United States Court of Appeals for the Fifth Circuit

United States Court of Appeals
Fifth Circuit
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No. 21-50078

TERRY BLACK'S BARBECUE, L.L.C.; TERRY BLACK'S BARBECUE DALLAS, L.L.C.,

Plaintiffs—Appellants,

versus

STATE AUTOMOBILE MUTUAL INSURANCE COMPANY,

Defendant—Appellee.

Appeal from the United States District Court
for the Western District of Texas
USDC No. 1:20-CV-665

Before STEWART, HAYNES, and GRAVES, *Circuit Judges*.

JAMES E. GRAVES, JR., *Circuit Judge*:

In the wake of the COVID-19 pandemic, government officials and civil authorities across the nation placed several limitations on the operations of nonessential businesses. In Texas, among orders for reduced-sized gatherings and social distancing measures, civil authorities prohibited restaurants from offering dine-in services. Terry Black's Barbecue restaurants followed these orders. Unsurprisingly, the restaurants lost revenue.

Terry Black's then tried to recoup its losses through its commercial property insurance policy which covers business interruption losses caused by "direct physical loss of or damage to property." The insurer, however, determined the policy did not cover the claimed losses. Terry Black's sued and the district court granted judgment on the pleadings in favor of the insurer. Because the suspension of dine-in services during the COVID-19 pandemic is not a direct physical loss of or damage to property, we AFFIRM.

I. BACKGROUND

Appellants Terry Black's Barbecue, L.L.C. and Terry Black's Barbecue Dallas, L.L.C. (collectively, TBB) own and operate two barbecue dine-in restaurants in Austin and Dallas, Texas, respectively. Each of the restaurants is insured by identical, but separate, commercial property insurance policies.[1] The policy was issued by Appellee State Automobile Mutual Insurance Company.

The policy is an "all risk" commercial property insurance policy and includes business income and extra expense coverage (BI/EE). That coverage extends to "the actual loss of Business Income . . . sustain[ed] and Extra Expense . . . incur[red] due to the necessary suspension of [TBB's] operations during the period of restoration." To trigger this coverage, the suspension of operations "must be caused by direct physical loss of or damage to property at the premises." The policy defines the period of restoration as the period that begins at the time of loss or damage and ends when the property is "repaired, rebuilt or replaced" or when operations resume at a new location. The policy also has a restaurant extension

[1] Because the relevant policy provisions are identical, we refer to them collectively as "the policy."

endorsement (REE) providing coverage for "the suspension of [TBB's] operations at the described premises due to the order of a civil authority . . . resulting from the actual or alleged . . . exposure of the described premises to a contagious or infectious disease."

On March 19, 2020, in response to the COVID-19 pandemic, the Governor of Texas issued an executive order directing people to avoid eating or drinking at restaurants. The Governor encouraged restaurants to use drive-thru, pickup, and delivery options rather than host dine-in services. In Travis and Dallas Counties, civil authorities also prohibited in-person restaurant services and limited restaurants to providing take out, delivery, or drive-thru services.

Complying with these orders, TBB curtailed its usual and customary business operations, including suspending dine-in services. TBB then suffered business income losses. To recover the lost revenue, TBB filed a claim with State Auto under the BI/EE and REE provisions. State Auto denied TBB's claim.

TBB sued State Auto in Texas state court seeking coverage under the policy. TBB also asserted several extra-contractual claims including breach of good faith and fair dealing and violations of the Texas Insurance Code. State Auto removed the case to federal court in the Western District of Texas.

State Auto moved for judgment on the pleadings pursuant to Federal Rule of Civil Procedure 12(c). The district court concluded the policy did not cover TBB's losses and granted State Auto's motion.[2] The district court concluded there was no coverage under the BI/EE provision because a

[2] The motion was referred to a magistrate judge for a report and recommendation. The district court adopted the report and recommendation in its entirety.

"physical loss" requires a "distinct, demonstrable, physical alteration of the property." As for the REE provision, the district court concluded there was no coverage because the civil authority orders were issued as a result of the global pandemic, not "the actual or alleged exposure of the described premises" to COVID-19. Because the district court determined there was no coverage, it declined to address whether a "virus exclusion" applied to preclude coverage.[3]

The district court also granted State Auto's motion on the remaining claims because it determined TBB had abandoned those claims and the claims were otherwise meritless. The district court denied TBB leave to amend based on futility because the unambiguous terms of the policy did not provide coverage. Judgment was entered in favor of State Auto and TBB timely appealed.

II. APPLICABLE LAW

The court reviews de novo a district court's decision on a Rule 12(c) motion for judgment on the pleadings. *See In re Katrina Canal Breaches Litig.*, 495 F.3d 191, 205 (5th Cir. 2007). The standard for a Rule 12(c) motion is the same as the standard used for Rule 12(b)(6) motions. *See id.* The court accepts the "well-pleaded facts as true," and views "them in the light most favorable to the plaintiff." *Guidry v. Am. Pub. Life Ins. Co.*, 512 F.3d 177, 180 (5th Cir. 2007) (internal quotation marks and citation omitted).

Texas law applies to this case. But the Texas Supreme Court has not interpreted the policy language at issue or whether the relevant provisions cover business interruption losses due to civil authority orders suspending

[3] The virus exclusion bars coverage for losses "caused by or resulting from any virus, bacterium or other microorganism that induces or is capable of inducing physical distress, illness or disease."

nonessential businesses during the COVID-19 pandemic. Pursuant to *Erie*, the court must make an "*Erie* guess" as to how the Texas Supreme Court would decide the issue. *See Erie R.R. v. Tompkins*, 304 U.S. 64 (1938); *see also Carrizales v. State Farm Lloyds*, 518 F.3d 343, 345 (5th Cir. 2008). An *Erie* guess must be based on: (1) decisions of the Texas Supreme Court in analogous cases, (2) the rationales and analyses underlying Texas Supreme Court decisions on related issues, (3) dicta by the Texas Supreme Court, (4) lower state court decisions, (5) the general rule on the question, (6) the rulings of courts of other states to which Texas courts look when formulating substantive law, and (7) other available sources, such as treatises and legal commentaries. *Am. Int'l Specialty Lines Ins. Co. v. Rentech Steel LLC*, 620 F.3d 558, 564 (5th Cir. 2010) (internal citation omitted).

In Texas, insurance policies are interpreted by the same principles as contract construction. *See State Farm Lloyds v. Page*, 315 S.W.3d 525, 527 (Tex. 2010). We begin with the language of the policy because it is "presume[d] parties intend what the words of their contract say." *Gilbert Tex. Constr., L.P. v. Underwriters at Lloyd's London*, 327 S.W.3d 118, 126 (Tex. 2010) (internal citation omitted). The words of the policy "are given their ordinary and generally-accepted meaning unless the policy shows the words were meant in a technical or different sense." *Id.* (internal citation omitted). All parts of the policy are read together, and courts must give "effect to each word, clause, and sentence, and avoid making any provision within the policy inoperative." *State Farm Lloyds*, 315 S.W.3d at 527.

If a policy is subject to more than one reasonable interpretation, it is ambiguous. *See Nat'l Union Fire Ins. Co. of Pittsburgh v. CBI Indus.*, Inc., 907 S.W.2d 517, 520 (Tex. 1995). "Only where a contract is first determined to be ambiguous may the courts consider the parties' interpretation." *Id.* (citation omitted). When an insurance policy is ambiguous, and the parties offer conflicting reasonable interpretations of the policy, Texas law favors

adopting the interpretation in favor of the insured. *See RSUI Indem. Co. v. The Lynd Co.*, 466 S.W.3d 113, 118 (Tex. 2015). But a policy is only ambiguous "if, after applying the rules of construction, it remains subject to two or more *reasonable* interpretations." *Id.* at 119 (emphasis added) (internal quotation marks and citation omitted).

III. DISCUSSION

We conclude the district court correctly determined TBB's losses are not covered by either the BI/EE or the REE provision. Without coverage, we need not address whether any policy exclusions also apply. As for TBB's extra-contractual claims, they were properly dismissed as abandoned. And finally, we find no error in the district court's decision to deny TBB leave to amend.

A. BI/EE Coverage

TBB's suspension of dine-in services does not qualify as a direct physical loss of property under the BI/EE provision. BI/EE coverage requires TBB to allege it suffered a direct physical loss of property at its restaurants.[4] These words, however, are not defined in the policy. And

[4] There is no dispute TBB has not alleged it suffered direct physical damage to property. Rather, TBB argues a "loss of" property is distinct from "damage to" property because the two phrases in the BI/EE provision are separated by the disjunctive "or." Some courts have interpreted "loss" and "damage" to have synonymous meanings. *See, e.g.*, *Trinity Indus., Inc. v. Ins. Co. of N. Am.*, 916 F.2d 267, 270–71 (5th Cir. 1990) (defining "physical loss or damage" together); *Great Am. Ins. Co. of N.Y. v. Compass Well Servs., LLC*, No. 02-19-00373, 2020 WL 7393321, at *14 (Tex. App. Dec. 17, 2020) (same). At the same time, Texas law requires us to read the policy language in context and "in light of the rules of grammar and common usage." *RSUI Indem. Co. v. The Lynd Co.*, 466 S.W.3d 113, 118 (Tex. 2015). We recognize "or," at least as it is interpreted in statutes, is ordinarily disjunctive, meaning the words it connects have two separate meanings. *See, e.g.*, *Encino Motorcars, LLC v. Navarro*, 138 S. Ct. 1134, 1141 (2018). We thus conclude "loss" and "damage" have two distinct meanings as stated in the BI/EE provision. And TBB having sought coverage only as a direct physical loss of property, we analyze that language only.

although Texas courts have not interpreted the specific language at issue in the BI/EE provision, their interpretation of similar language in different policies sheds sufficient light here.[5]

Starting with "physical," Texas courts have interpreted it to mean "tangible." In *U.S. Metals, Inc. v. Liberty Mutual Group, Inc.*, the Texas Supreme Court defined the phrase "physical injury," and stated "'[p]hysical' means 'of, relating to, or involving material things; pertaining to real, tangible objects.'" 490 S.W.3d 20, 24 (Tex. 2015) (quoting BLACK'S LAW DICTIONARY 1331 (10th ed. 2014)). The Texas Supreme Court concluded "[t]o give 'physical' its plain meaning, a covered injury must be one that is tangible." *Id.* at 25. Texas appellate courts have also interpreted "physical" to require tangible alterations to property. *See N. Am. Shipbuilding, Inc. v. S. Marine & Aviation Underwriting, Inc.*, 930 S.W.2d 829, 833–34 (Tex. App. 1996) (interpreting "physical loss or damage" to mean there is "an initial satisfactory state that was changed by some external event into an unsatisfactory state" (quoting *Trinity Indus., Inc. v. Ins. Co. of N. Am.*, 916 F.2d 267, 270–71 (5th Cir. 1990))); *Great Am. Ins. Co. of N.Y. v. Compass Well Servs., LLC*, No. 02-19-00373, 2020 WL 7393321, at *14 (Tex. App. Dec. 17, 2020) ("[A]n intangible or incorporeal loss that is unaccompanied by a distinct, demonstrable, physical alteration of the property is not considered a direct physical loss." (quoting 10A STEVEN PLITT ET AL., COUCH ON INSURANCE § 148:46 (3d ed. 2020)).

"Loss" as used in an insurance policy "means a state of fact of being lost or destroyed, ruin or destruction." *de Laurentis v. U.S. Servs. Auto. Ass'n*, 162 S.W.3d 714, 723 (Tex. App. 2005) (quoting BLACK'S LAW

[5] We accordingly deny TBB's motion to certify the question to the Texas Supreme Court.

DICTIONARY 945 (6th ed. 1990)). In *de Laurentis*, a Texas appellate court stated "[a] physical loss is simply one that relates to natural or material things." *Id.* (also noting loss "has been synonymous with or equivalent to, 'damage'"). The plain meaning of loss is also understood as "perdition, ruin, destruction" or "the being deprived of, or the failure to keep (a possession, appurtenance, right, quality, faculty, or the like)." *Loss*, OXFORD ENG. DICTIONARY, OXFORD UNIV. PRESS (Dec. 2021).

Considering the plain meaning of "physical loss," we conclude TBB's claim is not covered by the BI/EE provision. TBB has failed to allege any tangible alteration or deprivation of its property. Nothing physical or tangible happened to TBB's restaurants at all. In fact, TBB had ownership of, access to, and ability to use all physical parts of its restaurants at all times. And importantly, the prohibition on dine-in services did nothing to physically deprive TBB of any property at its restaurants.

The context of the provision supports this conclusion. The BI/EE provision provides coverage only for a "period of restoration." This period is defined in the policy as the time needed to repair, rebuild, or replace the lost or damaged property or the period necessary to resume operations at a different location. This period necessarily contemplates a tangible alteration to the property that requires repair, rebuilding, or replacement. The prohibition on dine-in services does not require TBB to repair, rebuild, or replace any property in its restaurants.

The policy itself—as a commercial property policy—supports our conclusion as well. While the BI/EE provision provides business interruption coverage, it is tied to the commercial property that is insured. The policy insures the commercial property. The BI/EE provision thus covers business interruption that is caused by loss or damage *to the* commercial property. TBB's claimed loss is not about its property, but about its inability to provide

dine-in services. This economic loss, however, did not have any tangible effect on the property or restaurants.

In interpreting a "physical loss of property" to require a tangible alteration or deprivation of property, we join several other jurisdictions, including the Second, Sixth, Seventh, Eighth, Ninth, Tenth, and Eleventh Circuits. *See Santo's Italian Café LLC v. Acuity Ins. Co.*, 15 F.4th 398, 401 (6th Cir. 2021) ("Whether one sticks with the terms themselves (a 'direct physical loss of' property) or a thesaurus-rich paraphrase of them (an 'immediate' 'tangible' 'deprivation' of property), the conclusion is the same."); *Oral Surgeons, P.C. v. Cincinnati Ins. Co.*, 2 F.4th 1141, 1144 (8th Cir. 2021) ("[T]here must be some physicality to the loss or damage of property—e.g., a physical alteration, physical contamination, or physical destruction."); *Mudpie, Inc. v. Travelers Cas. Ins. Co. of Am.*, 15 F.4th 885, 892 (9th Cir. 2021) (concluding "California courts would construe the phrase 'physical loss of or damage to' as requiring an insured to allege physical alteration of its property"); *Sandy Point Dental, P.C. v. Cincinnati Ins. Co.*, -- F.4th --, No. 21-1186, 2021 WL 5833525, at *4 (7th Cir. Dec. 9, 2021) ("'[D]irect physical loss' requires a physical alteration to property."); *Goodwill Indus. of Cent. Okla., Inc. v. Phila. Indem. Ins. Co.*, -- F.4th --, No. 21-6045, 2021 WL 6048858, at *3 (10th Cir. Dec. 21, 2021) ("[A] 'direct physical loss' requires an immediate and perceptible destruction or deprivation of property."); *10012 Holdings, Inc. v. Sentinel Ins. Co., Ltd.*, -- F.4th --, 2021 WL 61009961, at *4 (2d Cir. Dec. 27, 2021) (concluding "direct physical loss" does not extend to loss of use but requires physical damage). *Gilreath Fam. & Cosm. Dentistry, Inc. v. Cincinnati Ins. Co.*, No. 21-11046, 2021 WL 3870697, at *2 (11th Cir. Aug. 31, 2021).

And because Texas courts strive for uniformity in construing insurance provisions when the language is the same across jurisdictions,

these other courts provide further support for our conclusion.[6] *See RSUI Indem. Co.*, 466 S.W.3d at 118 ("When construing an insurance policy, [Texas courts] are mindful of other courts' interpretations of policy language that is identical or very similar to the policy language at issue." (internal citation omitted)); *Zurich Am. Ins. Co. v. Nokia, Inc.*, 268 S.W.3d 487, 496–97 (Tex. 2008) ("We have repeatedly stressed the importance of uniformity 'when identical insurance provisions will necessarily be interpreted in various jurisdictions.'" (quoting *Trinity Universal Ins. Co. v. Cowan*, 945 S.W.2d 819, 824 (Tex. 1997))).

Despite the unambiguous terms of the policy, TBB argues the BI/EE provision does not require a tangible alteration and instead only requires that it be deprived of a "physical space" at the restaurants. TBB also asserts its loss of *use* of its dining rooms for their intended purpose amounts to a physical loss of property. We, however, discern no such reading of the provision to support TBB's argument.[7]

TBB's reliance on the phrase "physical space" is simply misplaced. The phrase appears nowhere in the policy and nonetheless provides no further definition of the phrase at issue here—physical loss of property. Even accepting TBB's argument, it still has not alleged that it was *deprived* of a physical space. TBB has always had access to the dining rooms in its restaurants. It was free to use that "physical space" in whatever manner it chose, except dine-in services. This limitation on the kind of services

[6] Although these other circuits have interpreted the same policy language under different states' laws, we find their analysis persuasive under Texas law.

[7] We therefore disagree with TBB's argument that its interpretation is reasonable such that it creates an ambiguity in the policy.

permitted to be offered at the restaurants is just not a deprivation of the physical space under any reading of the provision.

TBB's argument regarding the loss of use of its dining rooms is also unpersuasive. The BI/EE provision unambiguously requires a *loss of property*, not the loss of *use* of property. As the Sixth Circuit aptly stated, "[i]t is one thing for the government to ban the use of a bike or a scooter on city sidewalks; it is quite another for someone to steal it." *Santo's Italian Café LLC*, 15 F.4th at 402 (citations omitted). This distinction is clear enough that had the parties intended the policy to cover a loss of use of property, they would have said so explicitly. And again, even accepting TBB's interpretation, it still failed to allege it was deprived of use of its restaurants. The civil authorities prohibited one use of the restaurants, for dine-in services, but TBB was able to otherwise "use" the property for its business at all times.

Nevertheless, TBB tries to stretch BI/EE coverage to include the loss of use of its restaurants for their "intended" purposes. But TBB's argument reads far more words into the provision than are actually there. A "physical loss of property" cannot mean something as broad as the "loss of use of property for its intended purpose." None of those words fall within the plain meaning of physical, loss, or property. And that phrase has an entirely different meaning from the language in the BI/EE provision. "Physical loss of property" is not synonymous with "loss of use of property for its intended purpose."

We conclude the Texas Supreme Court would interpret a direct physical loss of property to require a tangible alteration or deprivation of property. Because the civil authority orders prohibiting dine-in services at restaurants did not tangibly alter TBB's restaurants, and TBB having failed

to allege any other tangible alteration or deprivation of its property, the policy does not provide coverage for TBB's claimed losses.

B. REE Coverage

Because the civil authority orders did not "result from" TBB's exposure to COVID-19, the REE provision does not provide coverage either. The REE provision provides coverage for the suspension of business operations due to a civil authority order "resulting from the actual or alleged exposure of the described premises to a contagious or infectious disease." The key here is the requirement that the civil authority orders "result from" TBB's actual or alleged exposure to a contagious disease.

The plain meaning of "resulting from" is causation. *See, e.g.*, *Nat'l Union Fire Ins. Co. of Pittsburgh v. Merchants Fast Motor Lines, Inc.*, 939 S.W.2d 139, 142 (Tex. 1997) (interpreting "resulting from" to require a "causal relation"); *Dillon Gage Inc. of Dallas v. Certain Underwriters at Lloyds*, No. 21-0312, 2021 WL 5750553, at *3 (Tex. Dec. 3, 2021) (listing various phrases of causation, including "resulting from"). We need not determine what standard of causation is required because TBB has failed to allege even a remote causal relationship between the civil authority orders and its restaurants' alleged or actual exposure to COVID-19.

TBB alleges the civil authority orders were issued "following" guidance from the Centers for Disease Control and Prevention advising individuals to social distance and take other precautions to prevent the spread of COVID-19. This does not allege the requisite causal relationship between the civil authority orders and TBB's exposure to COVID-19 to trigger REE coverage. And from a common sense understanding of the onset of the pandemic, the civil authority orders were not caused, even tangentially, by TBB's alleged or actual exposure to a contagious disease. The civil authority orders "resulted from" the global pandemic and the need to take measures

to contain and prevent the spread of COVID-19. The language in the orders indicates that they were enacted to *avoid* exposure to COVID-19, not *because of* exposure to COVID-19. In fact, those orders say as much in the introductory declarations.

The context of the REE provision makes clear that causation is required for REE coverage. For instance, the "period of restoration" for this cause of loss contemplates TBB "receiv[ing] notice of closing from the Board of Health or any other governmental authority." TBB does not allege it received notice of its restaurants being *closed* by a government authority. Rather, the civil authority orders TBB relies on were focused on social distancing measures and merely suspended dine-in services for *all* restaurants.

Also, the REE provision provides coverage for the "actual or alleged food or drink poisoning of a guest at the described premises." This coverage, like the contagious disease clause, contemplates a problem *at the described premises*, i.e., TBB's restaurants. That problem, whether it be the exposure to a contagious disease or food poisoning of a guest, must then cause a civil authority order suspending TBB's operations. The consistent use of "at the described premises" in the REE provision establishes that there must be a connection between the restaurants and the civil authority orders. That required connection, however, is absent here.

The REE provision requires a causal connection between TBB's restaurants' exposure to a contagious disease and the civil authorities suspending its operations. TBB has failed to allege that causal connection. We therefore conclude TBB's losses are not covered by the REE provision.

C. Extra-Contractual Claims

We find no error in the district court's conclusion that TBB abandoned its extra-contractual claims by failing to defend them in its

response to State Auto's motion for judgment on the pleadings. In State Auto's motion, it sought dismissal of TBB's bad faith and Texas Insurance Code claims. TBB's response, however, did not address these claims at all. A plaintiff abandons claims when it fails to address the claims or oppose a motion challenging those claims. *See In re Dall. Roadster, Ltd.*, 846 F.3d 112, 126 (5th Cir. 2017); *see also Bedford v. Tex. Dep't of Trans.*, 810 F. App'x 264, 268 (5th Cir. 2020) (per curiam) (finding no error in district court finding claims abandoned because plaintiff failed to respond to defendant's motion on the specific claims). TBB's failure to defend these claims in response to State Auto's motion seeking their dismissal is sufficient for the district court to conclude the claims were abandoned.

D. Leave to Amend

The unambiguous terms of the policy preclude coverage of TBB's claimed losses and therefore the district court did not err in denying leave to amend based on futility. We typically review the denial of leave to amend for an abuse of discretion. *See In re Life Partners Holdings, Inc.*, 926 F.3d 103, 125 (5th Cir. 2019). However, when the denial of leave to amend is based on futility, as is the case here, our review is de novo. *See id.* at 125–26.

The district court concluded the "clear terms" of the policy preclude coverage of TBB's losses and any amendment would be futile. TBB wants to amend its pleading to comport with federal pleading standards because the operative pleading was filed before removal to the district court. It also wants to cure its factual allegations regarding the REE provision by alleging the presence of COVID-19 in its restaurants. But neither of these amendments would lead to a different result.

We recognize that Texas' fair notice pleading is distinct from the federal pleading standard. *See Int'l Energy Ventures Mgmt., L.L.C. v. United Energy Grp., Ltd.*, 818 F.3d 193, 200–01 (5th Cir. 2016). Regardless, TBB's

breach of contract claim fails because the unambiguous terms of the policy preclude coverage. TBB does not state here, nor did it in the district court, how its amendment to comply with federal pleading standards would survive another motion. And based on representations at oral argument and in the briefs, TBB's restaurants have not been tangibly altered in any way such that it would be entitled to coverage under the policy.

To the extent TBB argues it can cure its factual deficiencies by alleging the presence of COVID-19 in its restaurants and obtain REE coverage, our analysis above regarding "resulting from" says otherwise. Even if TBB alleges COVID-19 was present in its restaurants, the civil authority orders did not result from TBB's exposure to the virus. TBB otherwise makes no attempt to clarify what its amendment would contain, or how its amended allegations would result in a covered claim.

We perceive no set of facts in which TBB states a covered claim for its losses due to the suspension of dine-in services during the pandemic. We conclude amendment would be futile and the district court did not err in denying leave to amend.

IV. CONCLUSION

TBB's claimed losses due to the suspension of dine-in services during the COVID-19 pandemic are not covered by the policy. The BI/EE provision requiring a physical loss of property means a tangible alteration or deprivation of property. The REE provision requires a causal connection between the restaurants' exposure to a contagious disease and a civil authority order closing TBB's restaurants. But TBB's restaurants were not physically altered by the suspension of dine-in services and the civil authority orders were not caused by TBB's restaurants' exposure to COVID-19.

Accordingly, the district court's judgment is AFFIRMED.