

NOT FOR PUBLICATION

FILED

UNITED STATES COURT OF APPEALS

APR 20 2022

FOR THE NINTH CIRCUIT

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U.S. COURT OF APPEALS

RIALTO POCKETS, INC.; BROOKHURST
VENTURE, LLC; CITY OF INDUSTRY
HOSPITALITY VENTURE, INC.;
FARMDALE HOSPITALITY SERVICES,
INC.; HIGH EXPECTATIONS
HOSPITALITY, LLC; INLAND
RESTAURANT VENTURE I, INC.;
KENTUCKY HOSPITALITY VENTURE,
LLC; K-KEL, INC.; L.C.M., LLC;
MIDNIGHT SUN ENTERPRISES, INC.;
NITELIFE, INC.; OLYMPIC AVENUE
VENTURE, INC.; THE OXNARD
HOSPITALITY SERVICES, INC.; PENN
AVE HOSPITALITY, LLC; PLATINUM SJ
ENTERPRISE; PNM ENTERPRISES, INC.;
ROUGE GENTLEMENS CLUB, INC.;
SANTA BARBARA HOSPITALITY
SERVICES, INC.; SANTA MARIA
RESTAURANT ENTERPRISES, INC.;
SARIES LOUNGE, LLC; THE SPEARMINT
RHINO ADULT SUPERSTORE, INC.;
WORLD CLASS VENUES, LLC;
WASHINGTON MANAGEMENT, LLC;
W.P.B. HOSPITALITY, LLC,

Plaintiffs-Appellants,

v.

BEAZLEY UNDERWRITING LIMITED,

Defendant-Appellee,

No. 21-55196

D.C. No. 2:20-cv-07709-DSF-JPR

MEMORANDUM*

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

and

CERTAIN UNDERWRITERS AT
LLOYDS LONDON, INCLUDING
BEAZLEY FURLONGE LTD,

Defendant.

Appeal from the United States District Court
for the Central District of California
Dale S. Fischer, District Judge, Presiding

Submitted April 20, 2022**
San Francisco, California

Before: W. FLETCHER and COLLINS, Circuit Judges, and FEINERMAN,***
District Judge.

Plaintiffs appeal the district court’s dismissal of their operative complaint in this insurance coverage dispute. We have jurisdiction under 28 U.S.C. § 1291. Reviewing de novo the grant of a motion to dismiss for failure to state a claim on which relief can be granted, *Mudpie, Inc. v. Travelers Cas. Ins. Co.*, 15 F.4th 885, 889 (9th Cir. 2021); FED R. CIV. P. 12(b)(6), we affirm.

Plaintiffs are 24 affiliated companies who operate 23 so-called “gentlemen’s” clubs and a retail store, and they claim coverage under a single policy issued by Defendant Beazley Underwriting Ltd. (“Beazley”) to non-party affiliate The Spearmint Rhino Companies Worldwide, Inc. Plaintiffs allege that all

** The panel unanimously concludes that this case is suitable for decision without oral argument. *See* FED. R. APP. P. 34(a)(2)(C).

*** The Honorable Gary Feinerman, United States District Judge for the Northern District of Illinois, sitting by designation.

24 businesses “were closed as a result of the Covid-19 Governmental Orders,” including stay-at-home orders issued by the State of California and relevant local governments. After Beazley denied coverage for economic losses resulting from the closures, Plaintiffs filed this civil action asserting a single claim for breach of the insurance policy. The district court granted a motion to dismiss Plaintiffs’ operative amended complaint. This timely appeal followed.

As alleged in the complaint, the “relevant coverage provision” is referred to as the “Time Element” provision, which addresses certain economic losses resulting from physical damage or loss to insured property. Specifically, that provision states that “[t]his Policy insures Time Element loss, as set forth in the Time Element Coverages, *directly resulting from direct physical loss or physical damage* insured by this Policy occurring during the Period of Insurance *to Property Insured by this Policy*” (emphasis added). According to the complaint, Beazley breached this coverage obligation by failing “to pay Plaintiffs for the Time Element losses” that “directly result[ed] from the Covid-19 Governmental Orders” or were “caused by the Covid-19 Governmental Orders.”

Plaintiffs’ claim of coverage is foreclosed by *Inns by the Sea v. California Mut. Ins. Co.*, 286 Cal. Rptr. 3d 576 (Ct. App. 2021). *See Ryman v. Sears, Roebuck & Co.*, 505 F.3d 993, 995 (9th Cir. 2007) (“Where there is no convincing evidence that the state supreme court would decide differently, a federal court is

obligated to follow the decisions of the state’s intermediate appellate courts.”) (simplified). *Inns by the Sea* addressed the interpretation of analogous policy language providing coverage for a suspension of operations “caused by direct physical loss of or damage to property at [the insured’s] premises,” and it did so in the context of comparable alleged losses based “on the situation created by the [Covid-19 Governmental] Orders.” 286 Cal. Rptr. 3d at 582, 590 (second emphasis added). The court rejected such coverage as a matter of law, and its reasoning is fully applicable here.

Inns by the Sea held that, under well-settled California insurance law, the “mere loss of use of physical property to generate business income, without any other physical impact on the property, does not give rise to coverage for direct physical loss.” *Id.* at 591 (emphasis added). The court further held that, even assuming *arguendo* that the “alleged physical presence of the virus on [the insured’s] premises” might be thought to give rise to a “physical impact” or to “direct physical damage,” there still was no coverage. *Id.* at 590–91. The relevant coverage language required that the alleged loss be “caused by” the claimed direct physical damage, but the insured’s own allegations confirmed “the lack of causal connection between the alleged physical presence of the virus on [the insured’s] premises and the suspension of [its] operations.” *Id.* at 590 (emphasis added). As the court explained, even if the insured “had thoroughly sterilized its premises to

remove any trace of the virus,” the insured “would *still* have continued to incur a suspension of operations because the Orders would *still* have been in effect and the normal functioning of society *still* would have been curtailed.” *Id.*

So too here. The complaint expressly alleges that the losses “directly result[ed] from the Covid-19 Governmental Orders” or were “caused by the Covid-19 Governmental Orders.” Consequently, under *Inns by the Sea*, the claimed losses did not “directly result[] from direct . . . physical damage . . . to Property,” as required by the relevant policy language. Further, in the absence of any such loss caused by direct physical damage, the inability to use the property that resulted from the Orders is not covered by the policy language concerning losses “directly resulting from direct physical loss . . . to Property.”

Plaintiffs point to various other provisions in the policy that more precisely define the amounts that will be paid when a covered loss occurs, but none of these provisions provides any basis for evading *Inns by the Sea*’s construction of the operative coverage language here. Moreover, Plaintiffs’ reliance upon policy exclusions in an effort to expand the policy’s coverage violates firmly established California law. *Inns by the Sea*, 286 Cal. Rptr. 3d at 594 (“[B]efore even considering exclusions, a court must examine the coverage provisions to determine whether a claim falls within the policy terms.”) (simplified).

Because Plaintiffs’ asserted losses do not fall within the scope of the

insurance policy, the district court correctly granted Defendant's motion to dismiss.

AFFIRMED.

United States Court of Appeals for the Ninth Circuit

Office of the Clerk
95 Seventh Street
San Francisco, CA 94103

Information Regarding Judgment and Post-Judgment Proceedings

Judgment

- This Court has filed and entered the attached judgment in your case. Fed. R. App. P. 36. Please note the filed date on the attached decision because all of the dates described below run from that date, not from the date you receive this notice.

Mandate (Fed. R. App. P. 41; 9th Cir. R. 41-1 & -2)

- The mandate will issue 7 days after the expiration of the time for filing a petition for rehearing or 7 days from the denial of a petition for rehearing, unless the Court directs otherwise. To file a motion to stay the mandate, file it electronically via the appellate ECF system or, if you are a pro se litigant or an attorney with an exemption from using appellate ECF, file one original motion on paper.

Petition for Panel Rehearing (Fed. R. App. P. 40; 9th Cir. R. 40-1)

Petition for Rehearing En Banc (Fed. R. App. P. 35; 9th Cir. R. 35-1 to -3)

(1) A. Purpose (Panel Rehearing):

- A party should seek panel rehearing only if one or more of the following grounds exist:
 - ▶ A material point of fact or law was overlooked in the decision;
 - ▶ A change in the law occurred after the case was submitted which appears to have been overlooked by the panel; or
 - ▶ An apparent conflict with another decision of the Court was not addressed in the opinion.
- Do not file a petition for panel rehearing merely to reargue the case.

B. Purpose (Rehearing En Banc)

- A party should seek en banc rehearing only if one or more of the following grounds exist:

- ▶ Consideration by the full Court is necessary to secure or maintain uniformity of the Court's decisions; or
- ▶ The proceeding involves a question of exceptional importance; or
- ▶ The opinion directly conflicts with an existing opinion by another court of appeals or the Supreme Court and substantially affects a rule of national application in which there is an overriding need for national uniformity.

(2) Deadlines for Filing:

- A petition for rehearing may be filed within 14 days after entry of judgment. Fed. R. App. P. 40(a)(1).
- If the United States or an agency or officer thereof is a party in a civil case, the time for filing a petition for rehearing is 45 days after entry of judgment. Fed. R. App. P. 40(a)(1).
- If the mandate has issued, the petition for rehearing should be accompanied by a motion to recall the mandate.
- See Advisory Note to 9th Cir. R. 40-1 (petitions must be received on the due date).
- An order to publish a previously unpublished memorandum disposition extends the time to file a petition for rehearing to 14 days after the date of the order of publication or, in all civil cases in which the United States or an agency or officer thereof is a party, 45 days after the date of the order of publication. 9th Cir. R. 40-2.

(3) Statement of Counsel

- A petition should contain an introduction stating that, in counsel's judgment, one or more of the situations described in the "purpose" section above exist. The points to be raised must be stated clearly.

(4) Form & Number of Copies (9th Cir. R. 40-1; Fed. R. App. P. 32(c)(2))

- The petition shall not exceed 15 pages unless it complies with the alternative length limitations of 4,200 words or 390 lines of text.
- The petition must be accompanied by a copy of the panel's decision being challenged.
- A response, when ordered by the Court, shall comply with the same length limitations as the petition.
- If a pro se litigant elects to file a form brief pursuant to Circuit Rule 28-1, a petition for panel rehearing or for rehearing en banc need not comply with Fed. R. App. P. 32.

- The petition or response must be accompanied by a Certificate of Compliance found at Form 11, available on our website at www.ca9.uscourts.gov under *Forms*.
- You may file a petition electronically via the appellate ECF system. No paper copies are required unless the Court orders otherwise. If you are a pro se litigant or an attorney exempted from using the appellate ECF system, file one original petition on paper. No additional paper copies are required unless the Court orders otherwise.

Bill of Costs (Fed. R. App. P. 39, 9th Cir. R. 39-1)

- The Bill of Costs must be filed within 14 days after entry of judgment.
- See Form 10 for additional information, available on our website at www.ca9.uscourts.gov under *Forms*.

Attorneys Fees

- Ninth Circuit Rule 39-1 describes the content and due dates for attorneys fees applications.
- All relevant forms are available on our website at www.ca9.uscourts.gov under *Forms* or by telephoning (415) 355-7806.

Petition for a Writ of Certiorari

- Please refer to the Rules of the United States Supreme Court at www.supremecourt.gov

Counsel Listing in Published Opinions

- Please check counsel listing on the attached decision.
- If there are any errors in a published opinion, please send an email or letter **in writing within 10 days** to:
 - ▶ Thomson Reuters; 610 Opperman Drive; PO Box 64526; Eagan, MN 55123 (Attn: Maria Evangelista (maria.b.evangelista@tr.com));
 - ▶ and electronically file a copy of the letter via the appellate ECF system by using “File Correspondence to Court,” or if you are an attorney exempted from using the appellate ECF system, mail the Court one copy of the letter.

**UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT
Form 10. Bill of Costs**

Instructions for this form: <http://www.ca9.uscourts.gov/forms/form10instructions.pdf>

9th Cir. Case Number(s)

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The Clerk is requested to award costs to *(party name(s))*:

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