

**UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA**

RIALTO POCKETS, INC., et al.,  
Plaintiffs,

v.

CERTAIN UNDERWRITERS AT  
LLOYD'S, INCLUDING  
BEAZLEY FURLONGE LTD, et  
al.,  
Defendants.

CV 20-7709 DSF (JPRx)

Order GRANTING Motion to  
Dismiss First Amended  
Complaint (Dkt. Nos. 24, 42)<sup>1</sup>

Plaintiffs operate a retail “adult superstore” and twenty-three “gentlemen’s clubs” in several states, including California. They sued Beazley Underwriting Limited (Defendant), in its role as a Lloyd’s underwriter of a business insurance policy because Defendant has refused to pay on the policy for Plaintiffs’ time element losses related to COVID-19 government shutdowns. Defendant now moves to dismiss the First Amended Complaint, arguing that Plaintiffs’ losses were not covered under the policy because they did not stem from “physical loss or damage” to the covered properties. The Court deems this matter appropriate for decision without oral argument. See Fed. R. Civ. P. 78; Local Rule 7-15.

As alleged in the FAC, the various COVID-19 government shutdowns have interrupted Plaintiffs’ operations and caused them business losses. As shown by the insurance policy, and admitted in the

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<sup>1</sup> The Court is not convinced that a surreply is appropriate but will consider Plaintiffs’ surreply nonetheless.

FAC and Plaintiffs' opposition, the policy covers only losses stemming from "physical loss or damage" to Plaintiffs' property.

Defendant's position is that governmental orders preventing Plaintiffs from operating their normal business do not cause physical loss or damage to Plaintiffs. Plaintiffs' precise position is a little difficult to discern, but it appears to be that being prevented from using property for its normal purpose amounts to a "physical loss" because Plaintiffs were prevented from physically using the property in the way they wanted to.

The Court, along with the vast majority of courts to have considered the issue,<sup>2</sup> agrees with Defendant that Plaintiffs have not suffered physical loss or damage. Nothing physical has happened to Plaintiffs' property, and, presumably, the property could be repurposed for other uses. Plaintiffs are complaining about a loss of intended use, not a physical loss of, or damage to, their property.

The Court agrees with Plaintiffs that "physical loss" is not synonymous with "physical damage," but Plaintiff has not suffered *physical* loss in any articulable way. "That the loss needs to be 'physical,' given the ordinary meaning of the term, 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." MRI Healthcare Ctr. of Glendale, Inc. v. State Farm Gen. Ins. Co., 187 Cal. App. 4th 766, 779 (2010) (internal quotation marks omitted). "For there to be a 'loss' within the meaning of the policy, some *external force* must have acted upon the insured property to cause a *physical change* in the condition of the property, i.e., it must have been 'damaged'

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<sup>2</sup> See, e.g., 10E, LLC v. Travelers Ind. Co. of Conn., 2020 WL 5359653 (C.D. Cal. 9/2/20); Mark's Engine Co. No. 28 Rest., LLC v. The Travelers Ind. Co., 2020 WL 5938689 (C.D. Cal. 10/2/20); Plan Check Downtown III, LLC v. AmGuard Ins. Co., 2020 WL 5742712 (C.D. Cal. 9/10/20).

within the common understanding of that term.” Id. at 780 (emphasis in original).

Because Plaintiffs have not alleged physical loss or damage as required to recover under the policy, the motion to dismiss is GRANTED. The Court is skeptical that the complaint’s deficiencies can be cured by amendment, but, in an abundance of caution, the Court will grant leave to amend if Plaintiffs’ can do so consistent with Rule 11 of the Federal Rules of Civil Procedure. An amended complaint must be filed and served no later than January 25, 2021. Failure to file by that date will waive the right to do so. The Court does not grant leave to add new defendants or new claims. Leave to add defendants or new claims must be sought by a separate, properly noticed motion. Defendant’s response will be due February 8, 2021.

IT IS SO ORDERED.

Date: January 7, 2021

  
Dale S. Fischer  
United States District Judge