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U.S. COURT OF APPEALS

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UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

HOT YOGA, INC., a Washington corporation, Plaintiff-Appellant, v. PHILADELPHIA INDEMNITY INSURANCE COMPANY, a Pennsylvania corporation, Defendant-Appellee.	No. 21-35806 D.C. No. 2:21-cv-00174-BJR MEMORANDUM[*]

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

Submitted August 10, 2022[**]
Seattle, Washington

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

Plaintiff Hot Yoga, Inc. (Hot Yoga) timely appeals the district court's dismissal of its complaint in this insurance coverage dispute with Philadelphia

[*] 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).

Indemnity Insurance Company (Philadelphia Indemnity). We have jurisdiction under 28 U.S.C. § 1291. We review de novo the order granting defendant'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. Hot Yoga seeks coverage under its Philadelphia Indemnity insurance policy for economic losses incurred during the COVID-19 pandemic. It alleges that Philadelphia Indemnity breached its policy by refusing to cover its loss of business income and extra expenses resulting from "direct physical loss," and losses caused by operation of "civil authority." Hot Yoga also argues that the policy's exclusions for losses caused by viruses did not bar coverage and that Philadelphia Indemnity is extracontractually liable for misrepresentation and failure to investigate, regardless of this court's disposition of its contractual claims.

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 Hot Yoga was not entitled to coverage under the provisions covering business losses resulting from "direct physical loss."

2. **Civil Authority.** Hot Yoga also asserts that it may recoup its 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." For this provision to apply, the "action of civil authority [must be] taken in response to dangerous physical conditions resulting from the damage." Hot Yoga's argument fails because the complaint included no colorable allegation that the Governor entered his orders in response to any dangerous *physical* conditions that resulted from property damage rather than because of concern for public health and safety. *See Hill & Stout*, 515 P.3d at 533 (explaining that there was no physical alteration of the covered property as a result of the COVID-19 pandemic, nor was the property "rendered unsafe or uninhabitable because of a dangerous physical condition").

3. **Virus Exclusion.** Further, because "COVID-19 initiated the causal chain that led to . . . the cause of any alleged loss of use," the virus exclusion bars coverage. *Id.* at 528–29.

4. **Extracontractual Claims.** Finally, Hot Yoga asserts that the district court erred by denying its extracontractual claims for "misrepresenting the pertinent policy language and preemptively denying the claim without any investigation." The district court properly dismissed Hot Yoga's claims that its insurer violated its duty of good faith and fair dealing; the Washington Consumer Protection Act, Wash. Code Rev. § 19.86, *et seq.*; the Washington Insurance Fair Conduct Act, Wash. Code Rev. § 48.30.015; and associated regulations by failing to fully and adequately disclose the policy's benefits and coverage in its preemptive denial-of-coverage letter, and by failing to adequately investigate. These claims fail because the policy does not provide coverage.

AFFIRMED.