No. 21-10490

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

R.T.G. FURNITURE CORP.

Plaintiff/Appellant,

vs.

ASPEN SPECIALTY INSURANCE CO. *et al.*,

Defendants/Appellees.

Appeal from the United States District Court
for the Middle District of Florida
Tampa Division
Case No. 8:20-cv-02323-JSM-AEP

APPELLANT'S BRIEF

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CORPORATE DISCLOSURE STATEMENT

Pursuant to 11th Circuit Rule 26.1, counsel for Plaintiff-Appellant R.T.G. Furniture Corp. hereby certifies that the following listed persons and entities have or may have an interest in the outcome of this case:

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Ashy, Michael H., attorney for Defendant-Appellee Homeland Insurance Company of New York

Aspen Specialty Insurance Company (AHL_PE), Defendant-Appellee

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Evanston Insurance Company, owned by Markel Corporation (MKL), Defendant-Appellee

Everest Indemnity Insurance Company, an operating subsidiary of Everest Re Group, Ltd. (RE), Defendant-Appellee

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American Insurance Company, Maxum Indemnity Company, PartnerRe Ireland Insurance DAC, Starr Surplus Lines Insurance Company, and Underwriters at Lloyd's London Subscribing to Policy No. LMPR2098555

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HDI Global Specialty SE, Defendant-Appellee

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R.T.G. Furniture Corp., Plaintiff-Appellant

Starr Surplus Lines Insurance Company, Defendant-Appellee

Steklof, Cary D., attorney for Plaintiff-Appellant

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Underwriters at Lloyd's London Subscribing to Policy No. LMPRP20928555, Defendant-Appellee

Appellant R.T.G. Furniture Corp. declares that it is privately owned, and there are no publicly traded corporations that own 10% or more of its stock.

Dated: March 29, 2021

HUNTON ANDREWS KURTH LLP

/s/ Walter J. Andrews

Walter J. Andrews

Attorney for Appellant, R.T.G. Furniture Corp.

STATEMENT REGARDING ORAL ARGUMENT

Plaintiff-Appellant R.T.G. Furniture Corp., referred to in this brief as Rooms To Go, requests oral argument.

Businesses suffered staggering losses because of the COVID-19 pandemic and resulting stay-at-home orders. Many of those businesses, including Rooms To Go, have paid substantial insurance premiums to protect themselves from this sort of loss. Most commercial property insurance policies, including the policies that Rooms To Go bought, include so-called business-interruption coverage for the loss of use of the insured's property.

But Rooms To Go's Insurers rejected its claim, contending that under Florida law, the COVID-19 pandemic and stay-at-home orders did not cause "direct physical loss of or damage to property," which is the basis for coverage under the policies. The district court agreed and dismissed Rooms To Go's complaint.

Oral argument is appropriate because this case addresses a novel legal question plaguing insurance policyholders across Florida, the outcome will affect many people beyond just the parties, and due to the underlying subject matter—multiple commercial property insurance policies—this Court will benefit from the additional clarity provided by oral argument.

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JURISDICTIONAL STATEMENT

The district court had diversity jurisdiction under 28 U.S.C. § 1332(a) because the plaintiff is completely diverse from the defendants and the amount in controversy exceeds $75,000. The district court dismissed Rooms To Go's Complaint with prejudice. Order, Doc 45, Appx 259–66. Rooms To Go timely filed its notice of appeal. Notice of Appeal, Doc 46, Appx 268–69. This Court has appellate jurisdiction under 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES

1. Under Florida law, if a policyholder offers a reasonable interpretation of an insurance policy that provides coverage, that interpretation must control. Here, a reasonable interpretation of the phrase "direct physical loss of" property is that it includes the loss of use of property. But the district court rejected this reasonable interpretation in favor of an alternative interpretation advanced by the Insurers. Did the district court err by refusing to adopt Rooms To Go's reasonable interpretation?
2. Rooms To Go pleaded that COVID-19 physically damaged its property, and under Rule 12(b)(6) the district court was required to accept that factual allegation as true. Yet the district court found that COVID-19 does not and thus did not cause damage to property. Did the district court err by making that factual determination at the motion to dismiss stage?

I. INTRODUCTION

In baseball, a tie goes to the runner; in Florida insurance cases, a tie goes to the policyholder.[1] At least that is how it is supposed to work. Yet that is not what happened here.

Plaintiff-Appellant R.T.G. Furniture Corp sued the Defendant-Appellee Insurers for failing to cover losses incurred due to COVID-19 and the resulting stay-at-home orders. The policies at issue provide coverage for "all risks" of "direct physical loss of or damage to property." Thus, the question is whether the actual presence of COVID-19 on Rooms To Go's insured property or the stay-at-home orders caused either "direct physical loss of" property or "damage to property" under Florida law. Rooms To Go pleaded and argued that it suffered both direct physical loss and damage, each of which provides an independent basis for recovery under the policies. By dismissing Rooms To Go's complaint, the district court ruled that COVID-19 and the stay-at-home orders cause neither "direct physical loss of" property nor "damage" to property. Both of those rulings were in error and both are independently sufficient for reversal.

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[1] Cf. Ortiz v. Principi, 247 F. 3d 1361, 1365 (Fed. Cir. 2001) (analogizing another legal standard to "sandlot baseball's 'tie goes to the runner' rule," which "can be summarized as follows: If the umpire determines that the ball beats the runner to the base, the runner is called out. However, if it appears that (but is unclear whether) the runner and the ball arrived at the base at the same time, then the runner is safe by operation of the 'tie goes to the runner' rule").

First, the district court did not properly apply the tie-goes-to-the-policyholder rule of construction when considering whether COVID-19 and the stay-at-home orders caused "direct physical loss of" property. When applying Florida law, courts must construe ambiguous insurance policies in favor of the policyholder. Policy language is ambiguous if it is susceptible to more than one reasonable interpretation, one in favor of and one limiting coverage. So long as the policyholder can put forth a reasonable interpretation providing coverage, that interpretation controls—either because the policyholder's interpretation is the only reasonable one, or because, if the insurer also puts forth a reasonable interpretation, the tie goes to the policyholder.

Rooms To Go established a reasonable interpretation of the phrase "direct physical loss of" property as loss of use. Under this interpretation, both the actual presence of COVID-19 and the stay-at-home orders caused "direct physical loss of" property because each caused Rooms To Go to lose the use of its property. But instead of considering whether this interpretation was reasonable—as Florida law requires—the district court simply adopted the Insurers' competing interpretation that "direct physical loss of" property requires Rooms To Go to establish a "tangible injury to property." That was error.

Second, regardless of the standard, the district court also erred by making a fact determination at the motion to dismiss stage. Even accepting the district court's incorrect standard that "direct physical loss" and "damage" require a "tangible

injury," there must be a factual finding about whether the actual presence of COVID-19 causes a "tangible injury." Yet the district court ruled that as a matter of "common sense" COVID-19 cannot cause "tangible injury to property." But whether a substance causes "tangible injury" is a question of fact. The district court dismissed this case by making its own fact determination. That, too, was error.

Had the district court appropriately determined that Rooms To Go suffered "direct physical loss of or damage to property," it would have then turned to whether any exclusions applied. No exclusions in the policies bar coverage for "direct physical loss of or damage to property" resulting from the actual presence of COVID-19 or the stay-at-home orders. As a result, the district court erred by dismissing Rooms To Go's complaint.

II. STATEMENT OF THE CASE

Rooms To Go is a furniture retailer with a corporate office in Seffner, Florida. Compl., Doc 1 at 3 ¶ 7, Appx 011. To protect its stores, Rooms To Go bought commercial property insurance policies in the form of a so-called insurance tower. Id. at 7 ¶ 25, Appx 015.

An insurance tower spreads the risk of an insurance program across multiple insurers. Room To Go's insurance tower spreads the risk across fourteen policies

issued by twelve insurers, all of whom are the Defendants-Appellees in this case.[2] Id. at 13–14 ¶ 54, Appx 021–22. Although each of the Insurers issued its own separate policy, the relevant terms in each policy are the same.[3] Id. at 13 ¶ 52 n.4, Appx 021; Insurers' Mot. to Dismiss, Doc 36 at 4 & n.2, Appx 112.

In early 2019, COVID-19 swept across the United States.[4] COVID-19 spreads, in part, through respiratory droplets from infected people that land on surfaces. Compl., Doc 1 at 8 ¶ 31, Appx 016. A person can become infected with

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[2] Hallmark Specialty Insurance Company, Crum & Forster Specialty Insurance Company, Everest Indemnity Insurance Company, Ironshore Specialty Insurance Company, HDI Global Specialty SE, Underwriters at Lloyds London Subscribing to Policy No. LMPRP20928555, PartnerRe Ireland Insurance dac, Starr Surplus Lines Insurance Company, Evanston Insurance Company, Aspen Specialty Insurance Company, Landmark American Insurance Company, Maxum Indemnity Company, and Homeland Insurance Company of New York. Compl., Doc 1 at 3–7 ¶¶ 8–20, Appx 011–12.

[3] Some of the individual policies include endorsements that change small aspects of the policies, but none of the endorsements alters the relevant trigger for coverage. Insurers' Mot. to Dismiss, Doc 36 at 4 & n.2, Appx 112. All the policies cover "all risks of direct physical loss of or damage to property." Doc 45 at 1, Appx 259. As a result, Rooms To Go cites to only one of the fourteen policies, attached as Exhibit 1 to its complaint. Doc 36, citing Doc 1-1 Appx 112–16, 119, 128–29. The other policies are identical in all relevant respects unless otherwise noted.

[4] COVID-19 is an illness caused by the SARS-CoV-2 virus. Naming The Coronavirus Disease (COVID-19) and The Virus That Causes It, WORLD HEALTH ORG., https://www.who.int/emergencies/diseases/novel-coronavirus-2019/technical-guidance/naming-the-coronavirus-disease-(covid-2019)-and-the-virus-that-causes-it (last visited Mar. 26, 2021). But for clarity, some organizations refer to both interchangeably as COVID-19 and the COVID-19 virus. Id. Rooms To Go refers to both the virus and the resultant disease here as COVID-19.

COVID-19 by touching a surface or object that has the virus on it, and then touching their own mouth, nose, or eyes. Id.

COVID-19 was present on Rooms To Go's property. Id. at 8–9 ¶¶ 32–35, Appx 016–17. In fact, Rooms To Go was forced to close certain stores upon learning that employees or customers who had visited the store tested positive for, or were displaying symptoms of, COVID-19. Id. at 16 ¶ 64, Appx 024. As a result, COVID-19 damaged the property, and Rooms To Go was unable to use it. Id.

What's more, in an effort to reduce the spread of COVID-19, states and municipalities across the country issued stay-at-home orders limiting, to various degrees, people's ability to leave their homes and businesses' ability to operate. Id. at 9 ¶¶ 36–37, Appx 017. Some orders were explicitly implemented because COVID-19 damaged property. Id. at 9–10 ¶¶ 39–41, Appx 017–18. For example, the Broward County, Florida, order, which affected several Rooms To Go stores, noted that COVID-19 "is physically causing property damage due to its proclivity to attach to surfaces for prolonged periods of time." Id. at 9–10 ¶ 40, Appx 017. Likewise, Miami's order stated that COVID-19 likely poses "a clear and present danger of substantial injury to health, safety, and welfare of persons or to property." Id. at 10 ¶ 41, Appx 018. And North Carolina's order stated that its purpose was, in part, to "assure adequate protection of . . . property." Id. at 11 ¶ 41, Appx 019.

Because of COVID-19 and the stay-at-home orders, Rooms To Go lost the use of its property and sought to recover under its insurance policies. The Insurers issued "all risk" policies, which cover all risks not specifically excluded. Doc 1 at 13 ¶ 53, Appx 021. The policies define the "Perils Insured Against" as "all risks of direct physical loss of or damage to property described herein . . . except as hereafter excluded." Id. at 14–15 ¶ 55, Appx 022–23 (citation omitted). The policies thus cover "direct physical loss of" or "damage to" property.

Because the damage and loss of use caused by COVID-19 and the stay-at-home orders are "perils insured against" under the policies, they trigger the following coverages:

Coverage	Policies' Language	Citation
Business Interruption	"This policy shall cover the loss resulting from necessary interruption of business conducted by the Insured including all interdependent loss of earnings between or among companies owned or operated by the Insured caused by loss, damage, or destruction **by any of the perils covered herein** during the term of this policy to real and personal property as covered herein."	Compl. Doc 1 at 16–17 ¶ 69, Appx 024–25 (emphasis added) (citation omitted).
Extra Expenses	"Th[is] policy shall cover the necessary extra expense, as hereinafter defined, incurred by the Insured caused by loss, damage, or destruction **by any of the perils covered herein** during the term of this policy to real and personal property as covered herein."	Id. at 17 ¶ 74, Appx 025 (emphasis added) (citation omitted); see also id. at 17–18 ¶ 75, Appx 00018–19.
Contingent Business Interruption	"[I]nsures against loss resulting from damage to or destruction **by the perils insured against**, to . . . [p]roperty that directly or indirectly prevents a supplier . . . of goods and/or services to the Insured from rendering their goods and/or services, or property that prevents a receiver . . . of goods and/or services from receiving the Insured's goods and/or services . . . ."	Id. at 18 ¶ 79, Appx 026 (emphasis added) (citation omitted).

Civil Authority Coverage[5]	"[I]nsures against loss resulting from damage to or destruction **by the perils insured against**, to . . . [t]he actual loss sustained during a period not to exceed sixty (60) consecutive days when, as a result of a peril insured against, access to real or personal property is prohibited by order of civil or military authority."	Id. at 18–19 ¶¶ 79, 82, Appx 026–27 (emphasis added) (citations omitted).
Ingress/Egress Coverage	"[I]nsures against loss resulting from damage to or destruction **by the perils insured against**, to . . . [t]he actual loss sustained during a period not to exceed sixty (60) consecutive days when, as a result of a peril insured against, ingress to or egress from real or personal property is thereby prevented or hindered irrespective of whether the property of the Insured shall have been damaged."	Id. at 18–20 ¶¶ 79, 88, Appx 026–28 (emphasis added) (citations omitted).
Loss Adjustment Expenses	"This policy is extended to include expenses incurred by the Insured, or by the Insured's representatives for preparing and certifying details of a claim resulting from a loss which would be payable under this policy. These expenses include fees of professionals engaged to assist the Insured in determining the cause and origin of the loss, the amount of loss sustained, and the amount of loss payable under this policy. This policy shall not cover the expenses of a public adjuster and cost of attorneys."	Id. at 20 ¶ 90, Appx 028 (citation omitted).

[5] Everest modified its civil authority coverage to say the following: "The actual loss sustained during a period not to exceed sixty (60) consecutive days when, as a result of a peril insured against, access to real or personal property is prohibited by order of a civil or military authority, subject to five (5) miles from premises." Insurers' Mot. to Dismiss, Doc 36 at 7 n.3, Appx 115 (citation omitted).

Rooms To Go informed the Insurers that it had a right to recover under each of those coverages. Compl. Doc 1 at 16–20 ¶¶ 69–92, Appx 024–28. But the Insurers took no action for almost six months, until they finally reserved their rights in late September 2020. Id. at 25–26 ¶¶ 119–120, Appx 033–34.

Rooms To Go sued the Insurers in the Middle District of Florida. Compl. Doc 1, Appx 009–107. The insurers moved to dismiss the complaint, and the district court issued an order granting that motion with prejudice. Insurers' Mot. to Dismiss, Doc 36 & Order, Doc 45, Appx 109–34, 259–66. Rooms To Go appeals that order.

III. SUMMARY OF THE ARGUMENT

Rooms To Go pleaded that COVID-19 caused both "direct physical loss of" property and "damage" to its property. The district court, in dismissing Rooms To Go's complaint, thus ruled that COVID-19 and the stay-at-home orders cause neither "direct physical loss of" property nor "damage" to property. Both of those rulings were in error and both are independently sufficient for reversal.

The district court first erred in considering whether Rooms To Go suffered a direct physical loss. "Direct physical loss of *or* damage to" is disjunctive, so that the two parts must mean something different. Rooms To Go alleged that "physical loss of" property encompasses loss of use. The district court rejected that interpretation and required Rooms To Go to establish that it had suffered a "tangible injury." By requiring some form of "tangible injury" for coverage, the district court

collapsed the two into one, adopting the Insurers' interpretation that "COVID-19 does not impact physical structures." But under Florida law, if the policyholder puts forth a reasonable interpretation providing coverage, the court need not undertake any further inquiry, and the policyholder's interpretation controls.

Properly applying Florida's principles of policy interpretation, the actual presence of COVID-19 did in fact cause "direct physical loss of" Rooms To Go's property because it caused Rooms To Go to lose the use of its property. And the stay-at-home orders caused direct physical loss under Florida law because they also caused Rooms To Go to lose the use of its property.

The district court's second error concerns whether Rooms To Go's property was "damage[d]." Even accepting the district court's incorrect standard of "tangible injury" for coverage, the district court also erred when it reached a factual conclusion at the motion to dismiss stage.

Rooms To Go properly pleaded that COVID-19 damaged its property. It pleaded that COVID-19 attaches to property. It pleaded that a person can become infected with COVID-19 by touching a surface or object that has the virus on it, and then touching their own mouth, nose, or eyes. It pleaded that COVID-19 was actually present on its property. And it pleaded that as a result, its property was unusable.

Those facts, accepted as true as required, establish that COVID-19 caused "tangible injury to property."

Despite those allegations, the district court dismissed the complaint, ruling that "common sense tells us that COVID-19 is incapable of causing a tangible injury to property." Order, Doc 45 at 6, Appx 264. That is not an appropriate factual determination for a district court to make when considering a motion to dismiss.

Finally, the district court did not address whether any exclusions apply. But because this Court can affirm a motion to dismiss for any reason supported by the record, even if not relied on by the district court, Rooms To Go addresses the policies' contamination and pollution exclusion issue raised by the Insurers.

This exclusion does not bar coverage for four independently sufficient reasons. First, the Insurers did not include in the policies a standalone virus exclusion; they instead included a contamination and pollution exclusion that applies to traditional environmental pollutants. That exclusion includes the word "virus" to modify "contamination" and "pollution." The exclusion therefore applies to only those viruses that are also traditional environmental pollutants. Second, it applies only to those viruses included in the listed acts and EPA regulations. Third, it applies to only those contaminants and pollutants that are "released." And fourth, it includes an applicable exception.

IV. ARGUMENT

The district court made two errors in granting the Insurers' motion to dismiss. The policies in this case cover "direct physical loss of or damage to property." By dismissing Rooms To Go's complaint, the district court ruled that COVID-19 and the stay-at-home orders cause neither "direct physical loss of" property nor "damage" to property. Both of those rulings were in error and both are independently sufficient for reversal.

The district court first erred when it failed to properly apply Florida law in determining the meaning of "direct physical loss of" property. Insurance claims are creatures of state law, but the district court did not properly apply Florida's rules for construing insurance policies.

The district court erred a second time when, at the motion to dismiss stage, it decided a factual dispute about whether COVID-19 causes "damage." Rooms To Go's complaint alleged that the actual presence of COVID-19 damages property. The district court should have accepted that well-pleaded allegation as true. But instead, the district court resolved that fact dispute, referring to its "common sense" understanding of COVID-19.

Had the district court not committed those two errors, it would have then considered whether any policy exclusions asserted by the Insurers applied. Here, no exclusions in the policies bar coverage for "direct physical loss of or damage to

property" resulting from the actual presence of COVID-19 or the stay-at-home orders. As a result, the district court erred by dismissing Rooms To Go's complaint.

This Court reviews de novo the district court's grant of the motion to dismiss for failure to state a claim, "accepting the allegations in the complaint as true and construing them in the light most favorable to the nonmoving party," here, Rooms To Go. Kizzire v. Baptist Health Sys., Inc., 441 F.3d 1306, 1308 (11th Cir. 2006). This Court also reviews de novo a district court's interpretation of state law. Trans Coastal Roofing Co., Inc. v. David Boland, Inc., 309 F.3d 758, 760 & n.1 (11th Cir. 2002).

A. Because the District Court Did Not Properly Apply Florida Law, It Failed to Recognize That the "Direct Physical Loss of" Property Encompasses Loss of Use.

In insurance cases, like in all diversity cases, state law controls. Under Florida law, courts must construe ambiguous policy language in favor of the policyholder. An ambiguous policy is one that has more than one reasonable interpretation. So if a policyholder can offer a reasonable interpretation of the policy language providing coverage, that interpretation controls.

A reasonable interpretation of the phrase "direct physical loss of or damage to" property is that it covers loss of use due to (i) the presence of an invisible but harmful substance like COVID-19 or (ii) the stay-at-home orders. That is especially true here because these policies cover "direct physical loss of or damage to

property." Based on the disjunctive "or," "direct physical loss" must mean something different from "damage." One reasonable interpretation that gives "direct physical loss" independent meaning is that it includes loss of use (as opposed to "damage," which requires a physical alteration). But the district court failed to consider whether that was a reasonable interpretation. It instead ruled that both "direct physical loss of" and "damage to" property require a "tangible injury to property." Order Doc 45 at 6, Appx 264. That was error.

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

The district court failed to properly apply Florida law as required under Erie R.R. Co. v. Tompkins, 304 U.S. 64, 78 (1938). Federal courts must apply "the substantive law of the forum state in a diversity case, unless federal constitutional or statutory law requires a contrary result." Galindo v. ARI Mut. Ins. Co., 203 F.3d 771, 774 (11th Cir. 2000).

In determining state law, federal courts look first to decisions from the state supreme court. Id. at 774. If the state supreme court has not clearly answered the question, federal courts must make an "Erie guess" about how that court would rule. Perkins v. Hartford Ins. Grp., 932 F.2d 1392, 1395 (11th Cir. 1991). And when making an Erie guess, "federal courts follow decisions of intermediate appellate courts in applying state law." Galindo, 203 F.3d at 775. Intermediate appellate decisions are especially persuasive in Florida because they "represent the law of

Florida unless and until they are overruled by [the Florida Supreme] Court." Pardo v. State, 596 So. 2d 665, 666 (Fla. 1992) (quoting Stanfill v. State, 384 So. 2d 141, 143 (Fla. 1980)).

But instead of relying on state supreme court decisions or intermediate appellate decisions, the district court relied only on non-precedential decisions—an unpublished 11th Circuit case, federal cases applying the law of other states, other federal district courts in Florida, and a Florida trial court order—to hold that, as a matter of Florida law, COVID-19 does not cause "tangible injury to property." [6] Order, Doc 45 at 6, Appx 264.

By looking to these decisions, the district court did more than just ignore the technicalities of making a competent Erie guess; doing so resulted in an opinion that violated substantive Florida law in three ways. First, the district court failed to follow—in fact, failed to even recognize—the Florida rule that a policyholder need only put forth a reasonable interpretation that provides coverage. Second, the district court failed to recognize that, under Florida contract-interpretation principles, "direct physical loss of" had to mean something different from "damage." And third,

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[6] The district court's reliance on the Florida state trial-court decision DAB Dental PLLC v. Main Street America Protection Insurance Co., No. 20-CA-005504 H (Fla. Cir. Ct. Nov. 10, 2020), was inappropriate in making an Erie guess. Order, Doc 45 at, Appx 264 (citing Doc 36-15). Unlike state supreme court and intermediate appellate court decisions, state trial court decisions are not controlling under Erie. Liberty Nat'l Life Ins. Co. v. Dobson, 377 F.2d 861, 864 (5th Cir. 1967); see also Bonner v. City of Prichard, 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc).

the district court failed to recognize that "direct physical loss of" property encompasses loss of use.

1. Under Florida Law, a Policyholder Need Only Put Forth a Reasonable Interpretation.

The district court failed to follow a fundamental Florida rule of insurance policy interpretation: if the policyholder puts forth a reasonable interpretation providing coverage, the court need not undertake any further inquiry, and the policyholder's interpretation controls. Despite that rule, the district court did not even consider whether Rooms To Go's proffered interpretation was reasonable. Nor did it attempt to explain why the many other courts that have adopted the same interpretation were unreasonable in doing so.

Under Florida law, interpretation of an insurance contract is a question of law for the court. Dahl-Eimers v. Mut. of Omaha Life Ins. Co., 986 F.2d 1379, 1381 (11th Cir. 1993). "In searching for meaning in an insurance contract under Florida law 'courts should read each policy as a whole, endeavoring to give every provision its full meaning and operative effect.'" Ruderman ex rel. Schwartz v. Wash. Nat'l Ins. Corp., 671 F.3d 1208, 1211 (11th Cir. 2012) ("Schwartz") (quoting Auto-Owners Ins. Co. v. Anderson, 756 So. 2d 29, 34 (Fla. 2000)).

But even considering "every provision," insurance policies are not always clear. If the "relevant policy language is susceptible to more than one reasonable interpretation, one providing coverage and the [other] limiting coverage, the

insurance policy is considered ambiguous." Id. Importantly, under Florida law, "[a]mbiguous policy provisions are interpreted liberally in favor of the insured and strictly against the drafter who prepared the policy." Auto-Owners, 756 So. 2d at 34; see also Prudential Prop. & Cas. Ins. Co. v. Swindal, 622 So. 2d 467, 470 (Fla. 1993) (same); Wash. Nat'l Ins. Corp. v. Ruderman, 117 So. 3d 943, 949–50 (Fla. 2013) (collecting cases).

Putting those rules together, a policyholder need only supply an interpretation that is reasonable. If the policyholder and insurer both supply reasonable interpretations of a policy, then that policy is ambiguous. Schwartz, 671 F.3d at 1211. And because an ambiguous policy must be interpreted in favor of coverage, the policyholder's interpretation must prevail. Auto-Owners, 756 So. 2d at 34. An insurer, in contrast, must show that its interpretation is the only reasonable one; if it cannot make that showing, then the policy is ambiguous and must be interpreted in favor of coverage. If this standard seems mismatched, that's because it is: under Florida law, as in baseball, a tie goes to the policyholder.

Yet the district court did not even acknowledge that ambiguous policies must be construed in favor of the policyholder.[7] See Order, Doc 45 at 3–4, Appx 261–62.

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[7] In its order, the district court referred to and adopted an earlier order that it issued in a similar, but not identical, COVID-19 matter. Order, Doc 45 at 4, Appx 262 (citing Infinity Exs., Inc. v. Certain Underwriters at Lloyd's London Known as Syndicate PEM 4000, No. 8:20-cv-1605-T-30AEP, 2020 WL 5791583, at *5 (M.D.

Nor did it consider whether Rooms To Go's interpretation was reasonable. Id. Instead, the district court merely adopted the Insurers' interpretation and ruled that "COVID-19 does not impact physical structures . . . ." Id. at 7, Appx 265. That was an improper policy interpretation under Florida law.

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

Had the district court properly applied Florida law, it would have had to address how the phrase "direct physical loss of" property is distinct from "damage to property." Recall that the policies' coverage grant is disjunctive: it insures against "all risks of direct physical loss of or damage to property described herein. . . except as hereafter excluded." Compl., Doc 1 at 14–15 ¶ 55, Appx 022–23 (emphasis added).

Because the policies explicitly differentiate between "loss" and "damage," Florida law requires courts to give both words independent meaning for three reasons. First, the word "or" is disjunctive, so the phrases on either side of the word "or" must be given some independent meaning. See Crown Life Ins. Co. v. Garcia, 424 So. 2d 893, 894 n.1 (Fla. 3d DCA 1982) ("On the contrary, the conclusion that the policy terms provide coverage can be achieved only by changing the disjunctive word, 'or,' between the two separate exclusionary definitions of 'disabled' to the

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Fla. Sept. 28, 2020)). That order likewise does not reference Florida law's principles of construing ambiguous insurance policy provisions.

conjunctive 'and.'" (citation omitted)); accord Royal Ins. Co. v. Latin Am. Aviation Servs., Inc., 210 F.3d 1348, 1350–51 (11th Cir. 2000); Prudential Ins. Co. of Am. v. Bellar, 391 So. 2d 737, 737 (Fla. 4th DCA 1980).

Second, courts must give each of those phrases different meanings because failing to do so would violate the well-worn surplusage canon. Premier Ins. Co. v. Adams, 632 So. 2d 1054, 1057 (Fla. 5th DCA 1994) ("[A]n interpretation which gives a reasonable meaning to all provisions of a contract is preferred to one which leaves a part useless or inexplicable."); Arawak Aviation, Inc. v. Indem. Ins. Co. of N. Am., 285 F.3d 954, 958 (11th Cir. 2002) ("On the other hand, the efficient cause doctrine cannot be incorporated into an insurance policy if doing so would render part of the policy meaningless" (citing Adams, 632 So. 2d at 1057)).

Third, "[w]ords and phrases in an insurance policy, when not specifically defined therein, 'must be given their everyday meaning and read in light of the skill and experience of ordinary people.'" Siegle v. Progressive Consumers Ins. Co., 788 So. 2d 355, 359–60 (Fla. 4th DCA 2001), aff'd, 819 So. 2d 732 (Fla. 2002) (quoting Lindheimer v. St. Paul Fire & Marine Ins. Co., 643 So. 2d 636, 638 (Fla. 3d DCA 1994)). The common legal dictionary meanings of the words "loss" and "damage" demonstrate that they are not the same. Black's Law Dictionary defines "loss" as the "disappearance or diminution of value, usu[ally] in an unexpected or relatively unpredictable way." *Loss*, Black's Law Dictionary (10th ed. 2014) ("Black's"). In

contrast, Black's Law Dictionary defines "damage" as "physical harm that is done to something. . . ." *Damage*, Black's. Importantly, while the definition of "damage" includes "physical harm" to property, the definition of "loss" does not. Instead, a policyholder can suffer a loss based only on "diminution of value." *Loss*, Black's.

The district court, however, did not distinguish between "loss" and "damage"; instead it interpreted the phrase "direct physical loss of or damage to" as an undifferentiated whole. Order, Doc 45 at 6, Appx 264. The district court specifically ruled that the physical presence of COVID-19 was not enough to establish direct physical loss of or damage to property because "COVID-19 is incapable of causing tangible injury to property." Id.

The district court thus found that both "direct physical loss of" and "damage to" property collapse into a single concept: "tangible injury to property." Id. That can't be right. Therefore, the district court erred by requiring Rooms To Go to prove a tangible injury to property to establish both "loss" and "damage."

3. Under Florida Law, it is Reasonable to Interpret the Phrase "Direct Physical Loss" to Encompass Loss of Use.

Had the district court given both phrases independent meaning, as required under Florida law, it would have determined that "direct physical loss of" property encompasses loss of use. The plain meaning of the words "direct physical loss of" property, other clauses in the policy, and Florida law all support that interpretation.

Also, although not binding, courts in other states have interpreted "loss" to include loss of use. As a result, that interpretation is a reasonable one. And because Rooms To Go need only advance a reasonable interpretation providing coverage, that interpretation controls. Supra at 16–18.

The insurers failed to define "direct," "physical," or "loss." Under Florida law, "when an insurer fails to define a term in a policy . . . the insurer cannot take the position that there should be a 'narrow, restrictive interpretation of the coverage provided.'" State Farm Fire & Cas. Co. v. CTC Dev. Corp., 720 So. 2d 1072, 1076 (Fla. 1998) ("CTC Dev. Corp.") (alteration in original) (quoting State Comprehensive Health Ass'n v. Carmichael, 706 So. 2d 319, 320 (Fla. 4th DCA 1997)); see also Nat'l Merch. Co. v. United Serv. Auto. Ass'n, 400 So. 2d 526, 530 (Fla. 1st DCA 1981).

An insurer's failure to define all the words in a policy does not necessarily render the policy ambiguous. CTC Dev. Corp., 720 So. 2d at 1076. But if undefined words have multiple possible meanings, they "should be construed liberally in favor of the insured and strictly against the insurer." Id. Thus, if a reasonable interpretation of an undefined word would provide coverage, this Court must adopt that broader meaning.

Florida courts look to dictionaries to determine the meaning of undefined terms. Deutsch v. Geico Gen. Ins. Co., 284 So. 3d 1074, 1076 (Fla. 4th DCA 2019)

(quoting Botee v. S. Fid. Ins. Co., 162 So. 3d 183, 186 (Fla. 5th DCA 2015)). Black's provides the following definitions for each of the undefined words:

Word	Black's Law Dictionary 10th Ed.
"Direct"	"Free from extraneous influence; immediate . . . ." *Direct*, Black's.
"Physical"	"Of, relating to, or involving the material universe and its phenomena; relating to the physical sciences . . . ." *Physical*, Black's.
"Loss"	"[D]isappearance or diminution of value, usu[ally] in an unexpected or relatively unpredictable way." *Loss* Black's.

Based on these definitions and Florida's rule of interpretation that undefined words must take a broader meaning that encompasses coverage, the phrase "direct physical loss of" property encompasses loss of use. Loss of use can be "direct" if it is an "immediate" consequence of something (like the actual presence of COVID-19 or the stay-at-home orders, as here). *Direct*, Black's. Likewise, the loss of use of real, tangible property is "[o]f, relating to, [and] involving the material universe." *Physical*, Black's. And, of course, loss of use is a loss; it is a "diminution of value." *Loss*, Black's.

Recognizing that "direct physical loss of" property encompasses loss of use also gives "loss" a different meaning from "damage," as required under Florida law (again because the coverage language is disjunctive, separated by "or"). Supra at 18–20. Direct physical damage to property can require some "tangible injury" to property. Direct physical loss of property, by contrast, requires only loss of use.

In addition, the policy itself recognizes that loss of use is "direct physical loss of" property. Schwartz, 671 F.3d at 1211 ("In searching for meaning in an insurance contract under Florida law 'courts should read each policy as a whole, endeavoring to give every provision its full meaning and operative effect.'" (citation omitted)). For example, the policy excludes the "loss of use necessitated by the enforcement of any law or ordinance regulating" asbestos and other poisons. Compl., Doc 1-1 at 36, Appx 084. The Insurers would have no need to exclude "loss of use" due to the presence of a hazard if the policies did not cover loss of use in the first place. See U.S. Fire Ins. Co. v. J.S.U.B., Inc., 979 So. 2d 871, 887 (Fla. 2007) (rejecting an insurer's narrow interpretation of a policy's insuring agreement because it would render meaningless an exception to an exclusion, which confirmed that coverage was available for the peril in question).

Florida courts, too, have recognized that "loss" encompasses "loss of use." For example, in Azalea, Ltd. v. American States Insurance Co., 656 So. 2d 600, 601 (Fla. 1st DCA 1995), a vandal poured an unknown substance into a sewage treatment plant. As a result, the plant shut down, first to find out if the substance was harmful to humans. Id. Although the substance was not harmful, it did adhere to the tank and kill desirable bacteria in it, so the plant operator had to drain and clean the tank. Id.

The plant operator sued its insurer, arguing that this substance caused "direct physical loss" under its property insurance policy. Id. The trial court found that "loss of use did not constitute direct physical loss." Id. at 602. But the First DCA reversed. Id. It ruled that other courts had repeatedly found that loss of use qualifies as loss. Id. (citing W. 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), aff'd, 774 F.2d 1151 (3d Cir. 1985)). Thus, the appellate court ruled that the sewage plant's argument was "even more compelling" because "residue from the dumped substance actually covered and adhered to the interior of the structure" and killed the desirable bacteria. Id. Put differently, "Azalea stands for the proposition that under Florida law 'direct physical loss' includes more than losses that harm the structure of the covered property." Three Palms Pointe, Inc. v. State Farm Fire & Cas. Co., 250 F. Supp. 2d 1357, 1364 (M.D. Fla. 2003), aff'd, 362 F.3d 1317 (11th Cir. 2004).

Likewise, in Homeowners Choice Property & Casualty v. Maspons, 211 So. 3d 1067, 1069 (Fla. 3d DCA 2017), the court ruled that the loss of use of a drainpipe was a "direct physical loss." And it held 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." Id.

So too here. COVID-19 particles adhered to Rooms To Go's property and caused it to fail to perform its function, which is a "direct physical loss of" property under Florida law.

Courts across the country have also recognized the reasonable interpretation that "direct physical loss" includes loss of use. Elegant Massage, LLC v. State Farm Mut. Auto. Ins. Co., No. 2:20-cv-265, 2020 WL 7249624, at *9 (E.D. Va. Dec. 9, 2020) (interpreting the phrase "direct physical loss" to cover loss of use, and collecting cases that reached the same result); see also, e.g., W. Fire Ins. Co., 437 P.2d at 55 (ruling that gasoline fumes that rendered a church building unusable constituted physical loss); Sentinel Mgmt. Co. v. N.H. Ins. Co., 563 N.W.2d 296, 300 (Minn. Ct. App. 1997) ("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 [its] presence . . . ."); Murray v. State Farm Fire & Cas. Co., 509 S.E.2d 1, 17 (W. Va. 1998) (home rendered unusable by increased risk of rockslide suffered direct physical loss even without structural damage).

By one university's count, courts have rejected insurers' motions to dismiss in 42 COVID-19 business interruption cases that deal with the precise question at issue in this case—whether COVID-19 causes physical loss or damage. Covid Coverage Litigation Tracker: Judicial Rulings on the Merits in Business Interruption

Cases, U. PENN. INS. LAW CTR., https://cclt.law.upenn.edu/judicial-rulings/ (last visited Mar. 29, 2021). And courts had granted policyholder's motions for summary judgment in seven COVID cases. Id. In at least 49 cases, then, courts have ruled for the policyholders. Id.

Decisions applying the law of other states are not, of course, binding on a court interpreting a policy under Florida law. But the fact that so many other courts and judges have ruled that "loss" includes "loss of use" is strong evidence of the reasonableness of that interpretation. After all, it is unlikely that all those judges in all 47 of those courts are unreasonable.

Although Rooms To Go cited to those decisions (and others) in opposing the motion to dismiss, the district court did not address any of them in its order. Nor did it attempt to explain how all those courts could adopt a meaning of the phrase "direct physical loss" that it ruled—at least by implication—was not even reasonable.

In short, the language of the coverage provision, other provisions in the policy, Florida law, and decisions from other states all confirm that one reasonable interpretation of "direct physical loss of" property is that it includes "loss of use."[8]

[8] The district court ruled that Rooms To Go's damages were "economic" damages. Order, Doc 45 at 4, Appx 262. But under Florida law, losses resulting from the loss of use of property are not "economic losses." Mid-Continent Cas. Co. v. Adams Homes of Nw. Fla. Inc., 725 F. App'x 777, 782 (11th Cir. 2018) (interpreting Florida law); see also McCreary v. Fla. Residential Prop. & Cas. Joint Underwriting Ass'n, 758 So. 2d 692, 695 (Fla. 4th DCA 1999) (allowing a loss of use claim to proceed).

And because Rooms To Go, as the policyholder, has put forth a reasonable interpretation of the policy that provides coverage for the loss of use of its property, the district court had to adopt that interpretation. Schwartz, 671 F.3d at 1211.

ii. COVID-19 Caused Rooms to Go to Lose the Use of Its Property, Which Is a "Direct Physical Loss of" Property under Florida Law.

It is a reasonable interpretation that the actual presence of COVID-19 caused "direct physical loss of" Rooms To Go's property under Florida law.

COVID-19 was actually present on Rooms To Go's property. Compl., Doc 1 at 8–9 ¶¶ 32–35, Appx 016–17. It was therefore the "direct" or "immediate" cause of the loss. Likewise, COVID-19 is physical; it is "[o]f, relating to, [and] involving the material universe . . . ." *Physical*, Black's. And COVID-19 caused a loss: Rooms To Go was unable to use its property. Compl., Doc 1 at 8 ¶ 32, Appx 016.

Under Florida law, "the failure of [property] to perform its function constituted a 'direct' and 'physical' loss to the property within the meaning of the policy." Maspons, 211 So. 3d at 1069. The district court therefore erred in dismissing Rooms To Go's complaint, and that dismissal should be reversed.

iii. The Stay-at-Home Orders Caused Rooms to Go to Lose the Use of Its Property, Which Also Is a "Direct Physical Loss of" Property under Florida Law.

In addition, the stay-at-home orders caused direct physical loss under Florida law because they also caused Rooms To Go to lose the use of its property.

Cities and states across the country issued the stay-at-home orders because of physical loss or damage that COVID-19 caused to property. Indeed, the stay-at-home orders caused some of Rooms To Go's stores to close. Supra at 5. So the orders themselves were "direct." And, as noted above, the orders caused a loss when Rooms To Go was unable to use its property. Likewise, the result of the orders was "physical" in that they dealt with the physical world and caused Rooms To Go to lose access to its stores.

In sum, the stay-at-home orders caused Rooms To Go to lose the use of its property, which amounts to a "direct physical loss of" property under Florida law. The district court erred by ruling that Rooms To Go did not suffer a "direct physical loss of" property under the policy and by dismissing Rooms To Go's complaint.

B. The District Court Improperly Resolved Factual Issues about Whether COVID-19 Causes "Tangible Injury to Property," so Rule 12(b)(6) Dismissal Was Inappropriate.

In addition to pleading that it suffered a "loss," Rooms To Go alternatively pleaded that the actual presence of COVID-19 "damage[d]" its property. The district court rejected that argument too, ruling that "common sense tells us that COVID-19 is incapable of causing a tangible injury to property." Order, Doc 45 at 6, Appx 264. It cited no authority whatsoever for the proposition that, under Florida law, the policy's language—"physical loss of or damage to"—can be satisfied only by showing a "tangible injury." Id.

Even assuming that the district court's definition of "damage" was correct, dismissal was still inappropriate. Rooms To Go properly pleaded that COVID-19 "damage[d]" its property by attaching itself to and rendering the property unusable. Thus, a factual dispute exists as to whether COVID-19 causes tangible injury or damage to property. Instead of allowing the parties to proceed to discovery and present fact and expert testimony, the district court relied on its own "common sense" understanding of COVID-19 to decide that it could not tangibly change property in the ways that Rooms To Go alleged. That was an error, and the district court's order dismissing the complaint should be reversed.

i. Rooms to Go Properly Pleaded That COVID-19 Damaged Its Property.

Rooms To Go properly pleaded that COVID-19 damaged its property. To survive a motion to dismiss, a plaintiff need only allege "sufficient factual matter" that, "accepted as true," states a "plausible" claim. Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." Id. And courts must accept factual allegations as true if they rise "above the speculative level." Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555 (2007).

It is true that Twombly and Iqbal do not require courts to accept bare legal conclusions. See Dusek v. JPMorgan Chase & Co., 832 F.3d 1243, 1246 (11th Cir.

2016) ("In deciding a Rule 12(b)(6) motion to dismiss, the court must accept all factual allegations in a complaint as true and take them in the light most favorable to plaintiff, . . . but '[l]egal conclusions without adequate factual support are entitled to no assumption of truth' . . . . " (citation omitted)). But Rooms To Go's allegation, that COVID-19 damaged its property, was not a bare legal conclusion.

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

Rooms To Go pleaded these facts:

- "Coronavirus is detectable on various types of surfaces for varying amounts of time." Compl., Doc. 1 at 8 ¶ 30, Appx 016.

- "The CDC has reported that a person can become infected with COVID-19 by touching a surface or object that has the virus on it, and then touching their own mouth, nose, or eyes." Id. ¶ 31, Appx 016.

- "The presence of coronavirus particles caused direct physical harm, direct physical damage, and/or direct physical loss to Rooms To Go's property." Id. ¶ 33, Appx 016.

- "The presence of people infected with or carrying COVID-19 on Rooms To Go's property caused direct physical harm, direct physical damage, and/or direct physical loss to Rooms To Go's property." Id. at 9 ¶ 35, Appx 017.

- "Coronavirus is a physical substance that can be active on inert physical surfaces, and may also be present in the air." Id. at 15 ¶ 60, Appx 023.

- "Indeed, Rooms To Go was forced to close certain stores upon learning that employees or customers who had visited the store tested positive for, or were displaying symptoms of, COVID-19." Id. at 16 ¶ 64, Appx 024.

- "[C]oronavirus, as a physical substance that can attach to and deprive a policyholder of its property by making it unusable, may constitute a 'direct physical loss' based on the plain and ordinary meaning of the phrase." Id. at 21 ¶ 95, Appx 029.

Thus, Rooms To Go pleaded that COVID-19 attaches to property. Id. at 15, 21 ¶¶ 60, 95, Appx 023, 029. It pleaded that, as a result, COVID-19 transformed the property and rendered it unusable. Id. at 8–9 ¶¶ 33, 35, Appx 016–17. And it pleaded that COVID-19 was actually present on its property. Id. at 16 ¶ 64, Appx 024.

Those facts, if the district court had accepted them as true, as required, establish that COVID-19 caused "tangible injury to property." See Order, Doc 45 at 6, Appx 264. These allegations, in other words, provide more than mere speculation that COVID-19 harms property. See Twombly, 550 U.S. at 555.

This Court considered a similar question in Adinolfe, where it reversed a dismissal of two toxic tort actions for failure to state a claim.[9] 768 F.3d at 1173–75.

[9] To be sure, Adinolfe and this case are not identical. In Adinolfe, 768 F.3d at 1172, the plaintiffs alleged that their property was "contaminated" by pollutants that had been discharged by a rocket engine manufacturer. That case thus involved traditional pollutants, not a communicable disease. Still, in both Adinolfe and this case, the plaintiffs had to plead that substances invaded their property and caused

This Court held that the following factual allegations were enough to state a claim: the defendant "generated and released or discharged contaminants into the soil, surface water, and groundwater," id. at 1172; the contaminants migrated from where they were dumped to the plaintiffs' neighborhood, id. at 1172–73; and the contaminants were found on the plaintiffs' property, where there was a cancer cluster, id. at 1173. Those allegations "set forth facts that amount to substantially 'more than labels and conclusions' concerning the matter of contamination." Id. (citing Twombly, 550 U.S. at 554).

Like the plaintiffs in Adinolfe, Rooms To Go pleaded that COVID-19 was found on its property. And like the plaintiffs in Adinolfe, Rooms To Go pleaded that COVID-19 rendered its property unusable. That is enough. By requiring more of Rooms To Go at the motion to dismiss stage, the district court improperly imposed a heightened pleading standard. See Twombly, 550 U.S. at 570 ("[W]e do not require heightened fact pleading of specifics, but only enough facts to state a claim to relief that is plausible on its face."). Deciding at the motion to dismiss stage that as a matter of "common sense" COVID-19 does not damage property is tantamount

damage. In both cases, the plaintiffs pleaded substantially the same facts. There is no reason that a plaintiff should have to plead more facts to survive a motion to dismiss just because the damage was caused by a communicable disease instead of a traditional environmental pollutant. As a result, Adinolfe is instructive here.

to the district court in Adinolfe deciding at the motion to dismiss stage that as a matter of "common sense" the substance at issue did not cause cancer.

The district court's job at the motion to dismiss stage was not to determine whether Rooms To Go proved its case. It was merely to assess whether Rooms To Go's complaint properly pleaded that COVID-19 damaged its property, which it did. By ruling otherwise, the district court erred.

ii. Because Rooms to Go Properly Pleaded That COVID-19 Damaged Its Property, Dismissal Was Inappropriate.

Despite those allegations, the district court dismissed the complaint. It ruled that "common sense tells us that COVID-19 is incapable of causing a tangible injury to property." Order, Doc 45 at 6, Appx 264.

That is not an appropriate determination for a district court to make at the motion to dismiss stage. Courts must accept factual allegations as true if they rise "above the speculative level." Twombly, 550 U.S. at 555. And courts cannot resolve factual disputes. Page v. Postmaster Gen. & Chief Exec. Officer of U.S. Postal Serv., 493 F. App'x 994, 995 (11th Cir. 2012); see also Chappell v. Goltsman, 186 F.2d 215, 218 (5th Cir. 1950); cf. Lawrence v. Dunbar, 919 F.2d 1525, 1529–31 (11th Cir. 1990) (the existence of disputed material facts precludes the district court from granting a motion to dismiss).

As explained above, Rooms To Go pleaded sufficient facts to plausibly allege that COVID-19 damaged its property. Supra at 29–33. When the district court

rejected those allegations based on its "common sense," which purportedly holds "that COVID-19 is incapable of causing a tangible injury to property," the district court made an improper factual determination. See United States v. Gomez-Castro, 605 F.3d 1245, 1249–50 (11th Cir. 2010) (confirming that only factfinders may rely on common sense to make decisions).

Although Rooms To Go need not prove that COVID-19 causes "tangible injury to property," at the motion to dismiss stage, it should be given the opportunity to do so. Indeed, in other COVID-19 business-interruption cases that have proceeded to discovery, experts have testified that COVID-19 does attach to property and does damage it. See, e.g., Treasure Island, LLC v. Affiliated FM Ins. Co., 2:20-cv-00965-JCM-EFY (D. New. Mar. 8, 2021), Mot to Amend Compl., Ex. 1 at 150, Docket 85-2 at 146–87 (expert reports of Angela L. Rasmussen, Ph.D., stating at pg. 151 that "SARS-CoV-2 in the air can cause substantial property damage…."); Id. at 226–49 (expert report of Alex LeBeau, Ph.D., MPH, CIH, stating at pg. 229 that guests "with COVID-19 at Treasure Island altered the physical characteristics of surfaces and the air of occupied spaces").

That is why Mama Jo's Inc. v. Sparta Insurance Co., 823 F. App'x 868, 870 (11th Cir. 2020), which the district court used as its basis for ruling that COVID-19 does not damage property, is fundamentally inapplicable here: it was decided on a motion for summary judgment with an evidentiary record, not a motion to dismiss.

In Mama Jo's, the plaintiff claimed that dust and debris from nearby road construction damaged its property. Id. at 871. Yet the plaintiff's restaurant was open the entire time and served "the same number of customers as it had before the construction began." Id.

There, the plaintiff first filed a claim only for the costs of cleaning and painting and for the loss of income due to lower than expected sales. Id. at 879. It later amended its claim to include "damage to the awning, retractable roof systems, HVAC, audio, and lighting systems." Id. at 872. The case proceeded to discovery, where three experts testified that the dust damaged the property. Id. The district court considered and rejected these experts as unreliable, and it concluded that "without expert testimony, [the plaintiff] could not prove that construction dust and debris" damaged its "awnings, retractable roof, HVAC system, railings, and audio and lighting system." Id. at 874–75.

On appeal, this Court affirmed the district court's decision to exclude the experts.

As an initial matter, Mama Jo's unpublished holding—that a "structure that merely needs to be cleaned" has not suffered a direct physical loss—conflicts with controlling Florida precedent. See Azalea, 656 So. 2d at 601 (ruling that an unknown substance that adhered to a wastewater tank, requiring it to be cleaned, caused direct physical loss or damage).

Even setting that aside, and accepting the reasoning of Mama Jo's as correct, that case is still distinguishable from this one. The district court in Mama Jo's had considered and rejected expert testimony that the construction dust damaged the plaintiff's property, and therefore there were no fact issues to resolve. 823 F. App'x at 878. And Mama Jo's was decided at the summary judgment stage—after discovery had proceeded and the plaintiff had failed to carry its evidentiary burden.

Rooms To Go, in contrast, has had no such opportunity to present evidence that COVID-19 damaged its property because its case was dismissed before discovery. Instead, as discussed, the district court purported to rely on "common sense" to resolve that fact question. And there are material fact issues left to be resolved. And as already noted, policyholders in other cases have already provided qualified experts to testify that COVID-19 can cause property damage. Supra at 34. By finding that COVID-19 does not damage property as a matter of common sense, the district court deprived Rooms To Go of the opportunity to develop and present its evidence to a factfinder.[10]

[10] Mama Jo's is unpublished, so it is not binding. 11th Cir. R. 36-2; United States v. Rodriquez-Lopez, 363 F.3d 1134, 1138 n.4 (11th Cir. 2004) ("While unpublished opinions are not binding on this Court, they may nonetheless be cited as persuasive authority"). In fact, Mama Jo's is doubly nonbinding because, on top of being unpublished, it is a state-law decision, and when this Court writes on state law issues, it writes in "faint and disappearing ink." LeFrere v. Quezada, 582 F.3d 1260, 1262 (11th Cir. 2009).

At base, the district court made a factual determination at the motion to dismiss stage. That was improper, and the order dismissing Rooms To Go's complaint should be reversed.

C. No Exclusion Bars Coverage.

Finally, no exclusion bars coverage. The district court did not address whether any exclusions apply. But because this Court can affirm a motion to dismiss "for any reason supported by the record, even if not relied upon by the district court," Allen v. USAA Cas. Ins. Co., 790 F.3d 1274, 1278 (11th Cir. 2015), Rooms To Go addresses the exclusion issue now.

Under Florida law, just as courts must construe insurance coverage broadly, they must construe exclusions narrowly in favor of coverage. See Allstate Ins. Co. v. Orthopedic Specialists, 212 So. 3d 973, 976 (Fla. 2017). For "an exclusion or limitation in a policy to be enforceable, the insurer must clearly and unambiguously draft a policy provision to achieve that result." Id. (citation omitted).

In their Motion to Dismiss, the Insurers contended that the contamination and pollution exclusion bars coverage. Doc 36 at 20–25, Appx 128–33. Contaminants or pollutants are defined in the policy as:

> [A]ny solid, liquid, gaseous or thermal irritant or contaminant, including smoke, vapor, soot, fumes, acids, alkalis, chemicals and waste, which after its release can cause or threaten damage to human health or human welfare or causes or threatens damage, deterioration, loss of value, marketability or loss of use to property insured hereunder, including, but not limited to, bacteria, virus, or hazardous substances as

> listed in the Federal Water, Pollution Control Act, Clean Air Act, Resource Conservation and Recovery Act of 1976, and Toxic Substances Control Act or as designated by the U.S. Environmental Protection Agency. Waste includes materials to be recycled, reconditioned or reclaimed.
>
> This exclusion shall not apply when loss or damage is directly caused by a covered peril not otherwise excluded.

Compl., Doc 1-1 at 36, Appx 084.

This exclusion does not bar coverage for four independently sufficient reasons.

First, the exclusion that the Insurers chose to include in this policy, and upon which they rely to deny coverage, is a contamination and pollution exclusion aimed at excluding traditional contaminants and pollutants. It is not a general virus exclusion. Mark's Engine Co. No. 28 Rest., LLC v. Travelers Indem. Co. of Conn., No. 2:20-cv-04423-AB-SK, 2020 WL 5938689, at *2, *5 (C.D. Cal. Oct. 2, 2020) (denying coverage for COVID-19-related losses because the policy at issue included a distinct virus exclusion that said: "We will not pay for loss or damage caused by or resulting from any virus, bacterium or other microorganism that induces or is capable of inducing physical distress, illness or disease." (citation omitted)).

General virus exclusions do exist and are in wide use throughout the insurance industry. E.g. Insurance Services Office, Exclusion of Loss Due to Virus or Bacteria (2006), https://www.propertyinsurancecoveragelaw.com/wp-includes/ms-files.php?file=2020/03/ISO-Circular-LI-CF-2006-175-Virus.pdf (last visited Mar.

29, 2021). If the Insurers wanted to exclude all viruses, including communicable diseases spread by viruses, they could have included a specific virus exclusion when they issued these policies in March 2020 (after the pandemic began). They did not.

Instead, the Insurers included a pollution exclusion that, by its own terms, primarily seeks to exclude "smoke, vapor, soot, fumes, acids, alkalis, chemicals and waste." Compl., Doc 1-1 at 36, Appx 084. Only after describing that list of contaminants and pollutants does the exclusion say that "contaminant or pollutant" also includes "bacteria, virus, or hazardous substances as listed under" various statutes and regulations. Id. As a result, the contamination and pollution exclusion does not bar coverage for "direct physical loss of or damage to property" caused by COVID-19 or the stay-at-home orders See, e.g., Urogynecology Specialist of Fla. LLC v. Sentinel Ins. Co., Ltd., No. 6:20-cv-1174-Orl-22EJK, 2020 WL 5939172, at *4 (M.D. Fla. Sept. 24, 2020) (refusing to apply exclusion for "fungi, wet rot, dry rot, bacteria or virus" because COVID-19 did not "logically align" with the other pollutants "such that the Policy necessarily anticipated and intended to deny coverage for these kinds of business losses"); JGB Vegas Retail Lessee, LLC v. Starr Surplus Lines Ins. Co., No. A-20-816628-B, 2020 WL 7190023, at *3 (Nev. Dist. Ct. Nov. 30, 2020) (citing Urogynecology and refusing to apply a pollution and contamination exclusion that included the word "virus" to bar coverage for COVID-

19 because it is was reasonably read to apply "only to instances of traditional environmental and industrial pollution and contamination that is not at issue here").

Second, even if the contamination and pollution exclusion applied to more than just those viruses that are traditional environmental pollutants, it still does not bar coverage for all viruses. The exclusion applies only to "bacteria, virus, or hazardous substances as listed in the Federal Water, Pollution Control Act, Clean Air Act, Resource Conservation and Recovery Act of 1976, and Toxic Substances Control Act or as designated by the U. S. Environmental Protection Agency. Compl., Doc 1-1 at 36, Appx 084 (emphasis added).

Therefore, the exclusion bars coverage for only those "bacteria, virus, or hazardous substances" that are listed in the specified acts or that the EPA designates. And the exclusion does not apply to bacteria, viruses, and hazardous substances that are not enumerated. Neither COVID-19 nor SARS-CoV-2 is listed in those acts or designated by the EPA. See Federal Water Pollution Control Act, 33 U.S.C. §§ 1251–1275; Clean Air Act, 42 U.S.C. §§ 7401–7431; Resource Conservation and Recovery Act, 42 U.S.C. §§ 6901–6992k; Toxic Substances Control Act, 15 U.S.C. §§ 2601–2692; 40 C.F.R., pt. 61 (listing the hazardous substances designated by the EPA under the Clean Air Act); id. § 116.4 (listing the hazardous substances designated by the EPA under the Federal Water Pollution Control Act); id. pt. 302 (listing the hazardous substances designated by the EPA under the Toxic Substances

Control Act and Clean Water Act). Accordingly, COVID-19 and SARS-CoV-2 are not subject to the exclusion.

Third, the contamination and pollution exclusion does not bar coverage for damage caused by COVID-19 because it expressly applies only to contaminants and pollutants that are "released." Compl., Doc 1-1 at 36, Appx 084 (excluding coverage for damage caused by contaminants and pollutants which "after [their] release can cause or threaten damage to human health or human welfare or cause[] or threatens damage, deterioration, loss of value, marketability or loss of use to property insured hereunder.").

Webster's defines "release" as "the act or an instance of liberating or freeing (as from restraint)." *Release*, Webster's Ninth New Collegiate Dictionary 994 (1988). Under that definition, COVID-19 would first have to be "restrain[ed]" in order to be "released."

Because COVID-19 was not restrained, it was also not released. And because COVID-19 was not released, it does not fit into the narrow category of pollutants excluded by the contamination and pollution exclusion. Hudson v. Prudential Prop. & Cas. Ins. Co., 450 So. 2d 565, 568 (Fla. 2d DCA 1984).

Fourth, even if this Court were to hold that the contamination and pollution exclusion barred coverage for more than just those viruses that are traditional pollutants, and even if this Court were to hold that the exclusion barred viruses that

are not listed in one of the specified acts or designated by the EPA, and even if this Court were to hold that COVID-19 is "released," the exclusion still would not apply. The exclusion itself includes an exception, and COVID-19 and the stay-at-home orders fall into that exception.

The contamination and pollution exclusion states that it does not apply "when loss or damage is directly caused by a covered peril not otherwise excluded." Compl., Doc 1-1 at 36, Appx 112; Appx 032. Here, as described above, the loss of use or damage caused by COVID-19 and the stay-at-home orders is a covered peril. Supra at 13–27. The damage caused by COVID-19 is also a covered peril. Supra at 13–28. And neither COVID-19 nor the stay-at-home orders are "otherwise" excluded—that is, neither is excluded elsewhere in the policy. The exclusion therefore does not bar coverage for "direct physical loss of or damage to property" caused by COVID-19 or the stay-at-home orders.

V. CONCLUSION

The district court erred in two ways. First, it failed to properly apply Florida law. As a result, it failed to recognize that "direct physical loss of" property includes the loss of use of property. Second, the district court improperly made a factual determination—that COVID-19 does not cause a "tangible injury" to property—at the motion to dismiss stage. In addition, no exclusion in the policies applies to bar coverage. This Court should reverse the district court's dismissal of the complaint.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the requirements of Fed. R. App. P. 32(a)(5) and (6) because it has been prepared in 14-point Times New Roman, a proportionally spaced font, and that it complies with the type-volume limitation of Fed. R. App. P. 32(f) because it contains 10,682 words, excluding the parts exempted by Rule 32(f), according to the count of Microsoft Word.

/s/ Walter J. Andrews
Walter J. Andrews

CERTIFICATE OF SERVICE

I hereby certify that on March 29, 2021, I electronically filed the foregoing brief with the Clerk of this Court by using the appellate CM/ECF system. The participants in the case are registered CM/ECF users and service will be accomplished by the appellate CM/ECF system.

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