No. 21-_____

IN THE

SUPREME COURT OF THE UNITED STATES

BEL AIR AUTO AUCTION, INC.,

Petitioner,

v.

GREAT NORTHERN INSURANCE COMPANY,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI BEFORE JUDGMENT

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The Question Presented for Review.

Did the United States Court of Appeals for the Fourth Circuit abuse its discretion and so far depart from the accepted and usual course of judicial proceedings as to call for the exercise by the Supreme Court of its supervisory power when, by orders of the Clerk acting for the Court, it denied Bel Air Auto Auction Inc.'s motion for certification and motion for reconsideration of that denial and refused to certify to the Maryland Court of Appeals the novel questions of Maryland insurance contract law as to which no controlling Maryland appellate decision, constitutional provision, or statute existed and that would have been determinative of the questions in Bel Air's appeal as well as the same questions in at least eight other nearly identical cases pending in Maryland state and federal courts.

The parties to the proceedings in the Fourth Circuit.

The caption of the case contains the names of the appellant and appellee. American Property Casualty Insurance Association and National Association of Mutual Insurance Companies, with leave of court and over the opposition of Bel Air, have filed an *amicus curiae* brief on behalf of Great Northern.

Corporate Disclosure Statement.

As required by Supreme Court Rule 29.6, Bel Air states that it is a privately held corporation with no parent company and no public company owns any stock or interest in it.

Directly related cases.

No other cases are "directly related" to this case as defined by Supreme Court Rule 14(1)(b)(iii).

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I. Citations to the orders entered in this case by the Clerk.

The Clerk entered the Order dated June 30, 2021, denying the motion to certify (Doc: 31) and the Order dated July 27, 2021, denying motion for reconsideration (Doc: 33) in USCA4 Appeal: 21-1493. This Petition is filed under Supreme Court Rule 11.

II. Statement of the basis for the jurisdiction of the Supreme Court.

A. The orders as to which review is sought were entered on June 30 and July 27, 2021. The appeal in the Fourth Circuit has been briefed but oral argument has not been scheduled and no decision has been issued. Bel Air files this Petition under Supreme Court Rule 11 and 28 U.S.C. § 2101(c) and is seeking certiorari review before judgment has been entered in the pending appeal for an issue of such imperative public importance as to justify deviation from normal appellate practice and to require immediate determination by the Supreme Court. *See United States v. Nixon*, 418 U.S. 683, 686–87 (1974) (granting certiorari before judgment because of the public importance of the issues presented and the need for their prompt resolution).

B. The imperative public importance of the issue presented results from (a) the SARS-19 pandemic and the wave of business interruption suits filed and pending in over 2,000 cases nationwide and whose resolution will be materially affected by a decision from the Supreme Court on the issue presented and (b) the relationship of federal and state courts on matters governed entirely by state law as determined by the state's highest court.

Prompt resolution of this issue is needed because the rights of the litigants in this case and the 2,000 other pending cases will be substantially affected and will be potentially, but needlessly, prejudiced unless expeditious review by the Supreme Court occurs.

C. No rehearing was held on the motion for certification or the motion for reconsideration.

D. Besides its jurisdiction under 28 U.S.C. § 1254(1) and Supreme Court Rule 11, the Supreme Court has inherent supervisory jurisdiction over lower federal courts and the procedures used by the lower federal courts to resolve substantive issues such as the issue presented by this Petition.

E. Supreme Court Rule 29.4(b) and (c) are inapplicable.

III. The statute involved in this case.

Md. Code Ann., Cts. & Jud. Proc. § 12-603 is the statute involved in this case. It states:

> § 12-603. POWER OF COURT OF APPEALS TO ANSWER QUESTION CERTIFIED BY COURTS OUTSIDE STATE
>
> The Court of Appeals of this State may answer a question of law certified to it by a court of the United States or by an appellate court of another state or of a tribe, if the answer may be determinative of an issue in pending litigation in the certifying court and there is no controlling appellate decision, constitutional provision, or statute of this State.

Md. Code Ann., Cts. & Jud. Proc. § 12-603; *see also* Md. Rule 8-305.

IV. Statement of the Case.

A. Jurisdiction of the lower courts.

1. District Court.

The removal jurisdiction of the District Court under 28 U.S.C. §§ 1441 and 1332 (a) existed based on diversity of citizenship of the parties and the amount in controversy. Plaintiff/appellant, Bel Air, is a Maryland corporation with its principal place of business in Harford County, Maryland and is a citizen of the state of Maryland. Defendant/appellee, Great Northern, is an Indiana corporation with its principal place of business in New Jersey and is a citizen of a state other than Maryland. The amount in controversy, exclusive of interest and costs, exceeds $75,000.

2. Court of Appeals.

The Circuit Court of Appeals has jurisdiction under 28 U.S.C. § 1291 over Bel Air's appeal from the final judgment of the District Court entered against it. The District Court entered a final judgment on April 14, 2021; Bel Air appealed on April 27, 2021.

B. Factual and procedural background.

This case emanates from the SARS-19 pandemic. Bel Air is one of the over 2,000 businesses that has sought and is currently litigating insurance coverage for the losses it sustained in connection with the pandemic.

1. Factual background.

a. Bel Air operates a vehicle auction facility and related businesses.

Bel Air operates a vehicle auction facility and related businesses in Belcamp, Maryland and several other locations in Maryland. The presence of SARS-CoV-2 in, on, around, and in the air of Bel Air's facility physically contaminated it. In response to the pervasive physical contamination caused by SARS-CoV-2, the State of Maryland and Harford County issued orders compelling businesses to cease or substantially reduce operations.

As a direct result of the physical contamination by SARS-CoV-2 and the governmental orders responding to this pervasive contamination, Bel Air was compelled to curtail and reduce drastically its operations. As an essential business, the governmental orders permitted Bel Air to operate but only on a limited, restricted basis. The governmental orders also prohibited access to the Bel Air facility, with only limited persons (such as managers and essential employees, but not customers) permitted to enter the facility.

Before the physical contamination of its facility by SARS-CoV-2 and the issuance of the governmental orders, large crowds of sellers and prospective buyers attended and were present at Bel Air's auctions. The purchasers attending the auctions inspected and bid on the vehicles as they moved through eleven auction lanes.

Besides the vehicle auctions, Bel Air provided other customer services, such operating a Vehicle Enhancement Center where vehicles were restored and enhanced for prospective sale and a full-service

restaurant catering to the auction attendees and other persons doing business with Bel Air.

The ubiquitous presence of SARS-Cov-2 in, on, around, and at the premises physically contaminated Bel Air's auction facility and, together with the governmental orders, prevented Bel Air both from using the auction facility as had been done before the physical contamination occurred and the governmental orders issued and from conducting the related businesses, such as the full-service restaurant. The large crowds that had attended the auctions and patronized the related businesses could no longer do so. While the SARS-CoV-2 was contaminating its facility, several Bel Air employees contracted SARS-19, although they do not know if they contracted the disease at the Bel Air facility of elsewhere.

Other businesses operate within one mile of Bel Air's location. The pervasive presence of SARS-Cov-2 and COVID-19 also physically contaminated these businesses and their property and made them subject to the governmental orders, as occurred with Bel Air. These businesses suffered similar physical contamination from SARS-CoV-2 that, in combination with the governmental orders, forced them to cease entirely or curtail drastically their operations.

b. Bel Air purchased business interruption insurance from Great Northern.

Bel Air purchased from Great Northern an all-risk policy of property insurance that insured against all perils other than those expressly excluded in the policy. The Policy specifically states that Great Northern will "pay for direct physical loss or damage to" the insured premises caused by a covered peril (*i.e.*,

all perils other than those expressly excluded) that occurs at or within 1,000 feet of the premises shown in the Declarations. The policy, although a contract of adhesion prepared by Great Northern, does not define what "direct physical loss or damage" is, encompasses, or requires.

The Policy includes business interruption coverage that requires Great Northern to pay for loss of business income due to the actual impairment of operations caused by or resulting from the "direct physical loss or damage to" the insured premises resulting from any peril not expressly excluded in the policy.

In addition, the policy, within the business interruption section, provides Civil Authority coverage. The Civil Authority provision covers loss of business income for a thirty-day period due to actual impairment of operations directly caused by prohibition of access (without defining if the prohibition must be a total prohibition of any access by anyone or only a prohibition of some access) to the insured premises by a civil authority that is the direct result of direct physical loss or damage to property away from but within one mile of the insured premises (property other than the insured property).

The Policy also contained in its main section (but not in the business interruption section) an Acts and Decisions exclusion that purports to deny coverage for any loss or damage to covered property that results in any way or to any extent from the act or decision of any person, group, organization, or governmental body.

2. Procedural background.

a. Bel Air sued for a declaratory judgment in state court after Great Northern denied its coverage claim.

Bel Air filed a claim for business interruption insurance coverage that Great Northern denied. Bel Air then sued Great Northern in the Circuit Court for Harford County, Maryland to obtain a declaratory judgment construing the policy under Maryland law and addressing the reasons Great Northern gave for denying coverage. Bel Air sought a declaration that the Policy afforded coverage

(i) under its business interruption portion for Bel Air's loss of business income resulting from Bel Air's being deprived of the full use of its insured premises caused by the presence and physical contamination of the premises by SARS-Cov-2 and by the governmental shutdown orders entered as a result of the SARS-Cov-2 contamination, despite the absence of any harmful or detrimental structural change or alteration to the insured premises;

(ii) under the Civil Authority coverage provision for the prohibition of access required by the governmental orders issued in response to SARS-Cov-2 contamination that afflicted business properties within one mile of Bel Air's facility that substantially restricted public access to Bel Air's facility even though all access to Bel Air's facility was not prohibited; and

(iii) despite the Acts and Decisions exclusion in the policy, which had no application to the coverage issues under the business interruption and Civil

Authority portions of the policy and did not exclude the coverage that otherwise exists.

b. Great Northern removed the case.

Great Northern removed the case to the District Court and filed an answer to the complaint.

c. Bel Air moved for summary declaratory judgment and certification to the Maryland Court of Appeals.

After the removal to the District Court, Bel Air immediately moved for a summary declaratory judgement. At the same time, Bel Air moved for certification to the Maryland Court of Appeals of the following three questions of Maryland law that have never been addressed by the Maryland Court of Appeals and would have been dispositive of Bel Air's case and the other pending Maryland state and federal cases involving the same issues:

> (a) Is the "direct physical loss or damage" requirement in the Business Income With Extra Expense and the Civil Authority coverage provisions of the Great Northern Insurance Company policy satisfied by a loss of full use of property caused by contamination from SARS-Cov-2 and Covid-19 or is a structural alteration and change in property necessary for coverage to exist?

(b) Is the prohibition of access requirement in the Civil Authority coverage provision of the Great Northern policy satisfied by a substantial prohibition of access or is a total prohibition of all access necessary?

(c) Does the Acts and Decisions exclusion in the Great Northern policy exclude all coverage under the in the Business Income and Extra Expense and Civil Authority portions of the policy?

See Motion To Certify Three Unresolved Questions of Maryland Law To The Maryland Court of Appeals, USCA4 Appeal: 21-1493 (Doc. 14).

Bel Air also requested the District Court to defer ruling on the motion for a summary declaratory judgment until the Maryland Court of Appeals had answered the certified questions, which would have fully resolved the appeal.

Great Northern, although it had denied almost all the allegations of the complaint, moved for judgment on the pleadings. Great Northern opposed the motion for summary judgment but did not contest the material facts Bel Air proffered as not being in genuine dispute as required by Fed. R. Civ. P. 56(c).

The District Court denied the motion to certify and the motion for declaratory summary judgment and granted Great Northern's motion for judgement on the pleadings under Fed. R. Civ. P. 12(c). The appeal to the Fourth Circuit followed.

d. The District Court determined both that the material facts were not in genuine dispute and the Maryland Court of Appeals had not ruled on the questions of law but still refused certification.

The District Court in its Memorandum Opinion determined that "there is no genuine issue of material facts as to Plaintiff Bel Air's claims." *Bel Air Auto Auction, Inc. v. Great N. Ins. Co.*, No. CV RDB-20-2892, 2021 WL 1400891, at *12 (D. Md. Apr. 14, 2021). Based on this finding, the District Court determined that only issues of Maryland law remained to be resolved.

The District Court also acknowledged that the Maryland Court of Appeals had not addressed the questions of law before it but held that it could rule based on general principles of contract interpretation under Maryland law. *Id.* at *6.

e. The Fourth Circuit peremptorily denied Bel Air's motion for certification.

In the Fourth Circuit, Bel Air again moved for certification of the three novel questions of Maryland law to the Maryland Court of Appeals. The Clerk, purportedly on behalf of the Court, denied the motion. Bel Air moved for reconsideration, but the Clerk again denied the motion.

The Clerk denied the motion for certification and for reconsideration of the motion's denial. The

Clerk gave no reason or explanation for the denials. Argument in support of the allowance of the writ.[1]

This *Petition for Certiorari* followed the denials by the Clerk.

V. Argument in support of the Petition.

A. The three questions of law for which Bel Air requested certification are issues of Maryland law as to which only the Maryland Court of Appeals can give a binding, precedential answer.

The three questions of law that Bel Air requested be certified to the Maryland Court of Appeals are questions of Maryland insurance contract law. While federal courts have the power to adjudicate cases based on Maryland law as to the parties before it, a federal court's doing so cannot conclusively determine any questions of Maryland law that would be binding precedent in other cases. Only the Maryland Court of Appeals can conclusively state what Maryland law is and have its pronouncement constitute binding precedent in all federal or state cases based on Maryland law.

A decision by the Fourth Circuit on the three questions of Maryland law may be binding precedent in federal courts in Maryland on these questions (unless later contradicted by the Maryland Court of

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[1] Bel Air's appeal is not the only pending Fourth Circuit appeal in which certification has been requested on similar issues. *See Cordish Companies, Inc. v. Affiliated FM Insurance Company*, No. 21-2055 (Maryland law) and *Uncork and Create, LLC v. The Cincinnati Insurance Company, et al*, No. 21-1311 (West Virginia law). The Fourth Circuit in a similar one-sentence order signed by the Clerk also denied the appellant's motion to certify in *Cordish* on October 20, 2021.

Appeals) but would not be binding precedent in state courts in Maryland or any other state applying Maryland law. *Erie R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938) ("Except in matters governed by the Federal Constitution or by acts of Congress, the law to be applied in any case is the law of the state."); *West v. Am. Tel. & Tel. Co.*, 311 U.S. 223, 236 (1940) ("[T]he highest court of the state is the final arbiter of what is state law."); *DIRECTV, Inc. v. Imburgia*, 577 U.S. 47, 54 (2015) ("Although we may doubt that the Court of Appeal has correctly interpreted California law, we recognize that California courts are the ultimate authority on that law."). The highest court in Maryland is the Maryland Court of Appeals, and its decisions establish the Maryland law of contracts, not the decisions of the Fourth Circuit. *Wells v. Chevy Chase Bank, F.S.B.*, 832 A.2d 812, 828 (Md. 2003) ("Contract interpretation . . . is a matter of state law.").

While a federal court is required to follow the decisions of a state's highest court *(i.e.*, the Maryland Court of Appeals), the courts of the state are not required to follow the decisions of federal courts on state law issues if the state court disagrees with a federal court's holding. *Sessoms v. State*, 744 A.2d 9, 16 (Md. 2000) ("The courts of this State, however, are not bound by the holdings of a federal district court or of a federal circuit court of appeals."); *Six Flags Am., L.P. v. Gonzalez-Perdomo*, 242 A.3d 1143, 1153 (Md. App. 2020) ("An opinion of a federal district court is not binding on the circuit court or on this Court, but at most might be a persuasive authority." If "the reasoning which supports the court's opinion fails to persuade, the opinion is no authority at all.") (citations omitted); *Selective Way Ins. Co. v.*

Nationwide Prop. & Cas. Ins. Co., 219 A.3d 20, 44 (Md. App. 2019); *French v. Hines*, 957 A.2d 1000, 1035 (Md. App. 2008).

These considerations support permitting the Maryland Court of Appeals to conclusively determine the principles of Maryland law when a conclusive determination of these principles is of paramount importance to a group of cases pending in both Maryland state and federal court.

B. The three questions of law are of major importance in both the state of Maryland and nationally.

The three questions of Maryland law Bel Air requested to be certified are of major importance in the state of Maryland and nationally. Currently, there are over 2,000 cases in federal and state courts in which some or all of the three questions of law are at issue. Of these pending cases, over 250 are on appeal in state and Federal Courts, although no state's highest court has yet issued a decision on its state's law. *See Trial Court Rulings on the Merits in Business Interruption Cases,* COVID COVERAGE LITIGATION TRACKER*,* https://cclt.law.upenn.edu/judicial-rulings/ (last visited September 10, 2021). Insureds continue to file new cases raising these issues. For example, a group of Chicago area restaurants sued fifteen insurance companies in the Cook County Circuit Court on September 1, 2021. *See 25 W. Hubbard, Inc. v. Illinois Cas. Co.*, No. 2021-L-008823 (Ill. Cir. Ct. Sept. 1, 2021). This case cannot be removed due to a lack of complete diversity of the parties and will have to be resolved in state court.

Besides Bel Air's suit, insureds have filed at least eight other suits in state and federal courts in Maryland. Four cases are pending in the district court

before different district judges. *See Hamilton Jewelry LLC v. Twin City Fire Ins. Co.*, No. 8:20-cv-02248-PWG; *ThinkFood Grp. LLC v. Travelers Prop. Cas. Co. of America*, No. 8:20-cv-02201-PWG; *RW* Rest. Grp., *LLC v. Charter Oak Fire Ins. Co.*, No. 8:20-cv-02161-GJH; *Cordish Cos., Inc. v. Affiliated FM Ins. Co.*, No. 1:20-cv-02419-ELH.; *Tapestry, Inc. v. Factory Mutual Insurance Co.*, No.: 1:21-cv-01941-GLR. The *Cordish* case was just decided on a motion to dismiss and has been appealed to the Fourth Circuit. *Cordish Cos., Inc. v. Affiliated FM Ins. Co.*, No. CV ELH-20-2419, 2021 WL 3883595, at *1 (D. Md. Aug. 31, 2021), Appeal No. 21-2055. Two other cases also were just decided on motions to dismiss and could be appealed to the Fourth Circuit. *See ThinkFood Grp. LLC v. Travelers Prop. Cas. Co. of Am.*, No. 8:20-CV-02201-PWG, 2021 WL 4478725, at *1 (D. Md. Sept. 30, 2021) and *Hamilton Jewelry, LLC v. Twin City Fire Ins. Co., Inc.*, No. 8:20-CV-02248-PWG, 2021 WL 4214837, at *1 (D. Md. Sept. 16, 2021).

Insureds have filed at least two other cases in Maryland state courts that were not removed by the insurance companies. *See GPL Enter. LLC v. Lloyds of London*, No. C-10-CV-20-000284 (Md. Cir. Ct. 2021), *appeal docketed*, No. CSA-REG-0302-2021 (Md. Ct. Spec. App. May 5, 2021); *Glyndon Hair Station, Inc. v. Erie Ins. Co.*, No. C-03-CV-20-003393 (Md. Cir. Ct. September 16, 2021). In *GPL,* the circuit court ruled in favor of Lloyds after the insurance company presented to the circuit court the District Court's decision in Bel Air's case. The ruling is on appeal to the Maryland Court of Special Appeals (CSA-REG-0302-2021) and likely will eventually reach the Maryland Court of Appeals. Bel Air has filed an *amicus* brief in this appeal.

Two cases filed in state court but removed to federal court have been remanded to state court for lack of diversity due to the inclusion of an instate insurance broker as a defendant. *Goucher Coll. v. Cont'l Cas. Co.*, No. C-03-CV-21-000013, 2021 WL 2155039 (D. Md. May 27, 2021); *McDaniel Coll., Inc., v. Cont'l Cas. Co.*, No. C-03-CV-21-000012, 2021 WL 2139404 (D. Md. May 26, 2021). These cases are pending in the Circuit Court for Baltimore County, Maryland. *See id.* They will likely reach the Maryland appellate courts once a decision has been rendered by the Circuit Court.

A decision by the Maryland Court of Appeals will provide binding precedent in these state and federal Maryland cases and a certainty of result to the parties to these cases as well as parties in potential future cases. A decision by the Maryland Court of Appeals also will provide definitive, if not binding, precedent for the numerous cases pending around the country. A decision by the Maryland Court of Appeals will enable the judges of the federal courts in Maryland to apply Maryland law uniformly to the pending cases rather than predict what the Maryland Court of Appeals will determine Maryland law to be, once a case finally reaches the Maryland Court of Appeals for decision.

A decision by the Fourth Circuit, while unquestionably persuasive, would not be binding on any of the state cases. The Fourth Circuit's prediction as to how the Court of Appeals will decide the questions of law would only bind the federal courts applying Maryland law.

And, what would the fate be of the litigants in the Maryland cases when the Maryland Court of Appeals, as it eventually will do, issues a decision on

the certification questions? If the decision is contrary to the Fourth Circuit's decision, the losing party in the appeal and all of the pending federal cases will be unfairly affected and have little or no recourse.

C. The lack of a decision by the Maryland Court of Appeals can lead to different rulings by different courts.

The absence of a decision by the Maryland Court of Appeals can lead to different rulings by different judges of the Maryland federal and state courts, as has happened and is happening in other states. A ruling by one district court judge does not preclude another district court judge or a state court judge from issuing a contrary ruling. This unsettling result has occurred around the country and is likely to continue to occur.

The following federal decisions reached contrary conclusions on the issue of whether loss of use versus structural alteration or change satisfies the requirement in the policies of "direct physical loss or damage." *Compare Serendipitous, LLC/Melt v. Cincinnati Ins. Co.*, No. 2:20-CV-00873-MHH, 2021 WL 1816960 (N.D. Ala. May 6, 2021) (denying a motion to dismiss) *with Dukes Clothing, LLC v. Cincinnati Ins. Co.*, 2021 WL 1791488 (N.D. Ala. May 5, 2021) (granting a motion to dismiss); *compare In re Soc'y Ins. Co. COVID-19 Bus. Interruption Prot. Ins. Litig.*, No. 20 C 5965, 2021 WL 679109 (N.D. Ill. Feb. 22, 2021) (denying motions to dismiss for summary judgment in multi-district case) *with L&J Mattson's Co. v. Cincinnati Ins. Co., Inc.*, No. 20 C 7784, 2021 WL 1688153 (N.D. Ill. Apr. 29, 2021) (granting a motion to dismiss); *compare Henderson Rd. Rest. Sys., Inc. v. Zurich Am. Ins. Co.*, No: 1:20 CV 1239, 2021

WL 168422 (N.D. Ohio Jan. 19, 2021) (granting summary judgment for the insured), *vacated*, *In re Zurich Am. Ins. Co.*, No. 21-0302, 2021 WL 4473398 (6th Cir. Sept. 29, 2021) *with Equity Plan. Corp. v. Westfield Ins. Co.*, No. 1:20-CV-01204, 2021 WL 766802 (N.D. Ohio Feb. 26, 2021) (granting a motion to dismiss); *compare Studio 417, Inc. v. Cincinnati Ins. Co.*, No. 20-cv-03127-SRB, 478 F. Supp. 3d 794, 796 (W.D. Mo. 2020) (denying motion to dismiss) *with Zwillo V, Corp. v. Lexington Ins. Co.*, No. 4:20-00339-CV-RK, 2020 WL 7137110 (W.D. Mo. Dec. 2, 2020) (granting a motion to dismiss); *compare Skillets, LLC v. Colony Ins. Co.*, No. 3:20cv678-HEH, 2021 WL 926211 (E.D. Va. Mar. 10, 2021) (granting a motion to dismiss) *with Elegant Massage, LLC v. State Farm Mut. Auto. Ins. Co.*, No. 2:20-cv-265, 2020 WL 7249624 (E.D. Va. Dec. 9, 2020) (denying a motion to dismiss).

State courts have reached conclusions contrary to federal courts in their states and have rejected the federal cases as precedent. The Superior Court of Washington provides a very recent example. There, the Superior Court rejected the holding of a federal court in Washington and the other federal decisions upon which it relied and granted partial summary judgment to the insured. *See Snoqualmie Entertainment Authority v. Affiliated FM Ins. Co.*, No. 21-2-03194-0 SEA, 2021 WL 4098938 (Wash. Super. Sep. 03, 2021). As the Superior Court held:

> Second, the Court respectfully declines to adopt the reasoning from the U.S. District Court for the Western District of Washington in *Nguyen v. Travelers Cas. Ins. Co. of Am.*, 2:20-CV-00597-BJR, 2021 WL 2184878 (W.D. Wash. May 28, 2021).

> This Court is not persuaded by *Nguyen's* reliance on the opinions of other federal district court opinions across the country that applied the laws of other states, nor its holding that the undefined phrase "all-risks of physical loss or damage" cannot be reasonably interpreted by the average lay person to include the insured's inability to physically use, control, or manipulate its property as a result of the COVID-19 closure orders and Tribal resolutions.

Id. at *6.

The Superior Court of Connecticut in *New Castle Hotels, LLC v. Zurich Am. Ins. Co.* recently rejected Zurich's reliance on federal decisions when it denied the insurer's motion to dismiss and applied Connecticut's pleading standard rather than the federal *Bell Atlantic* plausibility standard. No. X07-HHD-CV-216142969-S, 2021 WL 4478669, at *5 (Conn. Super. Ct. Sept. 7, 2021).

For another example of state courts rejecting federal precedent, the Court of Common Pleas of Allegheny County granted the insureds summary judgment in two cases despite a welter of contrary rulings by Pennsylvania district courts. *Compare MacMiles, LLC v. Erie Ins. Exchange*, No. GD-20-7753, 2021 WL 3079941 (Pa. Com. Pl. May 25, 2021) ("this Court concluded that the meaning of the term "loss" reasonably encompasses the act of losing possession [and/or] deprivation, which includes the loss of use of property absent any harm to property) *and Ungarean, DMD v. CNA*, No. GD-20-006544, 2021 WL 1164836, at *10 (Pa. Com. Pl. Allegheny Cnty.

Mar. 22, 2021) ("[T]his Court determined that Plaintiff provided a reasonable interpretation that: [1] there was 'direct physical loss of or damage to property' other than Plaintiff's property; and [2] the 'direct physical loss of or damage to property' other than Plaintiff's property caused civil authorities to take action(s) that prohibited access to Plaintiff's property.") *with Mareik Inc. v. State Farm Fire and Casualty Company*, No. 20-2744, 2021 WL 1940647, at *4 (E.D. Pa. May 5, 2021) ("[T]his Court finds that 'direct physical loss to Covered Property' means an immediate, actual, identifiable, and material impact to the structure of a building or to tangible items located therein.").

For yet another example, the California Superior Court denied a demurrer filed by Philadelphia Indemnity despite the almost unanimous plethora of California federal cases granting motions to dismiss or for judgment on the pleadings to insurance companies, noting:

> The Court recognizes that California federal cases have require[d] a physical change in the property or permanent dispossession of the property to qualify as "direct physical loss" and have generally rejected arguments that business losses due to coronavirus and Covid-19 are covered under Business Income, Extra Expenses and Civil Authority provisions. . . . However, **these federal California cases are not binding on this Court**."

Goodwill Indus. of Orange Ct. v. Phila. Indem. Co., No. 30-2020-01169032-CU-IC-CXC, 2021 WL 476268,

at *3 (Cal. Sup. Ct. Jan. 28, 2021) (emphasis added); *see also Boardwalk Ventures CA, LLC v. Century-National Ins. Co.*, No. 20STCV27359, 2021 WL 1215892, at *3 (Cal. Super. Mar. 18, 2021) (noting that "no California court has issued any opinion that is binding on this Court interpreting the policy language at issue" and rejecting the "litany of unpublished federal district court cases" interpreting California law as "not binding on this Court").

Similar results have occurred in other states. *Compare North State Deli, LLC v. Cincinnati Ins. Co.*, No. 20-CVS-02569, 2020 WL 6281507 (N.C. Super. Oct. 09, 2020) (granting the insured summary judgment) *with Summit Hosp. Grp., Ltd. v. Cincinnati Ins. Co.*, No. 5:20-CV-254-BO, 2021 WL 831013 (E.D.N.C. Mar. 4, 2021) (granting a motion to dismiss); *compare 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) (denying a motion to dismiss) *with Circus LV, LP v. AIG Specialty Ins. Co.*, No. 2:20-cv-01240-JAD-NJK, 2021 WL 769660 (D. Nev. Feb. 26, 2021) (granting a motion to dismiss).

And when a Maryland state court case reaches the Maryland Court of Appeals, a decision by the Maryland Court of Appeals could contradict the decisions of the Fourth Circuit and the other federal cases but leave the losing parties in those federal cases without a remedy under Maryland law that has been resolved by Maryland's highest court in their favor and contrary to the rulings of the federal courts. This outcome could eventually occur in the case on appeal to the Maryland Court of Special Appeals and the two cases remanded by the District Court to the Circuit Court for Baltimore County. *See GPL*, No. C-

10-CV-20-000284 (Md. Cir. Ct. 2021), *appeal docketed*, No. CSA-REG-0302-2021 (Md. Ct. Spec. App. May 5, 2021); *McDaniel Coll., Inc, v. Continental Casualty Co.*, No. RDB-21-0505, 2021 WL 2139404 (D. Md. May 26, 2021); *Goucher Coll.*, 2021 WL 2155039, two cases where the plaintiffs, as educational institutions, have the resources to match the insurance company opposing them. This is an outcome that may likely occur if the Supreme Court does not require the Fourth Circuit to issue a certification order and the Fourth Circuit rules against Bel Air on the merits.

D. This appeal involves more than a dispute between two litigants.

This case is not a one-off case between an insurance company and its insured, where the focus is on only the appellant and the appellee. This is a case of national importance where the rights of many insurance companies and their insureds are at issue. The only way the Fourth Circuit can ensure that its answer to the questions on appeal is correct is to certify the three questions to the Maryland Court of Appeals. A certain answer from the Maryland Court of Appeals is far more desirable than a prediction from the Fourth Circuit, no matter how well thought-out and reasoned, about how the Maryland Court of Appeals will rule. Certainty is much better than speculation when the rights of so many persons beyond those before the Court are in focus.

The questions Bel Air has requested be certified will be dispositive of the appeal. No decision of the Maryland Court of Appeals or the provisions of any statute or constitution resolve the questions presented for certification. The District Court, although denying the motion to certify, acknowledged the absence of any

controlling authority from the Maryland Court of Appeals on the certification questions.

E. The Ohio Supreme Court has before it on certification the question of whether direct physical loss requires structural change.

In *Neuro-Communication Services, Inc., v. Cincinnati Insurance Company* ("*Nuero-Communication*"), the District Court certified to the Ohio Supreme Court the question of whether contamination by SARS-CO-V 2 could constitute physical loss under a property policy with essentially the same business interruption coverage language as Bel Air's policy. No. 4:20-CV-1275, 2021 WL 274318 (N.D. Ohio Jan. 19, 2021). The case is pending before the Ohio Supreme Court. *See Neuro-Communication Servs., Inc.*, v. *Cincinnati Ins. Co.*, Case No. 2021-0130 (Ohio Jan. 28, 2021). If the Ohio Supreme Court rules that structural alteration is not required for coverage to exist, the ruling will contradict rulings by district courts in Ohio in favor of the insurance companies but will leave the insureds in those cases that may no longer appeal the district court's incorrect ruling without the ability to obtain what Ohio law says they are entitled to receive. *See e.g. Dakota Girls, LLC v. Philadelphia Indem. Ins. Co.*, No. 2:20-cv-2035, 2021 WL 858489 (S.D. Ohio Mar. 8, 2021) (dismissing the complaint); *Santo's Italian Cafe LLC v. Acuity Ins. Co.*, 508 F. Supp. 3d 186 (N.D. Ohio 2020) (same).

In explaining its decision, the District Court in *Neuro-Communication* pointed to the lack of controlling precedent of the Supreme Court of Ohio: "Dozens, if not hundreds of cases seeking coverage for losses related to the pandemic under policies similar or identical to that at issue in this case [that] have

been filed in both federal and state courts in Ohio," and the problem "differing interpretations of Ohio contract law by different courts threaten to undermine the uniform application of that law to similarly situated litigants." *Neuro-Commc'n*, 2021 WL 274318, at *1. As the District Court further noted "The certification procedure invoked here will allow the Supreme Court of Ohio to decide these questions and bring uniformity to the application of state law to these policies." *Id.* at * 2.

The reasons for the District Court's certification in *Neuro-Communication* apply equally to this case. The Maryland Court of Appeals should be given the opportunity to provide a uniform interpretation of Maryland insurance contract law regarding the Sars-Covid-2 and Covid-19 problem and business interruption insurance.

F. *Lehman Bros. v. Schein* provides authority that the Fourth Circuit should have granted the motion for certification.

The Supreme Court in several decisions has recognized the benefits of certifying novel, undecided questions of state law that can be dispositive of the case before the Court to the highest court of the state whose law controls the decision. *See McKesson v. Doe,* 141 S. Ct. 48 (2020); *Arizonans for Off. Eng. v. Arizona*, 520 U.S. 43 (1997); *Virginia v. Am. Booksellers Ass'n, Inc.*, 484 U.S. 383 (1988); *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491 (1985); *Elkins v. Moreno*, 435 U.S. 647 (1978); *Lehman Bros. v. Schein*, 416 U.S. 386 (1974).

While most of the Supreme Court's certification decisions involved the determination of an issue of state law that potentially would eliminate the need to

reach a constitutional issue or the interpretation of a state statute that had not previously been construed by the state's highest court, *Lehman Bros.* did not and involved only a question of state common law. This decision presents the primary authority relied upon by Bel Air in petitioning for certiorari.

Lehman Bros. involved several consolidated shareholders' derivative suits based on diversity of citizenship. The plaintiffs filed suit in the United States District Court for the Southern District of New York. The plaintiffs alleged that the corporation's president disclosed a drop in the corporation's earnings that was not yet public to a brokerage, which in turn disclosed the information to several mutual funds that sold stock before the earnings drop became public. Although filed in federal court in New York, Florida law provided the rule of decision under New York's choice-of-law rules. The district court, applying Florida law, dismissed the complaints on the basis that the president and the brokerage did not sell any stock and did not commit any breach of fiduciary duty or other wrongful act that injured the corporation. The district court rejected the holding of the New York Court of Appeals in *Diamond v. Oreamuno*, 248 N.E.2d 910 (N.Y. 1969) that an allegation of damage to the corporation was not essential when confidential information, which constituted a corporate asset, was exploited for the benefit of a corporate officer having a fiduciary relationship to the corporation. The district court noted that the Florida Supreme Court had not considered the issue, although several Florida lower courts had held that damage to the corporation was required.

The Second Circuit reversed. The Second Circuit looked to the law of other jurisdictions,

particularly New York, for assistance in determining how the Florida Supreme Court would rule and how it would apply the holding of the New York Court of Appeals in *Diamond*. The Second Circuit predicted that the Florida Supreme Court would agree with *Diamond*. *Schein v. Chasen*, 478 F.2d 817, 819 (2nd Cir. 1973). The dissenting judge, however, emphasized that he could not understand why the majority refused to utilize Florida's certification statute and rule. In words apt to Bel Air's request for certification, the dissent stated that "[t]he uncertainty inherent in the majority's speculation over what the Florida courts would decide if faced with this novel question of tippee liability under state common law fiduciary principles in a stockholders' derivative action would be dispelled authoritatively and finally." *Id.* at 829.

The Supreme Court vacated the Second Circuit's reversal and remanded so that the Second Circuit could "reconsider whether the controlling issue of Florida law should be certified to the Florida Supreme Court pursuant to Rule 4.61 of the Florida Appellate Rules." *Lehman Bros.*, 416 U.S. at 391–92. Noting that Florida law was controlling but did not decisively resolve the issue, resort to Florida's certification procedure "would seem particularly appropriate in view of the novelty of the question and the great unsettlement of Florida law." *Id.* at 391.

On remand, the Second Circuit certified the controlling question of law to the Florida Supreme Court, which agreed with and approved the district court's reversed decision. The Second Circuit thereupon affirmed the district court's judgment. *Schein v. Chasen*, 519 F.2d 453, 454 (2nd Cir. 1975).

Although the petitioners in *Lehman Bros.* did not ask the district court or the Second Circuit to certify the question to the Florida Supreme Court until the petitioners filed a motion for reconsideration in the Second Circuit, Bel Air from the outset has attempted to have Maryland law determined by the Maryland Court of Appeals, not a federal court speculating on how the Maryland Court of Appeals would rule.

G. The Fourth Circuit's refusal to certify the three questions of law to the Maryland Court of Appeals constituted an abuse of discretion.

The decision on whether to certify a question of undecided state law to a state's highest court rests within the sound discretion of the federal court considering a certification request. *McKesson*, 141 S. Ct. 48, 51 (2020); *Lehman Bros. v. Schein*, 416 U.S. 386, 390 (1974). But (d)iscretion is not whim" and must be based, not on inclination, but on judgment "guided by sound legal principles." *Martin v. Franklin Cap. Corp.*, 546 U.S. 132, 139 (2005). The Circuit Court's discretion is neither unlimited nor unfettered by meaningful standards and sound legal principles. And its exercise is always subject to judicial review. *Kirtsaeng v. John Wiley & Sons, Inc.*, 136 S. Ct. 1979, 1985 (2016); *Halo Elecs., Inc. v. Pulse Elecs., Inc.*, 136 S. Ct. 1923, 1932 (2016); *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 416 (1975).

"Whether discretion has been abused depends, of course, on the bounds of that discretion and the principles that guide its exercise." *United States v. Taylor*, 487 U.S. 326, 336 (1988). An abuse of discretion occurs when a court, in exercising its discretion, bases its decision on an erroneous view of

the law or incorrect assessment of the evidence. *Highmark Inc. v. Allcare Health Mgmt. Sys., Inc.*, 572 U.S. 559, 563, n.2 (2014); *Cooter & Gell v. Hartmarx Corp.*,110 S. Ct. 2447, 2461 (1990). But as the Fourth Circuit has noted, even when a court applies the correct legal principles to adequately supported facts, a reviewing court should reverse for abuse of discretion if it "has a definite and firm conviction that the court below committed a clear error of judgment in the conclusion it reached upon a weighing of the relevant factors." *Westberry v. Gislaved Gummi AB*, 178 F.3d 257, 261 (4th Cir. 1999) (citation omitted). *See also Huskey v. Ethicon, Inc.,* 848 F.3d 151, 158 (4th Cir. 2017); *Gannett Co. v. Clark Const. Grp., Inc.,* 286 F.3d 737, 741 (4th Cir. 2002).

Other Circuit Courts of Appeal have reached a similar conclusion. *See e.g. Graveline v. Benson*, 992 F.3d 524, 546 (6th Cir. 2021) ("Abuse of discretion is defined as a definite and firm conviction that the trial court committed a clear error of judgment.") (citation omitted); *Tubens v. Doe*, 976 F.3d 101, 104 (1st Cir. 2020) ("Abuse occurs when a material factor deserving significant weight is ignored, when an improper factor is relied upon, or when all proper and no improper factors are assessed, but the court makes a serious mistake in weighing them.") (citation omitted).

The Fourth Circuit's refusal to certify the three dispositive, unresolved questions of Maryland law to the Maryland Court of Appeals without any explanation for its refusal constituted an abuse of discretion. The importance of a definitive and precedential answer to the three questions of law, not just to the parties to this case but to other litigants in Maryland and throughout the country, underscores and emphasizes this abuse of discretion.

The issues on appeal are "novel issues of state law peculiarly calling for the exercise of judgment by the state courts." *McKesson*, 141 S. Ct. at 51. To answer these questions, the Maryland Court of Appeals will have to "consider "various moral, social, and economic factors," among them "the fairness of imposing liability," "the historical development of precedent," and "the direction in which society and its institutions are evolving." *Id.* (quoting *Posecai v. Wal-Mart Stores, Inc.*, 752 So.2d 762, 766 (La. 1999); *see also Arizonans for Official English*, 520 U.S. at 79 ("Speculation by a federal court about" how a state court would weigh . . . the economic consequences [of imposing or withholding liability] is particularly gratuitous when the state courts stand willing to address questions of state law on certification."). Refusing to permit a state's highest court to weigh in on the law of its state, particularly when that law will affect numerous parties in pending cases, constitutes an affront to federalism and the relationship of federal and state courts of constitutional significance. *See Levin v. Com. Energy, Inc.,* 560 U.S. 413, 421 (2010) ("The comity doctrine counsels lower federal courts to resist engagement in certain cases falling within their jurisdiction."); *Exxon Mobil Corp. v. Saudi Basic Indus. Corp.*, 544 U.S. 280, 292 (2005); *Rhines v. Weber*, 544 U.S. 269, 273 (2005); *Mendoza v. Nordstrom, Inc.*, 778 F.3d 834, 836 (9th Cir. 2015); *Am. States Ins. Co. v. LaFlam*, 672 F.3d 38, 44 (1st Cir. 2012) (noting that federalism dictates certification where the "case involves major state policy that 'will certainly impact future cases'"); *Walters v. Inexco Oil Co.*, 670 F.2d 476, 478 (5th Cir. 1982) ("Indeed, as the case involves question of local Mississippi policy, [certification] accords with our carefully wrought system of federalism. We should

hesitate to 'trade our judicial robes for the garb of prophet'").

H. The Fourth Circuit's refusal to certify the three questions of Maryland law so far departed from the accepted and usual course of judicial proceedings as to call for the exercise by the Supreme Court of its supervisory power.

In stark contrast to its terse, indeed brusque, denial of Bel Air's motions, the Fourth Circuit in other cases having less national and statewide import has certified significant questions to the highest court of the state whose law controls the decision. In *Sartin v. Macik*, 535 F.3d 284, 291 (4th Cir. 2008), the Fourth Circuit lamented that North Carolina did not have a certification process, noting that "[a] certification process would greatly facilitate the resolution of unresolved questions of state law like the present one by ensuring the correct legal outcome, aiding in judicial economy, and manifesting proper respect for federalism." *Sartin v. Macik*, 535 F.3d 284, 291 (4th Cir. 2008).

In *Travco Ins. Co. v. Ward*, 468 F. App'x 195 (4th Cir. 2012), the Fourth Circuit set out the factors that justified certifying a question on the construction of an insurance policy to the Virginia Supreme Court:

> Several factors justify certification. …[W]e find no clear controlling Virginia precedent to guide our decision. There are no disputed fact issues, and the questions presented are pure questions of state law which have not been squarely addressed by the Supreme Court of Virginia. In

> addition, we recognize the importance of allowing the Supreme Court of Virginia to decide questions of state law and policy with such far-reaching impact.

468 F. App'x at 201 (emphasis added). These same factors are present in this case and similarly justify and argue for certification. The Fourth Circuit, acting through the Clerk and not a Judge, never explained why certification was proper and desirable in *Travco Ins. Co. v. Ward* but is not proper and desirable in this case, in which the certification questions are being litigated in over 2000 cases nationwide and eight in Maryland alone.

The Fourth Circuit has certified questions of law to a state's highest court on at least 31 other occasions, sometimes in officially reported decisions. When it has denied certification, the Fourth Circuit has provided the reasons for its decision, sometimes in officially published decisions. *See e.g. Powell v. U.S. Fid. & Guar. Co.*, 88 F.3d 271 (4th Cir. 1996); *Nat'l Bank of Washington v. Pearson*, 863 F.2d 322 (4th Cir. 1988); *Boyter v. Comm'r*, 668 F.2d 1382 (4th Cir. 1981). At other times, the reasons were given in unofficially published decisions. *See e.g. Gariety v. Vorono*, 261 F. App'x 456 (4th Cir. 2008). In this case, the Fourth Circuit has given no reason for denying certification.

The Clerk's order denying certification in this case provided no explanation why certification was the right procedure in those 31 cases but not this case. Bel Air is entitled to such an explanation. Bel Air is entitled to have its rights under Maryland law decided by the Maryland Court of Appeals, not the United States District Court for the District of Maryland or

the United States Court of Appeals for the Fourth Circuit, when those rights are dependent upon a resolution of questions of Maryland law that have never been decided, much less squarely confronted, by the Maryland Court of Appeals, only Court that can give a final, definitive, and conclusive answer.

The other litigants in Maryland courts addressing these same issues are likewise entitled to the benefit of binding precedent from the Maryland Court of Appeals. A decision by the Fourth Circuit, while perhaps binding on the pending Federal cases, will not bind the Maryland state court cases or in any way constrain the Maryland Court of Appeals, just as the Florida Supreme Court was not constrained by the Second Circuit's decision in *Schein v. Chasen*, 478 F.2d 817 (2nd Cir. 1973). Yet unlike the petitioners in *Lehman Bros.*, Bel Air will have no recourse if the Fourth Circuit affirms the District Court and the Maryland Court of Appeals eventually, as will happen, decides that they were incorrect as a matter of Maryland law.

The Supreme Court has inherent supervisory power over the Circuit Courts of Appeal. *Dickerson v. United States*, 530 U.S. 428, 437 (2000) While a Circuit Court of Appeals has discretion to adopt local rules or procedures, that discretion is not without limits or bounds. *Frazier v. Heebe*, 482 U.S. 641, 645, (1987). As stated in *Frazier v. Heebe*, the Supreme Court "may exercise its inherent supervisory power to ensure that these local rules (or procedures) are consistent with "'the principles of right and justice.'" (citations omitted; parenthetical material added). *Id* at 645. As noted in an earlier case, where "a particular mode of trial [or deciding motions] being used by many judges is so cumbersome, confusing, and time

consuming that it places completely unnecessary obstacles in the paths of litigants seeking justice in our courts, we should not and do not hesitate to take action to correct the situation." *Fitzgerald v. U.S. Lines Co.*, 374 U.S. 16, 21 (1963) (deciding trial procedures in admiralty actions); *see also Communist Party of U.S. v. Subversive Activities Control Bd.*, 351 U.S. 115, 124 (1956) ("This Court is charged with supervisory functions in relation to proceedings in the federal courts. Therefore, fastidious regard for the honor of the administration of justice requires the Court to make certain that the doing of justice be made so manifest that only irrational or perverse claims of its disregard can be asserted.") (citation omitted); *West Pac. R. Corp. v. West Pac. R. Co.*, 345 U.S. 247, 260 (1953) (Regarding the Circuit Court of Appeals *en banc* procedures, noting that "In the exercise of our 'general power to supervise the administration of justice in the federal courts,' the responsibility lies with this Court to define these requirements and insure their observance.")

Supreme Court Rule 10(a) underscores these principles by indicating that one of the basis for review by writ of certiorari is a demonstration that "a United States court of appeals … has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power." Sup. Ct. R. 10(a). The Fourth Circuit's denial of the motion for certification via the Clerk and subsequent denial of the motion for reconsideration also via the Clerk, comes within the purview of this Rule.

The Fourth Circuit did not give Bel Air's motion serious, earnest, and thoughtful consideration when viewed in the context of

- the lack of any direct and controlling authority from the Maryland Court of Appeals on the novel questions of law presented for certification;
- the prevalence of the three questions of law in over 2,000 cases nationwide, including Maryland state and federal courts;
- the dominant importance of a decision by the Maryland Court of Appeals to Bel Air and to other Maryland plaintiffs in pending cases; and
- the potential that Bel Air will be denied its contractual rights if the Maryland Court of Appeals in one of the other pending state court cases disagrees with the eventual decision of the Fourth Circuit.

Instead of explaining why certification was not proper or desirable, the Fourth Circuit relegated issuing a ruling to the Clerk, as though it were a mere procedural matter (such as extending the time to file a brief). In light of the other Fourth Circuit cases in which questions of law were certified to a state's highest court for a determinative conclusion, the Fourth Circuit did not explain why Bel Air's case was different or why certification was proper in those case but not in Bel Air's case. In sum, the Fourth Circuit did not treat Bel Air fairly in the denial of its motions. That the unfairness should be reviewed by the Supreme Court in its supervisory power over the administration of justice in the Fourth Circuit.

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