

**FOR PUBLICATION**

**UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT**

MUDPIE, INC., <i>Plaintiff-Appellant,</i>	No. 20-16858
v.	D.C. No. 4:20-cv-03213- JST
TRAVELERS CASUALTY INSURANCE COMPANY OF AMERICA, <i>Defendant-Appellee.</i>	OPINION

Appeal from the United States District Court  
for the Northern District of California  
Jon S. Tigar, District Judge, Presiding

Argued and Submitted August 11, 2021  
San Francisco, California

Filed October 1, 2021

Before: Morgan Christen and Danielle J. Forrest, Circuit  
Judges, and Michael M. Anello,\* District Judge.

Opinion by Judge Christen

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\* The Honorable Michael M. Anello, United States District Judge for  
the Southern District of California, sitting by designation.

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**SUMMARY\*\***

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**California Insurance Law**

The panel affirmed the district court's order dismissing Mudpie, Inc.'s claims against its insurer in Mudpie's diversity putative class action seeking to recover under the insurance policy's "Business Income" and "Extra Expense" coverage after state and local authorities in California issued several public health orders in response to the COVID-19 pandemic.

Mudpie filed suit on behalf of itself and a putative class of all retailers in California that: purchased comprehensive business insurance coverage from Travelers Casualty Insurance Company of America that included coverage for business interruption; filed a claim for lost business income following California's Stay at Home order; and were denied coverage. The parties disputed whether Mudpie adequately alleged a "direct physical loss of or damage" to property under the Policy.

The panel held that California courts would construe the phrase "physical loss of or damage to" as requiring an insured to allege physical alteration of the property. The panel rejected Mudpie's interpretation of "direct physical loss of or damage to" to be synonymous with "loss of use." Mudpie's complaint did not identify a distinct, physical alteration of the property. The panel affirmed the district court's ruling that Mudpie's claimed losses were not covered by the Policy, and

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

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concluded that the district court did not err by dismissing Mudpie's claims for declaratory relief, breach of contract, and breach of the covenant of good faith and fair dealing.

The panel held that the Policy's Virus Exclusion barred coverage for Mudpie's claimed losses. The panel rejected Mudpie's argument that its losses were not subject to the Policy's Exclusion because the losses were caused by Stay at Home Orders that restricted Mudpie's use of its property, not directly by the virus. California courts apply the efficient proximate (meaning predominate) cause of the loss. The panel held that Mudpie did not plausibly allege that the efficient cause (the cause that set others in motion) was anything other than the spread of the virus throughout California, or that the virus was merely a remote cause of its losses.

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**COUNSEL**

Andre M. Mura (argued), Eric H. Gibbs, and Amanda M. Karl, Gibbs Law Group LLP, Oakland, California; Victoria S. Nugent and Geoffrey Graber, Cohen Milstein Sellers & Toll PLLC, Washington, D.C.; for Plaintiff-Appellant.

Theodore J. Boutrous Jr. (argued), Richard J. Doren, and Deborah L. Stein, Gibson Dunn & Crutcher LLP, Los Angeles, California; Stephen E. Goldman and Wystan M. Ackerman, Robinson & Cole LLP, Hartford, Connecticut; for Defendant-Appellee.

Gabriel K. Gillett, John H. Mathias Jr., David M. Kroeger, and Michael F. Linden, Jenner & Block LLP, Chicago, Illinois; Angelo I. Amador, Restaurant Law Center,

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Washington, D.C.; for Amicus Curiae Restaurant Law Center.

Jeffrey R. White, Counsel; Tobias L. Millrood, President; American Associate for Justice, Washington, D.C., for Amicus Curiae American Association for Justice.

David B. Goodwin and Breanna K. Jones, Covington & Burling LLP, San Francisco, California; Jad H. Khazem, Covington & Burling LLP, Washington, D.C.; for Amicus Curiae United Policyholders.

Laura A. Foggan, Crowell & Moring LLP, Washington, D.C., for Amici Curiae American Property Casualty Insurance Association and National Association of Mutual Insurance Companies.

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**OPINION**

CHRISTEN, Circuit Judge:

Mudpie, Inc. appeals a district court order dismissing its claims against Travelers Casualty Insurance Company of America (Travelers). Mudpie operates a children’s store located in San Francisco that sells clothing, toys, books, and other goods. Mudpie alleges that it purchased a comprehensive commercial liability and property insurance policy from Travelers (the Policy), and made a claim pursuant to the Policy’s “Business Income” and “Extra Expense” coverage in 2020 after state and local authorities in California issued several public health orders in response to the COVID-19 pandemic. Mudpie claimed the orders prevented it from operating its store. Travelers denied the claim.

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Mudpie filed a putative class action seeking declaratory relief and asserting claims for breach of contract and breach of the implied covenant of good faith and fair dealing. The district court granted Travelers’ motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6), and Mudpie timely appealed. We have jurisdiction pursuant to 28 U.S.C. § 1291. We affirm the district court’s judgment.

I

On March 4, 2020, Governor Gavin Newsom declared a state of emergency in California in response to the threat posed by COVID-19. Governor Newsom issued an executive order on March 12, 2020, that “[a]ll [California] residents are to heed any orders and guidance of state and local public health officials, including but not limited to the imposition of social distancing measures, to control the spread of COVID-19.”

The City and County of San Francisco issued a “Shelter in Place Order” on March 16, 2020.<sup>1</sup> This order required residents to remain at their place of residence unless performing “essential activities.” *Id.* at 1. The Shelter in Place Order also declared that “[a]ll businesses with a facility in the County, except Essential Businesses . . . , are required to cease all activities at facilities located within the County except Minimum Basic Operations.” *Id.* at 3. Failure to comply with San Francisco’s Shelter in Place Order was deemed a misdemeanor punishable by a fine, imprisonment, or both. *Id.* at 1.

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<sup>1</sup> City and County of San Francisco, Order of the Health Officer No. C19-07 (Mar. 16, 2020), <https://sfgsa.org/sites/default/files/Document/OrderC19-07ShelterinPlace.pdf>.

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On March 19, 2020, Governor Newsom in conjunction with the State Public Health Officer ordered “all individuals living in the State of California to stay home or at their place of residence except as needed to maintain continuity of operations of the federal critical infrastructure sectors.” Mudpie alleges that it complied with the local and state orders (collectively, the Stay at Home Orders) and as a result, was not able to operate its store after March 16, 2020.

Mudpie filed a claim with Travelers under the Policy on April 27, 2020. In its letter denying the claim, Travelers stated that “[b]ecause the limitations on [Mudpie’s] business operations were the result of the Governmental Order, as opposed to ‘direct physical loss or damage to property at the described premises’ . . . this Business Income and Extra Expense coverage does not apply to [Mudpie’s] loss.” Travelers further stated that the Policy’s coverage excluded “‘loss or damage caused by or resulting from any virus’ – such as the COVID-19 virus.”

Mudpie filed suit in the United States District Court for the Northern District of California on behalf of itself and a putative class of “[a]ll retailers in California that purchased comprehensive business insurance coverage from [Travelers] which includes coverage for business interruption, filed a claim for lost business income following California’s Stay at Home order, and were denied coverage.” Mudpie’s complaint asserted three causes of action: (1) a claim for declaratory relief that “its business income losses are covered and not precluded by exclusions or other limitations” in the Policy; (2) a claim for breach of contract; and (3) a claim for a breach of the implied covenant of good faith and fair dealing. Mudpie did not allege that COVID-19 was present in its storefront premises during the relevant period.

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Travelers filed a motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6). The motion argued that Mudpie was not entitled to Business Income or Extra Expense coverage because Mudpie had “not alleged . . . any facts demonstrating that [it] suffered a ‘direct physical loss of or damage to’ insured property,” and because the Policy included a Virus Exclusion.<sup>2</sup> Mudpie countered “that its inability to operate and occupy its storefront following the government closure orders [wa]s a direct physical loss of property covered by [the Policy].”

The district court granted Travelers’ motion, ruling that Mudpie “fail[ed] to allege any intervening physical force beyond the government closure orders” and thus was “not entitled to Business Income or Extra Expense coverage” pursuant to the Policy. The district court declined to consider Travelers’ argument that the Virus Exclusion barred Mudpie’s recovery. The court dismissed the complaint without prejudice but gave Mudpie leave to amend. Mudpie responded by filing a notice advising “it [would] not be amending its Complaint, as permitted by the Court’s Order.” The court then dismissed the complaint with prejudice, and Mudpie timely appealed.

## II

We review de novo an order granting a motion to dismiss for failure to state a claim under Federal Rule of Civil

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<sup>2</sup> Travelers also argued that Mudpie could not establish entitlement to the Policy’s “Civil Authority” coverage. Mudpie’s complaint alleged that its losses were insured under the Policy’s Civil Authority coverage, but Mudpie abandoned this argument in the district court, and it is not a part of this appeal.

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Procedure 12(b)(6). *L.A. Lakers, Inc. v. Fed. Ins. Co.*, 869 F.3d 795, 800 (9th Cir. 2017). “[W]e accept the factual allegations of the complaint as true and construe them in the light most favorable to the plaintiff.” *Id.* (quoting *AE ex rel. Hernandez v. County of Tulare*, 666 F.3d 631, 636 (9th Cir. 2012)).

“When interpreting state law, we are bound to follow the decisions of the state’s highest court, and when the state supreme court has not spoken on an issue, we must determine what result the court would reach based on state appellate court opinions, statutes and treatises.” *Diaz v. Kubler Corp.*, 785 F.3d 1326, 1329 (9th Cir. 2015) (internal quotation marks and brackets omitted) (quoting *Paulson v. City of San Diego*, 294 F.3d 1124, 1128 (9th Cir. 2002) (en banc)). “We will ordinarily accept the decision of an intermediate appellate court as the controlling interpretation of state law,” *Tomlin v. Boeing Co.*, 650 F.2d 1065, 1069 n.7 (9th Cir. 1981), “unless [we] find[] convincing evidence that the state’s supreme court likely would not follow it,” *Ryman v. Sears, Roebuck & Co.*, 505 F.3d 993, 994 (9th Cir. 2007).

### III

Pursuant to the Policy, Travelers agreed to “pay for direct physical loss of or damage to [Mudpie’s] Covered Property . . . caused by or resulting from a Covered Cause of Loss.” At oral argument before our court, defense counsel agreed the “Covered Property” included Mudpie’s storefront premises and its contents. The coverage also extended to certain losses to Mudpie’s “Business Income” and “Extra Expense” incurred to recover from a covered loss. In relevant part, the Policy provides:



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[Travelers] will pay for the actual loss of Business Income [Mudpie] sustain[s] due to the necessary “suspension” of [Mudpie’s] “operations” during the “period of restoration”. The “suspension” *must be caused by direct physical loss of or damage to property* at the described premises. The loss or damage must be caused by or result from a Covered Cause of Loss. . . .

. . . .

[Travelers] will also pay Extra Expense (including Expediting Expenses) to repair or replace the property, but only to the extent it reduces the amount of loss that otherwise would have been payable under [the “Business Income” provision].

Under California law, the burden is on the insured to establish that a claimed loss “is within the basic scope of insurance coverage.” *Aydin Corp. v. First State Ins. Co.*, 959 P.2d 1213, 1215 (Cal. 1998). “[O]nce an insured has made this showing, the burden is on the insurer to prove the claim is specifically excluded.” *Id.* Where, as here, a policy covers “direct physical loss of or damage to” property, the “direct physical loss requirement is part of the policy’s insuring clause and accordingly falls within [the insured’s] burden of proof.” *MRI Healthcare Ctr. of Glendale, Inc. v. State Farm Gen. Ins. Co.*, 115 Cal. Rptr. 3d 27, 36 (Ct. App. 2010).

The parties dispute whether Mudpie adequately alleged a “direct physical loss of or damage to” property under the

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Policy, and they offer competing interpretations of that phrase. California courts require that we interpret an insurance policy according to the “clear and explicit” meaning of the terms as used in their “ordinary and popular sense.” *AIU Ins. Co. v. Superior Ct.*, 799 P.2d 1253, 1264 (Cal. 1990) (internal quotation marks omitted); *Bay Cities Paving & Grading, Inc. v. Laws.’ Mut. Ins. Co.*, 855 P.2d 1263, 1270 (Cal. 1993) (“The clear and explicit meaning of the[] provisions, interpreted in their ordinary and popular sense, unless used by the parties in a technical sense or a special meaning is given to them by usage[,] controls judicial interpretation.”) (internal quotation marks and citations omitted). We must “construe [insurance policies] as would a reasonable layperson, not an expert, attorney, or a historian.” *E.M.M.I. Inc. v. Zurich Am. Ins. Co.*, 84 P.3d 385, 391 n.2 (Cal. 2004) (citing *Crane v. State Farm & Cas. Co.*, 485 P.2d 1129 (Cal. 1971)).

California courts have interpreted coverage provisions similar to the Policy’s “direct physical loss of or damage to property” term.<sup>3</sup> For example, in *MRI Healthcare*, the California Court of Appeal considered the meaning of the phrase “direct physical loss” in a business insurance policy. 115 Cal. Rptr. 3d at 31–32. The plaintiff in *MRI Healthcare*, MRI Healthcare Center (MHC), was required to demagnetize, or “ramp down,” its MRI machine when its landlord repaired storm damage to the roof over the room housing the machine. *Id.* at 32. After the roof was repaired, the machine failed to restart for several months, causing MHC to lose business income. *Id.* at 31–32. MHC’s business insurance policy provided coverage for lost income sustained during a business

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<sup>3</sup> Accordingly, we decline Mudpie’s request to certify its question to the California Supreme Court. *See* Cal. R. Ct. 8.548(a)(2).

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interruption “caused by *accidental direct physical loss to property* at the described premises.” *Id.* at 31. MHC’s insurer denied coverage for lost business income during the period when the MRI machine was nonoperational, *id.* at 32, and the superior court entered summary judgment in favor of the insurer, *id.* at 30.

The California Court of Appeal affirmed the superior court’s ruling, explaining “direct physical loss ‘contemplates an actual change in insured property . . . occasioned by accident or other fortuitous event directly upon the property causing it to become unsatisfactory.’” *Id.* at 37 (quoting *AFLAC Inc. v. Chubb & Sons, Inc.*, 581 S.E.2d 317, 319 (Ga. Ct. App. 2003)). In other words, “[f]or loss to be covered, there must be a ‘distinct, demonstrable, physical alteration’ of the property.” *Id.* at 38. The court cited Couch on Insurance § 148:46,<sup>4</sup> which explains:

The requirement that the loss be “physical” . . . is widely held to exclude alleged losses that are intangible or incorporeal and, thereby, to preclude any claim against the property insurer when the insured merely suffers a detrimental economic impact unaccompanied by a distinct, demonstrable, physical alteration of the property.

The California appellate court concluded there was no coverage because there had been no “distinct, demonstrable, physical alteration” of the MRI machine. *MRI Healthcare*, 115 Cal. Rptr. 3d at 38. Rather, the machine was turned off

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<sup>4</sup> 10A STEVEN PLITT ET AL., COUCH ON INSURANCE § 148:46 (3d ed. 2021) (footnotes omitted).

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and could not be turned back on due to the inherent nature of the machine itself rather than actual physical damage or alteration. *Id.*

Mudpie contends that under California law “direct physical loss of or damage to” property does not require actual damage to the property but merely requires that the property no longer be suitable for its intended purpose. In support, Mudpie cites *Hughes v. Potomac Insurance Co. of the District of Columbia*, 18 Cal. Rptr. 650 (Dist. Ct. App. 1962), *abrogated on other grounds by Sabella v. Wisler*, 377 P.2d 889 (Cal. 1963). But *Hughes* cannot bear the weight Mudpie places on it. First, *Hughes* did not purport to interpret a “direct physical loss” provision similar to the one at issue here. *Hughes* concerned whether a home insurance policy’s definition of “dwelling” included the ground underneath a home in addition to the structure itself. *See id.* at 655. Second, contrary to Mudpie’s suggestion, *Hughes* did not imply that an insured need not show any physical change to the insured property to prove “direct physical loss.” To the contrary, the court in *Hughes* concluded that the home sustained “real and severe damage when the soil beneath it slid away and left it overhanging a 30-foot cliff” and deemed the home uninhabitable. *Id.*<sup>5</sup>

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<sup>5</sup> Both parties discuss an unpublished federal district court decision from the Central District of California: *Total Intermodal Services Inc. v. Travelers Property Casualty Co. of America*, No. CV 17-04908 AB (KSX), 2018 WL 3829767 (C.D. Cal. July 11, 2018). Mudpie cites this case for the proposition that “direct physical loss” can include permanent dispossession of property. Besides the fact that *Total* is an unpublished decision, this argument is not well taken because our task is to gauge how the California state courts would resolve the legal issue at hand and *Total* was a federal district court decision. In any event, the result in *Total* is not

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Unlike the cases that Mudpie relies upon, Mudpie’s complaint does not identify a “distinct, demonstrable, physical alteration of the property,” see *MRI Healthcare*, 115 Cal. Rptr. 3d at 37, and it does not allege that Mudpie was permanently dispossessed of its property. Instead, Mudpie alleges the Stay at Home Orders temporarily prevented Mudpie from operating its store as it intended, and urges us to interpret “direct physical loss of or damage to” to be synonymous with “loss of use.” We cannot endorse Mudpie’s interpretation because California courts have carefully distinguished “intangible,” “incorporeal,” and “economic” losses from “physical” ones. *Id.*; see also *Doyle v. Fireman’s Fund Ins. Co.*, 229 Cal. Rptr. 3d 840, 843–44 (Ct. App. 2018) (concluding no physical damage was alleged where wine collection diminished in value after counterfeit wine was added, because no wine was physically lost); *Ward Gen. Ins. Servs., Inc. v. Emps. Fire Ins. Co.*, 7 Cal. Rptr. 3d 844, 851 (Ct. App. 2003) (concluding no physical damage was alleged where plaintiff sought to recover loss of electronically stored data, because there was “no loss of or damage to tangible property”).

Interpreting the phrase “direct physical loss of or damage to” property as requiring physical alteration of property is consistent with other provisions of Mudpie’s Policy. *Cf. Producers Dairy Delivery Co. v. Sentry Ins. Co.*, 718 P.2d 920, 927 n.7 (Cal. 1986) (“[L]anguage in a contract must be construed in the context of that instrument as a whole . . . and cannot be found to be ambiguous in the abstract.”). For example, the Policy provides coverage for Business Income and Extra Expense only during the “period of restoration,”

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inconsistent with *MRI Healthcare* and does not change the result we reach here.

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and it defines the “period of restoration” as ending on “[t]he date when the property at the described premises should be repaired, rebuilt or replaced with reasonable speed and similar quality; or . . . [t]he date when business is resumed at a new permanent location.” That this coverage extends only until covered property is repaired, rebuilt, or replaced, or the business moves to a new permanent location suggests the Policy contemplates providing coverage only if there are physical alterations to the property. To interpret the Policy to provide coverage absent physical damage would render the “period of restoration” clause superfluous.

Our conclusion that California courts would construe the phrase “physical loss of or damage to” as requiring an insured to allege physical alteration of its property is consistent with conclusions reached by other courts. *See, e.g., Michael Cetta, Inc. v. Admiral Indem. Co.*, 506 F. Supp. 3d 168, 179 (S.D.N.Y. 2020) (interpreting the phrase “direct physical loss of or damage to” in an insurance policy and observing that “nearly every court to address this issue has concluded that loss of use of a premises due to a governmental closure order does not trigger business income coverage premised on physical loss to property”); *Promotional Headwear Int’l v. Cincinnati Ins. Co.*, 504 F. Supp. 3d 1191, 1200 (D. Kan. 2020) (“[T]he overwhelming majority of cases to consider business income claims stemming from COVID-19 with similar policy language hold that ‘direct physical loss or damage’ to property requires some showing of actual or tangible harm to or intrusion on the property itself.”).

The Eighth Circuit recently considered whether the COVID-19 pandemic and related government-imposed restrictions constitute “accidental physical loss or accidental physical damage” to business property in *Oral Surgeons, P.C.*

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*v. Cincinnati Insurance Co.*, 2 F.4th 1141 (8th Cir. 2021). There, an oral and maxillofacial surgery practice ceased non-emergency services in March 2020 to comply with COVID-19 restrictions imposed by the Governor of Iowa. *Id.* at 1143. The restrictions were lifted and non-emergency surgeries resumed in May 2020. *Id.* Oral Surgeons filed a claim with its insurer for losses suffered during the suspension of non-emergency procedures. *Id.* The subject policy insured Oral Surgeons against lost business income and certain extra expense resulting from the suspension of operations “caused by direct loss to property.” *Id.* (internal quotation marks omitted). The policy defined “loss” as “accidental physical loss or accidental physical damage,” *id.*, but Oral Surgeons did not allege physical alteration to its property, *id.* at 1145.

Applying Iowa law, the Eighth Circuit interpreted the policy to require direct physical loss or physical damage, and concluded “there must be some physicality to the loss or damage of property—*e.g.*, a physical alteration, physical contamination, or physical destruction.” *Id.* at 1144. The Eighth Circuit observed that the policy covered business income and incurred extra expense only during the “period of restoration” and reasoned that the fact “the policy provides coverage until property ‘should be repaired, rebuilt or replaced’ or until business resumes elsewhere assumes physical alteration of the property, not mere loss of use.” *Id.*; *see also O’Brien Sales & Mktg., Inc. v. Transp. Ins. Co.*, 512 F. Supp. 3d 1019, 1023 (N.D. Cal. 2021) (relying on *MRI Healthcare* and holding that plaintiff’s loss of use “unaccompanied by a distinct, demonstrable, physical alteration to the property” was insufficient to be compensable under its insurance policy). We affirm the district court’s ruling that Mudpie’s claimed losses are not covered by the Policy. The district court did not err by dismissing Mudpie’s

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claims for declaratory relief, breach of contract, and breach of the covenant of good faith and fair dealing.<sup>6</sup>

IV

We also conclude that the Policy’s Virus Exclusion bars coverage for Mudpie’s claimed losses. The Policy specifies:

[Travelers] will not pay for loss or damage caused by or resulting from any virus, bacterium or other microorganism that induces or is capable of inducing physical distress, illness or disease.

Having ruled that Mudpie did not allege a direct physical loss, the district court did not rely on the Virus Exclusion when it dismissed Mudpie’s complaint. Nevertheless, the parties fully briefed the applicability of the Virus Exclusion in the district court and we may affirm “on any basis the record supports, including one the district court did not reach.” *Or. Short Line R.R. Co. v. Dep’t of Revenue Or.*, 139 F.3d 1259, 1265 (9th Cir. 1998) (quoting *Herring v. FDIC*, 82 F.3d 282, 284 (9th Cir. 1995)).

Mudpie argues that its losses are not subject to the Policy’s Virus Exclusion because the losses were caused by

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<sup>6</sup> To survive the motion to dismiss Mudpie’s claim for breach of the implied covenant of good faith and fair dealing, Mudpie was required to adequately plead two elements: (1) benefits under the policy were withheld; and (2) the reason for withholding benefits was unreasonable or without proper cause. *See Love v. Fire Ins. Exch.*, 271 Cal. Rptr. 246, 255 (Ct. App. 1990). Because Mudpie failed to plausibly allege that it was entitled to coverage under the Policy, it failed to adequately plead the first element of this claim.



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Stay at Home Orders that restricted Mudpie’s use of its property, not directly by the virus. Travelers contends that this exclusion bars coverage for all of Mudpie’s claimed losses because it was the virus that prompted state and local authorities to issue the Stay at Home Orders in the first place.

California courts broadly interpret the term “resulting from” in insurance contracts. *Mosley v. Pac. Specialty Ins. Co.*, 263 Cal. Rptr. 3d 28, 35 (Ct. App. 2020) (explaining “[t]he term ‘resulting from’ ‘broadly links a factual situation with the event creating liability, and connotes only a minimal causal connection or incidental relationship’”) (citation omitted). And “where there is a concurrence of different causes, the efficient cause—the one that sets others in motion—is the cause to which the loss is to be attributed, though the other causes may follow it, and operate more immediately in producing the disaster.” *Sabella v. Wisler*, 377 P.2d 889, 895 (Cal. 1963) (quoting 6 COUCH, INSURANCE § 1466 (1930)).

The California Supreme Court explained in *Garvey v. State Farm Fire & Casualty Co.*, 770 P.2d 704 (Cal. 1989), that *Sabella* “impliedly recognized that coverage would not exist if the covered risk was simply a *remote* cause of the loss, or if an excluded risk was the efficient proximate (meaning predominant) cause of the loss” and concluded “the fact that an excluded risk contributed to the loss would not preclude coverage if such a risk was a remote cause of the loss.” *Id.* at 707. California courts apply the efficient proximate cause doctrine developed in *Sabella* and reaffirmed in *Garvey* because the doctrine “creates a workable rule of coverage that provides a fair result within the reasonable expectations of both the insured and the insurer.” *Julian v. Hartford Underwriters Ins. Co.*, 110 P.3d 903, 907 (Cal.

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2005), *as modified* (May 5, 2005) (internal quotation marks omitted).

Mudpie’s complaint does not allege an attenuated causal chain between the virus and Mudpie’s losses. Nor does Mudpie dispute that the Stay at Home Orders that impacted Mudpie’s business were issued in response to the COVID-19 pandemic, and the point is not debatable. The state authorities’ March 19 Stay at Home Order explained that COVID-19 had “rapidly spread throughout California” and “a State of Emergency . . . exist[ed] in California as a result of the threat of COVID-19.” Based on these findings, Californians were ordered to remain at home or at their place of residence except for purposes deemed essential. Though Mudpie argues it was the government orders that most directly caused its injury, Mudpie does not plausibly allege that “the efficient cause,” i.e., the one that set others in motion, *Sabella*, 377 P.2d at 895, was anything other than the spread of the virus throughout California, or that the virus was merely a remote cause of its losses. *Cf. Garvey*, 770 P.2d at 707. Accordingly, the Policy’s Virus Exclusion bars coverage for Mudpie’s claims.

V

The judgment of the district court is **AFFIRMED**.<sup>7</sup>

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<sup>7</sup> United Policyholders’ motion to become amicus, Dkt. # 33, is **GRANTED**.



**City and County of  
San Francisco**

**Department of Public Health  
Order of the Health Officer**

**ORDER OF THE HEALTH OFFICER No. C19-07**

**ORDER OF THE HEALTH OFFICER  
OF THE CITY AND COUNTY OF SAN FRANCISCO DIRECTING  
ALL INDIVIDUALS LIVING IN THE COUNTY TO SHELTER AT THEIR  
PLACE OF RESIDENCE EXCEPT THAT THEY MAY LEAVE TO  
PROVIDE OR RECEIVE CERTAIN ESSENTIAL SERVICES OR  
ENGAGE IN CERTAIN ESSENTIAL ACTIVITIES AND WORK FOR  
ESSENTIAL BUSINESS AND GOVERNMENT SERVICES; EXEMPTING  
INDIVIDUALS EXPERIENCING HOMELESSNESS FROM THE  
SHELTER IN PLACE ORDER BUT URGING THEM TO FIND SHELTER  
AND GOVERNMENT AGENCIES TO PROVIDE IT; DIRECTING ALL  
BUSINESSES AND GOVERNMENTAL AGENCIES TO CEASE NON-  
ESSENTIAL OPERATIONS AT PHYSICAL LOCATIONS IN THE  
COUNTY; PROHIBITING ALL NON-ESSENTIAL GATHERINGS OF  
ANY NUMBER OF INDIVIDUALS; AND ORDERING CESSATION OF  
ALL NON-ESSENTIAL TRAVEL**

**(SHELTER IN PLACE)**

DATE OF ORDER: March 16, 2020

*cited in Mullins, Inc. v. Travelers Casualty Insurance  
No. 20-16858 argued on September 27, 2021*

**Please read this Order carefully. Violation of or failure to comply with this Order is a misdemeanor punishable by fine, imprisonment, or both. (California Health and Safety Code § 120295, et seq.; California Penal Code §§ 69, 148(a)(1); San Francisco Administrative Code section 7.17(b).)**

Summary: The virus that causes Coronavirus 2019 Disease (“COVID-19”) is easily transmitted, especially in group settings, and it is essential that the spread of the virus be slowed to protect the ability of public and private health care providers to handle the influx of new patients and safeguard public health and safety. Because of the risk of the rapid spread of the virus, and the need to protect all members of the community and the Bay Area region, especially including our members most vulnerable to the virus and also health care providers, this Order requires all individuals anywhere in San Francisco to shelter in place—that is, stay at home—except for certain essential activities and work to provide essential business and government services or perform essential public infrastructure construction, including housing. This order begins at 12:01 a.m. on March 17, 2020 and will continue for three weeks through April 7, 2020, subject to the limited exceptions and under the terms and conditions more particularly set forth below.

Gatherings of individuals outside the home are generally prohibited, with certain exceptions for essential activities or essential travel or to perform work for essential businesses and government agencies or perform essential infrastructure work. Consistent



**City and County of San Francisco**

**Department of Public Health  
Order of the Health Officer**

**ORDER OF THE HEALTH OFFICER No. C19-07**

with the directive issued by Governor Gavin Newsom on March 15, 2020, all bars and nightclubs are ordered closed. Restaurants and cafes—regardless of their seating capacity—that serve food are ordered closed except solely for takeout and delivery service. Additionally, all gyms and recreation facilities are ordered closed. Homeless individuals are not subject to the shelter in place order but are strongly urged to find shelter and government agencies are urged to take steps needed to provide shelter for those individuals.

Under any of the limited circumstances in which individuals are allowed to interact in person outside their residence, the Health Officer orders individuals to abide by the following requirements: (i) maintain at least six feet from other individuals, wash hands with soap and water for at least 20 seconds as frequently as possible or using hand sanitizer, cover coughs or sneezes, and not shake hands; (ii) for people with medical conditions, regardless of age, that put them at higher risk of serious complications should they get COVID-19, and other than health care workers and other essential providers, avoid leaving their homes to the extent possible; and (iii) for employers in San Francisco that do not provide essential businesses or government services, take all steps necessary for employees to work remotely from home to the extent possible. These requirements build on the California Department of Public Health and United States Centers for Disease Control and Prevention guidelines issued March 11, 2020, extended as necessary to address the health emergency affecting the Bay Area region. No individual who is sick may go to the workplace or be outside the home except as necessary to seek or receive medical care in accordance with guidance from public health officials. The Health Officer may revise this Order as the situation evolves, and facilities must stay updated by checking the City Administrator’s website ([sfgsa.org](http://sfgsa.org)) regularly.

This Order revokes and replaces Order Number C19-05b, issued March 13, 2020, and C19-02, issued March 7, 2020. Those orders are no longer in effect as of the effective date and time of this Order. This Order does not revoke Order Numbers C19-01b, C19-03, C19-04, or C19-06.

**UNDER THE AUTHORITY OF CALIFORNIA HEALTH AND SAFETY CODE SECTIONS 101040, 101085, AND 120175, THE HEALTH OFFICER OF THE CITY AND COUNTY OF SAN FRANCISCO (“HEALTH OFFICER”) ORDERS:**

- 1. The intent of this Order is to ensure that the maximum number of people self-isolate in their places of residence to the maximum extent feasible, while enabling essential services to continue, to slow the spread of COVID-19 to the maximum extent possible. When people need to leave their places of residence, whether to obtain or perform vital services, or to otherwise facilitate authorized activities necessary for continuity of social and commercial life, they should at all times reasonably possible comply with Social Distancing Requirements as defined in Section 10 below. All provisions of this Order should be interpreted to effectuate this intent. Failure to**



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comply with any of the provisions of this Order constitutes an imminent threat and creates an immediate menace to public health.

2. All individuals currently living within the City and County of San Francisco (the “County”) are ordered to shelter at their place of residence. To the extent individuals are using shared or outdoor spaces, they must at all times as reasonably possible maintain social distancing of at least six feet from any other person when they are outside their residence. All persons may leave their residences only for Essential Activities, Essential Governmental Functions, or to operate Essential Businesses, all as defined in Section 10. Individuals experiencing homelessness are exempt from this Section, but are strongly urged to obtain shelter, and governmental and other entities are strongly urged to make such shelter available as soon as possible and to the maximum extent practicable (and to use COVID-19 risk mitigation practices in their operation).
3. All businesses with a facility in the County, except Essential Businesses as defined below in Section 10, are required to cease all activities at facilities located within the County except Minimum Basic Operations, as defined in Section 10. For clarity, businesses may also continue operations consisting exclusively of employees or contractors performing activities at their own residences (i.e., working from home). All Essential Businesses are strongly encouraged to remain open. To the greatest extent feasible, Essential Businesses shall comply with Social Distancing Requirements as defined in Section 10 below, including by maintaining six-foot social distancing for both employees and members of the public, including, but not limited to, when any customers are standing in line.
4. All public and private gatherings of any number of people occurring outside a single household or living unit are prohibited, except for the limited purposes as expressly permitted in Section 10. Nothing in this Order prohibits the gathering of members of a household or living unit.
5. All travel, including, but not limited to, travel on foot, bicycle, scooter, motorcycle, automobile, or public transit, except Essential Travel and Essential Activities as defined below in Section 10, is prohibited. People must use public transit only for purposes of performing Essential Activities or to travel to and from work to operate Essential Businesses or maintain Essential Governmental Functions. People riding on public transit must comply with Social Distancing Requirements as defined in Section 10 below, to the greatest extent feasible. This Order allows travel into or out of the County to perform Essential Activities, operate Essential Businesses, or maintain Essential Governmental Functions.
6. This Order is issued based on evidence of increasing occurrence of COVID-19 within the County and throughout the Bay Area, scientific evidence and best practices regarding the most effective approaches to slow the transmission of communicable diseases generally and COVID-19 specifically, and evidence that the

*Watermark: cited in Mudpie, Inc. v. Travelers Casualty Insurance Co., No. 20-16858, archived on September 21, 2021*



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age, condition, and health of a significant portion of the population of the County places it at risk for serious health complications, including death, from COVID-19. Due to the outbreak of the COVID-19 virus in the general public, which is now a pandemic according to the World Health Organization, there is a public health emergency throughout the County. Making the problem worse, some individuals who contract the COVID-19 virus have no symptoms or have mild symptoms, which means they may not be aware they carry the virus. Because even people without symptoms can transmit the disease, and because evidence shows the disease is easily spread, gatherings can result in preventable transmission of the virus. The scientific evidence shows that at this stage of the emergency, it is essential to slow virus transmission as much as possible to protect the most vulnerable and to prevent the health care system from being overwhelmed. One proven way to slow the transmission is to limit interactions among people to the greatest extent practicable. By reducing the spread of the COVID-19 virus, this Order helps preserve critical and limited healthcare capacity in the County.

7. This Order also is issued in light of the existence of 37 cases of COVID-19 in the County, as well as at least 258 confirmed cases and at least three deaths in neighboring Bay Area counties, as of 10:00 a.m. on Sunday, March 16, 2020, including a significant and increasing number of suspected cases of community transmission and likely further significant increases in transmission. Widespread testing for COVID-19 is not yet available but is expected to increase in the coming days. This Order is necessary to slow the rate of spread and the Health Officer will re-evaluate it as further data becomes available.
8. This Order is issued in accordance with, and incorporates by reference, the March 4, 2020 Proclamation of a State of Emergency issued by Governor Gavin Newsom, the February 25, 2020 Proclamation by the Mayor Declaring the Existence of a Local Emergency issued by Mayor London Breed, as supplemented on March 11, 2020, the March 6, 2020 Declaration of Local Health Emergency Regarding Novel Coronavirus 2019 (COVID-19) issued by the Health Officer, and guidance issued by the California Department of Public Health, as each of them have been and may be supplemented.
9. This Order is also issued in accordance with, and incorporates by reference the March 12, 2020 Executive Order (Executive Order N-25-20) issued by Governor Gavin Newsom. Executive Order N-25- 20 expressly orders that “[a]ll residents are to heed any orders and guidance of state and local public health officials, including but not limited to the imposition of social distancing measures, to control the spread of COVID-19.” This Order is also based on statements by Governor Newsom during a press conference on March 15, 2020, indicating the guidance of the State of California that all nightclubs, bars, wineries, and brewpubs close and that persons 65 years old and older isolate at home.



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**10. Definitions and Exemptions.**

- a. For purposes of this Order, individuals may leave their residence only to perform any of the following “Essential Activities.” But people at high risk of severe illness from COVID-19 and people who are sick are urged to stay in their residence to the extent possible except as necessary to seek medical care.
  - i. To engage in activities or perform tasks essential to their health and safety, or to the health and safety of their family or household members (including, but not limited to, pets), such as, by way of example only and without limitation, obtaining medical supplies or medication, visiting a health care professional, or obtaining supplies they need to work from home.
  - ii. To obtain necessary services or supplies for themselves and their family or household members, or to deliver those services or supplies to others, such as, by way of example only and without limitation, canned food, dry goods, fresh fruits and vegetables, pet supply, fresh meats, fish, and poultry and any other household consumer products, and products necessary to maintain the safety, sanitation, and essential operation of residences.
  - iii. To engage in outdoor activity, provided the individuals comply with Social Distancing Requirements as defined in this Section, such as, by way of example and without limitation, walking, hiking, or running.
  - iv. To perform work providing essential products and services at an Essential Business or to otherwise carry out activities specifically permitted in this Order, including Minimum Basic Operations.
  - v. To care for a family member or pet in another household.
- b. For purposes of this Order, individuals may leave their residence to work for or obtain services at any “Healthcare Operations” including hospitals, clinics, dentists, pharmacies, pharmaceutical and biotechnology companies, other healthcare facilities, healthcare suppliers, home healthcare services providers, mental health providers, or any related and/or ancillary healthcare services. “Healthcare Operations” also includes veterinary care and all healthcare services provided to animals. This exemption shall be construed broadly to avoid any impacts to the delivery of healthcare, broadly defined. “Healthcare Operations” does not include fitness and exercise gyms and similar facilities.

*cited in Middle, Inc. v. Travelers Casualty Insurance Co., No. 20-16858 archived on September 24, 2021*



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- c. For purposes of this Order, individuals may leave their residence to provide any services or perform any work necessary to the operations and maintenance of “Essential Infrastructure,” including, but not limited to, public works construction, construction of housing (in particular affordable housing or housing for individuals experiencing homelessness), airport operations, water, sewer, gas, electrical, oil refining, roads and highways, public transportation, solid waste collection and removal, internet, and telecommunications systems (including the provision of essential global, national, and local infrastructure for computing services, business infrastructure, communications, and web-based services), provided that they carry out those services or that work in compliance with Social Distancing Requirements as defined this Section, to the extent possible.
- d. For purposes of this Order, all first responders, emergency management personnel, emergency dispatchers, court personnel, and law enforcement personnel, and others working for or to support Essential Businesses are categorically exempt from this Order. Further, nothing in this Order shall prohibit any individual from performing or accessing “Essential Governmental Functions.” Essential Governmental Functions means all services needed to ensure the continuing operation of the government agencies and provide for the health, safety and welfare of the public. All Essential Governmental Functions shall be performed in compliance with Social Distancing Requirements as defined this Section, to the extent possible.
- e. For the purposes of this Order, covered businesses include any for-profit, non-profit, or educational entities, regardless of the nature of the service, the function they perform, or its corporate or entity structure.
- f. For the purposes of this Order, “Essential Businesses” means:
  - i. Healthcare Operations and Essential Infrastructure;
  - ii. Grocery stores, certified farmers’ markets, farm and produce stands, supermarkets, food banks, convenience stores, and other establishments engaged in the retail sale of canned food, dry goods, fresh fruits and vegetables, pet supply, fresh meats, fish, and poultry, and any other household consumer products (such as cleaning and personal care products). This includes stores that sell groceries and also sell other non-grocery products, and products necessary to maintaining the safety, sanitation, and essential operation of residences;
  - iii. Food cultivation, including farming, livestock, and fishing;

*Filed in In re: Plaintiff's Casualty Insurance No. 20-16858 archived on September 27, 2021*





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- iv. **Businesses that provide food, shelter, and social services, and other necessities of life for economically disadvantaged or otherwise needy individuals;**
- v. **Newspapers, television, radio, and other media services;**
- vi. **Gas stations and auto-supply, auto-repair, and related facilities;**
- vii. **Banks and related financial institutions;**
- viii. **Hardware stores;**
- ix. **Plumbers, electricians, exterminators, and other service providers who provide services that are necessary to maintaining the safety, sanitation, and essential operation of residences, Essential Activities, and Essential Businesses;**
- x. **Businesses providing mailing and shipping services, including post office boxes;**
- xi. **Educational institutions—including public and private K-12 schools, colleges, and universities—for purposes of facilitating distance learning or performing essential functions, provided that social distancing of six-feet per person is maintained to the greatest extent possible;**
- xii. **Laundromats, dry cleaners, and laundry service providers;**
- xiii. **Restaurants and other facilities that prepare and serve food, but only for delivery or carry out. Schools and other entities that typically provide free food services to students or members of the public may continue to do so under this Order on the condition that the food is provided to students or members of the public on a pick-up and take-away basis only. Schools and other entities that provide food services under this exemption shall not permit the food to be eaten at the site where it is provided, or at any other gathering site;**
- xiv. **Businesses that supply products needed for people to work from home;**
- xv. **Businesses that supply other essential businesses with the support or supplies necessary to operate;**

*cited in People v. Travelers Casualty Insurance  
No. 20-16858 archived on September 27, 2021*



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- xvi. **Businesses that ship or deliver groceries, food, goods or services directly to residences;**
- xvii. **Airlines, taxis, and other private transportation providers providing transportation services necessary for Essential Activities and other purposes expressly authorized in this Order;**
- xviii. **Home-based care for seniors, adults, or children;**
- xix. **Residential facilities and shelters for seniors, adults, and children;**
- xx. **Professional services, such as legal or accounting services, when necessary to assist in compliance with legally mandated activities;**
- xxi. **Childcare facilities providing services that enable employees exempted in this Order to work as permitted. To the extent possible, childcare facilities must operate under the following mandatory conditions:**
  - 1. **Childcare must be carried out in stable groups of 12 or fewer (“stable” means that the same 12 or fewer children are in the same group each day).**
  - 2. **Children shall not change from one group to another.**
  - 3. **If more than one group of children is cared for at one facility, each group shall be in a separate room. Groups shall not mix with each other.**
  - 4. **Childcare providers shall remain solely with one group of children.**
- g. **For the purposes of this Order, “Minimum Basic Operations” include the following, provided that employees comply with Social Distancing Requirements as defined this Section, to the extent possible, while carrying out such operations:**
  - i. **The minimum necessary activities to maintain the value of the business’s inventory, ensure security, process payroll and employee benefits, or for related functions.**
  - ii. **The minimum necessary activities to facilitate employees of the business being able to continue to work remotely from their residences.**

*cited in Mudro, et al. v. Travelers Casualty Insurance Co. No. 20-16858 archived at September 27, 2021*



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- h. For the purposes of this Order, “Essential Travel” includes travel for any of the following purposes. Individuals engaged in any Essential Travel must comply with all Social Distancing Requirements as defined in this Section.
  - i. Any travel related to the provision of or access to Essential Activities, Essential Governmental Functions, Essential Businesses, or Minimum Basic Operations.
  - ii. Travel to care for elderly, minors, dependents, persons with disabilities, or other vulnerable persons.
  - iii. Travel to or from educational institutions for purposes of receiving materials for distance learning, for receiving meals, and any other related services.
  - iv. Travel to return to a place of residence from outside the jurisdiction.
  - v. Travel required by law enforcement or court order.
  - vi. Travel required for non-residents to return to their place of residence outside the County. Individuals are strongly encouraged to verify that their transportation out of the County remains available and functional prior to commencing such travel.
- i. For purposes of this order, residences include hotels, motels, shared rental units, and similar facilities.
- j. For purposes of this order Social Distancing Requirements includes maintaining at least six-foot social distancing from other individuals, washing hands with soap and water for at least twenty seconds as frequently as possible or using hand sanitizer, covering coughs or sneezes (into the sleeve or elbow, not hands), regularly cleaning high-touch surfaces, and not shaking hands.

*cited in Mudge, County Travelers Casualty Insurance No. 20-16858 archived on September 27, 2021*

**11. Pursuant to Government Code sections 26602 and 41601 and Health and Safety Code section 101029, the Health Officer requests that the Sheriff and the Chief of Police in the County ensure compliance with and enforce this Order. The violation of any provision of this Order constitutes an imminent threat and creates an immediate menace to public health.**

**12. This Order shall become effective at 12:01 a.m. on March 17, 2020 and will continue to be in effect until 11:59 p.m. on April 7, 2020, or until it is extended, rescinded, superseded, or amended in writing by the Health Officer.**



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**13. The City must promptly provide copies of this Order as follows: (1) by posting on the City Administrator’s website ([sfgsa.org](http://sfgsa.org)) and the Department of Public Health website ([sfdph.org](http://sfdph.org)); (2) by posting at City Hall, located at 1 Dr. Carlton B. Goodlett Pl., San Francisco, CA 94102; and (3) by providing to any member of the public requesting a copy. In addition, the owner, manager, or operator of any facility that is likely to be impacted by this Order is strongly encouraged to post a copy of this Order onsite and to provide a copy to any member of the public asking for a copy.**

**14. If any provision of this Order or its application to any person or circumstance is held to be invalid, then the remainder of the Order, including the application of such part or provision to other persons or circumstances, shall not be affected and shall continue in full force and effect. To this end, the provisions of this Order are severable.**

**IT IS SO ORDERED:**

Tomás J. Aragón, M.D., DrPH,  
Health Officer of the  
City and County of San Francisco

Dated: March 16, 2020

*added in Mudpie, Inc. v. Travelers Casualty Insurance  
No. 20-16858 archived on September 27, 2021*

## 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.
- An answer, 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 answer must be accompanied by a Certificate of Compliance found at Form 11, available on our website at [www.ca9.uscourts.gov](http://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](http://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](http://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](http://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 a letter **in writing within 10 days** to:
  - ▶ Thomson Reuters; 610 Opperman Drive; PO Box 64526; Eagan, MN 55123 (Attn: Jean Green, Senior Publications Coordinator);
  - ▶ 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)**

**Case Name**

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

I swear under penalty of perjury that the copies for which costs are requested were actually and necessarily produced, and that the requested costs were actually expended.

**Signature**

**Date**

(use "s/[typed name]" to sign electronically-filed documents)

<b>COST TAXABLE</b>	<b>REQUESTED</b> <i>(each column must be completed)</i>			
DOCUMENTS / FEE PAID	No. of Copies	Pages per Copy	Cost per Page	TOTAL COST
Excerpts of Record*	<input style="width: 100%; height: 25px;" type="text"/>	<input style="width: 100%; height: 25px;" type="text"/>	\$ <input style="width: 100%; height: 25px;" type="text"/>	\$ <input style="width: 100%; height: 25px;" type="text"/>
Principal Brief(s) ( <i>Opening Brief; Answering Brief; 1st, 2nd, and/or 3rd Brief on Cross-Appeal; Intervenor Brief</i> )	<input style="width: 60px; height: 25px;" type="text"/>	<input style="width: 60px; height: 25px;" type="text"/>	\$ <input style="width: 100%; height: 25px;" type="text"/>	\$ <input style="width: 60px; height: 25px;" type="text"/>
Reply Brief / Cross-Appeal Reply Brief	<input style="width: 60px; height: 25px;" type="text"/>	<input style="width: 60px; height: 25px;" type="text"/>	\$ <input style="width: 100%; height: 25px;" type="text"/>	\$ <input style="width: 60px; height: 25px;" type="text"/>
Supplemental Brief(s)	<input style="width: 60px; height: 25px;" type="text"/>	<input style="width: 60px; height: 25px;" type="text"/>	\$ <input style="width: 100%; height: 25px;" type="text"/>	\$ <input style="width: 60px; height: 25px;" type="text"/>
Petition for Review Docket Fee / Petition for Writ of Mandamus Docket Fee				\$ <input style="width: 60px; height: 25px;" type="text"/>
<b>TOTAL:</b>				\$ <input style="width: 60px; height: 25px;" type="text"/>

**\*Example:** Calculate 4 copies of 3 volumes of excerpts of record that total 500 pages [Vol. 1 (10 pgs.) + Vol. 2 (250 pgs.) + Vol. 3 (240 pgs.)] as:

No. of Copies: 4; Pages per Copy: 500; Cost per Page: \$.10 (or actual cost IF less than \$.10);

TOTAL: 4 x 500 x \$.10 = \$200.

*Feedback or questions about this form? Email us at [forms@ca9.uscourts.gov](mailto:forms@ca9.uscourts.gov)*