

1 its operations because its property or property in its immediate area suffered
2 physical damage. Because 10012 Holdings does not plausibly allege such
3 physical damage, we **AFFIRM**.

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8
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33

34 LOHIER, Circuit Judge:

35 In a scenario that has become all too familiar during the COVID-19
36 pandemic, 10012 Holdings, Inc. d/b/a Guy Hepner, which operates as a brick-
37 and-mortar art gallery and dealership in New York City, was forced to

1 suspend its operations to comply with government restrictions on non-
2 essential businesses. As a result, 10012 Holdings could no longer sell
3 paintings at its gallery and resorted to online sales, with employees allowed
4 to access the gallery for routine business purposes such as packing and
5 shipping a painting purchased online. The company, which was insured
6 under a widely used business property insurance policy (the “Policy”) issued
7 by Sentinel Insurance Company, Ltd., sought coverage under the Policy for its
8 business income losses and expenses relating to the gallery’s closure. Sentinel
9 denied coverage on the ground that 10012 Holdings did not suffer direct
10 physical loss of or physical damage to its property or property within its
11 vicinity, as the Policy required. Invoking three provisions of the Policy, 10012
12 Holdings brought this action for breach of contract and a declaratory
13 judgment that Sentinel was liable for coverage of its COVID-19-related
14 business losses, claiming that the Policy’s references to “physical damage” or
15 “physical loss” include the loss of use of property as a result of the
16 suspension of business operations. The United States District Court for the
17 Southern District of New York (Schofield, L.), applying New York law, agreed

1 with Sentinel’s reason for denying coverage and dismissed 10012 Holdings’s
2 claims with prejudice under Federal Rule of Civil Procedure 12(b)(6).

3 For the reasons that follow, we **AFFIRM**.

4 **BACKGROUND**

5 The following facts are drawn from 10012 Holdings’s complaint and
6 documents attached thereto, and are assumed to be true for purposes of our
7 de novo review of the District Court’s judgment dismissing the complaint for
8 failure to state a claim upon which relief can be granted. See Schlosser v.
9 Kwak, 16 F.4th 1078, 1080 (2d Cir. 2021).

10 In 2019, 10012 Holdings purchased the Policy from Sentinel to cover the
11 period from April 1, 2019 through April 1, 2020. The Policy provides three
12 principal types of coverage relevant to this appeal: “Business Income,” “Extra
13 Expense,” and “Civil Authority.” The Business Income provision requires
14 Sentinel to cover certain business losses incurred if 10012 Holdings
15 suspended its operations due to “direct physical loss of or physical damage
16 to” its property “caused by or resulting from a Covered Cause of Loss.” Joint
17 App’x 83. The Policy defines “Covered Cause of Loss” as “risks of direct
18 physical loss” not otherwise excluded by the Policy. Joint App’x 75. The

1 Extra Expense provision, meanwhile, reimburses “reasonable and necessary
2 Extra Expense” incurred during a “period of restoration” of the premises
3 following “direct physical loss or physical damage to” 10012 Holdings’s
4 property “caused by or resulting from a Covered Cause of Loss.” Joint App’x
5 83. Finally, the Civil Authority provision extends coverage for business
6 income losses if access to 10012 Holdings’s premises “is specifically
7 prohibited by order of a civil authority as the direct result of a Covered Cause
8 of Loss to property in the immediate area of” 10012 Holdings’s premises.
9 Joint App’x 84.

10 Starting in March 2020, 10012 Holdings was forced to suspend business
11 operations at the art gallery in compliance with the now well-known
12 executive orders issued by the Governor of New York as the immediate
13 response to the COVID-19 pandemic. Relying on the Business Income, Extra
14 Expense, and Civil Authority provisions, 10012 Holdings demanded that
15 Sentinel reimburse it for the losses and expenses it incurred as a result of
16 suspending its operations. In a letter dated April 3, 2020, Sentinel disclaimed
17 coverage, asserting that “COVID-19 did not cause property damage at [10012
18 Holdings’s] place of business or in the immediate area.” Joint App’x 15.

1 When 10012 Holdings filed this action for breach of contract and
2 declaratory relief, Sentinel moved to dismiss the complaint. In a brief
3 opinion, the District Court granted Sentinel’s motion and dismissed 10012
4 Holdings’s claims with prejudice. 10012 Holdings, Inc. v. Sentinel Ins. Co.,
5 507 F. Supp. 3d 482 (S.D.N.Y. 2020). The District Court first concluded that
6 10012 Holdings could not recover under either the Business Income provision
7 or the Extra Expense provision because, under New York law, the provisions
8 are unambiguously “limited to losses involving physical damage to the
9 insured’s property,” which 10012 Holdings did not allege it suffered. Id. at
10 486–88. The Civil Authority provision was also inapplicable, the District
11 Court explained, because it provided coverage only if the closure of 10012
12 Holdings’s business resulted directly from the closure of neighboring
13 properties. Id. at 488. The District Court pointed out that 10012 Holdings
14 was forced to close the gallery for the same reason that its neighbors were
15 required to shutter their businesses, namely, the risk of harm to individuals
16 on its own premises due to the pandemic. Id. at 488–89. Finally, the District
17 Court denied 10012 Holdings leave to amend for the simple reason that “the
18 Policy does not provide coverage for the loss Plaintiff suffered.” Id. at 489.

1 This appeal followed.

2 **DISCUSSION**

3 The central question we address is whether the Policy provides
4 coverage for 10012 Holdings’s financial losses even though 10012 Holdings
5 does not allege that its closure resulted from physical damage to its property
6 or the adjoining property of its neighbors. To answer that question, we apply
7 New York law, which the parties agree governs our interpretation of the
8 Policy.

9 Under New York law, “an insurance contract is interpreted to give
10 effect to the intent of the parties as expressed in the clear language of the
11 contract.” Parks Real Est. Purchasing Grp. v. St. Paul Fire & Marine Ins. Co.,
12 472 F.3d 33, 42 (2d Cir. 2006) (quotation marks omitted). “The policy must . . .
13 be construed in favor of the insured, and ambiguities, if any, are to be
14 resolved in the insured’s favor and against the insurer.” U.S. Fid. & Guar. Co.
15 v. Annunziata, 67 N.Y.2d 229, 232 (1986). But “[w]here the provisions of [a]
16 policy are clear and unambiguous, they must be given their plain and
17 ordinary meaning, and courts should refrain from rewriting the agreement.”
18 Id. (quotation marks omitted).

1 I. The Business Income and Extra Expense Provisions

2 10012 Holdings argues that it is entitled to coverage under the Business
3 Income and Extra Expense provisions because the Policy's use of the term
4 "direct physical loss," which appears in both provisions and which the Policy
5 does not define, plainly includes circumstances where 10012 Holdings is
6 merely deprived of access to its business property. But New York law
7 compels us to reject 10012 Holdings's proposed reading of the term.

8 In particular, we note that in Roundabout Theatre Co. v. Cont'l Cas.
9 Co., 751 N.Y.S.2d 4 (1st Dep't 2002), the First Department rejected a similar
10 reading of the term "loss of . . . property." Id. at 8. There, a municipal order
11 closed a street for safety reasons following a construction accident at a
12 building in the area. Id. at 5. The plaintiff, a theater company, was forced to
13 cancel several scheduled performances when its theater was rendered
14 inaccessible to the public for several weeks due to the street's closure. Id.
15 Although the theater itself suffered no physical damage, it sought coverage
16 for its monetary losses under its insurance policy's business interruption
17 provision. Id. at 5–6. The trial court in Roundabout Theatre ruled in favor of
18 the theater and concluded that the phrase "loss of" as used in the policy's

1 business interruption provision included the theater’s “loss of use” of its
2 premises. Id. at 6. Describing the trial court’s interpretation as “flawed,” id.
3 at 8, the Appellate Division reversed. The policy’s business interruption
4 provision, the court noted, covered loss of property “caused by the perils
5 insured against,” which the policy defined as “all risks of direct physical loss
6 or damage to the [insured’s] property, not otherwise excluded.” Id.
7 (quotation marks omitted). Given the plain meaning of the words “direct”
8 and “physical” and the structure of the policy overall, the Appellate Division
9 held that the provision “clearly and unambiguously provides coverage only
10 where the insured’s property suffers direct physical damage.” Id.

11 We follow this holding. The relevant provisions at issue in
12 Roundabout Theatre and the provisions at issue in the Policy before us are
13 not materially different. In construing New York law, we are “bound . . . by
14 the law of New York as interpreted by the New York Court of Appeals,” and
15 we “consider the language of [state intermediate appellate] courts to be
16 helpful indicators of how the state’s highest court would rule.” Licci ex rel.
17 Licci v. Lebanese Canadian Bank, SAL, 739 F.3d 45, 48 (2d Cir. 2013)
18 (quotation marks omitted). We are unaware of any contrary authority in

1 New York that diverges from the holding in Roundabout Theatre, which state
2 and federal courts in New York have (at either the motion to dismiss stage or
3 on summary judgment) uniformly applied since the start of the COVID-19
4 pandemic to deny coverage under similar insurance provisions where the
5 insured property itself was not alleged or shown to have suffered direct
6 physical loss or physical damage. See, e.g., Benny's Famous Pizza Plus Inc. v.
7 Sec. Nat'l Ins. Co., 72 Misc. 3d 1209(A), slip op. at *4 (N.Y. Sup. Ct., Kings
8 Cnty. July 1, 2021); 6593 Weighlock Drive, LLC v. Springhill SMC Corp., 147
9 N.Y.S.3d 386, 392–93 (N.Y. Sup. Ct., Onondaga Cnty. 2021); Mangia Rest.
10 Corp. v. Utica First Ins. Co., 148 N.Y.S.3d 606, 611-12 (N.Y. Sup. Ct., Queens
11 Cnty. 2021); Visconti Bus Serv., LLC v. Utica Nat'l Ins. Grp., 142 N.Y.S.3d 903,
12 915 (N.Y. Sup. Ct., Orange Cnty. 2021); see also, e.g., Kim-Chee LLC v. Phila.
13 Indemnity Ins. Co., No. 1:20 Civ. 1136, 2021 WL 1600831 (W.D.N.Y. Apr. 23,
14 2021); Mohawk Gaming Enters., LLC v. Affiliated FM Ins. Co., 534 F. Supp. 3d
15 216 (N.D.N.Y. 2021); Jeffrey M. Dressel, D.D.S., P.C. v. Hartford Ins. Co. of the
16 Midwest, Inc., No. 20 Civ. 2777 (KAM)(VMS), 2021 WL 1091711 (E.D.N.Y.
17 Mar. 22, 2021); Sharde Harvey DDS, PLLC v. Sentinel Ins. Co., No. 20 Civ.

1 3350 (PGG) (RWL), 2021 WL 1034259 (S.D.N.Y. Mar. 18, 2021).¹ As one New
2 York State trial judge recently explained, courts in jurisdictions outside New
3 York may have reached a different conclusion,² but “all New York courts
4 applying New York law . . . have soundly rejected the argument that business
5 closures . . . due to New York State Executive Orders constitute physical loss
6 or damage to property.” Benny’s Famous Pizza Plus Inc., slip op. at *4.

7 Urging a contrary conclusion, 10012 Holdings and the amici point to
8 Pepsico v. Winterthur Int’l Am. Ins. Co., 806 N.Y.S.2d 709 (2d Dep’t 2005),
9 Port Auth. of N.Y. & N.J. v. Affiliated FM Ins. Co., 311 F.3d 226 (3d Cir. 2002),
10 and TRAVCO Ins. Co. v. Ward, 715 F. Supp. 2d 699 (E.D. Va. 2010), aff’d, 504

¹ To the extent that 10012 Holdings cites lower court decisions from other states and their interpretations under non-New York law, those cases are not binding on New York courts and do not prevent us from confidently predicting how the Court of Appeals would decide the issue before us.

² That is not true, however, for six sister circuits applying Oklahoma, Illinois, California, Ohio, Georgia, and Iowa law, and holding that similar business interruption provisions require some physical damage to the insured’s property. See Goodwill Indus. Cent. Okla., Inc. v. Phila. Indem. Ins. Co., — F.4th —, 2021 WL 6048858 (10th Cir. Dec. 21, 2021) (Oklahoma); Sandy Point Dental, P.C. v. Cincinnati Ins. Co., — F.4th —, 2021 WL 5833525 (7th Cir. Dec. 9, 2021) (Illinois); Mudpie, Inc. v. Travelers Cas. Ins. Co. of Am., 15 F.4th 885 (9th Cir. 2021) (California); Santo’s Italian Café v. Acuity Ins. Co., 15 F.4th 398 (6th Cir. 2021) (Ohio); Gilreath Fam. & Cosm. Dentistry, Inc. v. Cincinnati Ins. Co., No. 21-11046, 2021 WL 3870697 (11th Cir. Aug. 31, 2021) (Georgia); Oral Surgeons, P.C. v. Cincinnati Ins. Co., 2 F.4th 1141 (8th Cir. 2021) (Iowa).

1 F. App'x 251 (4th Cir. 2013), none of which are to the contrary. In Pepsico, for
2 example, a soda company was forced to destroy its soft-drink product when
3 the company "used faulty raw ingredients" provided by third-party vendors,
4 which rendered the soda "unmerchantable." Pepsico v. Winterthur Int'l Am.
5 Ins. Co., 788 N.Y.S.2d 142, 143 (2d Dep't 2004). One question was whether the
6 destruction of the soda product fell within the insurance coverage for "all
7 risks of physical loss of or damage to property," including "personal
8 property" such as the soda. Pepsico v. Winterthur Int'l Am. Ins. Co., 6 Misc.
9 3d 1006(A), slip op. at *1 (N.Y. Sup. Ct., Westchester Cnty. Dec. 10, 2004). The
10 Second Department concluded that the loss of the product was covered
11 because a "physical event" occurred that "seriously impaired" the "function"
12 of the soda and caused the injury or damage. 806 N.Y.S.2d at 711. In other
13 words, the product had sustained physical damage. Similarly, the courts in
14 Affiliated FM Ins. Co. and Ward determined that particulates like asbestos,
15 odors, and noxious fumes, which physically damaged the insured's premises,
16 could trigger coverage under certain policies. Affiliated FM Ins. Co., 311 F.3d
17 at 236; Ward, 715 F. Supp. 2d at 708. Of course, the requirement of a physical
18 event that causes damage to the premises is completely consistent with

1 Roundabout Theatre, but 10012 Holdings does not here allege a “physical
2 event” that caused injury or damage to its premises.

3 Under the circumstances, “we find [no] persuasive evidence that the
4 highest state court would reach a different conclusion” from Roundabout
5 Theatre. Entron, Inc. v. Affiliated FM Ins. Co., 749 F.2d 127, 132 (2d Cir. 1984).
6 We therefore hold, in accord with Roundabout Theatre and every New York
7 state court to have decided the issue, that under New York law the terms
8 “direct physical loss” and “physical damage” in the Business Income and
9 Extra Expense provisions do not extend to mere loss of use of a premises,
10 where there has been no physical damage to such premises; those terms
11 instead require actual physical loss of or damage to the insured’s property.
12 We therefore reject 10012 Holdings’s argument that “physical loss” must
13 mean “loss of physical possession and/or direct physical deprivation” — in
14 other words, loss of use.

15 We note, too, that the term “loss of use” is missing from the Business
16 Income and Extra Expense provisions but included in other provisions of the
17 Policy. A provision entitled “Pollutants and Contaminants,” for example,
18 explicitly distinguishes “physical loss [or] physical damage” on the one hand

1 and “loss of use of property” on the other, Joint App’x 98, treating “physical
2 loss” and “loss of use of property” as distinct harms.

3 10012 Holdings points to provisions in another section of the Policy
4 entitled “Business Liability Coverage Form,” which define “property
5 damage” to encompass both “[p]hysical injury to tangible property” and
6 “[l]oss of use of tangible property that is not physically injured.” Joint App’x
7 123. As Sentinel observes, however, the Business Liability Coverage Form
8 details coverage for claims that are asserted against the insured by a third
9 party, while the section of the Policy at issue in this appeal, contained in a
10 Special Property Coverage Form, details coverage for losses the insured itself
11 suffers. These two sections are entirely separate and protect “wholly different
12 interests.” Great N. Ins. Co. v. Mt. Vernon Fire Ins. Co., 92 N.Y.2d 682, 688
13 (1999). Worse still for 10012 Holdings, the term “property damage” is not
14 used at all in the coverage provisions that 10012 Holdings invokes. We have
15 said that distinct terms must be given their own effect, and that the use of a
16 term in one place but not the other is presumed to be intentional. See
17 India.com, Inc. v. Dalal, 412 F.3d 315, 323 (2d Cir. 2005) (applying New York
18 law). Here, the fact that “property damage” is expressly defined to include

1 loss of use in the third-party liability section of the Policy, but not in the first-
2 party property section of the Policy under which 10012 Holdings claims
3 coverage, further supports our holding.

4 Because 10012 Holdings alleges only that it lost access to its property as
5 a result of COVID-19 and the governmental shutdown orders, and not that it
6 suspended operations because of physical damage to its property, we agree
7 with the District Court that 10012 Holdings cannot recover under either the
8 Business Income or Extra Expense provisions.

9 II. The Civil Authority Provision

10 10012 Holdings separately contends that the Policy's Civil Authority
11 provision required Sentinel to pay for its lost income and extra expenses.
12 This argument is unpersuasive for at least two reasons. First, 10012 Holdings
13 acknowledges that coverage under the Civil Authority provision, which, as
14 previously noted, also requires a "Covered Cause of Loss" damaging
15 property, is contingent on showing that the civil authority orders — here, the
16 executive orders issued by the Governor — resulted from a risk of direct
17 physical loss to property in the vicinity of the gallery. But the executive
18 orders were the result of the COVID-19 pandemic and the harm it posed to

1 human beings, not, as “risk of direct physical loss” entails, risk of physical
2 damage to property. Shuttering a gallery because of possible human infection
3 does not qualify as a “risk of direct physical loss.” Second, even assuming
4 that COVID-19 itself posed a “risk of direct physical loss,” coverage under the
5 Civil Authority provision contemplates that the executive orders prohibiting
6 access to the insured’s premises were prompted by risk of harm to
7 neighboring premises. As the District Court observed, however, “the
8 Complaint does not plausibly allege that the potential presence of COVID-19
9 in neighboring properties directly resulted in the closure of Plaintiff’s
10 propert[y]; rather, it alleges that closure was the direct result of the risk of
11 COVID-19 at Plaintiff’s property.” 10012 Holdings, Inc., 507 F. Supp. 3d at
12 488–89.

13 We therefore conclude that 10012 Holdings also cannot recover under
14 the Policy’s Civil Authority provision. We express no opinion as to whether
15 the Policy would cover the different factual situations that amici suggest in
16 this case.

1 III. Request for Certification to the New York Court of Appeals

2 Finally, in the alternative, 10012 Holdings asks that we certify this
3 question of state law to the New York Court of Appeals³ pursuant to our
4 authority to certify “determinative questions of New York law [that] are
5 involved in a cause pending before [us] for which there is no controlling
6 precedent of the Court of Appeals.” 22 N.Y.C.R.R. § 500.27(a). Certification is
7 “a valuable device for securing prompt and authoritative resolution of
8 unsettled questions of state law, especially those that seem likely to recur and
9 to have significance beyond the interests of the parties in a particular
10 lawsuit.” Kidney v. Kolmar Lab’ys, Inc., 808 F.2d 955, 957 (2d Cir. 1987). If a
11 question of state law is arising primarily in diversity cases, it may be
12 particularly important to certify in order to ensure that state courts are not

³ The proposed question is:

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

1 “substantially deprived of the opportunity to define state law.” Gutierrez v.
2 Smith, 702 F.3d 103, 116–17 (2d Cir. 2012). Certification in diversity cases
3 “discourages forum shopping and affirm[s] that it is the state’s High Court
4 that is entitled to have the final say on any issue of state law.” Id. at 117
5 (quotation marks omitted).⁴ But, of course, certification is not costless:
6 Because “the certification process always incurs the risk of some delay,”
7 Friends of Van Cortlandt Park v. City of New York, 232 F.3d 324, 327 (2d Cir.
8 2000), we must consider the age and urgency of the litigation, the impact that

⁴ Sentinel has suggested that the fact that this is a diversity case cuts against certification. On occasion, dicta from our court has given credence to this view. See, e.g., Valls v. Allstate Ins. Co., 919 F.3d 739, 743 (2d Cir. 2019) (“In diversity cases, certification can effectively defeat a litigant’s constitutionally endorsed entitlement to have its case adjudicated by a federal court rather than a state court, as certification will often effectively empower the state court to determine the outcome.”); 53rd St., LLC v. U.S. Bank Nat’l Ass’n, 8 F.4th 74, 81 (2d Cir. 2021) (same). But this view against certification misses the mark. The right to a federal forum is not the right to a federal interpretation of state law. Erie R. Co. v. Tompkins, 304 U.S. 64 (1938), left no doubt in that regard. Rather, it is the right to a neutral forum for the more subjective determinations involved in fact-finding and trial administration, where “state prejudices” conceivably could “obstruct, or control[] the regular administration of justice.” Martin v. Hunter’s Lessee, 14 U.S. 304, 347 (1816). By “preserving the parties’ right to a federal determination of the factual questions in the suit,” Ira P. Robbins, The Uniform Certification of Questions of Law Act: A Proposal for Reform, 18 J. LEGIS. 127, 135 (1992), certification on questions of law gives the parties in a diversity case exactly what they are due: a state determination of state law and a level playing field as to the facts surrounding the dispute.

1 costs and delays associated with certification will have on the litigants, and
2 the costs that delay imposes on other cases that depend on resolution of the
3 legal issues.

4 In this case, the scales tip slightly against certification. Many suits
5 raising the same interpretive question have been filed in our district courts,
6 and all these cases would be delayed by certification. While it likely would
7 take no more than a few months for the New York Court of Appeals to accept
8 or decline certification, see, e.g., Veloz v. Garland, 37 N.Y.3d 1006 (2021)
9 (three months to decline certification), even that very reasonable delay
10 becomes significant when so many cases are affected. If there were
11 disagreement in the lower New York courts, certification might still be
12 justified, but as we already noted, every New York court interpreting the
13 phrase “direct physical loss” has read it the same way and denied coverage.
14 See Barenboim v. Starbucks Corp., 698 F.3d 104, 109 (2d Cir. 2012) (explaining
15 that the decision to certify a question to the Court of Appeals hinges in part
16 on “whether the New York Court of Appeals has addressed the issue and, if
17 not, whether the decisions of other New York courts permit us to predict how
18 the Court of Appeals would resolve it”).

1 Finally, many cases raising the same issue are percolating through the
2 New York state court system, and nine such cases are currently pending
3 before New York’s intermediate courts of appeals. See University of
4 Pennsylvania Carey Law School, Appeals, Covid Coverage Litigation Tracker,
5 <https://cclt.law.upenn.edu/appeals/> (last visited Dec. 22, 2021) (showing that
6 three appeals focused on this question are currently pending before New
7 York’s First Judicial Department, four are pending before the Second Judicial
8 Department, and two are pending before the Fourth Judicial Department).
9 Thus, the Court of Appeals will have every opportunity to address this
10 question and either endorse or correct our interpretation of New York law,
11 should it wish to do so. In the meantime, following what the lower New York
12 courts have uniformly done is justified.

13 We therefore deny 10012 Holdings’s alternative request to certify the
14 proposed question to the New York Court of Appeals.

CONCLUSION

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We have considered 10012 Holdings’s remaining arguments, including those relating to the Policy’s Covered Property provision, and conclude that they are without merit. For the foregoing reasons, the judgment of the District Court is **AFFIRMED**.