**NOT FOR PUBLICATION**

FILED

MAY 19 2023

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

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| FIRST AND STEWART HOTEL OWNER LLC, a Delaware limited liability company,<br><br>Plaintiff-Appellant,<br><br>v.<br><br>FIREMAN'S FUND INSURANCE COMPANY, a California corporation,<br><br>Defendant-Appellee. | No. 21-35637<br><br>D.C. No. 2:21-cv-00344-BJR<br><br>MEMORANDUM[*] |

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

Submitted March 31, 2023[**]
Seattle, Washington

Before: NGUYEN and HURWITZ, Circuit Judges, and PREGERSON,[***] District Judge.

In this insurance coverage action, First & Stewart Hotel Owner LLC seeks

[*] 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).

[***] The Honorable Dean D. Pregerson, United States District Judge for the Central District of California, sitting by designation.

reimbursement from Fireman's Fund Insurance Co. ("FFIC") for business losses incurred at a hotel during the COVID-19 pandemic. Applying Washington law, the district court granted FFIC's motion to dismiss. We have jurisdiction under 28 U.S.C. § 1291. Reviewing the Rule 12(c) dismissal de novo, *Fleming v. Pickard*, 581 F.3d 922, 925 (9th Cir. 2009), we affirm.

1. To establish coverage under Washington law, an "insured must show the loss falls within the scope of the policy's insured losses." *McDonald v. State Farm Fire & Cas. Co.*, 837 P.2d 1000, 1003–04 (Wash. 1992). FFIC's policy insures against loss "arising from direct physical loss or damage to property." The Washington Supreme Court recently observed that "in order to recover under a property insurance policy for physical loss of or damage to the property, something *physically* must happen to the property." *Hill & Stout, PLLC v. Mut. of Enumclaw Ins. Co.*, 515 P.3d 525, 533 (Wash. 2022). The court went on to hold that the "loss of intended use and loss of business income" caused by the Governor's orders "is not a *physical* loss of property," *id.* at 532, and stated that it agreed with the district court's conclusion in a related case that "there must be some *physical* effect on the property" to trigger coverage, *id.* at 534. Although *Hill & Stout* dealt only with a claim that the Governor's orders triggered coverage, the court also noted, as did the district court here, "the strong, if not unanimous, consensus around the country" that COVID-19 itself does not cause a direct physical loss of property. *Id.*

*Hill & Stout* acknowledged "that there are likely cases in which there is no physical *alteration* to the property but there is a direct physical loss under a theory of loss of functionality." *Id.* at 533. But, in rejecting a claim by dentists for business losses caused by the COVID-19 pandemic, the court held that "this case is not one of them" because there was "no *physical* loss of functionality to the *property*." *Id.* "[T]here was no alleged imminent danger to the property, no contamination with a problematic substance, and nothing that *physically* prevented use of the property or rendered it useless; nor were the dental offices rendered unsafe or uninhabitable because of a dangerous physical condition." *Id.* The same is true here.

2. First and Stewart's Communicable Disease Coverage is triggered by a "Communicable Disease event," which is "an event in which a **public health authority** has ordered that a location be evacuated, decontaminated, or disinfected due to the outbreak of a **communicable disease** at such location." There is no coverage under this provision because no such order was issued.

3. Even assuming that coverage was triggered under the FFIC policy, its exclusions preclude coverage. *See Overton v. Consol. Ins. Co.*, 38 P.3d 322, 329 (Wash. 2002). The policy excludes "any loss, damage, or expense caused directly or indirectly by or resulting from . . . [m]ortality, death by natural causes, disease, sickness, any condition of health, bacteria, or virus." This is materially similar to the exclusion that precluded coverage in *Hill & Stout*. *See* 515 P.3d at 528, 536–37

(applying an exclusion stating that the insurer "will not pay for loss or damage caused directly or indirectly by" "[a]ny virus . . . that induces or is capable of inducing physical distress, illness or disease").

4. As COVID-19 does not cause direct physical loss of covered property, the district court correctly concluded that discovery would be futile.[1]

**AFFIRMED.**

[1] Given the guidance in *Hill & Stout*, we deny First & Stewart's motion to certify the coverage question to the Washington Supreme Court. **Dkt. 11**. We also deny First & Stewart's motion to take judicial notice of district court orders in related litigation. **Dkt. 14**. We grant the motions to file briefs as amici curiae. **Dkts. 21, 24, 33**.