FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

DENNIS L. MUNDEN; SHERRILYN L. MUNDEN, *Plaintiffs-Appellants*, v. STEWART TITLE GUARANTY COMPANY, a Texas surety; CHICAGO TITLE INSURANCE COMPANY, an Illinois surety, *Defendants-Appellees.*	No. 20-35336 D.C. No. 4:19-cv-00112-DCN OPINION

Appeal from the United States District Court
for the District of Idaho
David C. Nye, Chief District Judge, Presiding

Argued and Submitted May 3, 2021
Seattle, Washington

Filed August 13, 2021

Before: Danny J. Boggs,[*] A. Wallace Tashima, and Marsha S. Berzon, Circuit Judges.

Opinion by Judge Boggs

[*] The Honorable Danny J. Boggs, Senior Circuit Judge of the United States Court of Appeals for the Sixth Circuit, sitting by designation.

SUMMARY[**]

Title Insurance / Idaho Law

The panel affirmed the district court's grant of summary judgment to Stewart Title Guaranty Company, reversed the district court's grant of summary judgment to Chicago Title Insurance Company, and vacated the district court's judgment as to Chicago Title only in a diversity action brought by plaintiff title insurance holders against insurance companies for indemnification and breach of contract.

The plaintiffs initially sued Bannock County, Idaho in state court to prevent enforcement of an ordinance restricting their use of a road passing through their land. Stewart Title and Chicago Title refused to defend and indemnify plaintiffs in the state action. The plaintiffs sued the insurers in federal court, and the district court granted the insurance companies' motions for summary judgment. The district court found that the plaintiffs had failed to show the existence of a "public record," as defined by the policies, showing any facts, rights, claims, interests, easements, liens, or encumbrances by reason of which the plaintiffs' state-court dispute arose. Because each policy excluded coverage for loss, damages, and expenses arising by reason of such items not shown in the public records, the district court found that the companies had no obligation to cover the plaintiffs' claims.

[**] This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

The panel examined Idaho law on the interpretation of contracts to interpret the policy language in dispute here.

Concerning the disputed meaning of the term "public records" in the title policies, the panel followed the process in *McFarland v. Liberty Ins. Corp.*, 434 P.3d 215 (Idaho 2019), to determine a reasonable meaning for the definition of the term. "Public records" are official documents that were brought into existence in accordance with Idaho public statutes, brought into existence on or before the date of the policy, and intended, at least in part, to provide constructive notice of some fact or circumstance relevant to the insured property to purchasers for value who did not have actual knowledge of that fact or circumstance. Applying the definition, the panel held that the Bannock County road map was a "public record" within the meaning of the policy. Because the maps were published before the effective date of each policy and because the plaintiffs' dispute with the County arose by reason of the County's claim to title of the road, none of General Exceptions 2–4 in the Stewart policy nor either of Exceptions 1 or 3 in the Chicago policy excluded coverage for the plaintiffs' claims.

The panel next considered the Stewart Title policy's separate exclusion at issue: Special Exception 4, disclaiming coverage for premises falling within the bounds of roads or highways. Although the district court did not reach the issue, the panel considered it because Stewart Title argued in its motion for summary judgment that Special Exception 4 applied to the plaintiffs' dispute. The panel held that the only reasonable meaning of Special Exception 4 in the Stewart Title policy favored the insurer, not the insured. Specifically, the panel held that so long as there was some causal link between a public interest in roads on the plaintiffs' property and some kind of loss, damage, costs,

attorneys' fees or expenses, the policy did not cover that loss or damages, and Stewart Title had no obligation to pay those costs, fees, or expenses. Here, the plaintiffs sued Bannock County because of the public interest the County asserted in the road on their land, by virtue of which the County imposed use restrictions on that road. Stewart Title had no obligation under its policy to defend or indemnify the plaintiffs in their action against the County.

COUNSEL

Nathan M. Olsen (argued), Petersen Moss Hall & Olsen, Idaho Falls, Idaho, for Plaintiffs-Appellants.

Matthew Cleverly (argued), Fidelity National Law Group, Seattle, Washington; Tyler H. Neill (argued), Casey Legal Group PLLC, Eagle, Idaho; for Defendants-Appellees.

OPINION

BOGGS, Circuit Judge:

This is a contract-interpretation case arising under Idaho law. The Mundens, a married couple, own land in Bannock County, Idaho. They purchased title insurance for that property from the defendant insurance companies. Several years later, the Mundens sued Bannock County in Idaho state court to prevent enforcement of an ordinance restricting their use of a road passing through their land. The Mundens then sued the insurance companies in federal court for indemnification and breach of contract, alleging that the companies failed to honor their promise to defend the Mundens' title. The insurance companies assert that the

Mundens' claims fall outside the scope of their policies' coverage. The district court granted summary judgment to the insurance companies, and the Mundens appealed.

We affirm in part and reverse in part. The district court erred in its interpretation of the insurance policies under Idaho law. One of the companies, Chicago Title, has not shown that it is entitled to judgment. The other company, Stewart Title, is still entitled to judgment, but for a different reason than the district court gave.

I. Background

A. Factual Circumstances

1. The Title Policies

Dennis and Sherrilyn Munden are a married couple living in Bountiful, Utah. They own over 1400 acres of real property in two sets of parcels in Bannock County, Idaho, which they use for ranching. They purchased the first set of parcels, about 768 acres total, in January 2012 and the second set, totaling about 660 acres, in August 2014. The Mundens purchased title insurance for the first purchase through Stewart Title Guaranty Co. and for the second purchase through Chicago Title Insurance Co. The policies obligate the companies to indemnify and defend the Mundens against any covered claims to their title.

At issue are the following exclusions in the policies. First, the Stewart Title policy:

> does not insure against loss or damage (and the Company will not pay costs, attorneys' fees or expenses) which arise by reason of:

. . .

General Exceptions:

. . .

2) Any facts, rights, interests, or claims which are not shown by the public records, but which could be ascertained by an inspection of the land or by making inquiry of persons in possession thereof.

3) Easements, liens, or encumbrances, or claims thereof, which are not shown by the public records.

4) Discrepancies, conflicts in boundary lines, shortages in area, encroachments, or any other facts which a correct survey would disclose, and which are not shown by the public records.

. . .

Special Exceptions: . . .

. . .

4. Right, title and interest of the public in and to those portions of the above described premises falling within the bounds of roads or highways.

The Chicago Title policy:

> does not insure against loss or damages, and the Company will not pay costs, attorney's fees, or expenses that arise by reason of:
>
> 1. Rights or claims of parties in possession not shown by the public records.
>
> . . .
>
> 3. Easements, or claims of easements, not shown by the public records.

And under both policies, the definition of "public records" is:

> Records established under state statutes at Date of Policy for the purpose of imparting constructive notice of matters relating to real property to purchasers for value and without Knowledge.

2. The Underlying State-Court Dispute

The Mundens' property contains a gravel road, Garden Creek Road, that is the subject of a dispute between the Mundens and Bannock County. This dispute began after the County enacted Ordinance No. 2019-01 (the "2019 ordinance") in January 2019, which amended Ordinance No. 2006-1 (the "2006 ordinance"). The 2006 ordinance closed specified snowmobile trails in the County, including Garden Creek Road, to all motor vehicles except snowmobile traffic and snow-trail-grooming equipment between December 15 of each year and April 15 of the next year. Using other motor vehicles on those trails during that closure was punishable

by up to six months of jail or a fine of up to $300. The 2019 ordinance amended the 2006 ordinance by deleting the December-to-April closure window, instead giving the County Public Works Director the discretion to determine when to close the specified snowmobile trails. The 2019 ordinance also increased the maximum fine for violations of the ordinance to $1000.

Shortly after the County enacted the 2019 ordinance, the Mundens filed an action in Idaho state court seeking an "injunction and other relief against Bannock County for its actions affecting the use of their property." During a hearing on February 4, 2019, the County asserted that Garden Creek Road had been listed as a public road on county maps since 1963.[1] In March 2019, the County filed a countercomplaint in Idaho state court seeking a declaration that Garden Creek Road is a public road. The County alleged (among other things) that Garden Creek Road had been listed as a county road on the Idaho Department of Transportation Maps showing public roads since at least 1958, that under Idaho Code § 40-202, Garden Creek Road has been a public highway since 1963, and that the Mundens purchased their property expressly subject to the easements and rights of way apparent or of record.

B. Proceedings Below

On February 7, 2019, the Mundens sent a notice of claim to Stewart Title and to Chicago Title, asking the companies

[1] Although the record does not contain a copy of one of these county maps, the title companies admit in their joint brief that "Garden Creek Road was included in Bannock County's road book at least by 1958" and "became a public roadway under [Idaho Code] § 40-202 by 1963." Answering Br. 8. We therefore take these facts to be conceded for purposes of summary judgment.

to defend and indemnify them because the County's claims in the action affected both the value and marketability of the Mundens' title. Each company "denied or failed to timely respond to" the Mundens' claims.

In April 2019, the Mundens filed a complaint in federal district court against the insurance companies, seeking declaratory and injunctive relief, indemnification, and damages for breach of contract. Stewart Title answered the complaint in May, and Chicago Title filed a Rule 12(b)(6) motion. The Mundens filed a motion for partial summary judgment (on the question of liability, not damages) in July, and Stewart Title filed its own summary-judgment motion in August. The district court, without objection, treated Chicago Title's motion to dismiss as a summary-judgment motion because it raised matters outside of the pleadings.

After hearing argument, the district court denied the Mundens' motion and granted the insurance companies' motions for summary judgment. The court concluded that there was at least a dispute of material fact as to whether the marketability of the Mundens' title was affected by the County's claim to Garden Creek Road, triggering potential claims under the two policies. But it found that the Mundens had failed to show the existence of a "public record," as defined by the policies, showing any facts, rights, claims, interests, easements, liens, or encumbrances by reason of which the Mundens' state-court dispute arose. Because each policy excludes coverage for loss, damages, and expenses arising by reason of such items *not* shown in the public records, the district court found that the companies had no obligation to cover the Mundens' claims. The district court did not address Stewart Title's additional argument that "Special Exception 4" in its policy, which excludes coverage for loss, damages, and expenses arising by reason of the

right, title, or interest of the public in roads and highways, also barred coverage for the Mundens' claims.

The Mundens' timely appeal followed.

C. Applicable Legal Framework

1. Standard of Review

We review de novo a grant of summary judgment. *Pac. Gulf Shipping Co. v. Vigorous Shipping & Trading S.A.*, 992 F.3d 893, 897 (9th Cir. 2021). Summary judgment is granted "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). A genuine dispute exists if "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby*, 477 U.S. 242, 248 (1986). We do not engage in credibility determinations or weigh evidence; rather, "[t]he evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor." *Id.* at 255.

2. Interpretation of Insurance Contracts Under Idaho Law

The insurance policies provide that "the court . . . shall apply the law of the jurisdiction where the Land is located . . . to interpret and enforce the terms of this policy" and that in no case "shall the court . . . apply its conflicts of law principles to determine the applicable law." No party disputes the validity of the choice-of-law clauses. Thus, because the "Land" specified in each policy is in Idaho, Idaho law governs the policies.

Perhaps because there is no Idaho case on-point for this question, the parties and the district court have relied heavily on out-of-state authorities in their legal analyses. But a

federal court applying state law has a responsibility to "ascertain from all the available data what the state law is and apply it rather than to prescribe a different rule." *Poublon v. C.H. Robinson Co.*, 846 F.3d 1251, 1266 (9th Cir. 2017) (quoting *West v. Am. Tel. & Tel. Co.*, 311 U.S. 223, 237 (1940)). Thus, we examine Idaho case law on the interpretation of contracts to interpret the policy language in dispute here.

In Idaho, whether an insurance policy is ambiguous "is a question of law." *McFarland v. Liberty Ins. Corp.*, 434 P.3d 215, 219 (Idaho 2019) (quoting *Farmers Ins. Co. of Idaho v. Talbot*, 987 P.2d 1043, 1047 (Idaho 1999)). A court begins with the policy's "plain language" and "determine[s] whether or not there is an ambiguity." *Ibid.* (quoting *Clark v. Prudential Prop. & Cas. Ins. Co.*, 66 P.3d 242, 244–45 (Idaho 2003)). A provision is ambiguous if it "is reasonably subject to differing interpretations." *Ibid.* (quoting *Markel Int'l Ins. Co. v. Erekson*, 279 P.3d 93, 95 (Idaho 2012)).

Idaho prescribes several rules for interpreting insurance policies. First, clear language in the policy is "given its plain and ordinary meaning." *Ibid.* (quoting *Farm Bureau Mut. Ins. Co. of Idaho v. Schrock*, 252 P.3d 98, 102 (Idaho 2011)).

There is a presumption that "common, non-technical words are given the meaning applied by laymen in daily usage—as opposed to the meaning derived from legal usage," but that presumption is rebutted if "a contrary intent [of the parties] is shown." *Ibid.* (quoting *Fisher v. Garrison Prop. & Cas. Ins. Co.*, 395 P.3d 368, 372 (Idaho 2017)). Examining reference materials helps in determining that usage. *Id.* at 220–21 (referring to "[a] survey of multiple dictionaries" such as *Webster's Third New International Dictionary* and the *Oxford English Dictionary*). Lay usage can accommodate more than one reasonable meaning for a

term or provision. *See id.* at 222 (holding that both "place of residence" and "house" are reasonable interpretations of the term "dwelling," as commonly understood).

For uncommon, technical terms, a policy's failure to define that term even though it defines other terms "weighs in favor of ambiguity." *Id.* at 219 (citing *Arreguin v. Farmers Ins. Co. of Idaho*, 180 P.3d 498, 501 (Idaho 2008)). But the "mere fact that a term is undefined in a policy does not make that term ambiguous if it has a settled legal meaning" in Idaho. *Ibid.* (quoting *Melichar v. State Farm Fire & Cas. Co.*, 152 P.3d 587, 592 (Idaho 2007)).

The court "must construe the policy as a whole, not by an isolated phrase." *Id.* at 222 (quoting *Cascade Auto Glass, Inc. v. Idaho Farm Bureau Ins. Co.*, 115 P.3d 751, 754 (Idaho 2005)). In particular, if an isolated term or provision appears initially ambiguous, "reading the policy as a whole can remove the ambiguity by rendering one of the possible interpretations unreasonable." *Ibid.*

And "[b]ecause insurance policies are adhesion contracts not typically subject to negotiation between the parties, 'all ambiguities in an insurance policy are to be resolved against the insurer . . . .'" *Id.* at 219 (quoting *Howard v. Or. Mut. Ins. Co.*, 46 P.3d 510, 513 (Idaho 2002)). The insurer has the burden "to use clear and precise language if it wishes to restrict the scope of coverage," and "exclusions not stated with specificity will not be presumed or inferred." *Ibid.* (quoting *Clark*, 66 P.3d at 245). Thus, if there is an ambiguity, there is no factfinding of the parties' actual intent in drafting the language. *Id.* at 223 (construing the ambiguous term "dwelling" by choosing the reasonable interpretation most favorable to the insureds).

To summarize Idaho's procedure for interpreting insurance policies: (1) First, give any expressly defined terms their defined meaning. (2) Give any clear provisions their plain, ordinary meaning. (3) If an uncommon, technical term is undefined in the policy but has a settled legal meaning in Idaho, give the term that settled legal meaning. (4) Give each undefined common, nontechnical term a meaning in daily usage by laymen. (5) All remaining terms are ambiguous; choose a reasonable meaning for each such term. For steps 4 and 5, the meanings selected should produce the interpretation most favorable to the insured but still reasonable in light of the policy as a whole—that is the interpretation to be adopted.[2]

II. Analysis

A. "Public Records"

1. Interpreting the Definition

The parties primarily dispute the meaning of the term "public records" in the title policies—namely, whether the "public records" contain facts, rights, claims, etc. by reason of which the Mundens' current dispute with Bannock County arose. Following the *McFarland* process described above, "public records" can be interpreted, reasonably in

[2] As a shortcut for steps 4 and 5, observe that the insured must prevail if there is *some* choice of meanings such that the resulting interpretation is both reasonable in light of the contract as a whole and results in a win for the insured—the most favorable interpretation for the insured has to be *at least* that favorable.

By contrast, for the insurer to prevail, it must win under all interpretations that are reasonable in light of the contract as a whole. That includes the *most* insured-favorable reasonable interpretation possible.

light of the entire policy, to include official maps listing Garden Creek Road as a public road. Because those maps were published before the effective date of each policy and because the Mundens' dispute with the County arose "by reason of" the County's claim to title of the road, none of General Exceptions 2–4 in the Stewart policy nor either of Exceptions 1 or 3 in the Chicago policy excludes coverage for the Mundens' claims.

First, we follow the *McFarland* process to determine a reasonable meaning for the definition of "public records." The parties have clearly expressed an intent to give a specific meaning in the policies to the term "public records." Each policy expressly defines that term as "[r]ecords established under state statutes at Date of Policy for the purpose of imparting constructive notice of matters relating to real property to purchasers for value and without Knowledge." "Date of Policy"[3] and "Knowledge"[4] are terms that the policies separately define. Uncommon, technical terms in the definition are "constructive notice"[5] and "purchasers for

[3] The "Date of Policy" for the Stewart policy is January 18, 2012, at 3:41 p.m., and the "Date of Policy" for the Chicago policy is April 9, 2013, at 10:41 a.m.

[4] "Actual knowledge, not constructive knowledge or notice that may be imputed to an Insured by reason of the Public Records or any other records that impart constructive notice of matters affecting the Title." Thus, to be "without Knowledge" under the policies means having no actual knowledge of some matter related to the property insured by the policies.

[5] "[K]nowledge of such facts and circumstances as would have led to the discovery of [a previous] purchase and conveyance by a reasonably prudent man." *Benz v. D.L. Evans Bank*, 268 P.3d 1167, 1178–79 (Idaho 2012) (quoting *Froman v. Madden*, 88 P. 894, 895 (Idaho 1907)); *see also id.* at 1178 (extending the notion of constructive

value,"[6] both of which have settled legal meanings in Idaho, set forth in footnotes 5 and 6.

The rest of the definition consists of common, nontechnical terms. Assigning those terms reasonable lay meanings, a reasonable interpretation of "records established under state statutes at Date of Policy" is: "Official documents that had been brought into existence in accordance with Idaho state statutes, on or before the Date of Policy." And "for the purpose of imparting constructive notice of matters relating to real property to purchasers for value and without Knowledge" can reasonably mean "intended, at least in part,[7] to provide constructive notice of some fact or circumstance relevant to the insured property to

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notice beyond discoveries of purchases and conveyances to discoveries of a "prior interest or defect in title").

[6] A person who takes an interest in property through a transaction in which the person relinquishes some other property interest. *See* Idaho Code § 28-1-201 ("(29) 'Purchase' means taking by sale, lease, discount, negotiation, mortgage, pledge, lien, security interest, issue or reissue, gift, or any other voluntary transaction creating an interest in property. (30) 'Purchaser' means a person that takes by purchase."); *id.* § 55-912 ("Value is given for a transfer or obligation if, in exchange for the transfer or obligation, property is transferred or an antecedent debt is secured or satisfied . . . .").

[7] Something whose *whole* purpose is to impart constructive notice is necessarily something whose purpose is, *at least in part*, intended to impart constructive notice. Thus, interpreting "intended" to include partial purposes brings more objects into consideration. The Mundens benefit from that broader meaning here—more things are potentially in the "public records" if more things are considered "intended" to impart constructive notice. Because we must interpret "intended" in the light most favorable to the Mundens, we therefore interpret it to include partial purposes.

purchasers for value who did not have actual knowledge of that fact or circumstance."

One last wrinkle: it is perhaps not entirely clear whether the phrase "for the purpose of imparting" should modify "records established" or "statutes," although most readers would view the phrase as specifying the purpose for which the "records" were "established." We have found no authority supporting that Idaho, in interpreting contracts, follows the nearest-reasonable-referent canon (often mistakenly called the "last-antecedent canon"), as described in Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 152–53 (2012) ("When the syntax involves something other than a parallel series of nouns or verbs, a prepositive or postpositive modifier normally applies only to the nearest reasonable referent."). Nor is that canon universally accepted in the contractual or even statutory setting. *See, e.g.*, *Phoenix Control Sys., Inc. v. Ins. Co. of N. Am.*, 796 P.2d 463, 470 (Ariz. 1990) (in banc) (Feldman, V.C.J., specially concurring) ("[I]t would be a fiction to pretend [the parties] drafted the language mindful that its meaning would be ascertained through use of the doctrine of the last antecedent."); *Kennett v. Bayada Home Health Care, Inc.*, 845 F. App'x 754, 768 (10th Cir. 2021) (Bacharach, J., concurring) (noting that "[t]he Colorado legislature has expressly repudiated the last-antecedent rule" in statutory interpretation and that only one Colorado court of appeals case had applied the rule in contractual interpretation).

Thus, we do not apply the canon here, instead choosing "[r]ecords established" as a reasonable referent. With that syntactic choice, the resulting interpretation of the definition of "public records" is: "Official documents that were:

- brought into existence in accordance with Idaho state statutes, and

- brought into existence on or before the Date of Policy, and

- intended, at least in part, to provide constructive notice of some fact or circumstance relevant to the insured property to purchasers for value who did not have actual knowledge of that fact or circumstance."

Notably, "state statutes" is unqualified in this interpretation. Contrary to the district court's conclusion, the policy, so interpreted, contemplates no restriction of the statutes to Idaho Code § 55-811, Idaho's real-property recording statute. And leaving unrestricted the kinds of state statutes under which public records may be established is consistent with interpreting the policy's language reasonably in favor of the Mundens.

2. Applying the Definition

An Idaho county that takes a real-property interest in a highway must update its official map to include the highway and regularly publish maps showing its highways. Idaho Code § 40-202(2), (3), (6). Those maps are official documents, and their purpose, at least in part, is to provide constructive notice of their contents. We can infer this purpose from the details of the statute, which offers county commissioners a choice when the county acquires real property for highway-system purposes: they must either record with the county recorder an instrument establishing that interest or else "[c]ause the official map of the county or highway-district system to be amended as affected by the acceptance of the highway or public right-of-way." Idaho Code § 40-202(2). Because recording an instrument gives

constructive notice of the county's interest in the road, *see Kalange v. Rencher*, 30 P.3d 970, 974 (Idaho 2001), it is logical that the alternate option provided by the statute—to amend the official county map—is also intended to do the same, *see Homestead Farms, Inc. v. Bd. of Comm'rs*, 119 P.3d 630, 637 (Idaho 2005) (Eismann, J., specially concurring) (noting that the "inclusion of a private road on the highway map" could have legal consequences for the owner of the private road "because members of the public may assert their right to use the road in reliance upon the highway map").

The Bannock County road map was established in accordance with state statutes—particularly, Idaho Code § 40-202(2) and (6). It was created in 1958, well before the insurance policies went into effect. And, as demonstrated above, the map was at least partially intended to provide constructive notice of the County's interest in the property to purchasers for value who did not have actual knowledge of that interest.

This is a reasonable interpretation in light of the contract as a whole. The Mundens could have reasonably expected the title companies, in doing their due diligence, to check county maps to ensure that roadways traversing the property are not public highways or rights-of-way. Indeed, Stewart Title's Special Exception 4, which excludes coverage arising from claims of public interest to roads and highways, seems to anticipate that instruments indicating public interest in highways might not be recorded. Adding that exception shifts to the insureds the burden of checking whether the County has acquired an interest in a road on the land. It is less likely that Stewart Title would have shifted that burden if it had been clear that the Mundens already bore it.

Thus, because there is an interpretation of the definition of "public records," reasonable in light of the policies as a whole, under which the Mundens prevail on this issue, we adopt that interpretation. The Bannock County road map is a "public record" within the meaning of the policy.

B. Stewart Title's "Special Exception 4"

As mentioned above, the Stewart Title policy has a separate exclusion at issue in this case: Special Exception 4, disclaiming coverage for damages, costs, expenses, etc. "aris[ing] by reason of . . . [r]ight, title and interest of the public in and to those portions of the above described premises falling within the bounds of roads or highways." The Mundens argue that this exception does not encompass their dispute with Bannock County over Gravel Creek Road.

The district court did not address this issue because it granted summary judgment to both insurance companies on the "public records" issue. Although we generally do not resolve issues that the district court did not first reach, *Hormel v. Helvering*, 312 U.S. 552, 556 (1941), that rule is not absolute, *Singleton v. Wulff*, 428 U.S. 106, 120–21 (1976) ("The matter of what questions may be taken up and resolved for the first time on appeal is one left primarily to the discretion of the courts of appeals, to be exercised on the facts of individual cases."). In particular, we may address an issue "even though the district court refused to resolve it" so long as it was "raised sufficiently for the trial court to rule on it." *CFPB v. Gordon*, 819 F.3d 1179, 1191 n.5 (9th Cir. 2016) (quoting *O'Rourke v. Seaboard Sur. Co. (In re E.R. Fegert, Inc.)*, 887 F.2d 955, 957 (9th Cir. 1989)). Because Stewart Title argued in its motion for summary judgment that Special Exception 4 applied to the Mundens' dispute, we may take up the issue now.

In contrast to the definition of "public records," the only reasonable meaning of Special Exception 4 in the Stewart Title policy favors the insurer, not the insured. The Mundens argue that this exception does not include their state case because they "are not seeking protection of a 'public' interest, but rather have alleged that *their* title has been adversely affected by Bannock County's claims." Opening Br. 32.

Their interpretation is unreasonable for two reasons. First, the main clause before the list of general and special exceptions reads: "This policy does not insure against loss or damage (and the Company will not pay costs, attorneys' fees, or expenses) *which arise by reason of*," and then lists specific exceptions. "By reason of" is broad language that does not inherently limit the kinds of reasons that may trigger an exclusion. So it need not be the Mundens who assert a public interest—any party's claim of a public interest (such as Bannock County's claim) triggers the exception.

Second, the Mundens' interpretation would not make sense in light of the policy as a whole. The policy is for title insurance for two private persons. It is implausible that the Mundens, as private persons, would assert a public right, title, or interest in the portions of their own land falling within the bounds of roads or highways. Under their interpretation, the exclusion would be practically a nullity, a consequence we must avoid. *Steel Farms, Inc. v. Croft & Reed, Inc.*, 297 P.3d 222, 229 (Idaho 2012) ("A court must look to the contract as a whole and give effect to every part thereof.").

So long as there is some causal link between a public interest in roads on the Mundens' property and some kind of loss, damage, costs, attorneys' fees, or expenses, the policy

does not cover that loss or damage, and Stewart Title has no obligation to pay those costs, fees, or expenses. And here, the Mundens sued Bannock County, ultimately, because of the public interest the County asserted in the road on their land, by virtue of which the County imposed use restrictions on that road. So Stewart Title had no obligation under its policy to defend or indemnify the Mundens in their action against Bannock County.[8]

III. Conclusion

We affirm the grant of summary judgment to Stewart Title and reverse the grant of summary judgment to Chicago Title. We vacate the judgment of the district court as to Chicago Title only, and we remand for further proceedings consistent with this opinion.

If we affirm in part, reverse in part, modify, or vacate a judgment, we may exercise our discretion in taxing costs. Fed. R. App. P. 39(a)(4). We normally order each party to bear its own costs on appeal in these circumstances because "neither side is the clear winner." *Exxon Valdez v. Exxon Mobil Corp.*, 568 F.3d 1077, 1081 (9th Cir. 2009). But here, Stewart Title is a clear winner on appeal, and Chicago Title

[8] The Mundens also make a perfunctory argument that there is no public interest in the roads on their property. But the Mundens present no citations to the record or case law to prove that proposition.

We need not delve into the state-court record to see if that issue has been preclusively decided. It suffices to note that the Mundens have waived the argument on appeal for failure to brief it sufficiently. *See United States v. Ghanem*, 993 F.3d 1113, 1133 (9th Cir. 2021) (holding that defendant waived argument supporting due-process claim because he failed to cite relevant case law).

is a clear loser; it is the Mundens only who are neither clear winners nor losers.

Recognizing this unique situation, we therefore award costs as follows. The Mundens' costs are taxed against Chicago Title, and Stewart Title's costs are taxed against the Mundens.

AFFIRMED IN PART, REVERSED IN PART, VACATED IN PART, and REMANDED.