UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CREATE ADVERTISING GROUP, LLC, Plaintiff, v. FEDERAL INSURANCE COMPANY, Defendant.	CV 21-5975 DSF (Ex) Order GRANTING Motion to Dismiss First Amended Complaint (Dkt. 37)

Defendant Federal Insurance Company has moved to dismiss Plaintiff Create Advertising Group, LLC's first amended complaint (FAC), claiming Plaintiff has not alleged "direct physical loss or damage" as required for coverage under the relevant insurance policy.[1] The Court deems this matter appropriate for decision without oral argument. See Fed. R. Civ. P. 78; Local Rule 7-15.

The Court dismissed Plaintiff's original complaint because it did not allege any "physical alteration" of its property. Plaintiff asserted that presence of SARS-CoV-2 on its property was sufficient to constitute a physical alteration, but Plaintiff had not directly alleged that the virus was ever present.

Defendant argues that the FAC continues to fail to directly and unambiguously allege that SARS-CoV-2 was present on the property at

[1] There are technically two policies at issue, but neither party argues that there is any relevant difference between the two. For simplicity, the Court will refer only to "the policy."

any relevant time. But even if there were a clear allegation of the presence of the virus, intervening California caselaw holds that presence of a virus does not constitute "direct physical loss or damage" under an insurance policy where the actual loss was caused by a general government shutdown order due to the widespread presence of a virus, rather than the presence of a virus on the insured's specific property. Inns-by-the-Sea v. California Mut. Ins. Co., 71 Cal. App. 5th 688, 703 (2021), review denied (Mar. 9, 2022) (shutdown orders "were issued because the COVID-19 virus was present *throughout* San Mateo and Monterey Counties, not because of any particular presence of the virus on Inns' premises.") (emphasis in original).

Nor does the policy's civil authority coverage provide coverage for Plaintiff's loss. The policy requires that any prohibition of access by a civil authority "be the direct result of direct physical loss or damage to property away from [the insured] premises or such dependent business premises." FAC, Ex. A at CRE 00062. This provision is substantively indistinguishable from the civil authority clause examined in Inns-by-the-Sea where coverage was available for loss of access "due to direct physical loss of or damage to property, other than at the described premises." Inns-by-the-Sea, 71 Cal. App. 5th at 710. The civil authority provision in Inns-by-the-Sea did not apply "because the plain language of the [relevant] Orders shows that they were not based on 'direct physical loss of or damage to property' to other premises." Id. at 711. Instead, "the Orders make clear that they were issued in an attempt *to prevent the spread* of the COVID-19 virus. The Orders give no indication that they were issued 'due to direct physical loss of or damage to' any property." Id. at 711-12 (emphasis in original).

The relevant orders cited by Plaintiff similarly were issued explicitly to reduce the spread of COVID-19. The only cited order mentioning property damage was an order from the Los Angeles Mayor's Office stating: "This Order is given because, among other reasons, the COVID-19 virus can spread easily from person to person and it is physically causing property loss or damage due to its tendency to attach to surfaces for prolonged periods of time." Safer at Home Order (Mar. 19, 2020 rev. Mar. 27, 2020). However, the curiously specific

reference to "physically causing property loss or damage" is in the context of an order overwhelmingly concerned with the spread of COVID-19, not any property damage. There can be no reasonable dispute that the Mayor would have issued the closure order regardless of his purported belief that "physical . . . property loss or damage" was occurring in the city.

Nor does the absence of a virus exclusion somehow create coverage for the loss here. Inns-by-the-Sea also addressed this issue:

> This contention is flawed because it improperly attempts to rely on the absence of an exclusion to create an ambiguity in an otherwise unambiguous insuring clause. Under California law, coverage is defined in the first instance by the insuring clause, and when an occurrence is clearly not included within the coverage afforded by the insuring clause, it need not also be specifically excluded.

Inns-by-the-Sea, 71 Cal. App. 5th at 709 (simplified).

The motion to dismiss is GRANTED. Because there is no amendment that would allow Plaintiff to state a claim, leave to amend is not granted and judgment will be issued in favor of Defendant.

IT IS SO ORDERED.

Date: March 17, 2022

Dale S. Fischer
United States District Judge