SUMMARY
June 18, 2025

2025COA57

No. 24CA34 *Spectrum v. Continental* — Insurance — COVID-19 — Direct Physical Loss — Property Rendered Uninhabitable

As a matter of first impression in Colorado, a division of the court of appeals addresses whether COVID-19 and the resulting governmental orders restricting business operations constituted a compensable loss under an insurance provision insuring against a direct physical loss. The division also addresses, as a matter of first impression, potential coverage for COVID-19 related losses incurred under a health care endorsement added to the insurance policy.

The majority concludes that the insured party failed to allege facts that support coverage for a direct physical loss, while the dissent disagrees. The division unanimously concludes that the insured stated a viable claim to recover some of its asserted losses under the health care endorsement.

COLORADO COURT OF APPEALS **2025COA57**

Court of Appeals No. 24CA0034
City and County of Denver District Court No. 21CV30695
Honorable Martin F. Egelhoff, Judge
Honorable Jon J. Olafson, Judge

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 Operators, 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-K Chandler 2 Opportunity I, LLC; S-K Chandler Owner, LLC; S-K Crestview, LLC; S-K Creve Coeur Owner, LLC; S-K Doughtery 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 Pickering 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 Ridgen Farms, LLC; Streamwood Operator, LLC; West Chester Operator, LLC; Westerville Operator, LLC; and WSPT Hickory View Investors V, LLC

Plaintiffs-Appellants,

v.

Continental Casualty Company,

Defendant-Appellee.

JUDGMENT AFFIRMED IN PART AND REVERSED IN PART,
AND CASE REMANDED WITH DIRECTIONS

Division VI
Opinion by JUDGE SCHUTZ
Kuhn, J., concurs
Welling, J., concurs in part and dissents in part

Announced June 18, 2025

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¶ 1 Spectrum Retirement Communities, LLC (Spectrum[1]) appeals the district court's entry of judgment on the pleadings in favor of Spectrum's insurer, Continental Casualty Company (Continental). We affirm in part, reverse in part, and remand with directions.

I. Background

¶ 2 Spectrum owned, operated, and managed forty-three senior living and memory care communities in ten different states. Spectrum was insured by Continental under a broad all-risk commercial property policy that included a health care endorsement (HCE).[2]

¶ 3 During the COVID-19 pandemic, Spectrum kept its facilities open in accordance with orders from state and federal authorities, although its ability to conduct its business was substantially impacted. Spectrum contended that it suffered property and

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[1] The plaintiffs in this case also include Spectrum's individual senior living facilities and the limited liability companies that managed and operated those facilities. In the district court and in their briefing to this court, plaintiffs and defendant consistently referred to the plaintiffs as simply Spectrum. We adopt this convention.

[2] An "endorsement" is "a provision added to an insurance contract altering its scope or application." Merriam-Webster Dictionary, https://perma.cc/KPY8-N47X.

economic losses due to these governmental orders. It filed claims with Continental for these losses, and Continental denied them.

¶ 4 Spectrum filed suit against Continental, alleging breach of contract, statutory delay and denial of insurance claims, and common law bad faith. Spectrum's claims were based on allegations of direct physical property loss or damage and additional costs created by governmental orders intended to limit the spread of COVID-19.

¶ 5 Continental filed two motions under C.R.C.P. 12. Shortly after the complaint was filed, Continental filed a motion to dismiss under C.R.C.P. 12(b)(5), arguing that Spectrum had failed to state a claim upon which relief could be granted. After extensive briefing and argument, the court granted in part and denied in part Continental's motion. With the exception of one claim not at issue here, the court found that Spectrum had asserted recognized legal claims and alleged sufficient facts to plausibly support a conclusion that COVID-19 caused it to suffer a "direct physical loss" as that phrase is used in the policy. Relatedly, the court concluded that "Spectrum has plausibly plead[ed] a direct connection between local

government COVID-19 shutdown orders and the resulting limited use of the covered properties."

¶ 6 The parties then began a lengthy discovery process during which Spectrum filed an amended complaint that was substantially similar to the original. Almost eighteen months after the court denied its motion to dismiss, Continental moved for judgment on the pleadings under C.R.C.P. 12(c). In this motion, Continental argued that, in view of recent decisions from the Colorado Supreme Court and the United States Court of Appeals for the Tenth Circuit, Spectrum's claims failed as a matter of law because Spectrum had not suffered a direct physical loss of property. Because the motion was filed under C.R.C.P. 12(c) rather than C.R.C.P. 56, the parties did not have the opportunity to submit evidence in support of their claims and defenses. Instead, the court was required to premise its ruling solely on the operative pleadings.

¶ 7 In framing its task in view of emerging case law, the court noted,

> The court . . . does not construe the motion for judgment on the pleadings as an invitation or opportunity to reconsider de novo the findings and conclusions entered in its order denying [Continental's] motion to dismiss simply on the

> basis of what may be a burgeoning body of contrary out-of-state and federal authority. However, to the extent that the state of the law in Colorado has developed or has been clarified since the time of this Court's original order, the Court is obliged to consider such authority as it bears on whether the defendant is now entitled to entry of judgment on the pleadings.

¶ 8 The district court's analysis relied on two cases from the Colorado Supreme Court — *Western Fire Insurance Co. v. First Presbyterian Church*, 437 P.2d 52 (Colo. 1968), and *MJB Motels LLC v. County of Jefferson Board of Equalization*, 2023 CO 26 — and two from the Tenth Circuit — *Sagome, Inc. v. Cincinnati Insurance Co.*, 56 F.4th 931 (10th Cir. 2023), and *Monarch Casino & Resort, Inc. v. Affiliated FM Insurance Co.*, 85 F.4th 1034 (10th Cir. 2023). In briefing the motion, Spectrum relied heavily on the supreme court's seminal decision in *Western Fire*, while Continental pointed to the remaining three cases to argue COVID-19 could not cause a direct physical loss as a matter of law. The three cases Continental relied on were decided after the court's order on the Rule 12(b) motion but before the judgment on the Rule 12(c) motion.

¶ 9 Relying on rationales articulated in the three newer cases, the district court granted Continental's motion for judgment on the

pleadings. The court concluded, based on the facts alleged in the amended complaint, that Spectrum could not establish a direct physical loss or damage to covered property resulting from COVID-19 or the associated governmental orders. In light of this conclusion, the court entered judgment in favor of Continental and against Spectrum on all of Spectrum's remaining claims. Spectrum appeals that judgment.

II. Analysis

A. The Parties' Contentions

¶ 10 Spectrum argues it sufficiently alleged that COVID-19 and the resulting governmental orders caused it to suffer a "direct physical loss of or damage to property." Citing *Western Fire*, Spectrum argues that the presence of COVID-19 rendered the insured buildings unsafe and uninhabitable. *See* 437 P.2d at 55. Spectrum also argues that even if it suffered no direct physical loss of or damage to property, the HCE covered other aspects of its economic losses.

¶ 11 Continental argues that the district court correctly decided that Spectrum did not sufficiently plead a plausible claim for coverage because neither COVID-19 nor the resulting governmental

orders caused it to suffer any direct physical loss of or damage to property. Continental also contends that Spectrum did not sufficiently preserve its assertion of coverage under the HCE.

¶ 12 We begin our analysis by addressing Spectrum's argument that it alleged facts sufficient to support a claim that it suffered a direct physical loss. We then turn to Spectrum's argument that the district court erred by resolving factual disputes that were relevant to its claim for property damage. Finally, we address Spectrum's contention that the court erroneously concluded that its claim under the HCE required proof of a direct physical loss or property damage.

B. Direct Physical Loss

¶ 13 It is undisputed that the policy insured Spectrum against a direct physical loss of property. 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 each of the coverage provisions pleaded in the amended complaint. Thus, we begin by addressing this contention.

1. Standards of Review

¶ 14 "Whether a court properly granted a motion for judgment on the pleadings under C.R.C.P. 12(c) presents a question of law that we review de novo." *Brown v. Long Romero*, 2021 CO 67, ¶ 17. We evaluate a judgment on the pleadings the same as we would evaluate a motion to dismiss under Rule 12(b)(5). *Paradine v. Goei*, 2018 COA 55, ¶ 8. "Judgment on the pleadings is appropriate if, from the pleadings, the moving party is entitled to judgment as a matter of law." *City & Cnty. of Denver v. Qwest Corp.*, 18 P.3d 748, 754 (Colo. 2001).

¶ 15 To survive a Rule 12(c) motion, a complaint's factual allegations must allege plausible grounds to support a viable claim for relief. *Paradine*, ¶ 7. But we are not obliged to accept as true implausible or conclusory factual allegations. *Warne v. Hall*, 2016 CO 50, ¶¶ 18, 27. Nor are we obligated to accept bare legal conclusions. *Houser v. CenturyLink, Inc.*, 2022 COA 37, ¶ 11.

¶ 16 "Insurance policies are subject to contract interpretation, and like contracts are reviewed de novo, with the ultimate aim of effectuating the contracting parties' intentions." *Bailey v. Lincoln Gen. Ins. Co.*, 255 P.3d 1039, 1050 (Colo. 2011) (citation omitted).

In applying these standards, we liberally construe coverage provisions and narrowly construe coverage exclusions. *Farmers All. Mut. Ins. Co. v. Ho*, 68 P.3d 546, 550 (Colo. App. 2002) ("Coverage provisions in an insurance contract are to be liberally construed in favor of the insured to provide the broadest possible coverage. Thus, when an insurer seeks to restrict coverage, the limitation must be clearly expressed.") (citation omitted); *Sims v. Sperry*, 835 P.2d 565, 572 (Colo. App. 1992) ("[W]e must interpret words of exclusion strictly against the insurer . . . .").

¶ 17 Whether the district court applied the correct legal standards in resolving an insurance dispute also presents a question of law that we review de novo. *Tallman v. Aune*, 2019 COA 12, ¶ 21.

2. Applicable Law

¶ 18 In *Western Fire*, the supreme court held that an insurance claim for a direct physical loss does not necessarily have to be based on visible, physical damage to a building, its improvements, or its contents. 437 P.2d at 54-55. Rather, a direct physical loss may result from the existence of airborne materials that accumulate to such a degree that they render a property completely

uninhabitable, even though they do not cause physical damage or destruction of the subject property. *Id.* at 55.

¶ 19 The dispute in *Western Fire* arose when gasoline fumes — presumably from a large-scale leak on a neighboring property — eventually infiltrated a building owned by a church, rendering the building uninhabitable. *Id.* at 54. The church was insured against all risks of direct physical loss, with limited exceptions. *Id.* at 54-55. The church argued that it suffered a direct physical loss of property, even though the property had not been physically destroyed or materially damaged, because the accumulation of gasoline vapors and resulting closure order from the local fire department rendered the building completely unusable until the vapors were eliminated. *Id.* at 55. The insurance company argued there was no coverage because the gasoline vapors had not physically destroyed or damaged the property. *Id.*

¶ 20 In rejecting the insurance company's argument, the supreme court held,

> It is perhaps quite true that the so-called "loss of use" of the church premises, standing alone, does not in and of itself constitute a "direct physical loss." A "loss of use" of course could be occasioned by many different causes. But,

> in the instant case the so-called "loss of use," occasioned by the action of the Littleton Fire Department, cannot be viewed in splendid isolation, but must be viewed in proper context. When thus considered, 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 [policy].

Id.

¶ 21 Relatedly, while rejecting the insurance company's argument that the loss was due to a pre-existing condition, the court "conclude[d] that there was no direct physical loss sustained on, for example, the first day that gasoline actually seeped onto the insured's premises." *Id.* Indeed, the court held that

> no direct physical loss was incurred by the insured until the *accumulation* of gasoline under and around the church *built up* to the point that there was such infiltration and contamination of the foundation, walls and rooms of the church building as to render it uninhabitable and make the continued use thereof dangerous.

Id.

¶ 22 Before the district court and on appeal, Spectrum argues that *Western Fire* is both binding and the most instructive case to address the losses it incurred as a result of COVID-19. And while acknowledging that *Western Fire* did not deal with a communicable disease, Spectrum argued to the district court that *Western Fire*'s facts parallel those created by COVID-19. In resolving Continental's Rule 12(b)(5) motion, the district court relied largely on *Western Fire*'s framework.

¶ 23 Not unexpectedly, given the profound and evolving consequences created by the COVID-19 pandemic, courts continued to address COVID-19 insurance issues in the eighteen months between the denied Rule 12(b) motion and the granted Rule 12(c) motion. Continental points to three of those cases as particularly instructive in resolving the coverage issues presented here.

¶ 24 In *Sagome*, the Tenth Circuit addressed whether COVID-19 created a direct physical loss of or damage to covered property. 56 F.4th at 932. Sagome owned a restaurant, the operation of which was severely impacted by COVID-19. *Id.* In the federal district court, the insurance company successfully moved to dismiss Sagome's claims for failure to state a claim. *Id.* at 933.

¶ 25 On appeal, the Tenth Circuit acknowledged Sagome's reliance on *Western Fire*, but noted that "whether COVID-19 causes direct physical loss or damage under a property insurance policy is an open question in Colorado." *Id.* at 934. Applying Colorado law, the Tenth Circuit identified the "pertinent question" as "not simply whether COVID-19 was present, but whether it caused physical loss or damage." *Id.* at 935.

¶ 26 Ultimately, the Tenth Circuit held that COVID-19 did not cause a direct physical loss because it did not "destroy Sagome's property." *Id.* In amplification of this conclusion, the Tenth Circuit reasoned that "COVID-19 does not physically injure or harm property." *Id.* It noted most courts have reached this conclusion because COVID-19 "does not physically alter the property it rests on," and it "can be removed from a surface by standard cleaning measures." *Id.* (quoting *Dukes Clothing, LLC v. Cincinnati Ins. Co.*, 35 F.4th 1322, 1328 (11th Cir. 2022)).

¶ 27 The Tenth Circuit noted that in "defining 'physical loss' and 'physical damage,'" Sagome relied on the fact that the virus was "physical," "attache[d] to property," and "cause[d] disease." *Id.* But in affirming the district court's order dismissing Sagome's claims,

the Tenth Circuit reasoned that for insurance coverage to exist, "the loss or damage itself must be physical, not simply stem from something physical." *Id.*

¶ 28 While not binding on the state district court or us, we may consider the rationale of *Sagome* for its persuasive value in conducting our analysis. *See First Nat'l Bank v. Rostek*, 514 P.2d 314, 316 n.1 (Colo. 1973) ("[A] state court is not bound by federal court interpretation of state law."); *Goeddel v. Aircraft Fin., Inc.*, 382 P.2d 812, 814 (Colo. 1963) (considering Tenth Circuit interpretation of Colorado statutes for its persuasive value).

¶ 29 During this time the Colorado Supreme Court also wrestled with the legal ramifications of COVID-19's impact on property owners. While not arising in the context of an insurance claim, the court's decision in *MJB* afforded it the opportunity to address the impact COVID-19 had on property.

¶ 30 *MJB* arose out of a dispute over the valuation of real property for tax purposes. Under Colorado law, assessors must revalue

property in an intervening property tax year[3] if there were "unusual conditions," § 39-1-104(11)(b)(I), C.R.S. 2024, where "a change in the property or the property's use rendered application of the base year value unjust." *MJB*, ¶ 6 (quoting *LaDuke v. CF & I Steel Corp.*, 785 P.2d 605, 608 (Colo. 1990)). The supreme court held that COVID-19 and the public health orders issued in response to it did not constitute unusual conditions related to real property that would justify revaluation of commercial properties for the intervening year. *Id.* at ¶ 3.

¶ 31 In reaching this conclusion, the court noted that COVID-19 is not related to real property. *Id.* at ¶¶ 21, 23. The court reasoned,

> [T]he COVID-19 pandemic was not "in or related to any real property." § 39-1-104(11)(b)(I). COVID-19 may have infected people who were on the property. *See* [*In re Interrogatory on House Joint Resol. 20-1006*, 2020 CO 23], ¶ 5 ("COVID-19 is transmitted by close exposure to a person with the virus, particularly an infected person's respiratory

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[3] "Generally, property valuations are calculated only once every two years. That is, the actual value for the first (odd-numbered) year carries over to the second (even-numbered) year of the biennial reassessment cycle." *MJB Motels LLC v. Cnty. of Jefferson Bd. of Equalization*, 2023 CO 26, ¶ 6 (citing § 39-1-104(10.2)(a), C.R.S. 2024). The "intervening year" is the even numbered year. § 39-1-104(11)(b)(I).

> droplets from coughing or sneezing."). But COVID-19 did not infect the property itself.

Id. at ¶ 23.

¶ 32 Continental relies on this language to support its contention that, as a matter of law, COVID-19 cannot cause a direct physical loss of property, and therefore, the district court did not err by entering judgment on the pleadings. Spectrum acknowledges *MJB*'s binding status in interpreting Colorado law, but it argues that the case is factually distinguishable because it did not involve an insurance dispute or the meaning of a direct physical loss as set forth in *Western Fire*. Indeed, Spectrum notes, *MJB* did not even cite *Western Fire*.

¶ 33 As it did in the district court, Continental also relies on the Tenth Circuit's decision in *Monarch*. In that case, Monarch — a casino — brought claims against its insurer for losses incurred because of COVID-19 based on a policy provision that insured "against all risks of physical loss or damage" to property. *Monarch*, 85 F.4th at 1036. The insurance company moved for partial judgment on the pleadings, which the federal district court granted,

concluding that COVID-19 did not cause Monarch to suffer a physical loss of injury. *Id.* Monarch appealed. *Id.*

¶ 34 Drawing heavily from *Sagome*, the Tenth Circuit held that "Monarch cannot claim coverage for physical loss or damage caused by COVID-19 because the virus cannot cause physical loss or damage." *Id.* at 1042. Specifically, the Tenth Circuit noted that in *MJB* the supreme court held that COVID-19 "cannot infect property itself." *Id.* Relying on this language, the Tenth Circuit held that "COVID-19 cannot cause direct physical loss or damage under a property-insurance policy." *Id.* Unlike *Sagome*, *Monarch* did not acknowledge *Western Fire* or its framework, and it did not address whether COVID-19 rendered the property uninhabitable.

¶ 35 Synthesizing *Sagome*, *MJB*, and *Monarch*, Continental argues that the district court correctly concluded, as a matter of law, that COVID-19 cannot cause a direct physical loss of property. Distinguishing *MJB* factually and noting that *Sagome* and *Monarch* are not binding authorities, Spectrum relies on *Western Fire* to support its argument that the district court erred by concluding that COVID-19 cannot cause a direct physical loss of property.

3. Analysis

¶ 36 We agree with Spectrum that *Western Fire* provides the framework for considering what constitutes a "direct physical loss" in Colorado. Spectrum is also correct that *Western Fire* instructs that such a loss does not necessarily have to result from structural or visible damage to insured property. However, *Western Fire* also holds that, for coverage to exist under a policy that insures against a direct physical loss, any intangible damage must render the insured property "uninhabitable, making further use of the [property] highly dangerous." 437 P.2d at 55.

¶ 37 Here, Spectrum did not allege that there was a buildup of COVID-19 to such a degree that it rendered Spectrum's properties "uninhabitable." Indeed, it could not have made such an allegation in good faith because it is undisputed that Spectrum's facilities remained open throughout the COVID-19 pandemic. Spectrum continued to provide services to its residents at its facilities. Therefore, the properties remained habitable, even though the day-to-day facility operations were significantly impacted. Thus, the factual circumstances alleged by Spectrum are substantially different than those in *Western Fire*.

¶ 38 Facing this barrier, Spectrum argues on appeal that it has alleged facts supporting the conclusion that its properties were rendered "partially uninhabitable." Specifically, Spectrum notes that it alleged that dining halls and communal portions of its facilities were rendered unusable for a period and that it could not re-rent some of its patient rooms.

¶ 39 Spectrum argues that this partial loss of the use of its facilities falls within the ambit of *Western Fire*. Spectrum does not point to any binding authority that has applied *Western Fire* to the partial loss of use of an insured property. But to bridge this gap, Spectrum noted at oral argument that in *Western Fire*, the subject policy encompassed the church building, the manse, and two other buildings. *See id.* at 53. That is true, but *Western Fire* did not base its loss of property analysis on any percentage loss of the church building as compared to the other insured buildings. Rather, the determination of a direct physical loss within the meaning of the policy there was based on the conclusion 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." *Id.* at 55 (emphasis added). In other words, *Western Fire* was focused on the point at which the building itself became unusable.

¶ 40 And contrary to Spectrum's argument on appeal, *Western Fire* does not state or suggest that a direct property loss can be based solely on the property being dangerous rather than uninhabitable, or even partially unusable. Indeed, in *Western Fire* the court reasoned that the loss of use could not be viewed in "splendid isolation" and did not arise from partial infiltration of the premises, but only when gasoline infiltration rose to such a level that the building became uninhabitable and highly dangerous. *Id.* It is undisputed that COVID-19 did not render any Spectrum-owned facility uninhabitable, either temporarily or permanently.

¶ 41 Additionally, Spectrum fails to provide an analytical framework for assessing when the inability to use some portion of property rises to the level of a direct physical loss of property. Spectrum acknowledges that every sneeze or cough that requires some cleaning of property does not equate to a direct physical loss. But Spectrum identifies no objective line that a court can draw to say what degree of limitation on the day-to-day operations should

be deemed such an impairment that it results in direct physical loss. Should it be 5% of the facility, 25%, 50%? And we reject any implied invitation to adopt a subjective "we know it when we see it" type of standard. *See Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring) (In assessing pornography, Justice Stewart said, "I shall not today attempt further to define the kinds of material I understand to be embraced within that shorthand description; and perhaps I could never succeed in intelligibly doing so. But I know it when I see it, and the motion picture involved in this case is not that.").

¶ 42 When asked at oral argument to address the absence of an analytical framework for this argument, Spectrum's counsel suggested that the framework should be married to the amount of damages. But that answer begs the question. Damages do not determine whether a loss is covered; rather, the determination of whether there is coverage informs the amount of damages.

¶ 43 Spectrum also relies on general principles governing our interpretations of insurance policies. We agree that coverage provisions are broadly construed, and coverage exclusions narrowly construed. *Farmers*, 68 P.3d at 550; *Sims*, 835 P.2d at 572.

Drawing on these maxims, Spectrum notes that the subject insurance policy does not include a virus exclusion that was available at the time. Thus, it argues, we should broadly construe the meaning of "direct physical loss." But Spectrum also concedes that the absence of an exclusion for a specific loss cannot create the existence of coverage for that specific loss. *See, e.g.*, *Verveine Corp. v. Strathmore Ins. Co.*, 184 N.E.3d 1266, 1277 (Mass. 2022) ("[A]bsence of an express exclusion does not operate to create coverage." (quoting *Given v. Com. Ins. Co.*, 796 N.E.2d 1275, 1279 (Mass. 2003))).

¶ 44 We also reject Spectrum's argument based on the phrase "direct physical loss" in the policy and the dictionary definitions of those individual words:

> "Direct physical loss" from COVID-19 means that COVID-19 caused a *loss* (Spectrum suffered harm or privation from the separation from something) from a *physical* event (COVID-19 physically contaminated Spectrum's property; COVID-19 is physical; it is not mental, moral, spiritual, or imaginary) and that cause is *direct* (there is a consequential relationship between COVID-19 and the loss). From this, the plain meaning does not support the conclusion that physical alteration of the property is required for direct physical loss or damage.

¶ 45 This analysis separates "physical" from the policy language of "physical loss" — the nature of Spectrum's claimed loss — and engrafts it onto the cause of Spectrum's alleged loss: COVID-19. This construction is clearly contrary to the policy's plain language. *See, e.g.*, *Sachs v. Am. Fam. Mut. Ins. Co.*, 251 P.3d 543, 546 (Colo. App. 2010) ("[W]e must enforce the plain language of the policy unless it is ambiguous."); *Sagome*, 56 F.4th at 935 (rejecting insured's arguments based on like definitions and coverage for direct physical loss or damage).

¶ 46 Applying the controlling precedent — *Western Fire* — we conclude that the district court did not err by concluding that Spectrum failed to plead facts that could establish it suffered a direct physical loss. Having reached this conclusion, we need not, and thus do not, address the district court's conclusion that COVID-19 cannot cause a direct physical loss as a matter of law.

¶ 47 For these reasons, we affirm — albeit on different grounds — the district court's conclusion that Spectrum failed to allege a direct physical loss of property. Having reached this conclusion, however, we caution that our analysis does not mean that COVID-19 can never be found to cause a direct physical loss, as Continental seems

to advocate. Rather, we simply conclude that in this case, Spectrum failed to allege facts that would support a conclusion that the presence of COVID-19 caused it to suffer a direct physical loss under the framework of *Western Fire*.

C. Damage to Property

¶ 48 Spectrum argues that determining whether COVID-19 damaged property depends on expert factual testimony, and that the district court erred by resolving this factual dispute without considering its expert testimony. *See Strout Realty, Inc. v. Snead*, 530 P.2d 969 (Colo. App. 1975) (When resolving a motion for a judgment on the pleadings, "the court must construe the allegations of the pleadings strictly against the movant" and treat the opposing party's factual allegations in the "pleadings as true.") .

¶ 49 But Spectrum also argues that "in Colorado (and as recognized by many of the very cases [Continental] argued should be applied here) *Western Fire* controls the determination of physical loss or damage necessary for coverage under the Policy." While *Western Fire* interpreted only the "direct physical loss" provision of the policy at issue there, Spectrum is right that numerous cases — including *Sagome* — have analyzed whether an insured has suffered damage

to property under the *Western Fire* rubric. But this does not further Spectrum's coverage argument. As explained above, under *Western Fire*, coverage for a direct physical loss depends on proof that the intangible contaminant resulted in the property being rendered "uninhabitable, making further use of the building highly dangerous." *Western Fire*, 437 P.2d at 55.

¶ 50 Even assuming, without deciding, that the pleadings established a factual dispute regarding how COVID-19 physically affects property, it remains undisputed that the property was not rendered uninhabitable. Quite the opposite, as Spectrum's facilities remained open.

¶ 51 Accordingly, any factual disputes concerning the physical impact of COVID-19 on property — whether based on the pleadings or in combination with Spectrum's forecasted expert testimony — do not change our analysis under *Western Fire*. Because the property remained habitable, the district court did not err by concluding that the pleadings failed to allege that Spectrum suffered a direct physical loss.

D. HCE Coverage

¶ 52 In relevant part, the HCE provided Spectrum the following coverage:

> a. If as a result of an evacuation or decontamination order at a location by the National Center for Disease Control, authorized public health official or governmental authority because of the discovery or suspicion of a communicable disease or the threat of the spread of a communicable disease, the Insurer will pay for:
>
> (1) direct physical loss of or damage to covered property; and
>
> (2) the necessary and reasonable costs incurred by the Insured to:
>
> (a) evacuate the contaminated location, if required by the governmental authority;
>
> (b) decontaminate or dispose of contaminated covered property;
>
> (c) test after disposal, repair, replacement or restoration of damaged property is completed; and
>
> (d) any employee overtime costs associated with providing additional care to patients affected by a communicable disease.

¶ 53 Spectrum argues that the district court erred by concluding, as a matter of law, that it failed to allege coverage under the HCE. We agree, in part.

1. Preservation

¶ 54 Because it affects whether we will consider the HCE coverage question, we first address Continental's argument that Spectrum did not preserve its contention that it had suffered losses covered under the HCE. *See City of Westminster v. Centric-Jones Constructors*, 100 P.3d 472, 482 (Colo. App. 2003) ("We do not consider issues raised for the first time on appeal.").

¶ 55 While Spectrum's amended complaint is not a model of clarity, looking at the record as a whole, we conclude that Spectrum preserved its argument regarding coverage under the HCE.

¶ 56 Spectrum alleged in its amended complaint, "By letters dated August 31, 2020 and November 16, 2020, [Continental] wrongly denied [Spectrum's] claims." Spectrum also attached copies of Continental's denial letters to its complaint, the first of which expressly quoted the HCE.

¶ 57 Spectrum alleged in its amended complaint that it was subject to numerous orders from the U.S. Centers for Disease Control and

Prevention and state authorities that substantially impacted its operations and hindered its inability to use portions of its facilities. These orders required Spectrum to maintain social distancing and take various practical and remedial steps to decontaminate the surfaces of its properties. *See* Colo. Dep't of Pub. Health & Env't, Fourth Updated Public Health Order 20-24 (Apr. 9, 2020).

¶ 58 In addition, Spectrum's amended complaint alleged that,

> as a direct result of the COVID-19 pandemic and governmental orders, and due to the presence of COVID-19 at each of the Covered Properties, Plaintiffs were forced to shutter or severely limit and restrict the activities at each of their Covered Properties and to incur covered extra expenses that are covered benefits under the Policy and Renewal Policy.

¶ 59 Thus, prior to filing both the complaint and amended complaint, Continental knew that Spectrum was alleging coverage for its losses under the HCE. Indeed, in its answer to the amended complaint, Continental asserted affirmative defenses that included language from the HCE. And in response to Continental's motion for judgment on the pleadings, Spectrum repeatedly alleged that it had suffered losses that were covered under the HCE, including losses unrelated to direct physical loss.

¶ 60 An issue is preserved if the asserting party provided the district court with the sum and substance of the argument it asserts on appeal. *Gebert v. Sears, Roebuck & Co.*, 2023 COA 107, ¶ 25. Given this record, we reject Continental's argument that Spectrum failed to preserve its claim for covered losses under the HCE.

2. Standard of Review and Applicable Law

¶ 61 Whether the district court properly granted the Rule 12(c) motion with respect to coverage under the HCE presents an issue of law that we review de novo. *Brown*, ¶ 17. Likewise, the interpretation of an insurance policy presents an issue of law that we review de novo. *DeHerrera v. Am. Fam. Mut. Ins. Co.*, 219 P.3d 346, 349 (Colo. App. 2009).

3. Analysis

¶ 62 The district court rejected Spectrum's claims based solely on its conclusion that Spectrum had suffered no direct physical loss to its property. However, the language of the HCE provides coverage for losses in addition to those caused by a direct physical loss of property. Coverage under section a(1) requires Spectrum to demonstrate a direct physical loss to property. In contrast, the

language of section a(2) provides coverage for "necessary and reasonable costs" incurred for, among other things, the decontamination of property and providing care for patients affected by a communicable disease. *See Lawrence Gen. Hosp. v. Cont'l Cas. Co.*, 90 F.4th 593, 604 (1st Cir. 2024) (HCE provides coverage if the insured is subject to an evacuation or decontamination order, at a covered location, issued by a governmental authority, because of the threat of a communicable disease).

¶ 63 The district court rejected coverage for any direct physical loss, a conclusion that we have affirmed, which forecloses coverage under subsection a(1) of the HCE. In contrast, the district court did not address Spectrum's potential coverage under section a(2) of the HCE. By failing to consider Spectrum's claim for coverage under section a(2), the district court erred.

¶ 64 Appellate courts are not equipped to make factual findings; that essential role falls within the province of our trial courts. *Carousel Farms Metro. Dist. v. Woodcrest Homes, Inc.*, 2019 CO 51, ¶ 18 (trial courts make factual findings and appellate courts determine the controlling law). Therefore, we make no findings regarding whether Spectrum has suffered losses covered under

section a(2) of the HCE. Rather, we conclude only that Spectrum alleged sufficient facts to state a claim for coverage under section a(2). Thus, we reverse the district court's entry of judgment on that portion of Spectrum's claims.

III. Disposition

¶ 65 The district court's judgment dismissing Spectrum's amended complaint is affirmed in part and reversed in part. We remand to the district court for further proceedings consistent with this opinion.

JUDGE KUHN concurs.

JUDGE WELLING concurs in part and dissents in part.

JUDGE WELLING, concurring in part and dissenting in part.

¶ 66 I agree with the majority that *Western Fire Insurance Co. v. First Presbyterian Church*, 437 P.2d 52 (Colo. 1968), controls our analysis of Spectrum's claim that it suffered a direct physical loss. I also agree with the majority's analysis and conclusion in Part II.D that Spectrum alleged sufficient facts to state a claim for coverage under the health care endorsement (HCE).

¶ 67 Where I part ways with the majority is whether Spectrum alleged sufficient facts that COVID-19 "so infiltrated and saturated [the insured property] as to be uninhabitable, making further use of the [property] highly dangerous," *id.* at 55, such that it was error for the trial court to dismiss its claims for coverage under the "direct physical loss" provision of the insurance policies issued by Continental.

¶ 68 In my view, Spectrum adequately alleged that sufficient portions of its facilities were rendered "uninhabitable and highly dangerous" by COVID-19 to survive Continental's motion for judgment on the pleadings. The following allegations support this conclusion:

- The presence of COVID-19 "impair[ed] the[] function [of the covered properties] for their ordinary and intended use."
- Due to the COVID-19 pandemic, "government orders [were] issued requiring [essential] businesses to cease certain activities [and] not use or alter certain physical spaces within such businesses."
- "Plaintiffs were prohibited by . . . [COVID-19-related] government orders from accessing their Communities to the same extent as before those orders . . . ."
- Plaintiffs "have been unable to occupy and use their physical property to the full extent they would otherwise haven been able to."
- "[D]ue to the presence of COVID-19 at each of the Covered Properties, Plaintiffs were forced to shutter or severely limit and restrict the activities at each of their Covered Properties," including "shutter[ing] common areas."
- "[A]ccess to the dining halls and other facilities . . . was still denied as areas and operations where people

previously gathered were forced to close," so plaintiffs had to accommodate "in-room dining," providing "food and beverage to resident rooms due to the closure of Plaintiff's dining halls."

- Due to government-imposed COVID-19 restrictions, plaintiffs were "required to suspend all new move-ins," "unable to register new residents," and "prohibited from accepting new residents."
- Due to COVID-19 and government orders, "Plaintiffs had vacant residential units that were required to remain unoccupied and unrented despite interest from otherwise ready and willing new residents . . . ."
- Plaintiffs had to refund deposits for residents who weren't permitted to move in because of government orders.

¶ 69 In my view, under the test laid out in *Western Fire*, these allegations of loss — which include the complete shutdown of portions of Spectrum's facilities — are adequate to survive a motion for judgment on the pleadings. While it's true that existing residents continued to inhabit their residential units, it can hardly be said that the insured properties continued to operate as

retirement communities. Spectrum's facilities aren't mere apartment complexes, according to the allegations in the complaint. Spectrum avers that "each Community has communal facilities and offers a number of amenities to appeal to and foster the socialization of senior citizens." It further alleges that its "business depends upon an ability to provide social programming, experiences, and services that a senior citizen could not otherwise have living at home." Spectrum's allegations, in my view, are adequate to survive Continental's motion for judgment on the pleadings.

¶ 70 I acknowledge that this is a close case that poses serious difficulties in drawing clear lines. This is because the insured property is only partially uninhabitable, not completely so. The majority criticizes the test Spectrum urges us to adopt as lacking an "analytical framework for assessing when the inability to use some portion of the property rises to the level of a direct physical loss of property." *Supra* ¶ 41. Indeed, it does. But this isn't a shortcoming of Spectrum's making; instead it's inherent in the test established by *Western Fire* — and its mandate that in assessing

the question of coverage, the alleged loss mustn't "be viewed in splendid isolation." *Western Fire*, 437 P.2d at 55.

¶ 71 In *Western Fire*, the church — one of four insured structures — was rendered "uninhabitable and highly dangerous" by the combination of the gas infiltration and the fire authority's order that the insured couldn't use the church. In assessing whether the loss of use fell within the scope of coverage under the direct physical loss provision, the court in *Western Fire* said,

> It is perhaps quite true that the so-called "loss of use" of the church premises, standing alone, does not in and of itself constitute a "direct physical loss." A "loss of use" of course could be occasioned by many different causes. But, in the instant case the so-called "loss of use," occasioned by the action of the Littleton Fire Department, cannot be viewed in splendid isolation, but must be viewed in proper context. When thus considered, *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. (emphasis added).

¶ 72 While I agree that the *Western Fire* standard — if it can be called that — creates difficulty in line-drawing when an insured's claim of coverage is based on something less than total uninhabitability, I conclude that wherever that line is, Spectrum's allegations, if taken as true, put it on the coverage side of that line. *See McBride v. People*, 2022 CO 30, ¶ 45 (we only decide the issues that are before us in a particular case). I reach this conclusion based on the entire context of the alleged losses, including the nature of the insured facilities, the danger that COVID-19 is alleged to have posed, and the scope and extent of the closures alleged.

¶ 73 In addition to the context of the claimed losses, the operation of two legal principles persuades me in the opposite direction of my colleagues in the majority.

¶ 74 First, "[c]overage provisions in an insurance contract are to be liberally construed in favor of the insured to provide the broadest possible coverage." *Farmers All. Mut. Ins. Co. v. Ho*, 68 P.3d 546, 550 (Colo. App. 2002) (citing *Tepe v. Rocky Mountain Hosp. & Med. Servs.*, 893 P.2d 1323 (Colo. App. 1994)). Relatedly, "[i]n the absence of such a clear expression of limitation, or if the policy provisions are inconsistent or ambiguous, the insurance contract

must be construed in favor of coverage and against limitations." *Tepe*, 893 P.2d at 1328 (first citing *State Farm Mut. Auto. Ins. Co. v. Nissen*, 851 P.2d 165 (Colo. 1993); and then citing *Lister v. Am. United Life Ins. Co.*, 797 P.2d 832 (Colo. App. 1990)); *cf. Thompson v. Md. Cas. Co.*, 84 P.3d 496, 502 (Colo. 2004) ("[A]mbiguous terms in an insurance policy are construed against the insurer." (citing *Nissen*, 851 P.2d at 166)). These principles favor construing the coverage provided by the policies to include the extensive, but only partial, closures alleged here.

¶ 75 Second, the doctrine of reasonable expectations pushes me toward the conclusion that coverage has been adequately alleged. "In Colorado, the doctrine of reasonable expectations is one of the principles of fairness to which insurance policies are subject, as it is designed to protect insureds from the dangers inherent in standardized insurance policies." *Bailey v. Lincoln Gen. Ins. Co.*, 255 P.3d 1039, 1049 (Colo. 2011). One of the reasons that courts apply this doctrine in the insurance context is "because insurance is a unique product, which is purchased by insureds not to secure commercial advantage, but to protect 'themselves from unforeseen calamities and for peace of mind.'" *Id.* (quoting *Goodson v. Am.*

Standard Ins. Co. of Wis., 89 P.3d 409, 414 (Colo. 2004)); *see id.* at 1050 ("This manifestation of the doctrine of reasonable expectations applies when policy coverage-provisions may not be ambiguous in a technical sense, and hence subject to the rule that ambiguities must be construed against the drafter, but are ambiguous from the perspective of an ordinary reader. In such cases, exclusionary language may be held unenforceable.").

¶ 76 In assessing the reasonable expectations of the insured here, I think Spectrum's allegation that it paid "more money in premiums for coverage that d[id] not have a virus exclusion" bears some weight. While it may be that the absence of an exclusion doesn't create coverage where none exists, *see, e.g.*, *Verveine Corp. v. Strathmore Ins. Co.*, 184 N.E.3d 1266, 1277 (Mass. 2022), that maxim doesn't render the fact irrelevant in assessing coverage, particularly when, as here, the policy is capaciously denominated as an "all risks policy." Again this, standing alone, isn't determinative of the question of coverage, but it does inform my conclusion that coverage was adequately alleged.

¶ 77 For these reasons, I would conclude that the trial court erred in determining that Spectrum failed to allege a direct physical loss.

Accordingly, I would reverse the trial court's dismissal of Spectrum's complaint on this basis as well.