21-80

In the
United States Court of Appeals
For the Second Circuit

10012 HOLDINGS, INC. DBA GUY HEPNER,

Plaintiff-Appellant,

v.

SENTINEL INSURANCE COMPANY, LTD.,

Defendant-Appellee,

- and -

HARTFORD FIRE INSURANCE COMPANY,

Defendant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR PLAINTIFF-APPELLANT

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DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, Plaintiff-Appellant 10012 Holdings, Inc. d/b/a Guy Hepner ("Appellant") states that it has no parent corporation, and no publicly held corporation owns more than 10% of its stock

Dated: April 2, 2021

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INTRODUCTION

In March 2020, and in response to the ongoing COVID-19 pandemic, state and local officials in New York ordered the Manhattan-based art gallery owned by appellant 10012 Holdings, Inc. d/b/a Guy Hepner ("Appellant" or "Guy Hepner") to be shuttered. Eleven months earlier, in April 2019, Appellant purchased an all-risk comprehensive commercial insurance policy from appellee Sentinel Insurance Company, Ltd. ("Sentinel" or "Appellee"), which included a business interruption provision. As drafted by Sentinel, this provision obligated Sentinel to pay for lost business income and extra expenses caused by all risks of "direct physical loss of or damage to" Appellant's property. Appellant's reasonable understanding and interpretation of this operative, yet undefined, provision was that Sentinel would not only cover all losses in business income resulting from "damage" to Guy Hepner's gallery but would also cover all losses in business income resulting from the loss, *i.e.,* the loss of possession and/or deprivation of, Guy Hepner's business property. Such deprivation is what plainly occurred in when Appellant's gallery was shuttered by the COVID-19 shutdown orders. At minimum, Guy Hepner's interpretation of the provision was reasonable considering that, in New York, effect must be given to all terms of an insurance agreement -- meaning, *inter alia*, that "loss" and "damage" must have different meanings -- and that all ambiguities in an insurance policy must be interpreted against the insurer-drafter.

In denying Guy Hepner's insurance claim, and again before the district court, Sentinel took the position that when it agreed to pay for all lost business income caused by all risks of "direct physical loss of or damage to" Guy Hepner's business, what it was actually agreeing to cover was losses stemming from structural damage to Guy Hepner's gallery, and nothing more. This was of course news to Guy Hepner, who believed it was purchasing all risk business interruption coverage to protect its business income in the event its ability to operate the gallery was interrupted caused by risks of "direct physical loss of or damage to" its property.

In accepting Sentinel's self-serving interpretation of its own policy provisions – which it had declined to define in its policy – the district court effectively held that no reasonable reading of the policy as a whole could support Guy Hepner's interpretation of Sentinel's coverage obligations. It also veered, however, from long-standing precepts of insurance policy interpretation, which mandate, *inter alia*, that "loss" and "damage" cannot mean the same thing and that policy ambiguities must be interpreted against the insurer. Undertaking *de novo* review, this Court should reverse the holding of the district court, and remand for further proceedings.

JURISDICTIONAL STATEMENT

This Court has jurisdiction under 28 U.S.C. § 1291. The district court had jurisdiction over this action under 28 U.S.C. § 1332. It dismissed all claims in this case, JA-287; the Clerk's Judgment dismissed the case with prejudice, JA-296; and Guy Hepner timely filed its notice of appeal. JA-297.

STATEMENT OF THE ISSUES

1. Could business interruption for all risks of "direct physical loss of or damage to" covered property reasonably be interpreted to mean that an insurance company must insure against the loss of business property resulting from state and local orders suspending operations at Appellant's art gallery due to the ongoing COVID-19 pandemic?

2. Should this Court certify this issue of state law to the New York Court of Appeals?

STATEMENT OF THE CASE

Guy Hepner's Policy with Sentinel

Guy Hepner is a Manhattan-based art gallery. JA-7, ¶¶ 1, 14. In April 2019, Guy Hepner purchased and thereafter paid premiums on an all-risk business owner's insurance policy from Sentinel, Policy number 13SBATQ2841SB (the "Policy"), to protect the gallery and its income from the operation of same. JA-9-10, ¶ 20. The Policy is an all-risk policy, meaning that all risks of loss are covered unless they are specifically excluded or limited in the Policy. JA-10, ¶ 21. The Policy specifically provided Business Income, Extra Expense, and Civil Authority coverage. JA-10-11, ¶¶ 22, 26, 27. As to Business Income coverage, Sentinel represented as follows:

> We will pay for the actual loss of Business Income you sustain due to the necessary suspension of your "operations" during the "period of restoration". The suspension must be caused by direct physical loss of or physical damage to property at the "scheduled premises", including personal property in the open (or in a vehicle) within 1,000 feet of the "scheduled premises", caused by or resulting from a Covered Cause of Loss. "scheduled premises", caused by or resulting from a Covered Cause of Loss.

JA-10, ¶ 23 (quoting Policy, Special Property Coverage Form § A.5.o(1)).[1] The Policy defines "suspension" as: (a) "The partial slowdown or complete cessation of your business activities; or (b) That part of all of the "scheduled premises" is

[1] A full copy of the Policy is found at JA-45.

rendered untenantable as a result of a Covered Cause of Loss if coverage for Business Income applies to the policy," (JA-11, ¶ 25 (quoting Policy, Special Property Coverage Form § A.5.o(5)), and defines "Covered Cause of Loss" as "RISKS OF DIRECT PHYSICAL LOSS," unless otherwise excluded. JA-12., ¶ 28 (quoting Policy, Special Property Coverage Form § A.3) (capitalization in Policy). As to Extra Expense coverage, Sentinel represented as follows:

> We will pay reasonable and necessary Extra Expense you incur during the "period of restoration" that you would not have incurred if there had been no direct physical loss or physical damage to property at the "scheduled premises", including personal property in the open (or in a vehicle) within 1,000 feet, caused by or resulting from a Covered Cause of Loss.

Id., ¶ 26 (quoting Policy, Special Property Coverage Form § A.5.p). As to Civil Authority coverage, Sentinel represented as follows:

> (1) This insurance is extended to apply to the actual loss of Business Income you sustain when access to your "scheduled premises" is specifically prohibited by order of a civil authority as the direct result of a Covered Cause of Loss to property in the immediate area of your "scheduled premises".
>
> (2) The coverage for Business Income will begin 72 hours after the order of a civil authority and coverage will end at the earlier of:
>
> (a) When access is permitted to your "scheduled premises"; or
> (b) 30 consecutive days after the order of the civil authority.

JA-12. ¶ 27.

Guy Hepner is Ordered to Close by the Governor of New York

Starting in March 2020, and pursuant to civil authority orders issued by the Governor of the State of New York in response to the outbreak of COVID-19 in New York City, access to and occupancy of Guy Hepner's art gallery were first ordered diminished and then outright prohibited. JA-8, ¶ 9.[2] Guy Hepner promptly alerted Sentinel of the forced cessation of its operations and sought insurance coverage, and by letter dated April 3, 2020 Sentinel denied the claim on the grounds that COVID-19 "did not cause property damage at [Plaintiff's] place of business or in the immediate vicinity." JA-15, ¶¶ 38-39.

The Action Before the District Court

Following Sentinel's rejection of coverage, Guy Hepner filed a lawsuit against Sentinel in the U.S. District Court for the Southern District of New York for (1) declaratory relief, and (2) breach of contract. JA-7. Sentinel moved to dismiss under Rule 12 of the Federal Rules of Civil Procedure on the grounds that Guy Hepner did not satisfy the prerequisites for Business Income, Extra Expense, or Civil Authority coverage under the Policy. JA-21. Without the benefit of a hearing on this motion, the district court entered an order dismissing Guy Hepner's complaint with prejudice. JA-287.

[2] *See* JA-14, ¶ 36, citing, *inter alia*, Executive Order No. 202.8, which ordered, among other things, that effective at 8 p.m. on Sunday, March 22, 2020, all non-essential businesses statewide would be closed.

STANDARD OF REVIEW

This Court reviews *de novo* a district court's determinations that resolve a motion to dismiss a complaint. *McCarthy v. Dun & Bradstreet Corp*. 482 F.3d 184, 191 (2d Cir. 2007).

ARGUMENT

The district court committed reversible error in its interpretation of Guy Hepner's Policy because it allowed Sentinel to escape liability even though a reasonable interpretation of the Sentinel-drafted Policy requires Sentinel to provide coverage. Under long-settled principles of insurance contract interpretation, any contract ambiguity should have been interpreted against the drafter, Sentinel, which must overcome a presumption of coverage by proving that no reasonable reading of the Policy affords coverage. Sentinel has not approached this steep burden, and this Court should reverse.

I. The Sentinel Policy

A. The Sentinel Policy is Ambiguous

Whether an insurance policy is ambiguous is a matter of law to be determined by the court. *See Board of Managers of Yardarm Condominium II v. Federal Ins. Co.*, 247 A.D.2d 499, 500 (2d Dep't 1998). In assessing the threshold question of ambiguity, a court's "focus is on the reasonable expectations of the average insured upon reading the policy." *Villanueva v. Preferred Mutual Ins. Co.*,

48 A.D.3d 1015, 1016 (3d Dep't 2008) (citations and quotations omitted) *See also, Antoine v. City of New York*, 56 A.D.3d 583, 585 (2d Dep't 2008) ("reasonable expectations of ordinary businesspeople when making ordinary business contracts."). Assessing the existence of ambiguity requires courts to consider "the entire contract 'to safeguard against adopting an interpretation that would render any individual provision superfluous.'" *RJE Corp. v. Northville Indus. Corp.*, 329 F.3d 310, 314 (2d Cir. 2003) (quoting *Sayers v. Rochester Tel. Corp. Supplemtnal Mgmt. Pension Plan*, 7 F.3d 1091, 1095 (2d Cir. 1993).

It is axiomatic that courts "must interpret insurance contracts so as to effectuate the intent of the parties at the time the contract was formed," *Kenevan v. Empire Blue Cross and Blue Shield*, 791 F.Supp.75 (S.D.N.Y. 1992) (citations omitted), and "unambiguous provisions of an insurance contract must be given their plain and ordinary meaning." *White v. Continental Cas. Co.* 9 N.Y. 3d 264 (2002); *RJE Corp.* 329 F.3d at 314 (2d Cir. 2003) (where a "contract is clear and unambiguous on its face, the intent of the parties must be gleaned from within the four corners of the instrument, and not from extrinsic evidence.") (quoting *De Luca v. De Luca*, 300 A.D.2d 342, 342 (2d Dep't 2002)). An insurer can show a policy provision it drafted is unambiguous by demonstrating "there is no reasonable basis for a difference of opinion" as to what the provision means. *Red Rock Commodities, Ltd. v. Standard Chartered Bank*, 140 F.3d 420, 424 (2d Cir.

1998); *Sayers*, 7 F.3d at 1095 (insurance contract not ambiguous where policy provision has "a definite and precise meaning and [is] not reasonably susceptible to differing interpretations.").

Where, however, a provision of an insurance contract is "susceptible of two reasonable interpretations", it will be deemed ambiguous in New York. *State of New York v. Home Indem. Co.*, 66 N.Y.2d 669, 671 (1985) ("*Home Indemnity*").

From a finding of ambiguity, three things necessarily follow: ***first***, "any ambiguity must be construed in favor of the insured and against the insurer," *White v. Continental Cas. Co.* 9 N.Y. 3d 264 (2002); ***second***, the parties may "submit extrinsic evidence as an aid in construction, and the resolution of the ambiguity is for the trier of fact," *Home Indemnity*, 66 N.Y. 2d at 671, and; ***third***, "the insurer bears the heavy burden of proof of demonstrating that 'it would be unreasonable for the average man reading the policy to [construe it as the insured does].'" *Kenevan*, 791 F.Supp. at 79 (quoting *Vargas v. Ins. Co. of North America*, 651 F.2d 838, 840 (2d Cir. 1981). A finding of ambiguity thus obligates the insurer to demonstrate that its chosen construction of the operative policy provision and terms is the "only construction that fairly could be placed on the policy." *Id.* (quoting *Vargas*, 651 F.2d at 840); *Sea Ins. Co. v. Westchester Fire ins. Co.*, 51 F.3d 22, 26 (2d Cir. 1995) (noting that to restrict coverage, "an insurer must

establish that the exclusion is stated in clear and unmistakable language, is subject to no other reasonable interpretation, and apples in the particular case.").

B. The Sentinel Policy is an All-Risk Policy

Guy Hepner's Policy is an all-risk policy, under which "losses caused by *any* fortuitous peril not specifically excluded under the policy will be covered." *Parks Real Estate Purchasing Grp. v. St. Paul Fire and Marine Ins. Co.*, 472 F.3d 33, 41 (2d Cir. 2006) (quoting 2 Ostrager & Newman, *Insurance Coverage Disputes* § 21.01[a], at 1306) (citations omitted) (emphasis in *Parks Real Estate*). "Under an all[-]risk policy, recovery is allowed for all losses arising from any fortuitous cause, unless the policy contains an express provision excluding loss from coverage." *Murray v. State Farm Fire and Cas. Co.*, 203 W.Va 477, 509 S.E. 2d 1, 7 (1998). Although, "under an all-risks policy, the insured bears the burden of showing that it suffered a loss and that the loss is fortuitous … the insured need not demonstrate the precise cause of damage for the purpose of proving fortuity." *Churchill v. Factory Mut. Ins. Co.*, 234 F.Supp.2d 1182, 1189 (W.D. Wash. 2002).

Consistent with the "broad coverage" provided under an all-risk policy, "the insured's burden for establishing a prima facie case for recovery under an all-risk policy is 'relatively light.'" *AGCS Marine Ins. Co. v. World Fuel Servs., Inc.*, 187 F.Supp.3d 428, 438 (S.D.N.Y. 2016) (citing *Int'l Multifoods Corp. v. Commercial Union Ins. Co.*, 309 F.3d 76, 83 (2d Cir. 2002). An insured meets this burden by

showing: "(1) the existence of an all-risk policy, (2) an insurable interest in the subject of the insurance contract, and (3) the fortuitous loss of the covered property." *Int'l Multifood*, 309 F.3d at 438. "A loss is fortuitous unless it results from an inherent defect, ordinary wear and tear, or intentional misconduct of the insured." *Ingersoll Milling Machine Co. v. M/V Bodena*, 829 F.2d 293, 307 (2d Cir. 1987), An insured "need not explain the precise cause of the loss." *Int'l Multifoods*, 309 D.3d at 84.

II. Sentinel's All-Risk Policy is Ambiguous

It is against the backdrop of these core rules of policy interpretation that the district court determined that under no reasonable reading of the Policy could the Business Income or Extra Expense coverage Guy Hepner purchased be triggered. JA-290-295. For a few reasons, such position is seriously flawed.

A. "Loss" is Not Synonymous With "Damage"

Sentinel's Policy obligates cover losses relating to "direct physical loss of ***or*** physical damage to Covered Property…." JA-10, ¶ 23. The district court accepted Sentinel's argument that "loss" and "damage" are synonymous, and that the lack of structural damage to Guy Hepner's gallery means as a matter of law Guy Hepner is entitled to no Business Income coverage. Sentinel having declined in the Policy to define either "physical loss" or "physical damage," however, this Court should reject such position, especially considering the clear dictionary definition of these

terms. Though the primary definition of "loss" is "destruction, ruin," the secondary definition is "a) the act of losing possession: deprivation; b) the harm or privation resulting from loss or separation; c) an instance of losing."[3] "Direct physical *loss*" is thus fairly interpreted to mean "loss of physical possession" and/or "direct physical deprivation," which is precisely what the state and local COVID-19 shutdown orders mandated.

"Damage" on the other hand is defined as "loss or harm resulting from injury to person, property, or reputation."[4] Such definition finds support in the Policy, which defines "property damage" as "a. Physical injury to tangible property, including all resulting loss of use of that property….; b. Loss of use of tangible property that is not physically injured." JA-123, ¶ 20.

First: "Damage" cannot be synonymous with "loss" because the dictionary definition of "damage" is "loss…from injury," *i.e.*, a specific type of loss. Sentinel itself endorses such interpretation by defining "Property damage" as, *inter alia*, "loss of use of tangible property that is not physically injured." *Id.* "Loss" is thus by definition broader than "damage," not synonymous with it. Since it is long settled in this Circuit that "effect and meaning must be given to every term in the contract, and reasonable effort must be made to harmonize all of its terms,"

[3] https://www.merriam-webster.com/dictionary/loss (as of April 1, 2021).

[4] https://www.merriam-webster.com/dictionary/damage (as of April 1, 2021).

India.com v. Dalal, 412 F.3d 315, 324 (2d Cir. 2005) (citations and quotations omitted), "loss" in the Sentinel Policy is thus distinct from "damage." Assuming *arguendo* "damage" means structural damage to Guy Hepner's gallery, Guy Hepner's interpretation that "loss" does *not* require structural damage is abundantly reasonable.

Second: given the way Sentinel has defined "property damage," not only does "*loss*" not require structural damage under the Sentinel Policy, but "*damage*" does not require structural damage either. As noted *supra*, Sentinel has made clear that "property damage" encompasses not only "physical injury to tangible property" but also includes "loss of use of tangible property that is *not* physically injured." JA-123, ¶ 20 (emphasis added). "Tangible property" is not defined in the Policy, but the accepted definition of "tangible" is "1.a. capable of being perceived especially by the sense of touch; b. substantially real;… 3. capable of being appraised at an actual or approximate value."[5] The most reasonable reading of these provisions taken together is that "damage" in the Sentinel Policy includes "loss of use" of Guy Hepner's premise, even though it is not physically injured.

Such definition is in accord with authority from New York and elsewhere which emphasizes that a policy that "require[es] 'physical loss or damage,' does

[5] https://www.merriam-webster.com/dictionary/tangible (as of April 1, 2021).

not require that the physical loss or damage be tangible, structural, or even visible." *Newman Myers Kreines Gross Harris, P.C. v. Great American Northern Ins. Co.*, 17 F.Supp. 3d 323, 330 (S.D.N.Y. 2014). *See also, Port Auth. of New York and New Jersey v. Affiliated FM Ins. Co.*, 311 F.3d 226, 236 (3d Cir. 2002) ("When the presence of large quantities of asbestos in the air is such as to make the structure uninhabitable and unusable, then there has been a distinct loss to its owner."); *TRAVCO Ins. Co. v. Ward*, 715 F.Supp.2d 699, 708 (E.D. Va 2010), *aff'd*, 504 Fed. Appx. 251 (4th Cir. 2013) (insured suffered covered loss under policy when sulfuric gas was present on the premises because "physical damage to the property is not necessary, at least where the building in question has been rendered unusable by physical forces."); *Essex. v. BloomSouth Flooring Corp.*, 562 F.3d 399, 406 (1st Cir. 2009) (unpleasant odor rendering property unusable constituted physical injury to property); *Motorists Mutual Ins. Co. v. Hardinger*, 131 Fed. Zppx. 823, 825-27 (3d Cir. 2005) (contamination of well water constitutes "direct physical loss" to home if it rendered it unusable); *Sentinel Mgmt. Co. v. New Hamshire Ins. Co.*, 563 N.W.2d 296, 300 (Minn. Ct. App. 1997) ("Direct physical loss also may exist in the absence of structural damage to the insured property" and holding that "release asbestos fibers have contaminated the buildings, creating a hazard to human health constituted physical loss."); *Prudential Prop. & Cas. Ins. Co. v. Lilliard-Roberts,* CV-01-1362-ST, 2002 WL

31495830, at *9 (D. Or. June 18, 2002) ("the inability to inhabit a building [is] a 'direct, physical loss' covered by insurance."); *Western Fire Ins. Co. v. First Presbyterian Church*, 165 Colo. 34, 437 P.2d 52 (1968) (gasoline vapors which penetrated the foundation of the insured church and accumulated, rendering building uninhabitable)*; Matzner v. Seaco Ins. Co.*, 1998 Mass. Super. LEXIS 407 (Mass. Super. 1998) (carbon monoxide at levels sufficient to render building uninhabitable); *Farmers Ins. Co. of Oregon v. Trutanich*, 858 P.2d 1332 (Or. Ct. App. 1993) (building rendered uninhabitable by odor from a methamphetamine lab).

These cases taken together underscore the point that where a business premise is uninhabitable and unusable as was Guy Hepner's art gallery, the business owner has suffered a loss. When read in light of Sentinel's definition of "property damage," these cases also make clear that neither "physical loss," "physical damage," nor "property damage" require structural damage to trigger coverage.

This is especially so considering the purpose of business interruption insurance, which is not to merely provide coverage when a business is interrupted due to structural damage,[6] but is also to "return the insured to that amount of profit that would have been earned during the period of interruption had a casualty not

[6] *See Voss v. Netherlands Ins. Co.,* 22 N.Y.3d 728, n.1 (2014).

occurred." *Nat'l Union Fire Ins. Co. of Pittsburgh, Pennsylvania v. TransCanada Energy USA, Inc.*, 52 Misc. 3d 455, 466, 28 N.Y.S.3d 800 (Sup. Ct. N.Y. Cnty. 2016) (quoting *Pennbarr Corp. v. Ins. Co. of N. Am.*, 976 F.2d 145 (3d Cir. 1992).

Since in interpreting an insurance policy, a court's "focus is on the reasonable expectations of the average insured upon reading the policy," *Villanueva*, 48 A.D.3d at 1016, Appellant need not belabor the point. Guy Hepner could have purchased property damage insurance, which would have covered structural or physical damage to the art gallery and losses stemming from same. It did not do so. It purchased business interruption insurance, to cover losses in business income stemming from an interruption in its business, which is what occurred when the Governor of New York ordered it to close its art gallery. That the Governor ordered the gallery shut because COVID-19 was killing thousands of people in New York and epidemiological experts were recommending indefinite suspension of all non-essential business, and not because, *e.g.*, a water main broke and flooded West 27th Street where Guy Hepner's gallery was located,[7] is not material under any reasonable reading of the Policy or reasonable expectation of an

[7] *See* JA-12. ¶ 27 (quoting Policy, Special Property Coverage Form § A.5.q) (providing "Civil Authority Coverage" when, *inter alia*, the insured loses business income because it is prevented access to the "scheduled premises" because of a "Covered Cause of Loss to property in the immediate area."

insured, because the end result was identical: shuttering of the gallery and interruption of the business.

Since Sentinel's failure to clearly define the critical terms of "loss" and "damage" must be interpreted in favor of the Plaintiff, *see Home Indemnity*, 66 N.Y. 2d at 671, the district court's decision that "loss" and "damage" are synonymous should be rejected.

B. The District Court's Decision is in Conflict with Recent COVID-19 Related Authority from Around the Country

Though no federal appellate court has yet opined whether the business interruption and extra expense provisions of an all-risk insurance policy provide coverage relating to COVD-19 shutdown orders, numerous courts around the country have determined that "loss" and "damage" are not synonymous and create policy ambiguities, as made clear by the Western District of Missouri in August 2020:

> Upon review of the record, the Court finds that Plaintiffs have adequately stated a claim for direct physical loss. First, because the Policies do not define a direct "physical loss" the Court must "rely on the plain and ordinary meaning of the phrase." *Vogt* [*v. State Farm Life Ins. Co.*], 963 F.3d [753] at 763 [(8th Cir. 2020)];*Mansion Hills Condo Ass'n v. Am. Family Mut. Ins. Co.*, 62 S.W. 3d 633, 638 (Mo. App. E.D. 2001) (recognizing that standard dictionaries should be consulted for determining ordinary meaning). The Merriam-Webster dictionary defines "direct" in part as "characterized by close logical, causal or consequential relationship." Merriam-Webster, www.merriam-webster.com/dictionary/direct (last visited August 12, 2020). "Physical" is defined as "having material existence: perceptible especially through the senses and subject to the laws of nature."

> Merriam-Webster, www.merriam-webster.com/dictionary /physical (last visited August 12, 2020). "Loss" is the "act of losing possession" and "deprivation." Merriam-Webster, www.merriam-webster.com/dictionary/loss (las visited August 12, 2020). Applying these definitions, Plaintiffs have adequately alleged a direct physical loss. Plaintiffs allege a causal relationship between COVID-19 and their alleged losses. Plaintiffs further allege that COVID-19 "is a physical substance," that it "live[s] on" and is "active on inert physical surfaces," and is also "emitted into the air."…. COVID-19 allegedly attached to and deprived Plaintiffs of their property, making it "unsafe and unusable, resulting in direct physical loss to the premises and property." …. Based on these allegations, the Amended Complaint plausibly alleges a "direct physical loss" based on "the plain and ordinary meaning of the phrase. *Vogt*, 963 F.3d at 763.

Studio 417, Inc. v. The Cincinnati Ins. Co., 20-cv-3127-SRB, 2020 WL 4692385, at * 4 (W.D. Mo., Aug. 12, 2020). Noting that it was incumbent on a court to give meaning to all contractual terms, *Studio 417* rejected the insurer's attempt (echoed by Sentinel here) to argue that "loss" and "damage" mean the same thing:

> Defendant conflates "loss" and "damage" in support of its arguments that the Policies require a tangible, physical alteration. However, the Court must give meaning to both terms. *See Nautilus Grp., Inc. v. Allianz Global Risks US*, No. C11-5281BHS, 2012 WL 760940, at *7 (W.D. Wash. Mar. 8, 2012) (stating that "if 'physical loss' was interpreted to mean 'damage,' then one or the other would be superfluous.")

Studio 417, 2020 WL 4692385, at *4. *Accord, Hampton Foods, Inc. v. Aetna Cas. & Sur. Co.,* 787 F.2d 349 (8th Cir. 1986) (holding ambiguous a policy which insured against "loss of or damage to the property insured… resulting from all risks of direct physical loss."); *Mehl v. The Travelers Home & Marine Ins. Co.*, No. 16-cv-1325-CDP (E.D. Mo. May 2, 2018) (denying insurer's motion for

summary judgment where the policy did not define "physical loss" and the insurer "point[ed] to no language in the policy that would lead a reasonable insured to believe that actual physical damage is required for coverage.")

Studio 417 is not the only COVID-19 related case in which a court has rejected an insurer's argument that "loss" and "damage" are synonymous. In December 2020, the Eastern District of Virginia held that since "direct physical loss" had been "subject to a spectrum of interpretations in Virginia on a case-by-case basis," an ambiguity as to its definition existed, which was necessarily interpreted against the insurer. *Elegant Massage, LLC v. State Farm Mut. Auto. Ins. Co.*, 20-cv-00265, 2020 WL 7249624, at *8 (E.D. Va. Dec. 9, 2020). Though recognizing that "direct physical loss" "has traditionally, though not exclusively, been defined as covering incidents that result in structural damage to the property," the *Elegant Massage* court also made clear that "physical loss" had been found when: 1) "a plaintiff cannot physically use his or her covered property, even without tangible structural destruction, if a plaintiff can show a distinct and demonstrable physical alteration to the property;" and, 2) a covered property was deemed "uninhabitable, inaccessible and dangerous to use." *Elegant Massage*, 2020 WL 7249624, at *8-9. Considering the various interpretations, the court determined that "direct physical loss" was ambiguous, and thus interpreted the provision most favorably to the insured, *i.e.*, that plaintiff "experienced a direct

physical loss when the property was deemed uninhabitable, inaccessible, and dangerous to use by the Executive [Shut-Down] Orders because of its high risk for spreading COVID-19, an invisible but highly lethal virus." *Id.*, 2020 WL 7249624, at *8-9. *See also, North State Deli, LLC v. Cincinnati Ins. Co.*, No. 20-CVS-02569, 2020 WL 6281507, at *3-4 (N.C. Super. Ct. Durham Cty. Oct. 9, 2020) ("Applying [dictionary] definitions reveals that the ordinary meaning of the phrase 'direct physical loss' includes the inability to utilize or possess something in the real, material, or bodily world, resulting from a given cause without the intervention of other conditions," and concluding that government orders restricting access to non-essential businesses constituted "direct physical loss."); *Optical Servs. USA/JC1 v. Franklin Mut. Ins. Co*., No BER-L-3681-20, 27-28 (N.J. Super. Ct., Bergen Cty. Aug. 13, 2020) (denying insurer's motion to dismiss, noting that plaintiff's argument that governmental shut-down order caused direct physical loss was "compelling"); *Blue Springs Dental Care, LLC v. Owners Ins. Co.*, No. 20-CV-00383-SRB, 2020 WL 5637963, at *2 & *4 (W.D. Mo. Sept. 21, 2020) (plaintiffs alleged "direct physical loss" with claim that "COVID-19 and the Stay Home Orders have forced them to suspend most of their business operations and deprived them of the use of their dental clinics."); *Perry Street Brewing Co., LLC v. Mut. Of Enumclaw Ins. Co.*, NO. 20-2-02212-32, 2020 WL 7258116, at *2-3 (Wash. Super. Nov. 23, 2020) ("an average lay person would understand" that

"the interruption of [plaintiff's] business operations as a result of the [public health] proclamations was a direct physical loss of [plaintiff's] property because [plaintiff's] property could not physically be used for its intended purpose, *i.e.*, [plaintiff] suffered a loss of its property because it was deprived of using it."); *Cajun Conti LLC v. Certain Underwriters at Lloyd's, London et al.*, No. 2020-02558, at 2 (La. Dist. Ct., Orleans Par. Nov. 4, 2020) (denying insurer's motion for summary judgment, finding genuine issue regarding loss caused by governmental prohibition of access to restaurant); *Dino Palmieri Salons, Inc. v. State Auto. Mut. Ins. Co.*, No. CV-20-932117, 2020 WL 7258114, at *5 (Ohio Ct. Com. Pl. Nov. 17, 2020) ("Court finds that Plaintiffs' allegations . . . plausibly allege that access to their premises was prohibited [by government order] to such a degree as to trigger the civil authority coverage," which required "direct physical loss."); *Independence Barbershop, LLC v. Twin City Fire Ins. Co.*, No. A-20-CV-00555-JRN, 2020 WL 6572428, at *3 (W.D. Tex. Nov. 4, 2020) (Court "might be receptive" to the argument that "having to . . . close one's business because of government orders intended to stop the spread of a disease caused by a virus" may be a covered loss.).

As noted *supra*, the central issue before this Court is whether the phrase "direct physical loss" is ambiguous as used in the Sentinel Policy, where it is contrasted with the phrase "physical damage to." A finding of ambiguity means

Sentinel must show that no reasonable person could it interpret the policy as Guy Hepner has. Taken together, the above decisions from around the United States interpreting the same "direct physical loss" language dispel any argument that Guy Hepner's interpretation of the Policy was unreasonable. Reversal of the district court's dismissal is thus appropriate.

C. "Covered Property" is Not Synonymous With "property"

The Policy provides that Sentinel "will pay for direct physical loss of or physical damage to Covered Property … caused by ***or resulting from*** a Covered Cause of Loss." JA-74. (emphasis added). Sentinel thus agreed to cover losses *resulting* from a "Covered Cause of Loss," defined by Sentinel only as:

> RISKS OF DIRECT PHYSICAL LOSS unless the loss is: a. Excluded in Section B., EXCLUSIONS; or; b. Limited in Paragraph A.4 Limitations; the follow.

JA-75, ¶ 3. What this means is that Sentinel agreed to cover a "loss" resulting from a "risk of direct physical loss." A global pandemic brought about by the infestation of novel coronavirus in New York City is exactly such "risk of direct physical loss": nothing in the Policy says otherwise; no other interpretation of this provision is reasonable; and when an "insurer wishes to exclude certain coverage from its policy obligations, it must do so in clear and unmistakable language." *MDW Enterprises, Inc.*, 4 A.D.3d 338, 340–341 (2d Dep't 2004) (citations omitted). "Such exclusions or exceptions from policy coverage must be specific and clear in

order to be enforceable, and they are not to be extended by interpretation or implication but are to be accorded a strict and narrow construction" *Id.* (citations omitted).

The district court's holding that it is only structural damage that triggers coverage further narrows the Policy by replacing the Policy's use of "Covered Property" with "property." As set forth in the Policy, Guy Hepner purchased coverage for losses to "Covered Property," defined by Sentinel as, *inter alia*, "Property you own that is used in your business," "Property of others that is in your care, custody or control" and "Leased personal property for which you have contractual responsibility to insure…." JA-74, ¶ 1(b). The district court's position that Guy Hepner must show "property damage" to trigger business interruption coverage thus must be rejected because while "Covered Property" in the Policy does include buildings, structures, fixtures, significantly more than that. Property Guy Hepner "own[s] that is used in [its] business" obviously includes Guy Hepner's business income, meaning that losses in Guy Hepner's business income is a covered loss.

D. Roundabout Theater *Does Not Support the District Court's Interpretation of the Policy*

Since Sentinel's Policy provides that Sentinel will "pay for direct physical loss of *or* physical damage to *Covered Property*," the district court's reliance on *Roundabout Theater Co. v. Contin. Cas. Co*, 302 A.D. 2d 1, 751 N.Y.S.2d 4 (1st

Dep't 2002) was misplaced. Unlike Sentinel's Policy, the policy at issue in *Roundabout Theater* stated that coverage was limited to losses sustained "as a direct and sole result of loss of, **damage to or destruction** of property or facilities (including the theatre building occupied … by the Insured)…." *Roundabout Theater*, 302 A.D. 2d at 2 (emphasis added). The policy in *Roundabout Theater* thus covered only loss, damage, or destruction to "property and facilities," *i.e.,* the theatre building itself. But as noted *supra*, "Covered Property" is far more broadly defined that the actual structure that houses Guy Hepner's gallery and includes not merely the structure housing Guy Hepner's gallery, but also Guy Hepner's business income. By underscoring that insurers are free to draft policies as specifically as they desire, *Roundabout Theater* thus supports Appellant's position that Sentinel could have drafted the Policy to only provide coverage when there is structural damage to Guy Hepner's gallery and that its decision to not so draft it must be interpreted against it.

Further, *Roundabout Theater* is nearly twenty years old, and provided a clear blueprint for Sentinel as to how to draft a policy which New York courts would interpret to exclude coverage for all losses except those relating to structural damage to Guy Hepner's premises. Sentinel cannot on the one hand induce insureds to purchase insurance from it with language far broader than that at issue *Roundabout Theater*, but then turn around and rely on *Roundabout Theater* when

an insured understandably believes it has purchased more coverage that did the insured in that case.

Since the policy provision at issue here differs materially from that at issue in *Roundabout Theater*, and since Sentinel did not demonstrate below that Guy Hepner's interpretation of the subject provision was unreasonable, *see Kenevan*, 791 F.Supp. at 79 (when addressing ambiguous terms, "the insurer bears the heavy burden of proof of demonstrating that 'it would be unreasonable for the average man reading the policy to [construe it as the insured does].'"), dismissal was inappropriate.

III. Guy Hepner's Civil Authority Coverage Could Be Reasonably Interpreted to Cover its Business Income Losses

In addition to business interruption and extra expense coverage, Guy Hepner also purchased civil authority coverage, which applies:

> to the actual loss of Business Income you sustain when access to your "scheduled premises" is specifically prohibited by order of a civil authority as the direct result of a Covered Cause of Loss to property in the immediate area of your "scheduled premises".

JA-12. ¶ 27. As noted *supra*, a Covered Cause of Loss is defined as:

> RISKS OF DIRECT PHYSICAL LOSS unless the loss is: a. Excluded in Section B., EXCLUSIONS; or; b. Limited in Paragraph A.4 Limitations; the follow.

JA-75, ¶ 3. Sentinel of course did not define "direct physical loss." "Immediate area" was also not defined by Sentinel. Considering the above, Sentinel's civil

authority coverage applied to Guy Hepner's loss of business income due to prohibitions issued by a civil authority due to risks of direct physical loss to property in the immediate area of Guy Hepner's gallery. "Immediate area" was also not defined by Sentinel.

Having declined to define "direct physical loss," it is thus incumbent on Sentinel to explain why no reasonable person, purchasing a Sentinel Policy, could reasonably believe that such loss encompasses a deadly global pandemic that was devastating to businesses in New York City.

IV. Certification to the New York Court of Appeals is Appropriate

Pursuant to Second Circuit Local Rule 27.2, this Court may certify to the New York Court of Appeals "determinative questions of New York law [that] are involved in a case pending before [it] for which no controlling precedent of the Court of Appeals exists." *Osterweil v. Bartlett*, 706 F.3d 139, 142 (2d Cir. 2013). The decision to certify a question to the Court of Appeals hinges on three issues: "(1) whether the New York Court of Appeals has addressed the issue and, if not, whether the decisions of other New York courts permit us to predict how the Court of Appeals would resolve it; (2) whether the question is of importance to the state and may require value judgments and public policy choices; and (3) whether the certified question is determinative of a claim before us." *Barenboim v. Starbucks Corp.*, 698 F.3d 104, 109 (2d Cir. 2012). Appellant submits that the

issues in this matter are ripe for certification to the New York Court of Appeals, and that the question for certification is straightforward:

> Could the business interruption provision of an all risk insurance policy, which provides coverage for "direct physical loss of or damage to" covered property, be reasonably interpreted to cover losses of business property and income caused by government shutdown orders which suspended or severely curtailed business operations for purposes of public health and safety in response to the outbreak of the COVID-19 pandemic?

This issue, which has never been before the Court of Appeals, is a question of significant importance to the thousands of businesses in New York that were shuttered or limited in response to COVID-19, many of which went closed permanently and almost all of which are still experiencing significant financial difficulties relating to the shutdown orders today, more than a year after the shutdown began. At least eight cases in New York, including this one, have hinged on the interpretation of the "direct physical loss of or damage to" language at issue here. *See Sharde Harvey, DDS, PLLC v. Sentinel Ins. Co., Ltd.*, 20-cv-3350(PGG)(RWL), 2021 WL 1034259, at *5 (S.D.N.Y. Mar. 18, 2021) ("At least seven different New York courts … have interpreted identical or materially identical Business Income provisions in COVID-19 cases," and listing cases). Considering the prevalence of this issue among state and federal courts in New York, Appellant submits certification to the New York Court of Appeals is appropriate.

CONCLUSION

Guy Hepner requests that this Court reverse the decision of the district court dismissing Guy Hepner's case and remand for further proceedings.

In the alternative, Guy Hepner requests that this Court certify to the New York Court of Appeals the coverage question at issue in this action.

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