptown LLC (collectively, "Henry's") respectfully request oral argument. The United States, and indeed, the world, are facing an unprecedented time due to the COVID-19 pandemic. Small, independently owned businesses like Henry's struggle to survive. Although Defendant-Appellee, Allied Insurance Company of America ("Nationwide") sold Henry's a policy covering business interruption losses stemming from physical loss of space, the insurance company denied Henry's claim—leaving a struggling business to tread the waters of a global pandemic without a life vest.

The district court based its decision on both Nationwide's Motion to Dismiss and Henry's Motion to Certify Questions to the Georgia Supreme Court on a single, nonbinding Georgia Court of Appeals decision: *AFLAC Inc. v. Chubb & Sons, Inc.*, 260 Ga. App. 306 (2003). Yet, the District Court ignored the fact that *AFLAC* does not directly address the key, undecided issue under Georgia law, which is whether "physical loss of" and "damage to" property can be interpreted the same

way, despite the fact that Georgia courts refuse to read surplusage into insurance policies.

There is also no Georgia authority directly on point to determine whether executive orders declaring public health emergencies constitute an act of civil authority sufficient to trigger civil authority coverage. Because of the importance and novelty of these issues under Georgia state law, Henry's respectfully request oral argument.

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STATEMENT OF JURISDICTION

The United States District Court for the Northern District of Georgia had jurisdiction over this case under 28 U.S.C. § 1332.

This Court has jurisdiction under 28 U.S.C. § 1291 over this appeal from the district court's final judgment entered October 6, 2020, based on the court's order granting Nationwide's Motion to Dismiss denying Henry's Motion to Certify Questions of Law to the Georgia Supreme Court. (Doc. 37.)

Henry's timely filed its Notice of Appeal on November 4, 2020. (Doc. 38.)

STATEMENT OF ISSUES

Issue 1: Whether the district court erred in dismissing Henry's complaint for failure to state a claim against Nationwide for wrongful denial coverage under an insurance policy covering claims for "physical loss of" property and actions of civil authority, where Henry's alleged the loss of its restaurant space as a result of the Georgia Governor's Executive Order admonishing businesses like Henry's to close because of COVID-19.

Issue 2: Whether the district court abused its discretion in declining to certify Henry's questions of law to the Georgia Supreme Court; namely, whether, under Georgia state law, an insurance policy providing coverage for "physical loss of or damage to" property and for "actions of civil authority" applies to business losses incurred as a result of government orders declaring COVID-19 a public health emergency.

STATEMENT OF THE CASE

I. Statement of Facts

A. The Parties

Appellants Henry's Louisiana Grill, Inc. ("Henry's LA Grill") and Henry's Uptown LLC ("Henry's Uptown") are independently-owned Georgia dining establishments located in Acworth, Georgia. (Doc. 1-1 at

¶ 1, 2.) Henry's LA Grill is a Louisiana-style restaurant owned and operated by Henry and Claudia Chandler. (*Id.* at ¶ 5.) Mr. Chandler has been operating Henry's LA Grill for over twenty years. (*Id.*) Henry's Uptown is an upstairs private party and overflow space associated with Henry's LA Grill. (*Id.* at ¶ 7.)

Henry's is a well-known restaurant and event space in Cobb County and the greater Atlanta and North Georgia area, with customers visiting from as far away as Florida and Tennessee. (*Id.*) Henry's was awarded ABC Nightline's "People's Platelist Award Winner" for best local restaurant in the country. We refer to the restaurants collectively as "Henry's."

Appellee Allied World Insurance Company of America ("Nationwide") is a national insurer. (*Id.* at ¶ 3.)

B. The Policy.

Nationwide issued Henry's a "Premier Businessowners Property Coverage" Form, Policy Number ACP BPFL 3047569584 for a policy period of March 1, 2020 to March 1, 2021. (Doc. 1-1 at ¶ 8; *id.* at p. 25.) The Policy provides business interruption coverage "for the actual loss of 'business income' [Henry's] sustain[s] due to the necessary

suspension of [Henry's] 'operations'…" (*Id.* at pp. 33-34.) Suspension of business operations must be due to "direct *physical loss of* or damage to property." (*Id.* at p. 34. (emphasis added).) The Policy provides additional coverage for "the actual loss of Business Income [Henry's] sustain[s] and necessary Extra Expense caused by action of civil authority that prohibits access" to the covered property. (*Id.* at ¶ 20; *id.* at p. 35.)

C. Governor Kemp's emergency executive order and closure of Henry's dining rooms

On March 14, 2020, Governor Brian Kemp of Georgia issued Executive Order #03.14.20.01 declaring a public health state of emergency related to the spread of novel coronavirus COVID-19. (*Id.* at ¶ 9.) The Executive Order provides that Governor Kemp "has determined a public health emergency exists, and that it is necessary and appropriate to take action to protect the health, safety, and welfare of Georgia's residents and visitors to ensure COVID-19 remains controlled throughout this State." (Ex. 1.) In response to the Order (Doc. 1-1 at ¶ 7), Henry's closed its dining rooms for regular restaurant service. (*Id.* at ¶ 13.) As a result, Henry's directly lost the physical use of its dining rooms and its primary source of revenue. (*Id.*)

D. Nationwide's denial of Henry's insurance claim.

Henry's timely noticed Nationwide of its losses on March 27, 2020. (*Id.* at ¶ 14.) Henry's cooperated with Nationwide in providing additional information, as well as a telephone interview, but Nationwide denied Henry's coverage claim based on a "virus and bacteria" exclusion, even though no virus or bacteria existed on Henry's property. (*Id.* at ¶¶ 15, 17.) The denial letter omitted the word "of" from the coverage section providing that Henry's must sustain "direct physical loss *of* or damage to Covered Property." (*Id.* at ¶ 16 (emphasis added).)[1]

II. Procedural History

Henry's filed a complaint against Nationwide in the Superior Court of Cobb County, Georgia, on June 12, 2020, alleging claims for declaratory judgment and breach of contract related to Nationwide's denial of Henry's claim for insurance coverage. (Doc. 1-1 at ¶¶ 25-28, 29-32.)

[1] Nationwide's counsel persisted in omitting the critical word "of" throughout its briefing to the district court. (*See, e.g.,* Doc. 4-1 at pp. 4, 6, 8, 9, 10, and 11.)

Nationwide removed the case to the federal district court. (Doc. 1) Following removal, Nationwide moved to dismiss Henry's case, alleging that Henry's failed to state a claim upon which relief could be granted. (*See* Doc. 4, 4-1.) Nationwide also filed a motion to stay discovery pending resolution of its motion to dismiss (Doc. 5.)

In response, Henry's opposed both motions and filed a motion to certify to the Georgia Supreme Court issues of state law related to the novel coverage issues raised by the dispute. (Doc. 8.) Henry's argued that no decision on the Motion to Dismiss should be made without discovery, which had yet to begin, because issues of damages and factual issues pertaining to the Georgia Department of Insurance had not yet been determined. (*See* Doc. 7, 9.) Once briefing concluded, the parties alerted the district court to new COVID-19-related insurance cases. (Doc. 25, 29, 30, 32, 34.)

On October 6, 2020, the district court granted Nationwide's motion to dismiss and denied Henry's motion to certify. (Doc. 36.) The district court acknowledged that Georgia state law is "sparse" on the issues raised by Henry's. (*Id.* at 8.) It relied primarily on a Georgia Court of Appeals case, *AFLAC, Inc. v. Chubb & Sons, Inc.*, 260 Ga. App.

306 (2003), a case arising from whether computer system upgrades necessitated by "Y2K" constituted direct physical loss or damage to property, in support of its grant of Nationwide's Motion. (*Id.* at 8-13.) Although the facts in *AFLAC* are distinct, the district court followed the *AFLAC* court's decision that policy provisions for "loss," "loss of," and "damage to" property all mean the same thing, namely, "change in the insured property resulting from an external event rendering the insured property, initially in a satisfactory condition, unsatisfactory." (*Id.* at 8-9.) The district court further determined that the Executive Order was not an "action of civil authority" under the Policy under the plain language of the Policy. (*Id.* at 14.)

Although the court recognized the dearth of Georgia case law on the phrase "physical loss of" (to say nothing of unprecedented executive orders relating to a pandemic like COVID-19), it denied Henry's motion to certify, stating that Henry's had not "generated a substantial doubt regarding the status of state law" to require certification. (*Id.* at 16.)

SUMMARY OF THE ARGUMENT

1. The district court erred in granting Nationwide's motion to dismiss because Henry's complaint states a claim under Georgia state

law. Application of Georgia's laws of contract interpretation support Henry's claims for breach of contract, because the policy language includes distinct provisions for loss of property in addition to damage to property. As a matter of Georgia law, the court erred in determining the policy covered only damage to property and dismissing the "loss of" language as mere surplusage. Alternatively, the court erred in failing to construe the language in favor of the insured. In either case, this Court should reverse the order granting Nationwide's motion to dismiss the case for failure to state a claim.

2. In the alternative, this Court should certify Henry's questions of law to the Georgia Supreme Court, which has yet to opine on the specific meaning of the language "physical loss of" property in an insurance policy that also covers "damage to" property, or on the meaning of coverage for "civil authority actions" generally or in the COVID-19 context.

ARGUMENT AND CITATION TO AUTHORITY

This Court reviews *de novo* a district court's grant of a motion to dismiss for failure to state a claim. *Lanfear v. Home Depot, Inc.*, 679 F.3d 1267, 1275 (11th Cir. 2012). This Court construes the complaint in

the light most favorable to Henry's, accepting as true the complaint's well-pleaded facts, even if they are disputed. *S & Davis Int'l, Inc. v. The Republic of Yemen*, 218 F.3d 1292, 1298 (11th Cir. 2000). To preclude dismissal, the allegations need only "raise a right to relief above the speculative level, on the assumption that all the allegations in the complaint are true (even if doubtful in fact)." *Lanfear*, 679 F.3d at 1275.

The district court's order denying Henry's motion to certify is reviewed for an abuse of discretion. *Royal Capital Dev., LLC v. Maryland Cas. Co.*, 659 F.3d 1050, 1054-55 (11th Cir. 2011). An abuse of discretion occurs where a judge has failed to apply the proper legal standard or applies the law in an unreasonable or incorrect manner. *Winthrop-Redin v. United States*, 767 F.3d 1210, 1215 (11th Cir. 2014).

I. The Court should remand with instructions to deny Nationwide's motion to dismiss because the district court erred in concluding that Henry's failed to state a claim.

In diversity-based actions, a district court must apply state law.[2] *E.g.*, *OneBeacon Am. Ins. Co. v. Catholic Diocese of Savannah*, 477 Fed. Appx. 665, 669 (11th Cir. 2012). Under Georgia state law, insurance policies are interpreted using the rules of contract interpretation. *Johnson v. State Farm Fire & Cas. Co.*, No. 1:12-CV-4434-SCJ, 2013 WL 12063918, at *2 (N.D. Ga. Aug. 28, 2013).

Ambiguities are construed strictly against the insurer as drafter of the contract. *York Ins. Co. v. Williams Seafood of Albany, Inc.*, 223 F.3d 1253, 1255 (11th Cir. 2000)*, certified question answered,* 273 Ga. 710, 544 S.E.2d 156 (2001); *see also St. Paul Mercury Ins. Co. v. F.D.I.C.*, 774 F.3d 702, 708 (11th Cir. 2014). Georgia courts "consider the insurance policy as a whole" and seek a construction that "will give effect to each provision, attempt to harmonize the provisions with each other, and not

[2] It is undisputed that the Policy was delivered to Henry's in Georgia, therefore Georgia Law should apply to this dispute. *See, e.g., Travelers Prop. Cas. Co. of Am. v. Moore*, 763 F.3d 1265, 1270 (11th Cir. 2014) (citing *Gen. Tel. Co. of the Southeast v. Trimm,* 252 Ga. 95, 311 S.E.2d 460, 461 (1984)).

render any of the policy provisions meaningless or mere surplusage." *Ace Am. Ins. Co. v. Wattles Co.*, 930 F.3d 1240, 1253–54 (11th Cir. 2019); O.C.G.A. 13-2-2(4); *see also, Garrett v. S. Health Corp. of Ellijay*, 320 Ga. App. 176, 183, 739 S.E.2d 661, 668 (2013).

At issue here is interpretation of the Policy pursuant to Georgia law. Henry's alleged sufficient facts to demonstrate that a physical loss of property occurred. (*See* Doc. 1-1 at ¶¶ 7, 9, 13.) The question is whether the Policy language covers the physical loss identified by the well-pleaded facts, which must be taken as true, in Henry's complaint.

A. Georgia law compels a finding that Henry's stated a claim for relief based on "physical loss of" its property.

It is undisputed that the significant Policy language at issue is "direct physical loss of or damage to" covered property. (Doc. 36 at 7.) As the district court recognized, "Georgia case law analyzing this phrase is relatively sparse," acknowledging that the only case to "provide some direction" on a possible meaning of this vital phrase is a single Georgia Court of Appeals case, *AFLAC*, 260 Ga. App. 306. (*Id.* at 8.)

AFLAC, however, does not address the specific concerns raised by Henry's here and contemplated by Henry's complaint: the specific,

distinct meaning of "physical loss of" property sufficient to constitute a valid claim for insurance coverage under Henry's Policy.

To date, the Georgia Supreme Court has not decided an interpretation of "direct physical loss *of* or damage to" property that defines and distinguishes *what types* of harm "loss" versus "damage" may entail. *AFLAC* does not answer this specific question. *ALFAC* addresses only the question of whether "direct physical loss" requires a change in an insured property. *AFLAC*, 260 Ga. App. at 307-08.

1. Existing Georgia law requires that "physical loss of" property be interpreted differently than "damage to" property.

Georgia courts recognize that ambiguities are construed against the drafter of the contract, *York,* 223 F.3d at 1255, and that courts should avoid reading surplusage into the contract, *Ace*, 930 F.3d at 1253–54; *Garrett*, 320 Ga. App. at 183.

Applying these principles, "physical loss of" necessarily must have a different interpretation than "damage to" property, or it would constitute surplusage. As argued in Henry's opposition to Nationwide's Motion to Dismiss, Henry's alleged facts sufficient to demonstrate that a "physical loss of" property occurred when it lost the physical use of its

dining rooms as a result of the Governor's executive order declaring a public health emergency and noting "community spread" of the COVID-19 pandemic. (Doc. 7 at 13; Doc. 1-1 at ¶ 5, 6, 7, 13.) The dining rooms need not have been physically harmed or destroyed (i.e., "damages") for Henry's to have suffered from their loss in the wake of the Executive Order. The correct interpretation of "physical loss of" property should include scenarios where, as here, an insured has lost the functional use of its space due to external circumstances beyond its control.

Even if the language of the Policy, which does not define "physical loss of" property, is ambiguous on this count, the complaint survives a motion to dismiss because Georgia law requires that ambiguous language be construed against the insurer as drafter.

2. The district court erred in applying *AFLAC*, which is not dispositive, and applying the same or similar meaning to "physical loss of" and "damage to" property.

In its interpretation of existing Georgia law, the district court accepted Nationwide's argument, based primarily on its application of *AFLAC,* 260 Ga. App. 306. But *AFLAC* is neither binding nor dispositive.

At issue in *AFLAC* was whether computer system upgrades necessitated by "Y2K" constituted direct physical "loss or damage to" property such that its insurer was required to provide coverage. *Id.* at 306. The court started by observing that it had "been unable to find any Georgia precedent construing the term of insurance 'direct physical loss or damage.'" *Id.* It determined that the policy in question used the term "direct physical" to modify both the word "loss" and the word "damage" in the policies at issue. *Id.* at 308. It did not opine separately on the phrase "loss of," which appeared elsewhere in the policy. *Id.* Based on this analysis, the court held that AFLAC's policies covered only an "actual change in insured property then in a satisfactory state, occasioned by…other fortuitous event directly upon the property causing it to be unsatisfactory for future use." *Id.*

AFLAC did not address the two important tenets of Georgia state contract law discussed above. First, every word in a contract is considered to each have meaning and cannot be read to create surplusage. *Ace*, 930 F.3d at 1253–54; O.C.G.A. 13-2-2(4).

Second, ambiguities contained within insurance contracts are construed against the insurer as drafter. *York*, 223 F.3d at 1255.

Georgia courts first apply rules of construction to interpret a contract, and where ambiguity still remains, such language must be construed against the insurer. *St. Paul Mercury*, 774 F.3d at 708.

The district court's Order does not differentiate between the meanings of "loss of" and "damage to." Nor does the *AFLAC* opinion on which it relied. Rather, the *AFLAC* court ruled that both phrases mean the same thing, namely, that "coverage is predicated upon a change in the insured property… rendering the insured property, initially in a satisfactory condition, unsatisfactory." 260 Ga. App. at 308. The conflation of these terms renders one or the other impermissible surplusage under the contract and/or creates ambiguity.

When neither the policy nor the case law adequately define the term "physical loss of" property, Georgia courts may look to dictionary definitions to aid in interpretation. *AEGIS Elec. & Gas Int'l Servs. Ltd. v. ECI Mgmt. LLC*, 967 F.3d 1216, 1225 (11th Cir. 2020); *see also A+ Restorations, Inc. v. Liberty Mut. Fire Ins. Co.*, 714 F. App'x 923, 925 (11th Cir. 2017) (consulting several dictionary definitions of the word "loss" to determine meaning of "loss" in insurance policy); *see also Catoosa Cty. v. Rome News Media*, 349 Ga. App. 123, 128, 825 S.E.2d

507, 512 (2019) ("Except when considering a technical term or term of art in a particular industry, Georgia courts often begin by considering how a word has been defined in dictionaries to determine its plain and ordinary meaning.").

In fact, the district court did so, noting that a possible definition of "physical loss" might include situations involving "diminution" or "disappearance" in value. (*Id.*) This definition supports Henry's understanding of the Policy, according to which Henry's loss of use of its dining rooms and event space—the specific locations in which Henry's earns its revenue—constitutes a "diminution in value." There is nothing more valueless in the restaurant industry than rooms and tables devoid of patrons.

The district court rejected this argument and relied instead on Nationwide's argument that the calculation provided for business interruption coverage does not contemplate physical loss of a space, because calculation of lost business income is dependent on the "period of restoration," defined as ending at the earlier of "(i) The date when the property at the described premises should be repaired, rebuilt or replaced with reasonable speed and similar quality; or (ii) The date

when business is resumed at a new permanent location." (Doc. 36 at 13.) As Henry's pointed out, however, Merriam-Webster provides that the definition for the verb "repair" includes "to restore to a sound and healthy state." Repair, Merriam-Webster, https://www.merriam-webster.com/dictionary/repair. (Doc. 7 at 16.) The Policy should therefore apply to cover business losses suffered while Henry's doors remained shut, ending when the Executive Order is lifted and the restaurant space is repaired or "restore[d] to its original sound and healthy state." If, as the district court recognized, "physical loss" may constitute "diminution" or "disappearance" in value, so too should repair constitute the restoration of value to Henry's establishment: the moment when patrons are able to return to the premises safely, per executive order or by physical modification of the premises.

The policy terms "loss of" and "damage to" should not be conflated to limit coverage to physical alteration in covered property given Georgia's rules against surplusage.[3]

[3] At the very least, the language of the policy is ambiguous, and should be read in favor of the insured, allowing physical loss of property to constitute the exact loss of space that Henry's suffered here.

In sum, this Court should remand Nationwide's Motion to Dismiss with instructions to the district court to find that Henry's sufficiently pled "physical loss of or damage to" property under the Policy.

3. Georgia courts have not decided what constitutes "physical loss of" property for purposes of COVID-19 related business interruption coverage, but may look to courts across the country for guidance.

Numerous courts across the country have decided in favor of policyholders—including bars and restaurants—on the same or similar interpretative bases as Henry's set forth before the district court. These courts have denied insurers' motions to dismiss that alleged the insureds failed to state claims upon which relief can be granted or otherwise granted in favor of policyholders relying on the same "physical loss of or damage to" property language at issue here.

Hill & Stout v. Mutual of Enumclaw, No. 20-2-07925-1 (Wa. Supr. Ct. Nov. 12, 2020) is right on point. There, a Washington trial court, applying contract principles nearly identical to those of Georgia, held that "[i]f 'physical loss of' was interpreted to mean 'damage to' then one or the other would be surplusage." *Id.* at 5:1-2. The court recognized that "loss" includes "deprivation" as an ordinary definition, which under

reasonable interpretation by an average lay person would apply to situations where the insured, a dental practice, was unable to see patients and practice dentistry in an ordinary sense. *Id.* at 4:16-19.

The court ultimately held, relying on state law construing ambiguities against the insurer as drafter, that the term "physical loss of" as applied to property damage was ambiguous and subject to multiple interpretations. *Id.* at 5:8-10. The court accordingly denied the insurer's motion to dismiss. *Id.* at 5:16.

Similarly, in *Elegant Massage, LLC d/b/a Light Stream Spa v. State Farm Mutual Automobile Ins. Co. and State Farm Fire and Casualty Co.*, Civil Action No. 2:20-cv-265 (E.D. Va. Dec. 9, 2020), the United States District Court for the Eastern District of Virginia, applying law very similar to the law in Georgia, held that a therapeutic massage facility's COVID-19-related claims survived a motion to dismiss brought by the insurer. *Id.* at 1. The insured massage facility argued that it suffered a complete loss of income when it voluntarily closed its space based on executive orders from the President of the United States and the Governor of Virginia. *Id.* at 3. Interpreting nearly identical policy language at issue here, the court evaluated whether the

insured had suffered an accidental direct physical loss as a result of COVID-19 executive orders, both for business interruption and civil authority losses. *Id.* at 7. The court noted that "direct physical loss" under applicable law had not been clearly defined under Virginia law, and accordingly construed the ambiguity against the insurers as drafters, applying the most favorable definition of "direct physical loss" to the insured's policy: one that defined "direct physical loss" to include "property that is uninhabitable, inaccessible, or dangerous to use because of intangible, or non-structural, sources." *Id.* at 19. The court held that the insured alleged a good faith plausible claim to the insurers for a "direct physical loss." *Id.* at 20.

In *Blue Springs Dental Care, LLC v. Owners Ins. Co.*, Case No. 20-CV-00383-SRB (W.D. Mo. September 21, 2020), the court rejected arguments that the insured had failed to state sufficient allegations to demonstrate physical loss because of the "period of restoration" language found in the policy. *Id.* at 12-13. The court also rejected arguments that the insured had failed to state claims related to civil authority coverage on the basis that the insureds successfully pled that they suffered a "physical loss" of their property. *Id.*

In *Studio 417, Inc. v. Cincinnati Ins. Co.*, No. 20-CV-03127-SRB, 2020 WL 4692385, at *1 (W.D. Mo. Aug. 12, 2020), insureds purchased insurance policies for their hair salons and restaurants. The policies at issue provided coverage for "direct physical loss *or* damage," and the insureds argued that they should recover insurance proceeds due to the COVID-19 pandemic. The insurance company moved to dismiss, arguing that there must be an actual, tangible, or physical alteration to the covered properties. The court rejected this argument and took the approach Henry's urged here: "loss" and "damage" should not be conflated when they are separated by the word "or." Instead, the court had to "give meaning to both terms" to avoid the other from being superfluous. *See also*, *K.C. Hopps, LTD., v. Cincinnati Ins. Co.*, No. 20-cv-00437-SRB (W.D. Mo., Aug. 12, 2020) (adopting *Studio 417*'s reasoning and holding on similar coverage issue).

Likewise, in *Optical Services USA/JC1, et al. v. Franklin Mutual Ins. Co.*, Dkt. No. BER-L-3681 (N.J. Superior Ct. August 13, 2020), the court at oral argument held that a motion to dismiss for failure to state a claim was denied. The policy at issue contained a virus exclusion. *Id.* at 8:16-21. The policy at issue also defined loss as "requiring physical

impact," which the insurer used to argue its motion to dismiss *Id.* at 11:8-9. The insured noted that the policy "has an exclusion for virus proliferation" but not "for closure of a business based on the risk of virus proliferation." *Id.* at 11:22-12:15. The insured argued that the business was forced to close due to the executive order issued by the State. *Id.* at 13:5-21. The insured argued that physical loss occurred based on the executive order's classification of the businesses as "unfit and unsafe because of a dangerous condition." *Id.* The insured further argued that "[t]he closure orders forced plaintiffs to close and banned occupancy of all non-essential businesses. In doing so, the closure orders necessarily not only affected plaintiffs' businesses, but they affected…all properties around plaintiffs." *Id.* at 15:1-6. The court ultimately ruled that the motion to dismiss was denied, in part due to the lack of discovery taken in the case. *Id.* at 26:19-25. The court noted a lack of controlling legal authority, *Id.* at 25:23-26:4, the "interesting" argument made regarding "where a policy holder loses functionality of their property and by operation of civil authority such as the entry of an executive order results in a change to the property." *Id.* at 29:15-20. The court elaborated further that the plaintiffs were advancing "a novel

theory of insurance coverage in this matter that warrants a denial of the Motion to Dismiss at this early stage of the litigation." *Id.* at 29:21-24.

And in *North State Deli et al. v. Cincinnati Ins. Co.*, 20-CVS-02569 (N.C. Super. Oct. 9, 2020), the North Carolina Superior court granted summary judgment for the insured, holding that Cincinnati Insurance must provide coverage, as a matter of law, for COVID-related losses. *Id.* at 8. There, sixteen restaurants that had purchased "all risk" insurance policies providing business interruption coverage argued that government orders mandating the suspension of business operations and prohibiting all non-essential movement, constituted a "direct physical loss" to the covered property. The government orders thus forced the restaurants to lose the physical use of and access to their property, thereby triggering coverage.

The court defined "direct physical loss" to include "the inability to utilize or possess something in the real, material, or bodily world," *without requiring physical alteration to the property for coverage*. *Id.* at 6. Under the insurer's argument, the court explained, if "physical loss" also required structural alteration to property, then the term "physical

damage" would be rendered meaningless. Accordingly, the court held that the COVID-related losses were "unambiguously a 'direct physical loss'" triggering coverage because the virus and government orders deprived the restaurant owners of the normal use of their property. *Id.*

These cases all support Henry's interpretation of the contract language. Like these other insureds, Henry's lost, or was otherwise *deprived* of, the physical space from which it obtained its primary source of revenue. (Doc. 1-1 at ¶¶ 7, 9, 13.) The district court's order is contrary to Georgia law regarding surplusage in contracts because it effectively reads out "physical loss of" property as a possible coverage under the Policy. It also contradicts Georgia law holding that ambiguities are construed strictly against the insurer as drafter. As seen by courts within other jurisdictions, many with similar law to Georgia as to policy interpretation, such interpretation cannot and should not be borne where state law does not support it.

Because the Georgia Supreme Court has not spoken on the precise issue of interpretation here, this Court is obligated—if it chooses to make an *Erie* prediction on Georgia state law—to do so pursuant to existing principles of Georgia contract law.

B. Henry's stated a claim upon which relief can be granted because it suffered physical loss based on an act of civil authority under the Policy.

Henry's Policy provides coverage for "the actual loss of Business Income [Henry's] sustain[s] and necessary Extra Expense caused by action of civil authority that prohibits access to the described premises," provided that:

> (1) 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; and
>
> (2) 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 the action is taken to enable a civil authority to have unimpeded access to the damaged property.

(Doc. 1-1 at ¶ 20.) No Georgia state law exists directly on point, as Georgia courts have not considered whether an executive order, such as the one at issue here, can constitute such an action of civil authority where a public health emergency exists, and widespread shutdowns are required.

The Governor's state-wide executive orders affected each and every business in the state of Georgia. Although the district court

accepted Nationwide's argument that the Executive Order could not constitute an action of civil authority sufficient to trigger business interruption coverage, it did so in the absence of Georgia precedent. The Executive Order, which "could be read as 'advising' Georgia residents to stay at home" (Doc. 36 at 15), implied that community spread of COVID-19 damaged not Henry's, where no COVID-19 was found on the premises, but other areas and businesses: including the ability to travel in groups within one mile of Henry's restaurants and the possibility that Henry's neighbors were, in fact, damaged by such community spread.

Accordingly, this Court should reverse and remand the case with instructions to let the case proceed.

II. This Court should certify these novel, important questions of state law to the Georgia Supreme Court.

Henry's asked to certify the following two questions to the Georgia State Supreme Court:

1. Whether "direct physical loss of or damage to" property may constitute the unavailability of a space (for example, the closure of Plaintiffs' dining spaces as a result of Executive Orders) as opposed to requiring that "loss" constitute "damage."

> 2. Whether Executive Orders, such as the Order issued by the Governor of Georgia declaring a public health emergency on March 14, 2020, constitute sufficient civil authority mandates based on damage to "other property" such that Civil Authority coverage applies to closure based on such Executive Orders.

(Doc. 8 at 2.)[4]

This Court recognizes that the "the views of the state's highest court with respect to state law are binding on the federal courts." *Brinson v. Providence Cmty. Corr.*, 785 F. App'x 738, 740–41 (11th Cir. 2019) (citing *Wainwright v. Goode*, 464 U.S. 78, 84 (1983); *accord*, *Riley v. Kennedy*, 553 U.S. 406, 425 (2008) ("A State's highest court is unquestionably the ultimate expositor of state law.") (alteration and quotation marks omitted); *Estelle v. McGuire*, 502 U.S. 62, 67–68 (1991) ("[I]t is not the province of a federal [] court to reexamine state-court determinations on state-law questions.")).

Although this Court and its district courts should not "abdicate" questions of state law, neither should federal courts make "unnecessary

[4] One of the three questions for which Appellants sought certification related to the presence of a virus exclusion within the Policy. The District Court did not decide coverage on that issue as moot (Doc. 36 at 16 n. 3), and so that issue is not before this Court on appeal.

Erie 'guesses.'" *Simmons v. Sonyika*, 394 F.3d 1335, 1339 (11th Cir. 2004). When the highest court in the state has yet to rule on an issue, district courts within this Circuit may certify questions "to offer the state court the opportunity to interpret or change existing law." *Id.*

The sole reason for which the district court held that Henry's failed to state a claim rests on interpretation of policy language yet to be considered by the Georgia Supreme Court. The only case on point—*AFLAC*, a Georgia Court of Appeals case—does not adequately address the facts or the policy interpretation required here. Rather, *AFLAC* lumps together discussions of "loss of" and "damage to" property. While the district court provided *dictionary* definitions for the terms "loss" and "damage," the district court could not point to a single Georgia decision actually *defining* "physical loss of" beyond requiring that such physical loss constitute some sort of "change." (Doc. 36 at 12.) This is because such a case does not exist.

As Henry's argues above, the "physical loss of" its dining spaces as a result of the Executive Order constitutes a loss of property, as well as an "actual change." Yet no Georgia law exists specifically defining what

"loss of" property may entail as opposed to "damage to" property, which is the interpretive guidance necessary here.

Nor does Georgia state law provide an answer to Plaintiffs' question regarding their Civil Authority coverage.

Federal courts across the country have recognized that coverage issues related to COVID-19 are important legal issues for state courts to resolve. These courts have remanded important coverage issues related to COVID-19 to state court for decision by state Supreme Courts or otherwise declined jurisdiction over these state law issues, to avoid unnecessarily predicting these issues of state law.

In *Venezie Sporting Goods, LLC v. Allied Ins. Co. of Am.*, No. 2:20-CV-1066, 2020 WL 5651598, at *1 (W.D. Pa. Sept. 23, 2020), the Western District of Pennsylvania acknowledged the "significant economic impacts" of the COVID-19 pandemic and recognized that many business owners have suffered losses due to the COVID-19 pandemic and government shut-down or related orders. *Id.* at *2. And the Western District of Pennsylvania declined to exercise jurisdiction over the insured's claims, observing that "if state law is uncertain or undetermined, the proper relationship between federal and state courts

requires district courts to 'step back' and be 'particularly reluctant' to exercise … jurisdiction." *Id.*

Likewise, in *Mark Daniel Hosp., LLC v. AmGUARD Ins. Co.*, No. CV206772FLWTJB, 2020 WL 6111039, at *2 (D.N.J. Oct. 16, 2020), the District Court of New Jersey declined to decide issues of state law related to a restaurant and bar's losses in relation to the COVID-19 pandemic. The court specifically recognized that "the unique nature of the COVID-19 pandemic and its resulting legal issues are best for the New Jersey state courts to resolve, as the resolution of these issues involve significant questions of public policy. Accordingly, as a matter of comity, this matter shall be remanded to state court." *Id.* at *5. *See also Mattdogg, Inc. v. Philadelphia Indem. Ins. Co.*, No. CV206889FLWLHG, 2020 WL 6111038, at *1 (D.N.J. Oct. 16, 2020) (same).

Each of the questions raised by Henry's involve important, novel issues of Georgia law. In the absence of Georgia precedent relating to the effects of global pandemic events and government orders requiring the closure of businesses, this Court should certify the questions posed by Henry's—namely (1) that "physical loss of" property may constitute

spatial losses, including losses of use of space, such as that Henry's suffered here, and (2) whether government orders related to COVID-19 satisfy the requirements for Civil Authority coverage based on the requirement that such an order contemplates "damage" to other properties.

Certification of these questions respects the Constitutional duties of federal courts not to legislate or adjudicate such important state law questions directly impacting thousands of Georgia businesses—especially when the certification process is available in Georgia and regularly employed by this Court. *See, e.g.*, *Pendergast v. Sprint Nextel Corp.*, 592 F.3d 1119 (11th Cir. 2010) (certifying questions); *Simmons*, 394 F.3d 1335 (same); *Mosher v. Speedstar Div. of AMCA Int'l, Inc.,* 52 F.3d 913 (11th Cir. 1995) (same).

Certification will also give the Georgia Supreme Court an opportunity to consider other cases applying principles of interpretation similar to Georgia's own to cases involving loss of business due to COVID-19.

CONCLUSION

For the foregoing reasons, this Court should reverse the District Court's ruling on Nationwide's Motion to Dismiss, and remand the case to the district court with instructions to proceed with the case, or, alternatively, certify Henry's questions of law to the Georgia Supreme Court.

Respectfully submitted,

Dated: December 14, 2020

By: */s/ James J. Leonard*

JAMES J. LEONARD
BARNES & THORNBURG LLP
3475 PIEDMONT ROAD, NE, SUITE 1700
ATLANTA, GEORGIA 30305-2954
TELEPHONE: (404) 846-1693
FACSIMILE: (404) 264-4033

ATTORNEYS FOR PLAINTIFFS-APPELLANTS, HENRY'S LOUISIANA GRILL, INC. AND HENRY'S UPTOWN LLC

CERTIFICATE OF COMPLIANCE

I certify that, pursuant to Fed. R. App. P. 32 (g) and 11th Cir. R. 28-1 (m), the attached opening brief is proportionately spaced, has a typeface of 14 points or more and contains 5,814 words.

Dated: December 14, 2020

By: */s/ James J. Leonard*

JAMES J. LEONARD
BARNES & THORNBURG LLP
3475 PIEDMONT ROAD, NE, SUITE 1700
ATLANTA, GEORGIA 30305-2954
TELEPHONE: (404) 846-1693
FACSIMILE: (404) 264-4033

ATTORNEYS FOR PLAINTIFFS-APPELLANTS, HENRY'S LOUISIANA GRILL, INC. AND HENRY'S UPTOWN LLC

CERTIFICATE OF SERVICE

I hereby certify that on December 14, 2020, I electronically filed the foregoing **HENRY'S OPENING BRIEF** with the Clerk of the Court for the United States Court of Appeals for the Eleventh Circuit using the appellate CM/ECF system.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

/s/ *James J. Leonard*