FILED
United States Court of Appeals
Tenth Circuit

November 2, 2021

Christopher M. Wolpert
Clerk of Court

PUBLISH

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH,

Plaintiff Counterclaim Defendant - Appellee,

v.

DISH NETWORK, LLC,

Defendant Counterclaimant - Appellant.

No. 20-1215

Appeal from the United States District Court for the District of Colorado (D.C. No. 1:15-CV-01053-JLK)

Lee M. Epstein, Flaster Greenberg PC, Philadelphia, Pennsylvania, for Defendant - Appellant.

Robert Reeves Anderson, Arnold & Porter Kaye Scholer LLP, Denver, Colorado (Timothy R. Macdonald, Arnold & Porter Kaye Scholer LLP, Denver, Colorado and Sally L. Pei, Arnold & Porter Kaye Scholer LLP, Washington, D.C., with him on the brief), for Plaintiff - Appellee.

Before **HOLMES**, **BALDOCK**, and **MATHESON**, Circuit Judges.

MATHESON, Circuit Judge.

The United States and four states sued DISH Network, LLC ("DISH"), a satellite television provider, for violations of the Telephone Consumer Protection Act ("TCPA"). DISH submitted a claim for defense and indemnity to its insurer, National Union Fire Insurance Company of Pittsburgh, Pennsylvania ("National Union"). National Union denied the claim and filed suit in Colorado federal court seeking a declaration that it had no duty to defend or indemnify DISH in the underlying TCPA lawsuit. The district court granted summary judgment to National Union, relying on our decision in *ACE American Insurance Co. v. DISH Network, LLC*, 883 F.3d 881 (10th Cir. 2018). Exercising jurisdiction under 28 U.S.C. § 1291, we affirm.

We also affirm the district court's denial of DISH's request for further discovery under Federal Rule of Civil Procedure 56(d). And we deny DISH's motion to certify a question of state law to the Colorado Supreme Court.

I. BACKGROUND

A. *Factual History*

DISH sells satellite television programming to consumers throughout the United States. DISH and its authorized dealers market its services through a variety of methods, including telemarketing.

1. The National Union Policies

National Union issued seven Commercial Umbrella Policies (the "Policies" and each one a "Policy") to DISH between 2003 and 2010. The 2003 Policy and 2004 Policy are relevant here.

Under Insuring Agreement I of the 2003 Policy, titled "Coverage," National Union agreed to:

> pay on behalf of [DISH] those sums in excess of the Retained Limit that [DISH] becomes legally obligated to pay by reason of liability imposed by law or assumed by [DISH] under an Insured Contract because of Bodily Injury, Property Damage, Personal Injury or Advertising Injury that takes place during the Policy Period and is caused by an Occurrence happening anywhere in the world. The amount we will pay for damages is limited as described in Insuring Agreement III, Limits of Insurance.

App., Vol. 6 at 1231.

The language of the 2004 Policy was substantially similar. Its coverage provision specified that National Union would pay on behalf of DISH:

> those sums in excess of the Retained Limit that [DISH] becomes legally obligated to pay as damages by reason of liability imposed by law because of Bodily Injury, Property Damage or Personal Injury and Advertising Injury to which this Insurance applies . . . .

Id. at 1196.

2. **The Underlying Telemarketing Lawsuit**

In 2009, the United States and the States of California, Illinois, North Carolina, and Ohio sued DISH in the United States District Court for the Central District of Illinois alleging DISH's telemarketing practices violated the TCPA (the "Telemarketing Lawsuit"). The TCPA makes it "unlawful for any person [subject to a limited list of exceptions] . . . to initiate any telephone call to any [cell phone or] residential telephone line using an artificial or prerecorded voice to deliver a message without the prior express consent of the called party." 47 U.S.C. § 227(b)(1)(A), (B).

It also permits a state to "bring a civil action on behalf of its residents to enjoin such calls, an action to recover for actual monetary loss or receive $500 in damages for each violation, or both such actions." *Id.* § 227(g)(1). The state enforcement provision allows for treble damages up to $1,500 for each violation that is committed "willfully or knowingly." *Id.*

The complaint in the Telemarketing Lawsuit (the "Telemarketing Complaint") alleged violations of the TCPA (among other claims not relevant here) and sought:

(1) Statutory damages of $500 for each violation of the TCPA;

(2) Statutory damages of $1,500 for each violation of the TCPA found by the court to have been committed by DISH willfully and knowingly; and

(3) A permanent injunction to prevent future violations of the TCPA and relevant state law.

3. ***ACE***

In addition to the Umbrella Policies it obtained through National Union, DISH purchased six primary commercial general liability policies from ACE American Insurance Co., for consecutive annual periods from 2004 through 2010 (the "ACE Policies").[1] The National Union Umbrella Policies provided additional coverage for amounts in excess of the limits in DISH's primary policies from ACE.

[1] DISH also purchased a primary commercial general liability policy from Travelers Insurance Company effective from 2003 through 2004. *See Travelers Prop. Cas. Co. of Am. v. DISH Network LLC*, No. 12-03098, 2014 WL 1217668, at *2 (C.D. Ill. Mar. 24, 2014).

ACE sued DISH in the District of Colorado seeking a declaration that the ACE Policies did not cover the Telemarketing Lawsuit. *ACE Am. Ins. Co. v. Dish Network, LLC*, 173 F. Supp. 3d 1128, 1132 (D. Colo. 2016). The district court granted summary judgment to ACE, *id.* at 1139, and we affirmed. *ACE Am. Ins. Co. v. Dish Network, LLC*, 883 F.3d 881 (10th Cir. 2018). We concluded that (1) the statutory damages sought in the Telemarketing Complaint are a "penalty" and thus uninsurable under Colorado law, and (2) the ACE policies did not cover claims for prospective injunctive relief. *Id.* at 892-94.[2]

B. ***Procedural History***

After the Telemarketing Complaint was filed, DISH submitted a claim to National Union for defense and indemnity under the Policies. National Union rejected the claim.

National Union then filed this suit in the District of Colorado, invoking the court's diversity jurisdiction. *See* 28 U.S.C. § 1332(a). It sought a declaratory judgment that it had no duty under the Policies to defend or indemnify DISH in connection with the Telemarketing Lawsuit. DISH asserted counterclaims alleging that National Union breached the Policies by denying coverage.

[2] In a separate suit for declaratory relief brought by Travelers in the Central District of Illinois, the district court granted partial summary judgment to DISH. *Travelers*, 2014 WL 1217668, at *15.

The parties filed cross-motions for summary judgment on National Union's duty to defend under the 2003 and 2004 Policies, as well as motions for additional discovery under Federal Rule of Civil Procedure 56(d).[3]

The district court granted summary judgment to National Union. It relied heavily on our previous decision in *ACE*. As relevant to this appeal, the district court concluded:

- Under *ACE*, the claim for statutory damages in the Telemarketing Complaint sought a penalty and therefore was uninsurable as a matter of Colorado public policy.
- The Policies did not cover the Telemarketing Complaint's claim for injunctive relief because, as in *ACE*, they did not cover the costs of preventing future violations.
- The Telemarketing Complaint's allegations did not potentially fall within the Policies' definitions of "Bodily Injury" or "Property Damage."

The district court thus held that National Union had no obligation to defend or, by extension, to indemnify DISH in the Telemarketing Lawsuit. The court also denied DISH's Rule 56(d) motion as unnecessary.

[3] The remaining five policies for the years 2005 to 2009 "contain an express exclusion which—if enforceable—clearly excludes" the coverage sought by DISH. App., Vol. 7 at 1577 n.3. The parties agreed that, if there is no coverage under the 2004 Policy, there could be no coverage under the successor policies because the coverage language, aside from the express exclusion, is substantially similar. The parties also agreed that if National Union had no duty to defend, it had no duty to indemnify because the duty to defend is broader. The district court therefore directed the parties to file initial summary judgment motions limited to the question of whether National Union had a duty to defend under the 2003 or 2004 Policies.

II. DISCUSSION

Federal jurisdiction in this case is based on diversity of citizenship. 28 U.S.C. § 1332(a). We therefore apply the substantive law of the forum state, Colorado, to the underlying duty-to-defend claim, and federal law to the Rule 56(d) procedural issue. *See Broker's Choice of America, Inc. v. NBC Universal Inc.*, 861 F.3d 1081, 1099 (10th Cir. 2017).

A. *Duty to Defend*

1. Standard of Review

"We review an order granting summary judgment de novo, giving no deference to the district court's decision and applying the same standards as the district court." *Carlile v. Reliance Standard Life Ins. Co.*, 988 F.3d 1217, 1221 (10th Cir. 2021). "In doing so, we view the evidence and draw reasonable inferences in the light most favorable to the nonmoving party." *Sinclair Wyo. Refin. Co. v. A&B Builders, Ltd.*, 989 F.3d 747, 765 (10th Cir. 2021) (quotations and alteration omitted). "The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a).

Under Colorado law, insurance policies are contracts, which courts review de novo. *Owners Ins. Co. v. Dakota Station II Condo. Ass'n, Inc.*, 443 P.3d 47, 51 (Colo. 2019).

2. **Colorado Insurance Law**

a. *General principles of policy interpretation*

Colorado courts "construe an insurance policy's terms according to principles of contract interpretation." *Thompson v. Md. Cas. Co.*, 84 P.3d 496, 501 (Colo. 2004). "As with any contract, we construe the terms of an insurance policy in order to promote the intent of the parties." *Cary v. United of Omaha Life Ins. Co.*, 108 P.3d 288, 290 (Colo. 2005). "The words of the contract should be given their plain meaning according to common usage, and strained constructions should be avoided." *Allstate Ins. Co. v. Huizar*, 52 P.3d 816, 819 (Colo. 2002). Policy terms "are to be interpreted as understood by an ordinary person, not by one engaged in the insurance business." *Allstate Ins. Co. v. Juniel*, 931 P.2d 511, 516 (Colo. App. 1996).

Courts must enforce the plain language of the insurance policy unless it is ambiguous. *Cary*, 108 P.3d at 290. "An insurance policy is ambiguous if it is susceptible on its face to more than one reasonable interpretation." *Id.* But "[a] mere disagreement between the parties concerning interpretation of the policy does not create an ambiguity." *Id.* "To determine whether a policy contains an ambiguity, we must evaluate the policy as a whole." *Id.* When an insurance policy is "offered on a take it or leave it basis, rather than being fully negotiated by the parties," Colorado courts "construe an ambiguity in favor of coverage." *Hoang v. Assurance Co. of Am.*, 149 P.3d 798, 892 (Colo. 2007) (citation omitted).

b. *Duty to defend*

Colorado courts hold that "an insurer's duty to defend arises solely from the complaint in the underlying action." *Cotter Corp. v. Am. Empire Surplus Lines Ins. Co.*, 90 P.3d 814, 827 (Colo. 2004). A duty to defend exists "when a complaint includes any allegations that, 'if sustained, would impose a liability covered by the policy.'" *Id.* (quoting *Hecla Mining Co. v. N.H. Ins. Co.*, 811 P.2d 1083, 1089 (Colo. 1991)). This duty is "broader than the duty to indemnify, which depends on the ultimate determination of coverage as decided by the trier of fact." *Id.*

In making the duty-to-defend determination, "Colorado courts adhere to a 'four corners rule' or 'complaint rule,' under which the courts compare the allegations of the underlying complaint with the terms of the applicable policy." *DISH Network Corp. v. Arch Specialty Ins. Co.*, 659 F.3d 1010, 1015 (10th Cir. 2011). This rule "operates to cast a broad net, such that when the underlying complaint alleges *any facts* or claims that might fall within the ambit of the policy, the insurer must tender a defense." *Cyprus Amax Mins. Co. v. Lexington Ins. Co.*, 74 P.3d 294, 301 (Colo. 2003). Insurers thus have "a heavy burden to overcome in avoiding the duty to defend, such that the insured need only show that the underlying claim may fall within policy coverage; the insurer must prove it cannot." *Id.* (quotations omitted).

"To defeat a duty to defend, an insurer must establish that there is no factual or legal basis on which the insurer might eventually be held liable to indemnify the insured." *Cotter*, 90 P.3d at 829 (quotations omitted). "Where the insurer's duty to

defend is not apparent from the pleadings in the case against the insured, but the allegations do state a claim which is potentially or arguably within the policy coverage, or there is some doubt as to whether a theory of recovery within the policy coverage has been pleaded, the insurer must accept the defense of the claim." *Hecla*, 811 P.2d at 1089 (quotations and alteration omitted).

3. **Analysis**

The underlying Telemarketing Complaint sought statutory damages under the TCPA and permanent injunctive relief. Following *ACE*, the district court concluded that (a) TCPA statutory damages are uninsurable as a matter of Colorado public policy and (b) the Policies do not cover claims for injunctive relief. We agree. Because the Policies do not cover any of the relief sought in the Telemarketing Complaint, National Union had no duty to defend DISH against the Telemarketing Lawsuit.

Alternatively, National Union had no duty to defend because (c) the Telemarketing Complaint did not allege a potentially covered injury. The district court correctly concluded that none of the allegations of the Telemarketing Complaint potentially fall within the Policies' definitions of "Bodily Injury" or "Property Damage," which are the only sources of coverage that DISH presses on appeal.

a. *Statutory damages*

National Union had no duty to defend DISH against a claim for TCPA statutory damages because those damages are a "penalty" under Colorado law and thus uninsurable as a matter of Colorado public policy.

i. TCPA statutory damages are uninsurable "penalties" under Colorado law

"Colorado public policy prohibits 'insuring intentional or willful wrongful acts.'" *ACE*, 883 F.3d at 888-89 (quoting *Bohrer v. Church Mut. Ins. Co.*, 965 P.2d 1258, 1262 (Colo. 1998)). Specifically, "the public policy of Colorado prohibits an insurance carrier from providing insurance coverage for punitive damages." *Id.* at 889 (alteration omitted) (quoting *Lira v. Shelter Ins. Co.*, 913 P.2d 514, 517 (Colo. 1996)). In Colorado, "[p]unitive damages are 'intended to punish the defendant for his wrongful acts and to deter similar conduct in the future' rather than compensate the plaintiff." *Id.* (quoting *Lira*, 913 P.2d at 517).

We have already held in *ACE*, which concerned the same underlying Telemarketing Complaint, that "the provision awarding statutory damages for violating the TCPA is a penalty under Colorado law and uninsurable as a matter of Colorado public policy." *ACE*, 883 F.3d at 892. That holding controls here. "[W]hen a panel of this Court has rendered a decision interpreting state law, that interpretation is binding on district courts in this circuit, and on subsequent panels of this Court, unless an intervening decision of the state's highest court has resolved the issue." *Wankier v. Crown Equip. Corp.*, 353 F.3d 862, 866 (10th Cir. 2003).

ii. *Rooftop Restoration* does not undermine *ACE*

DISH argues that the Colorado Supreme Court's decision in *Rooftop Restoration, Inc. v. American Family Mutual Insurance Co.*, 418 P.3d 1173 (Colo. 2018), has undermined the reasoning of *ACE*. We disagree.

Our analysis in *ACE* proceeded from the Colorado Supreme Court's conclusion in *Kruse v. McKenna* that TCPA statutory damages are a "penalty" as that term is used in Colorado's survival statute. 178 P.3d 1198, 1201 (Colo. 2008), *overruled on other grounds by Guarantee Tr. Life Ins. Co. v. Est. of Casper by & through Casper*, 418 P.3d 1163 (Colo. 2018). In Colorado, statutory claims for "penalties" "do not survive and are therefore non-assignable." *Id.* at 1200. The *Kruse* court articulated a three-part test for determining "whether a statutory claim is one for a penalty" under Colorado law. *Id.* at 1201.[4] Applying that test, the court held that statutory damages under the TCPA are "penalties" and therefore unassignable. *Id.*

In *ACE*, we recognized that "the Colorado courts have not had occasion to apply *Kruse* in the context of insurance coverage," but we concluded that, "absent a compelling reason to believe the Colorado Supreme Court would limit[] its holding in *Kruse* to assignability, we cannot depart from that decision." 883 F.3d at 890. We

[4] The three-part *Kruse* test asks "whether (1) the statute asserted a new and distinct cause of action; (2) the claim would allow recovery without proof of actual damages; and (3) the claim would allow an award in excess of actual damages." 178 P.3d at 1201 (footnote omitted).

thus held that TCPA statutory damages are uninsurable penalties under Colorado law. *Id.* at 892.

In *Rooftop Restoration*, decided after *ACE*, the Colorado Supreme Court held that a statutory claim for unreasonable delay or denial of insurance benefits is not an action for a "penalty" and therefore not subject to Colorado's one-year statute of limitations for "[a]ll actions for any penalty or forfeiture of any penal statutes." 418 P.3d at 1174-75 (quoting Colo. Rev. Stat. § 13-80-103(1)(d)). In that context, the court said "the *Kruse* test is not applicable when the intent of the legislature is clear that a particular cause of action is or is not governed by a certain statute of limitations." *Id.* at 1176. Rather than apply the *Kruse* test, the court looked "to the text of the statute of limitations and the associated accrual provision to determine the intent of the legislature." *Id.*

DISH argues that *Rooftop Restoration* abrogated *ACE*. It urges us to consider anew whether TCPA statutory damages are penalties for insurance purposes and to apply the "legislative intent" analysis endorsed in *Rooftop Restoration*. But DISH misreads *Rooftop Restoration*.

Rooftop Restoration did not disturb *Kruse*'s holding that TCPA statutory damages are penalties under Colorado law. Although it declined to apply the *Kruse* test in the statute of limitations context, the court specifically noted "that [the *Kruse* test] may be useful in other contexts and d[id] not necessarily abandon it entirely." *Id.* It then cited *Kruse* as an example of one circumstance in which that test may still

be "useful." *Id.*[5] *Rooftop Restoration* thus left intact the holding we relied upon in *ACE*—that TCPA statutory damages are penalties under Colorado law. *See* 883 F.3d at 890-92. Because *Rooftop Restoration* did not undermine the premise of *ACE*, we have no occasion to revisit *ACE*'s holding that TCPA statutory damages are uninsurable under Colorado law. *See Wankier*, 353 F.3d at 866 (When a panel of this court interprets state law, that interpretation is binding on subsequent panels "unless an intervening decision of the state's highest court has resolved the issue.").

b. *Injunctive relief*

The National Union Policies do not cover the costs of preventing future harms. National Union therefore had no duty to defend DISH against claims for prospective injunctive relief. Here, too, *ACE* controls.

i. The ACE Policies

The ACE Policies required ACE to "pay those sums that DISH *becomes legally obligated to pay* as damages *because of* injuries or damage to which this insurance applies." *ACE*, 883 F.3d at 893 (quotations and alterations omitted). We

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[5] Specifically, the court said:

> Although our decision today does not apply the *Kruse* test, we note that it may be useful in other contexts and do not necessarily abandon it entirely. *E.g.*, *Kruse*, 178 P.3d at 1198 (considering whether a claim under the Telephone Consumer Protection Act was assignable to a third-party). For example, the *Kruse* test may still prove useful in cases where the intent of the legislature is not clear from the plain meaning of the relevant statutory text when viewed in the context of the statutory scheme as a whole.

Rooftop Restoration, 418 P.3d at 1176 (footnote omitted).

interpreted this language to mean that "ACE is obligated to indemnify damages arising from *past* injuries, not the cost of preventing future violations." *Id.* Although the Colorado Supreme Court has held the "ordinary meaning of 'damages' is broad and covers equitable relief," we explained that Colorado has not "mandated that insurers absorb the costs of preventing future damages." 883 F.3d at 893 (quoting *Compass Ins. Co. v. City of Littleton*, 984 P.2d 606, 622-23 (Colo. 1999)).

ii. The National Union Policy

DISH argues that *ACE* is distinguishable because the ACE Policies covered only "damages," while the 2003 National Union Policy covered expenses that DISH became legally obligated to pay "by reason of liability imposed by law."[6] We agree with National Union that the 2003 Policy, like the ACE Policies, only covers damages arising from past injuries.

Like the ACE Policies, the 2003 National Union Policy covered only sums that DISH "becomes legally obligated to pay . . . because of" covered injury or damage "that takes place during the policy period." App., Vol. 6 at 1231. As we concluded in *ACE*, the "cost of preventing future violations" is not an amount incurred "because of" an injury that occurred during the applicable period. 883 F.3d at 893.

[6] The 2004 Policy, like the ACE Policies, replaced the phrase "by reason of liability imposed by law" with the phrase "as damages." App., Vol. 6 at 1196. Because we conclude that the 2003 Policy does not cover claims for injunctive relief, it follows that the 2004 Policy does not either.

* * * *

Under *ACE*, TCPA statutory damages are uninsurable under Colorado law, and the National Union Policies do not cover injunctive relief. Because the Policies do not cover the relief sought in the Telemarketing Complaint, National Union had no duty to defend DISH in the underlying suit.

c. *Covered injuries*

Alternatively, National Union had no duty to defend DISH in the underlying suit because the Telemarketing Complaint did not allege a covered injury.

The National Union Policies covered only "Property Damage," "Bodily Injury," "Personal Injury," and "Advertising Injury." On appeal, DISH argues that the allegations in the Telemarketing Complaint potentially fell within the Policies' definitions of "Bodily Injury" and "Property Damage." We agree with the district court that they did not.

The 2003 Policy defined "Bodily Injury" as "bodily injury, sickness, disability or disease" and "mental injury, mental anguish, humiliation, shock or death if directly resulting from bodily injury, sickness, disability or disease." App., Vol. 6 at 1233. The 2004 Policy similarly defined "Bodily Injury" as "bodily injury, sickness, or disease sustained by any person, including death or mental anguish resulting from any of these at any time." *Id.* at 1211.

Both Policies defined "Property Damage" as "1. Physical injury to tangible property, including all resulting loss of use of that property," or "2. Loss of use of tangible property that is not physically injured." *Id.* at 1216-17; 1236.

The allegations of the Telemarketing Complaint did not potentially or arguably fall within the Policies' definition of "Bodily Injury" or "Property Damage." Under the complaint rule, "if the complaint *does not* allege on its face a claim that would be covered by the policy, then there is no duty to defend." *Chavez v. Ariz. Auto. Ins. Co.*, 947 F.3d 642, 646 (10th Cir. 2020). The duty to defend arises only "when the underlying complaint alleges *any facts* or claims that might fall within the ambit of the policy." *Cyprus Amax Mins.*, 74 P.3d at 301. In applying the complaint rule, "we may not read hypothetical facts into the pleadings." *Lopez ex rel. Lopez v. Am. Fam. Mut. Ins. Co.*, 148 P.3d 438, 440 (Colo. App. 2006).

Nothing in the Telemarketing Complaint suggested any potential liability for "bodily injury, sickness, disability or disease." App., Vol. 6 at 1233. It contained no allegation that unsolicited telemarketing calls physically injured any consumer. The only "injury" alleged was the receipt of unwanted phone calls, which Congress has recognized as a legally cognizable concrete harm. *See Lupia v. Medicredit, Inc.*, 8 F.4th 1184, 1192 (10th Cir. 2021) (Congress "may elevate to the status of legally cognizable injuries concrete, *de facto* injuries that were previously inadequate in law" (quotations omitted)); *Gadelhak v. AT&T Servs., Inc.*, 950 F.3d 458, 463 (7th Cir. 2020) (recognizing unwanted text messages under the TCPA as a sufficiently "concrete" harm to satisfy Article III). But this "injury" did not fall within the Policies' definition of bodily harm.

Nor did the Telemarketing Complaint allege "Property Damage," including the "loss of use" of "tangible property." App., Vol. 6 at 1236. DISH argues that

unwanted telemarketing calls cause the "loss of use" of one's telephone because the recipient of such a call cannot use the phone for other purposes during the call. But that allegation did not appear in the Telemarketing Complaint.

* * * *

The Telemarketing Complaint did not allege any injuries that potentially fall within the Policies' definitions of "Bodily Injury" or "Property Damage." For this independent reason, National Union had no duty to defend DISH in the Telemarketing Lawsuit.

B. ***Rule 56(d)***

DISH also appeals the district court's denial of its request for additional discovery under Federal Rule of Civil Procedure Rule 56(d). Reviewing for abuse of discretion, *Birch v. Polaris Indus., Inc.*, 812 F.3d 1238, 1249 (10th Cir. 2015), we affirm.

Under Rule 56(d), a district court may permit additional time for discovery if "a nonmovant shows by affidavit or declaration that, for specified reasons, it cannot present facts essential to justify its opposition." The declaration must specify "(1) the probable facts not available, (2) why those facts cannot be presented currently, (3) what steps have been taken to obtain these facts, and (4) how additional time will enable the party to obtain those facts and rebut the motion for summary judgment." *Birch*, 812 F.3d at 1249 (quotations and alteration omitted). "Requests for further discovery should ordinarily be treated liberally. But relief under Rule 56(d) is not

automatic." *Cerveny v. Aventis, Inc.*, 855 F.3d 1091, 1110 (10th Cir. 2017) (citations omitted).

The district court correctly concluded that National Union had no duty to defend DISH based on the plain and unambiguous meaning of the relevant policy provisions. It decided a pure question of law. No discovery was needed. "A court should only admit parol evidence when the contract between the parties is so ambiguous that their intent is unclear." *Boyer v. Karakehian*, 915 P.2d 1295, 1299 (Colo. 1996); *see also In re MS55, Inc.*, 477 F.3d 1131, 1137 (10th Cir. 2007). Because the policy provisions were clear, the district court therefore did not abuse its discretion by denying DISH's Rule 56(d) request.[7]

C. ***Certification***

DISH also moved to certify the following question to the Colorado Supreme Court:

> Are the statutory damages allowed for violation of the Telephone Consumer Protection Act, 47 U.S.C. § 227 ("TCPA"), punitive and thus uninsurable as a matter of Colorado Public Policy?

Doc. 10781450 at 1.

[7] DISH's argument that the district court erroneously denied its Rule 56(d) request for failure to comply with the District of Colorado's local rules mischaracterizes the court's ruling. Although the district court noted in passing that "DISH did not file a separate Rule 56(d) motion as required by D.C.COLO.LCivR 7.1(d)," it denied DISH's request because the discovery sought was not necessary for deciding the summary judgment motions. App., Vol. 7 at 1577.

We deny the motion. Certification is appropriate if "the question before us (1) may be determinative of the case at hand and (2) is sufficiently novel that we feel uncomfortable attempting to decide it without further guidance." *Morgan v. Baker Hughes Inc.*, 947 F.3d 1251, 1258 (10th Cir. 2020) (quotations omitted). The question DISH seeks to certify is not novel or uncertain. We answered it in *ACE*.

III. **CONCLUSION**

We affirm the judgment of the district court. We also deny DISH's motion to certify a question of state law to the Colorado Supreme Court.