

No. 21-0302

UNITED STATES COURT OF APPEALS  
FOR THE SIXTH CIRCUIT



In re: ZURICH AMERICAN INSURANCE )  
COMPANY, )  
 )  
Petitioner. )

ORDER

Before: SUHRHEINRICH, CLAY, and NALBANDIAN, Circuit Judges.

This case arises from the denial of an insurance claim submitted by Plaintiffs, various restaurant operators, to Defendant Zurich American Insurance Company for business income lost as the result of COVID-19-related government shutdown orders that halted Plaintiffs’ dine-in operations. The district court granted summary judgment to Plaintiffs on the insurance coverage issues asserted in their claims for breach of contract (Count I) and declaratory judgment (Count III), granted summary judgment to Zurich on Plaintiffs’ claim for bad faith denial of coverage (Count II), and certified the legal issue in Count I for interlocutory appeal under 28 U.S.C. § 1292(b). Zurich now petitions this court for permission to appeal the district court’s order under § 1292(b).<sup>1</sup> Plaintiffs do not oppose the petition.

Under § 1292(b), a district court may certify for interlocutory appeal an otherwise non-appealable order in a civil action if it determines that the order “[1] involves a controlling question

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<sup>1</sup> Although the district court’s order certified a specific issue for appeal, “section 1292(b) authorizes certification of *orders* for interlocutory appeal, not certification of *questions*.” *In re Trump*, 874 F.3d 948, 951 n.3 (6th Cir. 2017) (order) (quoting *Linton v. Shell Oil Co.*, 563 F.3d 556, 557 (5th Cir. 2009)). “Thus, if the petition is granted, we retain full discretion to review the district court’s *order*.” *Id.*

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of law as to which there is [2] substantial ground for difference of opinion and that [3] an immediate appeal from the order may materially advance the ultimate termination of the litigation.” 28 U.S.C. § 1292(b). “The Court of Appeals . . . may thereupon, in its discretion, permit an appeal to be taken from such order[.]” *Id.* In exercising such discretion, “the three factors that justify interlocutory appeal should be treated as *guiding criteria* rather than *jurisdictional* requisites.” *In re Trump*, 874 F.3d at 951 (quoting 16 Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 3930 (3d ed. 2002)). Other prudential factors may also guide our discretion to permit an interlocutory appeal. *Id.* at 951–52.

The parties agree that Zurich raises at least one controlling question of law for appeal: whether the policy’s coverage for “direct physical loss of or damage to property” applies to Plaintiffs’ loss of business income due to COVID-19-related government shutdown orders that halted their dine-in operations. *See In re City of Memphis*, 293 F.3d 345, 351 (6th Cir. 2002); *GenCorp, Inc. v. Am. Int’l Underwriters*, 178 F.3d 804, 817 (6th Cir. 1999). And the parties agree that resolution of this question may materially affect Zurich’s liability and, thus, the outcome of the litigation below. *See In re City of Memphis*, 293 F.3d at 351.

A substantial difference of opinion also exists regarding the correctness of the district court’s decision. In granting summary judgment to Plaintiffs on Counts I and III, the district court reasoned that the COVID-19-related interruption of Plaintiffs’ dine-in operations amounted to “direct physical loss of or damage to [Plaintiffs’] property” under Ohio law. We have since held, however, that “a pandemic-triggered government order, barring in-person dining at a restaurant” does not qualify as “direct physical loss of or damage to’ the property” under Ohio law. *Santo’s Italian Café LLC v. Acuity Ins. Co.*, No. 21-3068, \_\_\_ F.4th \_\_\_, at \*3 (6th Cir. Sept. 22, 2021).

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Accordingly, the petition for permission to appeal is **GRANTED**, the district court's order is **VACATED** as to the insurance coverage issue alleged in Counts I and III, and the case is **REMANDED** for further proceedings consistent with this order.

ENTERED BY ORDER OF THE COURT

A handwritten signature in black ink, appearing to read "Deborah S. Hunt", written in a cursive style.

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Deborah S. Hunt, Clerk