COLORADO SUPREME COURT
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Denver, Colorado 80203

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Colorado Court of Appeals, 2024CA0034, published opinion (2025COA57) by Hon. Schutz (majority), Hon. Kuhn (concurring), Hon. Welling (concurring in part, dissenting in part)

Denver District Court, 2021CV30695, Hon. Marie Avery Moses, Hon. Martin F. Egelhoff, Hon. Jon J. Olafson

Petitioners: Spectrum Retirement Communities, LLC; Anson Operator, LLC; Anthem Operator, LLC; Burr Ridge Operator, LLC; Carmel Operator, LLC; Cary Senior Living, LLC; Cedar Park Operator, LLC; Chandler 2 Operator, LLC; Chandler Operator, LLC; Creve Coeur Operator, LLC; Dougherty Ferry Operator, LLC; Fishers Operator, LLC; Gahanna Operator, LLC; Gilbert Operator, LLC; Green Oaks Operator, LLC; HighPointe Operator, LLC; Hilliard Operator, LLC; Lakeway Operator, LLC; Lakeway Overlook, LLC; Lakeway Townline, LLC; Lincoln Meadows Senior Living, LLC; Lombard Operator, LLC; Lone Mountain Operator, LLC; Mason Operator, LLC; Mesa Operator, LLC; Park Meadows Senior Living, LLC; Peakview Operator, LLC; Peoria Senior Living, LLC; PH Operator, LLC; Pickerington Operator, LLC; Powell 2 Operator, LLC; Reavis St. Holdings, LLC; Reavis St. Operator, LLC; Round Rock Operator, LLC; Santa Fe Operator, LLC; Saxony Operator, LLC; SF Overland Park, LLC; S-K Anson Opportunity II, LLC; S-K Anthem Opportunity I, LLC; S-K Burr Ridge Residential, LLC; S-K Carmel LLC; S-K Cary, LLC; S-K Cedar Park Opportunity II, LLC; S-

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K Chandler 2 Opportunity I, LLC; S-K Chandler Owner, LLC; S-K Crestview, LLC; S-K Creve Coeur Owner, LLC; S-K Dougherty Ferry Owner, LLC; S-K Ellisville, LLC; S-K Fishers, LLC; S-K Gahanna, LLC; S-K Gilbert Residential, LLC; S-K Green Oaks, LLC; S-K HighPointe Owner, LLC; S-K Hilliard Owner, LLC; S-K Lombard Owner, LLC; S-K Lone Mountain, LLC; S-K Lone Mountain Owner, LLC; S-K Mason Opportunity II, LLC; S-K Meridian, LLC; S-K Mesa Opportunity II, LLC; S-K Palos Heights Opportunity II, LLC; S-K Peoria, LLC; S-K Pickerington Opportunity I, LLC; S-K Powell 2 Opportunity I, LLC; S-K Powell Owner, LLC; S-K Round Rock Opportunity I, LLC; S-K Santa Fe Opportunity II, LLC; S-K Saxony Opportunity I, LLC; S-K Shawnee, LLC; S-K Smoky Hill Owner, LLC; S-K South Elgin Opportunity III, LLC; S-K Streamwood Owner, LLC; S-K West Chester Opportunity I, LLC; S-K Westerville Opportunity II, LLC; South Elgin Operator, LLC; Spectrum Park Meadows Land, LLC; Spectrum Retirement of Ohio, LLC; SRC of Arizona, LLC; SRC of Colorado, LLC; SRC of Illinois, LLC; SRC of Indiana, LLC; SRC of Kansas, LLC; SRC of Missouri, LLC; SRC of New Mexico, LLC d/b/a Spectrum Retirement of New Mexico; SRC of Texas, LLC d/b/a Spectrum Retirement of Texas; SRC Rigden Farms, LLC; Streamwood Operator, LLC; West Chester Operator, LLC; Westerville Operator, LLC; and WSPT Hickory View Investors V, LLC v. **Respondent:** Continental Casualty Company.	Case No.: 2025SC433

Attorneys for Petitioners: Michael S. Burg, Reg. No. 7143 mburg@burgsimpson.com David K. TeSelle, Reg. No. 29648 dteselle@burgsimpson.com Holly B. Kammerer, Reg. No. 21752 hkammerer@burgsimpson.com Shane C. Fulton, Reg. No. 52212 sfulton@burgsimpson.com D. Dean Batchelder, Reg. No. 38425 dbatchelder@burgsimpson.com BURG SIMPSON ELDREDGE HERSH & JARDINE, P.C. 40 Inverness Drive East Englewood, Colorado 80112 Tel: (303) 792-5595	
OPENING BRIEF	

CERTIFICATION OF COMPLIANCE

I certify that this brief complies with all requirements of C.A.R. 25, 32, and 53, including all formatting requirements in these rules. Specifically, the undersigned certifies that:

The brief complies with C.A.R. 53(f)(1). It contains 9,385 words. I acknowledge that my brief may be stricken if it does not comply with any of the requirements of C.A.R. 32 or 53.

/s/ David K. TeSelle
David K. TeSelle, Reg. No. 29648

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I. INTRODUCTION

In insurance, words matter. The plain policy language is paramount. Standard-form all-risk commercial property insurance policies start from this straightforward premise: the insurer promises Colorado policyholders that they are protected from *all* risks of direct physical loss or damage not clearly and explicitly excluded. Relying on this clear promise, no Colorado business reasonably expects, after paying millions of dollars for broad all-risk protection, that they have *no* coverage for partial loss or damage, that coverage only exists if all of their property at a covered location becomes *completely* unusable, *especially when such an exclusion is nowhere in the policy's plain language.*

But that is exactly what the split division of the court of appeals held, declaring Colorado law imposes a novel "complete uninhabitably" standard.[1] It literally added the word "complete" to

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[1] *Spectrum Retirement Communities, LLC, et al., v. Continental Cas. Co.*, 2025 COA 57, ¶¶ 18-19, 36-37, 46-47, 49-51 (the "Opinion"). The majority used "uninhabitability" interchangeably with "unusability," despite the fact that neither is defined in, let alone present in, the policy.

the legal standard this court set out nearly sixty years ago, even though it is nowhere in the plain policy language and never before existed under Colorado law.[2] The majority's rule almost wholly eliminates coverage, contrary to Colorado policyholders' reasonable expectations regarding the "all risk" property coverage they purchased to protect their businesses.

If this novel rule is affirmed, there is no longer coverage for Colorado businesses when fire destroys part, but not all, of their property. Or when dangerous levels of carbon monoxide render their property partially, but not completely, dangerous for ordinary use. And for Spectrum,[3] who owns and operates senior housing, assisted living, and memory care facilities for the elderly nationwide, and for whom extensive viral contamination and hundreds of governmental orders forced it to completely shutter substantial elements of its

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[2] *Western Fire Ins. Co. v. First Presbyterian Church*, 437 P.2d 52, 53-55 (Colo. 1968) (confirming coverage under an all-risk policy for loss of use triggered by physical loss where gasoline fumes accumulated within one of four insured church buildings, rendering it "uninhabitable, making further use of the building highly dangerous").

[3] Petitioners are "Spectrum," Respondent is "Continental."

retirement communities, to stop offering key services for its vulnerable residents, and to expend vast sums to physically modify its property and substantially modify its operations—the division's new complete-loss rule means there is no coverage. The majority's rule cannot be correct.

The majority's novel complete-loss rule places this court's seminal insurance law precedent, *Western Fire*, and the rest of Colorado law in direct conflict. Overnight, it transforms Colorado from one of the nation's most business-friendly jurisdictions on policyholder rights, to one of the most business adverse. If insurers want to limit their exposure and exclude partial loss or damage in an all-risk property policy, they certainly can do so. But, to comply with Colorado law, they must clearly and explicitly limit the coverage they offer. They cannot simply take millions in premiums from Colorado businesses on expansive promises of broad coverage, secretly knowing that, after a loss, they will just move the goalposts.

Continental must stand behind the promises it made. For this reason, and because the courts below failed to follow Colorado C.R.C.P. 12 jurisprudence (improperly determining questions of fact contrary to the well-pleaded allegations the complaint, allegations confirmed by citation to scientific literature and governmental orders), Spectrum requests that the courts below be reversed on the issues presented and this matter be remanded for trial on Spectrum's breach of insurance contract and insurance bad faith claims.

II. ISSUES PRESENTED

> 1. Whether the division erred by holding that the *partial* loss of use of insured property, or anything less than the total loss of use of the entire insured property (*i.e.*, "complete uninhabitability"), cannot, as a matter of law, constitute "direct physical loss of or damage to" property for purposes of triggering coverage under an all-risk commercial property insurance policy.
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> 2. Whether it was error to conclude under C.R.C.P. 12(c), as a matter of law, that there was no coverage for direct physical damage to insured property, separate and apart from physical loss.

III. STATEMENT OF THE CASE

A. Spectrum Purchased an All-Risk Insurance Policy at Great Expense to Protect Its Facilities and Operations.

Spectrum owns and operates retirement communities throughout Colorado and several other states, providing for the needs of nearly 4,000 residents. *Opinion*, ¶ 2; CF, pp 1788-95. Spectrum's communities provide its residents with the essentials of life: food, housing, social and communal activities. *Id.*, 1795, 1798-1805. Spectrum offers a broad range of services for its older, vulnerable senior residents: individual residences; tiered care; and communal facilities including restaurants, community rooms, salons, movie theatres, and wellness/therapy centers. *Id.* Spectrum's business depends on its ability to provide, in addition to residences and critical care, invaluable social opportunities that its residents would not otherwise be able to access. *Id.*

To mitigate the risks inherent to senior living facilities, Spectrum prudently purchased a broad "all-risk" insurance policy protecting against all "risks of direct physical loss of or damage to property and/or interests[.]"[4] *Opinion*, ¶ 2; CF, pp 1795-96, 1801, 1829. The policy protected not only Spectrum's property itself but also its operations through protections against, for example, business interruption from physical loss or damage. *Id.* Spectrum demanded and paid for a policy without a virus exclusion, despite the

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[4] Spectrum purchased a policy and a renewal policy, containing materially similar terms, both of which are at issue. CF, pp 1795-96, 1810-91 (attaching policy).

existence of such a widely-used, industry-created exclusion.[5] *Id.*, 1796-98, 1803, 1892-1904. Spectrum paid more than $3 million—premiums celebrated by Continental as "historic"—for what it reasonably believed was broad coverage. *Id.*, 1795-96, 1801, 1803.

B. During the Pandemic, Despite Viral Contamination at Every Location and Hundreds of Governmental Orders, Spectrum Was Ordered to Stay Open.

Spectrum was "substantially impacted" by COVID-19 and the governmental orders combatting it. *Opinion*, ¶ 3; CF, pp 1795-1805. COVID-19 physically contaminated each and every Spectrum property, physically damaging the surfaces and air comprising each property; it infected and sickened thousands, killing residents at every community. *Id.*; *Opinion*, ¶ 68 (dissent). Despite these dangers, as an essential service provider, Spectrum was required to continue its operations (although with significant limitations). *Id.*, ¶ 3.

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5 That viruses can trigger coverage under all-risk policies is no surprise. In 2006, the Insurance Services Office created a form virus exclusion following a SARS coronavirus outbreak. CF, pp 1797-98, 1892-1904. Insurers commonly include this exclusion in policies because they know that viruses can cause physical loss or damage, and the absence of an exclusion demonstrates an intent not to exclude virus-related damages from coverage. *Id.*

Spectrum took heroic measures to protect against the dangers of COVID-19, to mitigate the continuing physical loss and damage, and to comply with hundreds of governmental orders.[6] *Id.*, ¶ 68 (dissent); CF, pp 1795-1805. It shuttered, decontaminated, and physically modified its properties and made numerous operational changes to allow limited use and to mitigate the deadly effects of COVID-19. *Id.* It lost the ordinary use of its property; it ceased social activities and services; it completely closed entire areas of its properties. *Id.* It radically limited access to its facilities; its residents were required to shelter in place; and it was unable to move new residents in, rendering numerous units unusable. *Id.*

C. Without Investigation, Continental Immediately Denied Spectrum's Claim for Coverage.

Spectrum submitted its losses to Continental. *Opinion*, ¶ 3. *Immediately and without investigation*, Continental denied coverage. *Id.*; CF, pp 1804, 1933-49. Denied any coverage under the policy, Spectrum filed suit, asserting claims for breach of contract, statutory

[6] In doing so, Spectrum complied with its duty to limit losses. CF, pp 1849, 1850.

delay/denial, and common law bad faith. *Id.*, 1, 1786. Spectrum alleged it suffered physical losses and damages, triggering coverage under the policy. *Id.*, 1795-1805. Spectrum not only pleaded specific facts documenting its losses, it referenced scientific literature, governmental authorities, and public health orders supporting and confirming its allegations.[7]

D. The District Court Entered Conflicting Rule 12 Orders, Ultimately Granting Continental's Motion for Judgment on the Pleadings under C.R.C.P. 12(c).

Continental's first Rule 12 motion, filed under C.R.C.P. 12(b)(5), was largely denied by the district court. CF, pp 202, 1364 (the First Order).[8] It set out a thorough analysis considering Spectrum's detailed allegations regarding the substantial impact of COVID-19 and governmental orders, the policy language itself, and Colorado

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[7] For example, Spectrum's complaint referenced scientific literature explaining how COVID-19 physically contaminated and altered both air and surfaces, documenting how it spread and persisted over time, as well as governmental orders concluding COVID-19 caused property damage. CF, pp 1796-99, 1906-07, and 1905-32 generally.

[8] The First Order broadly denied Continental's Rule 12(b)(5) motion, dismissing a narrow claim for coverage (ingress/egress coverage) that is not at issue here. CF, pp 1378-79.

law, specifically analyzing *Western Fire*. It rejected Continental's arguments, concluding Spectrum properly alleged coverage under the policy.

Following more than a year of intensive discovery and a docket rotation, Continental re-filed under Rule 12, now under C.R.C.P. 12(c).[9] Id., 70566. In a narrow order that contained no independent analysis of Spectrum's detailed allegations, the policy language, or *Western Fire*, the district court granted Continental's motion, ruling a mere two weeks after it was ripe. *Id.*, 7716 (the Second Order). Now, it held that *Western Fire* was "inapplicable" because Spectrum, as an essential business forced to remain partially open during the pandemic, could not allege that its property was "*uninhabitable and unsafe and unusable for any and all purposes whatsoever*." *Id.*, 7721 (emphasis added). It concluded not only did Spectrum fail to make this allegation, but Spectrum could not make it, "because COVID-19

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[9] Discovery was broad: more than 1,000,000 documents were disclosed, 32 depositions were taken, and 34 discovery disputes were addressed by the court-appointed special master. CF, pp 8206, 8209, 8213 (referencing same in motion). Regardless, Continental filed under Rule 12(c), rather than Rule 56, cabining the district court's analysis and withholding all discovery from it.

does not physically injure or harm property as a matter of law." *Id.*

Spectrum timely appealed.

E. The Division Below Unanimously Confirmed *Western Fire* Governs, but on a Split Decision, Held It Requires "Complete Uninhabitability" Before Coverage Exists.

At the court of appeals, the division began by noting:

> If the facts in the pleadings can support the conclusion that Spectrum suffered a direct physical loss of property, then Spectrum has viable claims [under the policy].

Opinion, ¶ 13.

The division unanimously held: *Western Fire* governs; direct physical loss does not require physical alteration to property; and, physical loss may result from airborne materials. *Id.*, ¶¶ 18, 36, 66. It also agreed that deadly diseases, such as COVID-19 in an assisted living facilities providing residences to the elderly, could cause "direct physical loss or damage" to property—it expressly declined to agree with Continental that they could not.[10]

[10] The division refused to adopt Continental's argument that COVID-19 cannot cause physical loss as a matter of law. *Opinion*, ¶¶ 46-47. Additionally, it partially reversed the district court, holding that Spectrum properly alleged coverage under the policy's Health Care Endorsement, providing coverage separate from physical loss or damage. *Id.*, ¶¶ 52-64, 66. This unchallenged holding is not at issue.

However, the majority added a novel complete loss requirement not present in *Western Fire*, the policy language (which it never analyzed), or Colorado law. Narrowly interpreting *Western Fire*, and without looking at how Colorado law interprets uninhabitability, it held that *Western Fire* required that property be "completely uninhabitable" or "completely unusable"—that is, there must be complete loss—before coverage for either physical loss or physical damage exists. *Id.*, ¶¶ 18-19 (adding complete requirement, using terms interchangeably), 36-37 (no coverage even though operations were "significantly impacted" because some services continued), 39-40 (analysis focused on when building became "unusable," no coverage when only "partially unusable"), 46-47 (no coverage because no complete loss), 48-51 (applying requirement to physical damage).[11]

The dissent rejected this novel requirement. *Id.*, ¶¶ 67-69 (Spectrum alleged "sufficient portions of its facilities were rendered

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[11] Because it applied its novel complete loss requirement to claims for physical damage, it affirmed the district court's Second Order without considering Spectrum's Rule 12 argument. *Opinion*, ¶¶ 12, 48-51.

‘uninhabitable and highly dangerous,’” listing exemplar allegations). It noted Spectrum alleged both complete loss of use of portions of its facilities as well as loss of intended and ordinary use of its facilities. *Id.*, ¶¶ 68-69. Looking to the “entire context” of the loss, it focused on the nature of the insured facilities, the nature of the cause of the loss, and its scope and extent. *Id.*, ¶ 72 (further, at ¶¶ 73-76, looking to Colorado legal principles: liberal construction in favor of coverage, requirement of clear coverage limits, and importance of reasonable expectations).

Spectrum timely sought, and this court granted, review.

IV. ARGUMENT SUMMARY

First, the majority erred in imposing a novel complete loss of use requirement for Colorado policyholders. Its rule—that for coverage under a standard-form all-risk commercial property insurance policy triggered by direct physical loss or damage, there must be complete loss of use (the property must be completely uninhabitable or unusable)—is unsupported. It is contrary to: the policy language (which nowhere mentions a complete-loss requirement); Colorado law regarding policy interpretation; the reasonable expectations of Colorado insureds; and *Western Fire*, this court's seminal decision that confirmed that the physical loss of use of a portion of insured property is a covered loss.

Second, the district court erred by entering judgment on the pleadings against Spectrum, resolving questions of fact contrary to its well-pleaded complaint. Spectrum's complaint properly pleaded facts of physical damage from COVID-19, facts triggering coverage under the policy. By interjecting itself as an expert and resolving facts against Spectrum on a Rule 12 motion as if they were questions of law, the district court failed to follow Colorado law.

V. "COMPLETE UNINHABITABILITY" IS NOT REQUIRED FOR DIRECT PHYSICAL LOSS OR DAMAGE UNDER AN ALL-RISK PROPERTY INSURANCE POLICY

A. Standard of Review and Preservation.

Spectrum preserved this issue. CF, p 7317; *Opinion*, ¶¶ 10, 12. Review is de novo. *Mt. States Mut. Cas. Co. v. Roinestad*, 2013 CO 14, ¶ 13 (insurance policy interpretation); *Goodson v. Am. Standard Ins. Co.*, 89 P.3d 409, 414 (Colo. 2004) (questions of law).

B. Longstanding Principles of Colorado Law Confirm Insurance Policies Are Liberally Construed in Favor of Coverage.

Courts apply principles of contract interpretation to insurance policies, looking to the plain language of the agreement to promote the intent of the parties. *Cary v. United of Omaha Life Ins., Co.,* 108 P.3d 288, 290 (Colo. 2005); *Simon v. Shelter Gen. Ins. Co.*, 842 P.2d 236, 239 (Colo. 1992). Unless otherwise defined, words are given their plain and ordinary meaning in light of the entire policy. *Allstate Ins. Co. v. Huizar*, 52 P.3d 816, 819 (Colo. 2002); *Cyprus Amax Minerals Co. v. Lexington Ins. Co.*, 74 P.3d 294, 306 (Colo. 2003). Courts must harmonize and give effect to all provisions so none are rendered meaningless. *Chacon v. Am. Family Mut. Ins. Co.*, 788 P.2d 748, 753 (Colo. 1990) (dissent) (citing *Pepcol Mfg. Co. v. Denver Union Corp.*, 687 P.2d 1310, 1313 (Colo. 1984)). Courts apply an average policyholder's understanding, and may look to dictionaries, if helpful; not the technical definitions of insurance experts. *Simon*, 842 P.2d at 240; *Hecla Mining Co. v. N.H. Ins. Co.*, 811 P.2d 1083, 1091 (Colo. 1991).

Insurance agreements are "unique" and Colorado courts have a "heightened responsibility" in reviewing them. *Cary v. United of Omaha Life Ins. Co.*, 68 P.3d 462, 466 (Colo. 2003) (noting their "special nature"). They are "unique," and insureds enter into them for financial security and protection against unforeseen calamities. *Bailey v. Lincoln Gen. Ins. Co.*, 255 P.3d 1039, 1048 (Colo. 2011); *Goodson*, 89 P.3d at 414.

Thus, while principles of contract interpretation are applied, Colorado courts have taken on a "heightened responsibility" to ensure that policy terms comply with public policy and principles of fairness. *Thompson v. Md. Cas. Co.*, 84 P.3d 496, 501-02 (Colo. 2004). As discussed below, insurance policies must be liberally construed to provide the broadest possible coverage and any limitations on coverage must be explicit. *Id.*, at 502; *Barnett v. Am. Family Mut. Ins. Co.*, 843 P.2d 1302, 1307 (Colo. 1993) ("[A]s a matter of public policy, insurers should be required to disclose fully and fairly to the purchasing public what insurance protection is actually being provided for the premium charged." (quotation marks omitted)).

This is particularly true of "all-risk" insurance policies. An all-risk policy is different in kind, and is considerably more expansive, than a named-peril policy, where only specific enumerated risks are covered. 1 NEW APPLEMAN INSURANCE LAW PRACTICE GUIDE 3.09 (coverage is "considerably more expansive" than named-peril coverage). All-risk policies provide coverage for all losses to the property unless expressly excluded.[12] *See Kane v. Royal Ins. Co.*, 768 P.2d 678, 679 n.1 (Colo. 1989).

Insurance policies are liberally construed in favor of broad coverage. *See Thompson*, 84 P.3d at 502 (duties construed "liberally with a view toward affording the greatest possible protection to the insured"); *see also Fire Ins. Exch. v. Bentley*, 953 P.2d 1297, 1300 (Colo. App. 1998). When the insurer wants to restrict coverage, limitations must be clearly stated: "having affirmatively expressed coverage through broad promises, the insurer assumes a duty to define any limitations upon that coverage in clear and explicit

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[12] Given this expansive nature, the typical observation that the lack of an exception cannot create coverage should be inapplicable to an all-risk policy. If coverage for all physical loss or damage exists unless expressly excluded, the absence of widely-used exclusions or standard-form limiting language is not *creating* coverage, it is simply not removing it.

terms[.]" *Hecla Mining* , 811 P.2d at 1090. Absent clear limitations or conflicting language, the policy is construed in favor of coverage. *See Cyprus Amax*, 74 P.3d at 306-07. Limiting language cannot be added by the court. *See id.*, at 299; *Western Fire*, 437 P.2d at 56.

Insurance policies are construed to meet the policyholder's reasonable expectations. *Hoang v. Assurance Co. of Am.*, 149 P.3d 798, 803 (Colo. 2007).

> Colorado courts have honored the reasonable expectations of an insured where an ordinary, objectively reasonable person would, based on the language of the policy, fail to understand that he or she is not entitled to the coverage at issue.

Bailey, 255 P.3d 1039, 1050 (2011).

Public policy requires insurers to fully and fairly disclose the coverage that is provided for the premium charged. *Id.*, at 1049-50; *Davis v. M.L.G. Corp.*, 712 P.2d 985, 989 (Colo. 1986) (courts are properly concerned with deceptive language that leads policyholder to believe they have "paid for broad protection," discussing doctrine and cases at n.6). Inadequate disclosures undermine the fundamental reason for buying insurance—protecting against risk and providing peace of mind. *Bailey*, 255 P.3d at 1049-50; *see also*

REST. (SECOND) CONTRACTS, § 211, cmt. f (party to form agreement not bound to unknown terms "beyond the range of reasonable expectations" that "eliminate[] the dominant purpose of the transaction").

"[W]e have adopted the common meaning of words in construing insurance contracts to ensure that the reasonable expectations of an ordinary individual purchasing the contract will be fulfilled." *Bailey*, 255 P.3d at 1051 (*quoting Carroll v. CUNA Mut. Ins. Soc.*, 894 P.2d 746, 749-50 (Colo. 1995)); *see also Opinion*, ¶ 76 (dissent) (absence of exclusion in all-risk policy supports reasonable expectation of coverage). The policy as a whole is construed "as it would be understood by an ordinary insured." *Bailey*, 255 P.3d at 1051. This fits squarely with other principles of contract interpretation. *Id.*, at 1049 (reasonable expectations is "principle[] of fairness").

Any ambiguity in the policy is resolved in favor of coverage. *Compass Ins. Co. v. City of Littleton*, 984 P.2d 606, 613, 619 (Colo. 1999) (describing same as "fundamental principle"). Policy language is ambiguous if, given the common meaning of the words chosen by the insurer, it is susceptible to two different but reasonable meanings. *Hecla Mining*, 811 P.2d at 1090-92. If so, the language is construed in favor of coverage. *Id.* (further noting, at n.13, that conflicting authority regarding meaning of policy language supported determination of ambiguity).

C. *Complete* Uninhabitability Is Not Required to State a Claim for Direct Physical Loss.

1. The policy language controls: there is no basis for the majority's *complete*-loss requirement.

There is no basis for the majority's complete-loss requirement. Rather, the policy language, as read by a reasonable policyholder and as construed in light of longstanding Colorado law, provides coverage for "direct physical loss," whether partial or complete.

a. The policy does not require complete physical loss.

Spectrum's policy provides broad coverage:

> [T]his policy insures against risks of direct physical loss of or damage to property and/or interests described herein at covered Locations.

CF, p 1829. As a starting point: this is not expressly limited to "*complete*" physical loss or damage. It does not say that. *See Hecla Mining*, 811 P.2d at 1090 (coverage limitations must be clearly stated).

In fact, the policy expressly contemplates that *partial* physical losses are covered. It repeatedly references partial (and complete) loss. For example:

- Business interruption losses from "physical loss or damage" are covered for such time as needed to remediate "such ***part*** *of the property*" that was impacted. CF, p 1830 (emphasis added).
- Losses incurred to continue normal operations following "physical loss or damage" are covered for such time as needed to remediate "such ***part*** *of the property*" that was damaged. *Id.*, 1835 (emphasis added).
- After a loss, the insured is obligated to "protect the property from ***further*** *loss or damage*" and to "furnish a complete inventory of the destroyed, damaged *and undamaged property*[.]" *Id.*, 1849 (emphasis added).
- If the insured can reduce losses "by ***complete*** *or* ***partial*** *resumption of operations* of the property … whether damaged or not," they are obligated to do so. *Id.*, 1850 (emphasis added).
- The insured's losses from "physical loss or damage" to their leasehold interest are covered, whether the property becomes "***wholly***" or "***partially***" untenable or unusable. *Id.*, 1836 (emphasis added).
- If there is physical loss or damage to machinery, the policy clarifies that in no event shall "loss or damage" mean "***total*** *loss*." *Id.* (emphasis added).

The policy does not limit "physical loss" to "complete loss." That a policyholder must mitigate losses by protecting property from "*further* loss or damage" or "*partial*" resumption of operations means there is coverage for *partial* losses. *Id.*, 1849, 1850 (emphasis added). Otherwise, if I've already lost all use, what am I protecting? How can I resume partial operations? There must be coverage for partial loss: there must be unaffected property to protect; there must be an ability to continue operations. Confirming this, where complete loss is required, it is expressly stated. *Id.*, 1836.

The policy language itself—read consistently, as a whole, and in light of these requirements—confirms coverage for partial losses.

b. The plain and ordinary meaning of "loss" is not limited to complete loss.

The plain and ordinary meaning of direct physical loss, as understood by a reasonable policyholder, is not limited to complete loss. *Simon*, 842 P.2d at 240. The common meaning of "loss" confirms this.

Loss	"the ***partial*** or complete deterioration or absence of a physical capability or function," or "***decrease*** in amount, magnitude, value or degree" MERRIAM-WEBSTER (available online at www.merriam-webster.com/dictionary/loss) (emphasis added).
	"the act or fact of losing," defined as "to undergo deprivation of something of value or ***deterioration*** of

> a valuable quality," or "***decrease*** in amount, magnitude, or degree" WEBSTER'S THIRD NEW INT'L DICTIONARY, 1338 (2002) (emphasis added).
>
> "the disappearance *or* ***diminution*** of value" BLACK'S LAW DICTIONARY, (12^{th} ed. 2024) (emphasis added).

This fits with a reasonable person's understanding: loss includes partial deprivation—it's not limited to "complete" loss. Everyday examples illustrate this: investment loss can be partial or complete, so can weight loss, hair loss, loss of value, hearing loss, and so on. If Continental intended to limit physical loss to complete loss, it knew how to do that. CF, p 1836 ("wholly" unusable; "total loss"); *Cyprus Amax*, 74 P.3d at 307 ("If Insurers intended a different result, it was incumbent upon them to so delineate.").

c. The policy must be liberally construed in favor of partial loss coverage, not artificially restricted.

Colorado law requires insurance policies to be "liberally" construed in favor of "the greatest possible protection." *Thompson*, 84 P.3d at 502; *Bentley*, 953 P.2d at 1300. Coverage limits must be clearly stated, otherwise the policy is construed broadly in favor of coverage. *Hecla Mining*, 811 P.2d at 1090. The majority turns this principle of Colorado law, to say nothing of other such principles, upside down: it imposed an unstated complete-loss restriction, radically limiting coverage. This is error.

The all-risk nature of the policy supports the conclusion that partial physical loss is covered. *See Kane*, 768 P.2d at 679 n.1. Coverage is provided for *all risks*, not just the risk of complete loss. Continental could have employed clear limiting language or widely-used, standard-form exclusions, but it chose not to. There is no complete loss requirement in the policy. There is no partial-loss exclusion. Further, while a form virus exclusion is now found in more than 80% of commercial insurance policies, it is absent from Spectrum's policy.[13]

d. A reasonable policyholder expects partial loss coverage.

Spectrum, and Colorado policyholders generally, reasonably expect that a standard-form, all-risk property policy insuring against

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[13] CF, pp 1892-1904; *N. State Deli, LLC v. Cincinnati Ins. Co.*, 908 S.E.2d 802, 812 (N.C. 2024) (prevalence of exclusion). Like the policy language discussed above, whether the absence of a widely-used exclusion speaks to the scope of the coverage grant or the policyholder's reasonable expectations, *see Opinion*, ¶ 76 (dissent), that Spectrum demanded a policy without a virus exclusion directly impacts the coverage analysis.

"direct physical loss" will, in fact, cover direct physical loss whether partial or total. The policy language is broad (covering *all risks*, protecting against *physical loss*), unlimited by narrowing language, exclusions, or technical definitions. Colorado courts have a "heightened responsibility" to align coverage with these reasonable expectations. *Thompson*, 84 P.3d at 501-02; *Hoang*, 149 P.3d at 803; *see also Opinion*, ¶¶ 75-76 (dissent) (Spectrum had reasonable expectation of coverage). The majority's conclusion that only a sliver of the expected protection is actually provided undermines the reasons Spectrum and other Colorado businesses buy insurance: "to protect 'themselves from unforeseen calamities and for peace of mind.'" *Bailey*, 255 P.3d at 1049 (*quoting Goodson*, 89 P.3d at 414).

Spectrum's expectations of coverage fit with what happens every day. When carbon monoxide, smoke, or some other dangerous or noxious substance renders part of a property unusable or impairs its functionality, Colorado policyholders rightly expect coverage. These risks are the reason why they bought insurance to protect themselves; coverage for these risks—whether they affect part or all of the insured property—is not limited or excluded by policy language. And, as expected, such coverage is routinely, and properly, found to exist. *See, e.g., Mellin v. N. Sec. Ins. Co.*, 115 A.3d 799, 805 (N.H. 2015) (partial loss of use of residence from offensive odor); *Oregon Shakespeare Festival Ass'n v. Great Am. Ins. Co.*, 2016 WL 3267247, at *3, *9 (D. Or. June 7, 2016) (partial loss of use from wildfire smoke) *vac'd by settlement*; *Stack Metallurgical Servs., Inc. v. Travelers Indem. Co. of Conn.*, 2007 WL 464715, at *8 (D. Or. Feb. 7, 2007) (loss of intended use of sterilizing equipment).

e. Spectrum previously tendered—and Continental paid—a claim for partial loss under the policy.

Indeed, shortly after the policy was issued, Spectrum suffered losses from smoke and water damage to portions of its Round Rock community following a roof fire. Smoke infiltrated portions of the property, impairing its use; the fire itself and water from extinguishing it seeped into portions of the property, causing damage. Spectrum tendered claims for these partial losses.

Continental paid these claims. They were not disputed, nor should they have been. They were unremarkable claims for coverage for losses under an all-risk commercial property insurance policy.

They are exactly why Colorado businesses buy insurance: to protect themselves. As relevant here, there is no meaningful distinction between Spectrum's Round Rock claim and the claims at issue here. Both involve partial physical loss (and, as discussed below, physical damage) and both are covered under the policy.

f. Even if a complete-loss requirement were reasonable (it is not), at most the policy would be ambiguous and construed in favor of coverage.

Notwithstanding the above, if it appears that the majority's complete loss requirement were also reasonable (and it is not), at best that makes the policy language ambiguous.[14] *See Hecla Mining*, 811 P.2d at 1090-92. Even if true, because ambiguous language is read in favor of the policyholder, coverage still exists. *Thompson*, 84 P.3d at 502. Continental could have, but decided not to, define "physical loss" to expressly limit coverage. It must live with its decision to exclude a definition or other limiting language. *Cyprus Amax*, 74 P.3d

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[14] Even if support exists for the majority's narrow complete-loss reading of the policy, that does not make Spectrum's understanding of the policy unreasonable. It simply means that the policy language has two reasonable readings: partial loss coverage exists based on the above discussion, and, as the majority concluded and Continental asserts, coverage might exist only for complete loss.

at 307. As recently discussed by the North Carolina Supreme Court, when an insurer uses broad, "slippery," language, it cannot hide behind an undisclosed, narrower definition.

> It is the insurance company's responsibility to define essential policy terms and the North Carolina courts' responsibility to enforce those terms consistent with the parties' reasonable expectations. Otherwise, insurance companies are licensed to pitch consumers on an expansive, "all-risk" policy, while hiding behind a narrower definition imposed by judicial fiat when it comes time to pay out.

N. State Deli, 908 S.E.2d at 812, 813 (citation omitted).[15] Allowing insurers to advertise coverage based on broad language but to pay claims based on secret, narrow definitions runs directly contrary to Colorado law: policies are construed according to the policyholder's understanding and reasonable expectations, with any ambiguities resolved in favor of coverage.

2. The majority's complete loss requirement is inconsistent with *Western Fire* and caselaw nationwide applying it.

The majority's complete loss requirement is not only contrary to

[15] *North State Deli* cited to varied holdings regarding coverage as support for its conclusion of ambiguity. *Id.*, 908 S.E. 2d at 813; *see also Hecla Mining*, 811 P.2d at 1092, n.13 (same).

the above, but it is also contrary to this court's holding in *Western Fire*. It transforms Colorado from one of the most pro-policyholder states for coverage purposes to one that ignores policy language and deprives commercial policyholders of their reasonable expectations. Respectfully, this court should reverse and confirm that insureds have partial loss coverage—based on the policy language, Colorado law, and a proper reading of *Western Fire*.

a. Western Fire confirmed that loss of use from a dangerous airborne substance is a covered direct physical loss.

In *Western Fire*, this court held that the loss of use of insured property from a dangerous airborne substance, without any requirement of physical damage, is a covered physical loss under an all-risk property insurance policy. *Id.*, 437 P.2d at 55-56.[16] This court affirmed the conclusion that coverage existed for the church's loss of

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[16] *Western Fire* relied in part on *Hughes v. Potomac Insurance Co.*, 199 Cal. App. 2d 239 (1962), where a landslide tore away the soil supporting the insured home, perching it on a cliff overhanging a creek. *Id.*, 437 P.2d, at 55-56. The California court rejected the argument that there was no physical loss because the home itself was untouched: the policy insured the home—meaning a place safe for occupancy—and, after the landslide, plainly it was no longer safe.

use. *Id.*

> When [considered in "proper context"], this particular "loss of use" was simply the consequential result of the fact that because of the accumulation of gasoline around and under the church building the premises became so infiltrated and saturated as to be uninhabitable, *making further use of the building highly dangerous*. All of which we hold equates to a *direct physical loss* within the meaning of that phrase as used by the Company in its Special Extended Coverage Endorsement insuring against "all other risks."

Id., at 55 (emphasis added). Once the gasoline had accumulated to the point it was dangerous, there was a loss of use: the church could no longer be used as a church.

b. Western Fire does not require complete loss.

Western Fire's key observation is that insurance coverage exists for loss of use from a dangerous airborne substance, whether that loss is as to some or all of the insured property. The policyholder can no longer use their property as they had and that loss is just as detrimental to them as if the property had been physically damaged or destroyed. Spectrum met this standard. It properly alleged direct physical loss—it alleged that it could not safely use its property, it lost the ordinary use of its property, it lost the complete use of key portions of its property—entitling it to proceed on its claims.

Neither the facts nor the logic of Western Fire require complete loss. *Western Fire* itself did not contemplate complete loss: one of the four insured buildings was impacted, three were not. As to the one affected building, that the building itself may have been "uninhabitable" does not mean that all insured property must be uninhabitable to establish physical loss. Rather, the plain meaning of "physical loss," as discussed above, encompasses partial loss. There is no provision limiting coverage to complete loss. And *Western Fire* itself admonished against adopting an insurer's restrictive interpretation "in the absence of a provision specifically limiting coverage." *Id.*, 437 P.2d at 56.

Further, "uninhabitable"—the term mentioned in *Western Fire*—does not mean wholly unoccupiable or completely unusable for any purpose. It means, and expressly says that it means, that the property is uninhabitable because it is dangerous to use. *Id.*, at 55. This focuses on the fact that the property cannot be safely used, not on the completeness of the loss. Imagine if the fire department had closed only the church sanctuary, not the entire church building. The holding would be the same: coverage exists because the property (the sanctuary) cannot be used. That other portions of the building could be used for other purposes (as a community space, classrooms, offices, storage) does not change the fact of loss to the policyholder.

Spectrum's allegations track this language and logic: it was highly dangerous to use its property—it lost its use. Spectrum's vulnerable, elderly residents and employees were falling ill and dying because every location was contaminated by a persistent, dangerous physical substance. Residents were sheltering in place: they could not leave their rooms; they ate alone; their loved ones could not visit them; they were prohibited from socializing in common spaces and from using the community-focused amenities that were core to Spectrum's business.

Spectrum not only alleged that it was highly dangerous to use its property, it further alleged that it lost the ordinary and intended use of its property, and that it lost complete use of substantial portions of its property. *Opinion*, ¶¶ 68-69 (dissent) (summarizing allegations). Looking again to the central point of *Western Fire*, this is exactly why loss of use is a covered loss: the policyholder cannot use their property for the function they ordinarily did or to the extent they ordinarily did. Just as the church in *Western Fire* no longer had a church, Spectrum and its elderly residents no longer had retirement communities. *Opinion*, ¶ 69 (specifically noting Spectrum could no longer operate as retirement community). Spectrum properly alleged direct physical loss as contemplated by *Western Fire*'s rule: it lost the use of its property.

Loss of ordinary and intended use is covered direct physical loss. Imagine again that only the sanctuary of the church in *Western Fire* had been ordered closed. That loss of ordinary and intended use—the church could no longer hold services or perform other ceremonies—would certainly be a loss. This loss of functionality—or, the fact that uninhabitability does not require total uselessness—has been recognized by this, and other courts. The year before *Western Fire*, this court held that property became uninhabitable when portions of it could not be used for its intended purpose, not that it could not be used for any purpose whatsoever.[17] *Mulhern v. Hederich*, 430 P.2d 469, 470 (Colo. 1967) (while home could be occupied, a portion thereof was uninhabitable because it "could not be used for the purpose for which it was designed"). Spectrum's retirement communities no longer operated as retirement communities during the pandemic: its residents were isolated, sheltering in place; its restaurants and communal spaces were closed; its housing units were left empty; key operations were terminated, facilities shuttered.

Other cases similarly recognize that loss of ordinary and intended use is a covered direct physical loss.

> [There is] a contextual and common-sense expectation that insurance should protect from threats to property that make it unusable for the purpose for which it is insured. Property "loss" surely occurs when it is no longer

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[17] Consistent with this, Colorado statute defines uninhabitable property as lacking important health and safety characteristics. C.R.S. § 38-12-505(1) (*i.e.*, lack of running water, functioning heat); *see also* §§ 501(2)(d) (protecting health and safety); 503(2)(a) (warranty of habitability breached where property's condition interferes with "life, health, or safety"); 505(3)(c) (right to "safe and healthy housing" exists under warranty of habitability). Property lacking these characteristics breaches the warranty of habitability and, in pointed contrast with the majority's logic, the resident need not move out to make a claim for their breach.

> usable for its insured purpose, as a policyholder would reasonably expect.

N. State Deli, 908 S.E.2d at 810 (rejecting insurer's argument (that governmental orders regulate people, not property, so there is no covered loss) because "loss" overlaps with and must be sensitive to purpose of property's "use"); *see also Huntington Ingalls Indus., Inc. v. Ace Am. Ins. Co.*, 2022 VT 45, ¶ 29 (citing *Western Fire*, further noting that physical loss includes not only when the property cannot be used due to health hazard, but also in "specific situations based on how the property was intended to be used and why it cannot be used in that manner anymore").

People use property—that's why it's valuable. Policyholders insure against the risk of loss of property to protect this value. The logic of *Western Fire* is that the deprivation of the ordinary or intended use of property is a loss. Insureds cannot use their church as a church, cannot use their basement or home as intended, cannot use their business property as intended and they purchased insurance to guard against this risk.

Complete loss of use of portions of the insured property is covered loss. Again, *Western Fire* confirmed coverage exists where some, but not all, insured property cannot be used. And again, consider the example of the fire department closing only the church's sanctuary. Whether that is viewed as loss of ordinary and intended use or as complete loss of a portion of the insured property, *Western Fire* says that coverage exists because there is a physical loss of use. The majority's focus on the church *building* as a unit of loss, instead of the nature and impact of the loss of use of the policyholder's property, misunderstands *Western Fire.*[18]

Courts invoking the logic of *Western Fire* have sustained claims for coverage based on partial loss of use—in cases involving viruses, harmful odors, and wildfire smoke. *See, e.g., Huntington Ingalls*, 2022 VT 45, ¶¶ 29, 31 (loss "may be in whole or in part"); *Mellin*, 115 A.3d

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[18] In fact, it further calls the majority's conclusion into question. Why is the *building* the relevant unit of loss? The policy does not address buildings, it covers property at locations. In reality, it appears the majority focused on complete loss to *buildings* because that is another (unfortunately artificial) bright-line factor: all use of this discrete thing is lost. But that is not *Western Fire*'s focus, that is not the policy's focus, and that does not address the loss to the policyholder.

at 805 ("physical loss to property" includes loss from odor rendering property "temporarily or permanently unusable or uninhabitable"); *Oregon Shakespeare Festival Ass'n*, 2016 WL 3267247, at *3, *9 (coverage for cancellation of some, but not all, performances because of wildfire smoke). These cases rightly focus on the loss to the policyholder—which is exactly what the policyholder expected they were protected against.

In these ways, consistent with Western Fire, Spectrum alleged coverage: it suffered physical loss causing loss of use. Spectrum's allegations fit squarely within a proper reading of *Western Fire*. It was extremely dangerous and no longer safe to operate Spectrum's retirement communities. It could no longer operate as a retirement community. It lost the complete use of certain significant portions of its facilities. Just as the church in *Western Fire* was not able to function as a church while its property was impacted, Spectrum was not able to operate as a safe, community-oriented retirement community during the pandemic.

The majority's novel complete-loss rule turns *Western Fire* on its head and places it at odds with Colorado law. Loss of use from direct physical loss is covered, but only if the insured property is completely uninhabitable and unusable? Where is that found in the policy language, in the insured's reasonable expectations, or in Colorado law interpreting insurance policies? The majority erred when it twisted the logic of *Western Fire*, creating fundamental conflicts between it and standard-form all-risk policy language and longstanding Colorado law regarding the interpretation of insurance policies. Colorado policyholders are entitled to coverage for a loss of use, whether partial or complete, of their insured property: *Western Fire* supports, and does not undermine, this straightforward conclusion.

D. ***Complete*** **Uninhabitability Is Not Required to State a Direct Physical Damage Claim.**

The majority's complete unusability requirement is similarly unjustified—if not more so—for Spectrum's claim for coverage for physical damage. The above discussion regarding physical loss applies here with added force: nothing in the policy language, Spectrum's reasonable expectations, Colorado law, or *Western Fire* imposes a complete loss requirement on claims for physical damage.

Simply put: complete property destruction is not a coverage requirement. Considering the points made above, here in the context of physical damage, confirms this.

There is no complete loss requirement in the policy. Instead, its language expressly contemplates coverage for physical damage, whether in whole or in part. *See* Section V.C.1.a *supra* at 19-21 (citing CF, pp 1830 ("*part* of the property" that has been damaged), 1835 (same), 1849 (requiring protection against "*further*" damage and inventory of "*undamaged property*"), 1850 (requiring reduction loss by "*complete* or *partial* resumption of operations"), 1836 (coverage where leasehold interest is "*wholly*" or "*partially*" unusable, damage does not mean "*total* loss" (emphasis added)).

The policy language's plain meaning does not require complete unusability. The common meaning of "damage" confirms this fact. *Cyprus Amax*, 74 P.3d at 306.

Damage	"loss or harm resulting from injury to … property"; "damage suggests injury that *lowers value or* ***impairs usefulness***" MERRIAM-WEBSTER (available online at https://www.merriam-webster.com/dictionary/damage) (emphasis added). "loss due to injury" where "injury" means "an act that

> damages, harms, or hurts" where "[damage] applies to ***injury involving loss***, as of property, value, or ***usefulness***" WEBSTER'S THIRD NEW INT'L DICTIONARY, 571, 1164 (2002) (emphasis added).

"Damage" is injury that "impairs usefulness," it neither supports nor requires a complete-unusability requirement. Further, the policy distinguishes between "damage" and "destroy." CF, pp 1830, 1849. "Destroy" commonly means complete loss: "*to ruin* the structure, organic existence, or condition of : *damage beyond repair*" or "*to put out of existence*." MERRIAM-WEBSTER (available online at https://www.merriam-webster.com/dictionary/destroy (emphasis added)). "Damage" must mean something other than "destroy," the majority cannot read it out of the policy. *See Chacon*, 788 P.2d at 753 (dissent, citing *Pepcol Mfg.*, 687 P.2d at 1313).

Principles of Colorado law regarding insurance policy interpretation reject the majority's novel complete loss requirement for physical damage. *First*, insurance policies are liberally construed in favor of broad coverage. *Thompson*, 84 P.3d at 502; *Bentley*, 953 P.2d at 1300. Coverage grants, especially in an all-risk policy, are read to provide coverage; restrictions on coverage must be clear and express. *Hecla Mining*, 811 P.2d at 1090; *Cyprus Amax*, 74 P.3d at 299.

Second, a reasonable policyholder expects coverage for physical *damage* to their property, not only from its destruction, from an all-risk policy with no express coverage limits or exclusions. *Bailey*, 255 P.3d at 1049-51. A reasonable policyholder properly expects coverage on the facts here, just as they expect coverage when a flood or a fire damages part, but not all, of their property. Property damaged does not need to be completely destroyed or unusable before coverage exists—everyday, Colorado businesses make claims for, and coverage is provided for, partial loss: when, for example, fire damages part of their offices or where flooding impacts portions of their operations. Again, recall that Continental paid a claim under the policy for damage from a roof fire at Spectrum's Round Rock facility. Complete loss is simply not required and if Continental intended to limit coverage in this way, it had an affirmative duty "to disclose fully and fairly" what protection it was actually providing. *Davis*, 712 P.2d at 990 n.6.

Third, if it remains unclear that partial loss triggers coverage, that simply means that the policy language is ambiguous. *Hecla Mining*, 811 P.2d at 1090-92. There is nothing unreasonable about Spectrum's reading of the policy, therefore, if the majority's complete loss reading is reasonable, then the policy is ambiguous and this ambiguity must be resolved in favor of coverage. *Thompson*, 84 P.3d at 502.

Western Fire does not require complete loss for physical damage. The majority erred both in reading into *Western Fire* a complete-loss requirement to demonstrate "physical loss," and then in extending that requirement to serve as a barrier to establishing "physical damage." As above, neither the facts nor logic of *Western Fire* require complete unusability for loss from physical damage. If part of the church building was damaged (imagine there was a fire), it cannot seriously be argued there would be no coverage because only *part* of the church was damaged. The logic of *Western Fire* does not support such a conclusion. *See Huntington Ingalls*, 2022 VT 45, ¶¶ 41-43 (sufficiently alleging physical damage to property where operations, which were ordered to remain open, were continuously contaminated).

Coverage for physical damage where part, but not all, of the property is damaged or its functionality is impaired is commonplace. Everyday examples of physical damage causing partial loss—fire damage, roof collapse, power surge, water intrusion—highlight the radical shift the majority's novel complete loss requirement imposes on Colorado businesses. No reasonable business owner expects that such common perils are not covered unless their property is completely destroyed. Such a rule undercuts the reason they buy insurance: peace of mind and risk protection.

The majority's complete uninhabitability requirement for physical damage losses should be reversed.

VI. WHETHER AN AIRBORNE TOXIN LIKE COVID-19 CAN CAUSE PHYSICAL DAMAGE IS A FACT-BOUND ISSUE THAT CANNOT BE DECIDED AGAINST A PLAINTIFF AS A MATTER OF LAW UNDER C.R.C.P. 12(c)

A. Standard of Review and Preservation.

Spectrum preserved this issue. CF, p 7317; *Opinion*, ¶¶ 12, 48. Review is de novo. *Melat, Pressman & Higbie, L.L.P. v. Hannon Law Firm, L.L.C.*, 2012 CO 61, ¶ 17 (de novo review of judgment on the pleadings).

B. Spectrum Plausibly Stated a Claim for Direct Physical Damage, Based on the Impact of an Airborne Toxin to Its Property.

1. Colorado law requires that, on a Rule 12 motion, all facts be viewed in favor of the claiming party.

Motions for judgment on the pleadings are disfavored. *See Colo. Criminal Justice Reform Coal. v. Ortiz*, 121 P.3d 288, 294 (Colo. App. 2005); *see also Bly v. Story*, 241 P.3d 529, 533 (Colo. 2010) (Rule 12(b)(5) motions); *MLS Props. LLC v. Weld Cty. Bd. of Equalization*, 2022 COA 117, ¶ 19 (same). They are intended only to test the sufficiency of the complaint, permitting early dismissal of meritless claims. *City & Cty. of Denver v. Qwest Corp.*, 18 P.3d 748, 754 (Colo. 2001); *see also BSLNI, Inc. v. Russ T. Diamonds, Inc.*, 2014 COA 214, ¶¶ 12-13. Pleadings are to provide a short and plain statement setting forth a plausible claim for relief, ensuring "fair notice" of the claims. *CenturyLink v. Houser*, 2026 CO 20, ¶¶ 49, 51. They are not to be summarily dismissed under Rule 12 unless they show that the matter can be determined upon the pleadings themselves. *Brown v. Romero*, 2021 CO 67, ¶ 17.

Courts "must construe the allegations of the pleadings strictly against the movant [and] must consider the allegations of the opposing parties' pleadings as true," viewing them "in the light most favorable to the nonmoving party." *Melat Pressman*, 2012 CO 61, ¶ 17 (first quotation); *Parsons v. Allstate Ins. Co.*, 165 P.3d 809, 814 (Colo. App. 2006) (second quotation); *see also Huntington Ingalls*, 2022 VT 45, ¶¶ 44 ("the dissent argues that its inferences are reasonable and that all other inferences to the contrary, specifically those that favor insured in this case, are not." (footnote omitted)).

"Where material facts are disputed, judgment on the pleadings is not appropriate." *Quiroz v. Goff*, 46 P.3d 486, 488 (Colo. App. 2002) (*citing Koch v. Whitten*, 342 P.2d 1011, 1013 (Colo. 1959)); *Qwest Corp.*, 18 P.3d at 754 (judgment can only be sustained where result is *dictated* by proper application of law to *undisputed* facts); *see also Ortiz*, 121 P.3d at 295 (judgment may be appropriate where issue is "purely a question of law"). Where the nonmoving party could cure the defect by amendment, judgment on the pleadings is not proper. *N. Poudre Irr. Co. v. Hinderlider*, 150 P.2d 304, 309 (Colo. 1944).

The court cannot assume the role of an expert and undertake its own interpretation of scientific matters—this is the realm of expert testimony and is improper. *Prestige Homes, Inc. v. Legouffe,* 658 P.2d 850, 854 (Colo. 1983); *see also Anderson v. Lett*, 374 P.2d 355, 357 (Colo. 1962). Nor can it fashion its own summary judgment-like filter and dismiss claims at this early stage of litigation. *Antero Res. Corp. v. Strudley*, 2015 CO 26, ¶¶ 1-3 (reversing motion to dismiss granted based on order imposing early proof requirements).

2. A straightforward application of Colorado Rule 12 caselaw requires reversal of the judgment against Spectrum.

Spectrum's complaint amply alleged physical damage and it was error to resolve questions of fact against it, contrary to the requirements of Rule 12. While Continental is free to challenge Spectrum's factual allegations on summary judgment under Rule 56, it cannot do so now under Rule 12.[19] And while the district court

[19] Continental itself, after intensive discovery, chose to file under Rule 12, not Rule 56. Doing so permitted it to avoid facts that came to light in discovery. *See, e.g.*, CF, pp 7468-506 (expert disclosure of microbiologist Dr. Sulzinski who concluded, *inter alia*, that COVID-19 physically alters property causing property damage). Continental cannot now seek to challenge the facts of the complaint after it purposely filed under Rule 12. It can't have it both ways.

might agree with Continental on Rule 56, it cannot do so on Rule 12, ignoring Spectrum's well-pleaded factual allegations, erroneously labelling them questions of law.

Spectrum plausibly alleged facts supporting physical damage. COVID-19 is physical: it is a "physical" substance, a "natural" or "material thing." WEBSTER'S THIRD NEW INT'L DICTIONARY, 1706 (2002). COVID-19 was continually physically present at Spectrum's facilities. It contaminated and infected the property—the structures, the surfaces, and the air at Spectrum's facilities. This persistent viral contamination meant that Spectrum's facilities could not be used for their ordinary, intended purposes. While Spectrum took remedial steps, including physically and structurally altering its facilities to address this contamination, it incurred massive expenses and suffered significant losses as a result. CF, pp 1795-1805; *see also Opinion*, ¶ 68 (dissent) (highlighting allegations supporting

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And, that Continental delayed filing under Rule 12(c) highlights that there is no harm to it by remanding for further proceedings. Discovery is nearly complete. This is not a case of a plaintiff dragging a defendant through the expensive, yet empty, exercise of discovery. If Continental believes it can prevail *upon the facts*, it can readily file for summary judgment immediately upon remand.

claims).

Spectrum's allegations of fact meet Rule 12's requirements. And, as discussed above, insured property experiences damage when its usefulness is impaired. Numerous insurance precedents hold property experiences "physical damage" from airborne toxins impairing the functionality of the property.[20] *See, e.g., Oregon Shakespeare Festival Ass'n*, 2016 WL 3267247, at *3, *9 (smoke); *Gregory Packaging, Inc. v. Travelers Prop. Cas. Co. of Am.*, 2014 WL 6675934, *8 (D.N.J. Nov. 25, 2014) (ammonia gas). And, on materially similar facts, the Vermont Supreme Court concluded that the policyholder there had properly alleged physical damage from COVID-19. *Huntington Ingalls*, 2022 VT 45, ¶¶ 7-11, 41-43. Just like Spectrum: it was ordered to remain open; COVID-19 contaminated its properties, adhering to surfaces, sickening thousands; it took extensive remedial measures including physically modifying its

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[20] The policy confirms viruses can cause physical damage: although not directly at issue here, the Health Care Endorsement states that upon the discovery of a communicable disease the insurer will pay for "direct physical loss of or damage to covered property[.]" CF, p 1869.

properties; and it lost the intended use of its properties. *Id.*

Spectrum supported its factual allegations with citations to scientific literature and public health authorities. Spectrum's complaint not only included detailed factual allegations, it cited to both scientific and governmental authorities that COVID-19 physically alters property and causes physical damage. CF, pp 1796-99, 1906-07. For example, Spectrum specifically referenced public health orders stating:

> COVID-19 also physically contributes to property loss, contamination, and damage due to its propensity to attach to surfaces for prolonged periods of time.

Id., 1906-07 (further observing that public health orders "reduce the property damage caused by COVID-19"), *see also* 1905-32. These authorities, building on Spectrum's allegations, further rebut the court's imposition of its own scientific views.

Indeed, Colorado caselaw holds that courts cannot substitute their own judgment for proper expert authority. *Prestige Homes,* 658 P.2d at 854 ("The court in effect assumed the role of an expert medical witness by discrediting the opinion of [expert] based on independent research and interpretation of medical texts which properly should be interpreted only by experts in the appropriate field."). And again, *Huntington Ingalls* provides a helpful discussion, reconfirming that courts cannot proceed in this manner on Rule 12, using their own lay views of science to dismiss claims.

> [W]hen a pleading alleges facts sufficient to constitute a cause of action, what we think we know—beliefs not yet appropriately subject to judicial notice—has never been a proper basis for concluding, as a matter of law, those alleged facts cannot be true and thus cannot justify resolving [a] case against [the] plaintiff at pleadings stage.

Id., 2022 VT 45, ¶ 44 (quotation marks omitted). Expert testimony and evidence must be relied on to evaluate the claims and it is error to dismiss a case "based on a layperson's understanding" of the relevant science. *Id.*

Taken as true, Spectrum's well-pleaded allegations demonstrate physical damage triggering coverage. The courts below erred in concluding, as a matter of law, that COVID-19 cannot cause physical damage.[21] It is error to resolve Spectrum's factual

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[21] Spectrum's complaint is well-pleaded, but if there is any concern that it has somehow not sufficiently alleged facts of physical damage, permitting amendment, not entering adverse judgment, is the proper course. *North Poudre Irrigation Co.*, 150 P.2d at 309.

allegations *against it*, treating questions of fact as if they were questions of law.

VII. CONCLUSION

For these reasons, Spectrum respectfully requests that the courts below be reversed on the issues presented here, the district court's order granting Rule 12(c) judgment be vacated, and this matter be remanded to proceed to trial on all of Spectrum's claims.

Respectfully submitted this April 7, 2026.

BURG SIMPSON
ELDREDGE HERSH & JARDINE, P.C.

/s/ David K. TeSelle
Michael S. Burg, Reg. No. 7143
David K. TeSelle, Reg. No. 29648
Holly B. Kammerer, Reg. No. 21752
Shane C. Fulton, Reg. No. 52212
D. Dean Batchelder, Reg. No. 38425
Attorneys for Petitioners

<u>**CERTIFICATE OF SERVICE**</u>

I certify that on April 7, 2026, a copy of the above **OPENING BRIEF** was electronically filed and served through the Colorado Courts E-Filing System.

<u>/s/ Natalie Elliott</u>