

NOT FOR PUBLICATION

FILED

UNITED STATES COURT OF APPEALS

OCT 20 2022

FOR THE NINTH CIRCUIT

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U.S. COURT OF APPEALS

SHOKOFEH TABARAIE DDS, PLLC,

No. 21-35477

Plaintiff-Appellant,

D.C. No. 2:20-cv-00616-BJR

v.

MEMORANDUM*

ASPEN AMERICAN INSURANCE
COMPANY,

Defendant-Appellee.

Appeal from the United States District Court
for the Western District of Washington
Barbara Jacobs Rothstein, District Judge, Presiding

Submitted August 12, 2022**
Seattle, Washington

Before: BERZON, CHRISTEN, and FORREST, Circuit Judges.

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

** The panel unanimously concludes this case is suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

Plaintiff Shokofeh Tabaraie DDS, PLLC (“Tabaraie”) timely appeals the district court’s dismissal of her claims in this insurance coverage dispute with Defendant Aspen American Insurance Company (“Aspen American”). We review de novo the order granting Aspen American’s 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), and we affirm. We assume the parties’ familiarity with the facts and do not recite them here.

Tabaraie seeks coverage under her Aspen American insurance policy for economic business losses incurred during the COVID-19 pandemic. Tabaraie alleges that Aspen American breached her policy by refusing to cover Tabaraie’s loss of business income and extra expenses resulting from “direct physical loss” and losses caused by operation of “civil authority.” Tabaraie also argues that, regardless of this court’s disposition of her contractual claims, Aspen American is extracontractually liable for failing to investigate the facts underlying the claim.

1. Direct Physical Loss. While this appeal was pending, the Washington Supreme Court held, as a matter of contractual interpretation, that losses due to the Governor’s COVID-19 orders do not qualify for coverage as “direct physical loss of or damage to. . . property,” and that the virus exclusion in that case also barred coverage. *See Hill & Stout, PLLC v. Mut. of Enumclaw Ins. Co.*, 515 P.3d 525, 532 (Wash. 2022). “When interpreting state law, we are bound to follow the

decisions of the state’s highest court.” *Mudpie*, 15 F.4th at 889 (quoting *Diaz v. Kubler Corp.*, 785 F.3d 1326, 1329 (9th Cir. 2015)). The district court did not err in holding that Tabaraie was not entitled to coverage under the provisions covering business losses resulting from “direct physical loss.”

2. Civil Authority. Tabaraie also asserts that it may recoup her losses under a policy provision that provides coverage when an “action of civil authority . . . prohibits access” to the insured’s premises “due to loss of or damage to property other than the insured premises.” Tabaraie’s argument fails because the complaint includes no colorable allegation that the Governor entered his orders in response to any *physical* property damages. *See Hill & Stout*, 515 P.3d at 533 (explaining that the COVID-19 pandemic did not cause physical alteration of the covered property, nor was property “rendered unsafe or uninhabitable because of a dangerous physical condition”).

3. Extracontractual Claims. Finally, Tabaraie alleges that Aspen American failed to investigate the facts of her claim, violating the Washington Consumer Protection Act, Wash. Code Rev. § 19.86, *et seq.*, and a general duty of good faith and fair dealing. These claims fail. Because the policy does not provide coverage, there was nothing to investigate that could have affected the coverage decision.

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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