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## The Citation of Unpublished Cases in the Wake of COVID-19

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## The Citation of Unpublished Cases in the Wake of COVID-19

Michael L. Smith\*

*California's Rules of Court prohibit the citation of unpublished state court opinions. Courts and litigants, however, may still cite unpublished federal opinions and rulings and unpublished opinions from other states' courts. This may result in problems, such as limiting courts' and parties' authorities to a skewed sample set, and the covert importation of inapplicable, stricter federal court pleading standards in state court cases.*

*COVID-19 was a stress-test that brought the problems with California's citation rules into focus. The pandemic led to a flood of claims for pandemic-related business interruptions by insured business owners against their insurance companies. While state courts upheld some of these claims and overturned others at the pleading stage, federal courts took a virtually uniform approach in dismissing complaints by insureds. As time went on, however, litigants in California state courts could not rely on any of the favorable state court rulings, as they were prohibited from citing those cases. Instead, courts and parties turned to the next best source of authority: California federal court rulings, which led to a skewed perspective of the caselaw.*

*This Article initially contemplates overturning California's prohibition on citing unpublished state court cases altogether, and evaluates the benefits and disadvantages of such a step. Ultimately, this Article concludes that a less-dramatic solution may solve some of the most acute problems with California's citation rules: the simple proposal that courts and litigants interpret the rules as written, rather than in the expansive manner that courts have interposed. Under this approach, courts and parties can cite unpublished superior court opinions, so long as they are not issued by superior court appellate divisions, as persuasive authority. In situations where an unexpected technology, disaster, or pandemic gives rise to widespread litigation, this approach would give California state courts a more complete picture of the law.*

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INTRODUCTION.....	99
I. THE PUBLICATION AND CITATION OF STATE COURT OPINIONS.....	101
II. THE IMPACTS OF RESTRICTING CITATION TO UNPUBLISHED STATE COURT OPINIONS.....	103
III. THE COVID-19 PANDEMIC AND ENSUING BUSINESS INTERRUPTION LITIGATION.....	106
IV. CALIFORNIA’S RULE AGAINST CITING UNPUBLISHED CASES IN THE COVID-19 PANDEMIC.....	109
VI. WHAT CAN BE DONE.....	112
A. A Dramatic Solution: Permitting Citation to All Unpublished Opinions.....	112
B. A Less-Dramatic Solution: Applying California Rule 8.1115 as Written .....	113
CONCLUSION.....	114
APPENDIX I: CALIFORNIA FEDERAL RULINGS REGARDING MOTIONS TO DISMISS AND MOTIONS FOR SUMMARY JUDGMENT IN COVID-19 BUSINESS INTERRUPTION CASES.....	115
APPENDIX II: CALIFORNIA SUPERIOR COURT RULINGS REGARDING DEMURRERS, MOTIONS FOR JUDGMENT ON THE PLEADINGS, AND MOTIONS FOR SUMMARY JUDGMENT IN COVID-19 BUSINESS INTERRUPTION CASES.....	124

## INTRODUCTION

California’s Rules of Court generally prohibit the citation of unpublished California state court opinions.<sup>1</sup> While California Rule of Court 8.1115(a) specifically prohibits the citation of unpublished Court of Appeal and superior court appellate division opinions, the Court of Appeal has recently broadened the use of this rule by determining that unpublished cases from county superior courts are also not usually “citable authority.”<sup>2</sup>

Courts and parties may still cite opinions from other jurisdictions, including unpublished opinions from other states<sup>3</sup> and unpublished federal court opinions.<sup>4</sup> These cases may be cited as “persuasive” authorities, and courts may be persuaded to follow these authorities if the facts are particularly analogous.<sup>5</sup>

California is a large state with detailed statutes and a deep, extensive pool of published caselaw. With such a wide-ranging base of precedent to draw from, a useful case can often be found for most occasions. Sometimes, though, the published caselaw is not enough. New cases—weird cases—twist routine laws into applications beyond the wildest dreams “of the most creative, imaginative, or demented law professor.”<sup>6</sup> Novel technology, unexpected disasters (or pandemics), and changing societal norms and trends may give rise to situations where there are no clear, published cases on point.

In these situations, attorneys and courts may reach for alternate sources of authority, including unpublished opinions. But if those opinions are issued by California state courts, they are off limits, even if the factual circumstances in the opinion align perfectly with the case at bar. This leaves courts and

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<sup>1</sup> See CAL. R. CT. 8.1115(a).

<sup>2</sup> See *Aixtron, Inc. v. Veeco Instruments Inc.*, 265 Cal. Rptr. 3d 851, 881 (Cal. Ct. App. 2020) (citing California Rules of Court Rule 8.1115(a) in support of the conclusion that “an unpublished, tentative decision from the superior court in Los Angeles County” was not citable authority).

<sup>3</sup> See *Central Laborers’ Pension Fund v. McAfee, Inc.*, 225 Cal. Rptr. 3d 249, 274 n.9 (Cal. Ct. App. 2017) (noting that citation of unpublished Delaware caselaw is not prohibited by Rule 8.1115).

<sup>4</sup> See *Farm Raised Salmon Cases*, 175 P.3d 1170, 1182 n.18 (Cal. 2008) (noting parties’ discussion of “an unpublished federal district court opinion,” and finding that “[c]iting unpublished *federal* opinions does not violate” Rule 8.1115) (alteration in original).

<sup>5</sup> See, e.g., *Tichinin v. City of Morgan Hill*, 99 Cal. Rptr. 3d 661, 678 n.10 (Cal. Ct. App. 2009) (citing federal caselaw as authority for the proposition adopted by the court in its reasoning and recognizing that California Rules of Court permit citation of unpublished federal cases as “persuasive, although not binding, authority”).

<sup>6</sup> Frederick Schauer, *Easy Cases*, 58 S. CAL. L. REV. 399, 420 (1985) (providing several hypothetical examples of such “weird cases”).

parties with federal caselaw or opinions from other jurisdictions, including unpublished opinions. Indeed, in circumstances involving litigation over new forms of technology or widespread events or disasters that have not been addressed before, recent unpublished opinions may be the only guidance available.

This raises a problem: California courts may end up reaching decisions in a particular direction on a novel issue or question of law, while federal courts and other jurisdictions go in a different direction. Attorneys and courts, however, are barred from citing those California state court opinions if they are unpublished, leaving a skewed, and potentially inaccurate, well of authority from which to draw.

The COVID-19 pandemic was a stress test that revealed this flaw in California's citation rules. Specifically, it led to a flood of complaints seeking business interruption insurance coverage across the country. Many of these cases involved identical questions of policy interpretation, as most policies used the same terms to describe what losses and damages were covered.

As the months went by, courts began reaching decisions on the coverage claims. Most courts, including California federal courts, took a restrictive view of insurance policies' coverage and granted motions to dismiss at the pleading stage. California superior courts, though, took a more mixed approach, with several California superior courts ruling in favor of insureds at the pleading stage.<sup>7</sup>

These superior court rulings were of little help to insureds in other state court proceedings, because California law prohibited their citation. Instead, courts and litigants at the pleading stage of COVID-19 coverage cases relied on what they saw as the next best source of authority: California federal caselaw regarding COVID-19 business interruption claims. Those cases involved virtually identical factual circumstances and highly analogous insurance policies, and filled the void in the absence of persuasive, state court authority.

The federal cases, however, provided disproportionate support for insurers, as California's federal courts had granted insurers' motions to dismiss in nearly all cases before them. The one-sided nature of the citable caselaw created a substantial

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<sup>7</sup> See *infra* Appendices I and II for a list of California federal court outcomes and California state court outcomes in cases involving motions to dismiss, demurrers, and motions for judgment on the pleadings in COVID-19 business interruption cases.

obstacle for insured seeking to advance business interruption claims—an obstacle that did not reflect the state of the law in California’s superior courts.

While the COVID-19 crisis is, in many ways, an unprecedented occurrence, the flaws that it revealed in California’s Rules of Court should not be ignored. Any unexpected social change, disaster, or new technology that leads to widespread litigation could result in the same problem for litigants and courts. Litigants should not be precluded from citing to persuasive superior court caselaw, particularly when that caselaw is contrary to trends in federal courts and other jurisdictions. Additionally, California’s rule against citing unpublished authorities is likely to disadvantage plaintiffs more than defendants, as decisions based on unpublished federal opinions are more likely to take defendant-friendly postures as a result of the strict federal pleading standards of *Bell Atlantic Corp. v. Twombly* and *Ashcroft v. Iqbal*.<sup>8</sup>

This Article contemplates abolishing Rule 8.1115(a) and the benefits and disadvantages that may result from permitting citation to unpublished state court authorities. Ultimately, the Article concludes that such a drastic step is unnecessary. Instead, courts should simply apply Rule 8.1115 as it is written and permit the citation of unpublished superior court opinions as persuasive authority. This would allow litigants to cite to California superior court cases in scenarios that involve widespread, sudden challenges, like those posed by the COVID-19 pandemic or other scenarios involving widespread changes, emergencies, or technologies that prompt extensive litigation. Unpublished superior court decisions may serve as a stopgap source of authority for courts and litigants as the cases work their way through the appeal process. And allowing parties and courts to cite these opinions will break up the effective monopoly that California federal court cases would otherwise hold.

## I. THE PUBLICATION AND CITATION OF STATE COURT OPINIONS

Cases in California (as well as in federal courts and most other jurisdictions) may be published or unpublished. Published opinions have the honor of being reprinted in various series of

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<sup>8</sup> *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007); *Ashcroft v. Iqbal*, 556 U.S. 662, 677–80 (2009); see also William R. Slomanson, *California Federal Procedural Contrast: A Proposal*, 327 F.R.D. 1301, 1313–14 (2018) (comparing California’s pleading standards with the “‘increasingly restrictive’ plausibility standard” employed in federal courts).

bound volumes, such as West's California Reporter or the Official California Appellate Reports. These volumes are then purchased by law libraries and law offices—where they are never read—but lend an air of prestige and solemnity to wherever they are shelved.<sup>9</sup> While unpublished opinions do not have the honor of being reprinted in a series of dusty tomes, many of them, particularly those issued by the California Court of Appeal, may be found online, either through courts' websites or through legal search engines like LexisNexis or Westlaw.<sup>10</sup>

In California's Court of Appeal and superior court appellate divisions, an opinion is certified for publication if "a majority of the rendering court certifies the opinion for publication before the decision is final in that court."<sup>11</sup> Criteria for determining whether an opinion should be published include whether the opinion "[e]stablishes a new rule of law," applies an existing rule to a set of facts "significantly different from those stated in published opinions," involves "a legal issue of continuing public interest," and invokes "a previously overlooked rule of law, or reaffirms a principle of law not applied in a recently reported decision."<sup>12</sup> Not many opinions make the cut. For example, UCLA's law library reports that less than ten percent of Courts of Appeal decisions meet the criteria,<sup>13</sup> and this percentage has declined over the years.<sup>14</sup>

Even if an opinion is one of the few selected for publication, there is no guarantee it will remain that way. California's rules also permit the depublication of published opinion, providing a mechanism in which "any person" may send a letter to the California Supreme Court requesting that the court order that an opinion not be published.<sup>15</sup> The court, in response to such a letter, may then order the opinion depublished or deny the request for

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<sup>9</sup> See, e.g., *Law & Government Antiquarian & Collectible Books*, EBAY, [http://www.ebay.com/b/Law-Government-Antiquarian-Collectible-Books/29223/bn\\_7376997](http://www.ebay.com/b/Law-Government-Antiquarian-Collectible-Books/29223/bn_7376997) [<http://perma.cc/JF64-EVW8>] (last visited Oct. 11, 2021).

<sup>10</sup> See CALIFORNIA COURTS, *Opinions*, <http://www.courts.ca.gov/opinions.htm> [<http://perma.cc/D92T-9U6H>].

<sup>11</sup> Cal. R. Ct. 8.1105(b).

<sup>12</sup> Cal. R. Ct. 8.1105(c)(1)–(9) (listing the nine relevant factors).

<sup>13</sup> See *California Case Materials Checklist: Introduction to California Cases*, UCLA SCH. OF L. HUGH & HAZEL DARLING L. LIBR. (Sept. 29, 2021, 9:57 PM), <http://libguides.law.ucla.edu/californiacases> [<http://perma.cc/Y5Z6-8LLK>].

<sup>14</sup> Gerald F. Uelmen, *Publication and Depublication of California Court of Appeal Opinions: Is the Eraser Mightier than the Pencil?*, 26 LOY. L.A. L. REV. 1007, 1012 (1993) (noting a decrease in the statewide rate of publication in civil cases, going from nineteen percent during 1986–1987 to sixteen percent during 1990–1991).

<sup>15</sup> CAL. R. CT. 8.1125(a).

depublication.<sup>16</sup> Alternatively, the California Supreme Court, on its own motion, may order an opinion depublished.<sup>17</sup>

Published cases may be cited as precedential authority in California state court proceedings.<sup>18</sup> Unpublished cases, on the other hand, may not be cited or relied on by courts or parties, with certain limited exceptions.<sup>19</sup> While the text of California Rule of Court 8.1115(a) prohibits citation to unpublished opinions of the California Court of appeal or appellate divisions of California's superior courts, in practice, this ban on citation of unpublished opinions is applied to all unpublished opinions, including those of the non-appellate divisions of superior courts.<sup>20</sup>

Rule 8.1115(a) says nothing against citing unpublished federal court opinions or unpublished opinions from other state courts. As a result, California courts permit the citation of both unpublished federal court opinions and unpublished opinions from other state courts as persuasive authority.<sup>21</sup>

## II. THE IMPACTS OF RESTRICTING CITATION TO UNPUBLISHED STATE COURT OPINIONS

California's rule against citing unpublished state court opinions can lead to frustrating circumstances for litigators who, upon finding a case with identical facts and a favorable ruling, realize that the case is unpublished and therefore cannot be cited. To put it another way:

Consider the analogy to the Garden of Eden, where Adam and Eve had forbidden fruit dangling temptingly before their eyes, only to be told by God that they could not touch it. The online databases dangle the fruit, but the courts forbid its consumption. Like Eve, many lawyers would love to eat of the tree of knowledge.<sup>22</sup>

While not everyone may equate on-point, uncitable caselaw as fruit so tempting that it is worth risking the collective souls of

<sup>16</sup> See CAL. R. CT. 8.1125(c)(1).

<sup>17</sup> See CAL. R. CT. 8.1125(c)(2).

<sup>18</sup> See CAL. R. CT. 8.1115(d).

<sup>19</sup> See CAL. R. CT. 8.1115(a).

<sup>20</sup> See *Aixtron, Inc. v. Veeco Instruments Inc.*, 265 Cal. Rptr. 3d 851, 881 (Cal. Ct. App. 2020) (citing CAL. R. CT. 8.1125(a) in support of the conclusion that an unpublished, tentative decision from the superior court in Los Angeles County was not citable authority).

<sup>21</sup> See *Cent. Laborers' Pension Fund v. McAfee, Inc.*, 225 Cal. Rptr. 3d 249, 273–74 n.9 (Cal. Ct. App. 2017) (noting that citation of unpublished Delaware caselaw is not prohibited by Rule 8.1115); *Farm Raised Salmon Cases*, 175 P.3d 1170, 1182 n.18 (2008) (noting parties' discussion of an unpublished federal district court opinion and finding that citing unpublished federal opinions does not violate Rule 8.1116).

<sup>22</sup> Peter M. Tiersma, *The Textualization of Precedent*, 82 NOTRE DAME L. REV. 1187, 1266 (2007).



humankind to consume, knowing about such caselaw may prompt ethical concerns. Shenoa Payne notes that rules against citing unpublished opinions may result in attorneys being unable to meet their ethical obligation to provide competent representation under Model Rules of Professional Conduct, Rule 1.1, noting that “[n]o-citation rules prevent attorneys from accessing and bringing to the attention of the court an entire body of caselaw on behalf of their clients.”<sup>23</sup>

Private and government actors may also be confused by the legal status of unpublished opinions, particularly when those opinions have been ordered depublished.<sup>24</sup> At least one court has recognized the confusion and reliance on decisions that are later depublished and felt the need to account for the potential impact of such an opinion when explaining its decision in a later case.<sup>25</sup>

Courts, too, may be tempted to rely on unpublished opinions, whether they are brought to the court’s attention by the parties or if the court locates them through its own research.<sup>26</sup> The prohibition on citation to or reliance on unpublished opinions may prompt courts to employ substandard legal reasoning. For one, the court may apply the reasoning of an unpublished case without citing to it, which may result in an opinion that is conclusory or appears unsupported.<sup>27</sup> In the alternative, the court may apply a restrictive view of what it means to “rely” on a case in violation of Rule 8.1115, a tactic that may lead to uncertainty over how the cited opinion is being employed.<sup>28</sup> This also presents further problems for attorneys: even if courts may cite unpublished or

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<sup>23</sup> Shenoa L. Payne, *The Ethical Conundrums of Unpublished Opinions*, 44 WILLAMETTE L. REV. 723, 754 (2008).

<sup>24</sup> *Id.* at 731.

<sup>25</sup> See *Dakin v. Dep’t of Forestry & Fire Prot.*, 21 Cal. Rptr. 2d 490, 493–94 (Cal. Ct. App. 1993) (noting that the court’s prior opinion, which reached a contrary result, had been depublished by the California Supreme Court and citing reliance on the prior opinion as a reason to apply the court’s current ruling prospectively).

<sup>26</sup> See Payne, *supra* note 23, at 729 (discussing how unpublished opinions are widely available through online research systems).

<sup>27</sup> *Id.* at 739; see also Stephen R. Barnett, *Depublication Deflating: The California Supreme Court’s Wonderful Law-Making Machine Begins to Self-Destruct*, 45 HASTINGS L.J. 519, 537 (1994).

<sup>28</sup> See, e.g., *In re Marriage of Padilla*, 22 Cal. Rptr. 2d 630, 632 n.4 (Cal. Ct. App. 1993) (citing an unpublished case and stating that the court was not relying on the case, but was instead citing it “to highlight the present split of authority and to help elucidate [the court’s] agreement” with a line of cases), *vacated*, 932 P.2d 756 (Cal. 1997).

depublished cases for flexible, non-reliance reasons, an attorney's doing so could result in sanctions or antagonize a judge.<sup>29</sup>

There are several potential responses to these concerns. First, California is the most populous state in the country,<sup>30</sup> and the sheer number of cases that are heard and appealed mean that California attorneys and courts have an extensive set of opinions to draw from in formulating arguments and opinions. Thus, even if only ten percent of California cases end up getting published, that still leaves a lot of cases for courts and litigants to cite to.

Second, even if litigants are unable to find a published case that involves an identical set of facts, they may still rely on arguments from analogy to make other authorities fit the needs of the case.<sup>31</sup> Indeed, one may argue that the ability to make creative analogies in cases where precedent is thin is one of the several key skills that are to be expected from litigators.<sup>32</sup>

Third, litigants who are unable to find analogous caselaw to support their arguments may resort to citing persuasive authorities, such as federal caselaw or authority from other states.<sup>33</sup> Litigants may even resort to citing unpublished opinions so long as they are issued by non-California state courts.<sup>34</sup>

The first two responses admittedly address the problems with prohibiting citation of unpublished authority, at least to an extent. California's caselaw is extensive, and arguments by analogy may be acceptable to courts, although they may not get as much mileage with law firm partners who are convinced that there is an answer to their impossible research question because they read a case a few years ago that squarely addressed the issue.<sup>35</sup> But while California's published caselaw may suffice for many cases, there will inevitably be parties and courts who find

<sup>29</sup> See Barnett, *supra* note 27, at 563–64 (recognizing that while attorneys should be able to cite cases for reasons other than “reliance” on those cases, “it may not be either realistic or fair to expect a lawyer to take the chance”).

<sup>30</sup> Hans Johnson et al., *California's Population*, PUB. POL'Y INST. CAL. (Mar. 2021), [http://www.ppic.org/wp-content/uploads/JTF\\_PopulationJTF.pdf](http://www.ppic.org/wp-content/uploads/JTF_PopulationJTF.pdf) [<http://perma.cc/WG3T-WHMY>].

<sup>31</sup> See Scott Brewer, *Exemplary Reasoning: Semantics, Pragmatics, and the Rational Force of Legal Argument by Analogy*, 109 HARV. L. REV. 923, 926–27 (1996) (noting the prominence of arguments by analogy in the field of legal arguments).

<sup>32</sup> See Dan Hunter, *Reason Is Too Large: Analogy and Precedent in Law*, 50 EMORY L.J. 1197, 1217–18 (2001) (describing the “context effect,” where the strategic presentation of alternative fact patterns or scenarios create arguments or inferences in favor of particular conclusions, and skillful attorneys' use of such reasoning in drawing from other cases or scenarios to create strategic context for analogies).

<sup>33</sup> *Harris v. Inv.'s Bus. Daily, Inc.*, 41 Cal. Rptr. 3d 108, 112 (Cal. Ct. App. 2006).

<sup>34</sup> *Pac. Shore Funding v. Lozo*, 42 Cal. Rptr. 3d 283, 289 n.6 (Cal. Ct. App. 2006).

<sup>35</sup> In fact, they had not.

themselves in novel factual situations, addressing undeveloped areas of the law—or heaven help them—applying undeveloped areas of the law to novel factual situations.<sup>36</sup>

As for turning to federal or out-of-state authorities for help, this may suffice in some situations. But in circumstances involving widespread, sudden changes that tend to lead to equally widespread litigation, this solution breaks down and reveals a deeper flaw in California’s prohibition on citing unpublished cases. The COVID-19 pandemic is such a scenario.

### III. THE COVID-19 PANDEMIC AND ENSUING BUSINESS INTERRUPTION LITIGATION

The COVID-19 pandemic struck California in March 2020, prompting state and local authorities to issue orders closing businesses deemed “non-essential.”<sup>37</sup> Many businesses closed entirely.<sup>38</sup> Some businesses, like restaurants, were forced to significantly limit their operations by providing only limited services to customers, like carryout and drive-thru services.<sup>39</sup>

The impact of the pandemic and closure orders prompted businesses to turn to their insurers for relief. Many businesses affected by the pandemic held commercial property insurance policies or other similar policies that provided coverage for lost

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<sup>36</sup> See Frederick Schauer, *Easy Cases*, 58 S. CAL. L. REV. 399, 420 (1985) (explaining that even laws that typically make for “easy cases” may be difficult to apply or interpret in “weird cases” involving unusual facts or unanticipated events).

<sup>37</sup> For examples of such local authority, see *Safer at Home Order for Control of COVID-19*, CNTY. OF L.A. DEPT OF PUB. HEALTH at 2 (Mar. 19, 2020), [http://file.lacounty.gov/SDSInter/lac/1070029\\_COVID-19\\_SaferAtHome\\_HealthOfficerOrder\\_20200319\\_Signed.pdf](http://file.lacounty.gov/SDSInter/lac/1070029_COVID-19_SaferAtHome_HealthOfficerOrder_20200319_Signed.pdf) [<http://perma.cc/T4K4-Y9V6>] (ordering closure of commercial properties, including “Non-Essential Retail Businesses”); Eric Garcetti, *Safer at Home: Public Order*, CITY OF L.A. EMERGENCY AUTHORITY 1–4, 7–8 (Mar. 19, 2020), <http://www.lamayor.org/sites/g/files/wph1781/files/page/file/20200527%20Mayor%20Public%20Order%20SAFER%20AT%20HOME%20ORDER%202020.03.19%20%28REV%202020.05.27%29.pdf> [<http://perma.cc/UH75-KHND>] (ordering that people and businesses cease all activities and operations deemed “non-essential,” although non-essential businesses could conduct “minimum basic operations” such as inventory, security, payroll, and other reasonable activities that maximized the ability of employees to work from home). For an example of state authority, see Gavin Newsom, *Executive Order N-33-20*, EXEC. DEP’T, STATE OF CAL. at 1–2 (Mar. 19, 2020), <http://www.gov.ca.gov/wp-content/uploads/2020/03/3.19.20-attested-EO-N-33-20-COVID-19-HEALTH-ORDER.pdf> [<http://perma.cc/V5EQ-GPDB>].

<sup>38</sup> See, e.g., *California Small Business Owners Report Devastating Impacts of COVID-19*, SMALL BUS. MAJORITY (Apr. 21, 2020), <http://smallbusinessmajority.org/our-research/entrepreneurship/ca-small-business-owners-report-devastating-impacts-covid-19-need-immediate-cash-assistance> [<http://perma.cc/E8NR-CX5V>].

<sup>39</sup> See Garcetti, *supra* note 37, at 4–6.

business income in the event of a business interruption.<sup>40</sup> Those insured under these policies claimed that they had suffered lost income as a result of the pandemic and the closure orders that forced the closures of their businesses.<sup>41</sup>

Insurers, however, took a uniformly restrictive stance against these claims.<sup>42</sup> Some insurance policies contained exclusions for coverage for loss or damage resulting from viruses or pathogens, and insurers relied on these exclusions to deny coverage.<sup>43</sup> However, even where no such exclusions were present, insurers still denied coverage, claiming that the presence of a virus at an insured property does not constitute “physical loss or damage,” a coverage requirement that appears in virtually all insurance policies.<sup>44</sup>

Faced with denials of coverage, many insured businesses took to the courts, arguing breach of contract, bad faith denial, and other claims designed to seek coverage under their policies.<sup>45</sup> According to the Covid Coverage Litigation Tracker operated by the Insurance Law Center and the University of Pennsylvania Carey Law School, a spike in filings of complaints related to COVID-19 business interruption claims began in April 2020, and

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<sup>40</sup> See, e.g., Letter from National Association of Insurance Commissioners to U.S. House Committee on Small Business 2 (May 20, 2020), [http://naic.org/documents/government\\_relations\\_200521.pdf](http://naic.org/documents/government_relations_200521.pdf) [<http://perma.cc/38WM-RW5G>] (citing *Fact Sheet: COVID-19 & Business Interruption*, AM. PROP. CAS. INS. ASS'N 1 (Apr. 8, 2020), <http://www.pciaa.net/docs/default-source/industry-issues/national-faq-4-8-2020.pdf> [<http://perma.cc/Y3SJ-KRYD>]).

<sup>41</sup> See *id.* at 1–3.

<sup>42</sup> See *APCIA Releases New Business Interruption Analysis*, AM. PROP. CAS. INS. ASS'N (Apr. 6, 2020), <http://www.apci.org/media/news-releases/release/60052/> [<http://perma.cc/4QW4-BDRA>] (claiming that “[m]any commercial insurance policies, including those that have business interruption coverage, do not provide coverage for communicable diseases or viruses such as COVID-19” and asserting that pandemic outbreaks are “uninsurable”).

<sup>43</sup> See, e.g., *W. Coast Hotel Mgmt., LLC v. Berkshire Hathaway Guard Ins. Cos.*, 498 F. Supp. 3d 1233, 1240–42 (C.D. Cal. 2020) (granting motion to dismiss and finding that insurance policy’s exclusion of coverage for loss or damage caused by viruses precluded coverage).

<sup>44</sup> *Id.* at 1236; see also Madeleine Fischer & Covert J. Geary, *Physical Loss or Damage Requirement for Business Interruption and Civil Authority Insurance Coverage*, NAT’L L. REV. (Apr. 7, 2020), <http://www.natlawreview.com/article/physical-loss-or-damage-requirement-business-interruption-and-civil-authority> [<http://perma.cc/Q4B6-DGSN>] (“Commercial property policies typically provide coverage for business interruption losses that result from ‘direct physical loss or damage’ to the insured premises.”).

<sup>45</sup> See Christopher C. French, *Forum Shopping COVID-19 Business Interruption Insurance Claims*, 2020 U. ILL. L. REV. ONLINE 187, 188 (2020) (“As of September 15, 2020, over 1000 business interruption insurance lawsuits had been filed.”).

persisted through August 2020, with forty or more new complaints filed every week during that period.<sup>46</sup>

Most courts across the country took a restrictive approach to these business interruption claims, including California's federal courts, which almost uniformly granted motions to dismiss complaints against insurance companies arising from COVID-19 business interruption coverage claims.<sup>47</sup> As of November 15, 2021,<sup>48</sup> the Covid Coverage Litigation Tracker included information on seventy-five California federal cases in which motions to dismiss or motions for summary judgment were filed.<sup>49</sup> Of these cases, fifty-seven have been dismissed with prejudice, fifteen have been dismissed without prejudice, and three motions to dismiss have been denied, either in whole or in part.<sup>50</sup>

Insureds have been more successful in California state court—although the smaller sample size suggests that data on these cases may be incomplete. As of November 15, 2021, the Covid Coverage Litigation Tracker included information on twenty-three cases filed in California superior courts in which Defendants demurred to the complaints.<sup>51</sup> Of these cases, courts sustained insurers' demurrers, motions for summary judgment, or motions for judgment on the pleadings with prejudice in thirteen cases and

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<sup>46</sup> Insurance Law Center & Penn Law, *Covid Coverage Litigation Tracker*, INS. L. CTR. <http://cclt.law.upenn.edu/> [<http://perma.cc/6HJE-EXRW>] (last visited Apr. 14, 2021).

<sup>47</sup> See *infra* Appendix I.

<sup>48</sup> This Article addresses rulings up until November 21, 2021, when the first California Court of Appeal decision addressing COVID-19 business interruption was decided, thereby establishing citable, controlling precedent for California state courts. See *The Inns by the Sea v. California Mut. Ins. Co.*, 71 Cal. App. 5th 688 (Cal. Ct. App. 2021); see also Dina Richman, *COVID-19 Business Interruption Claims: First California Court of Appeal Decision Holds that Closure Orders Are Not "Direct Physical Loss,"* JD SUPRA (Nov. 18, 2021), <http://www.jdsupra.com/legalnews/covid-19-business-interruption-claims-4744073/> [<http://perma.cc/3YQ2-U8Q5>].

<sup>49</sup> This total eliminates entries on the list that describe initial motions to dismiss that were granted without prejudice, when the same court later granted a second motion to dismiss with prejudice. For citations to these cases and the dates of the rulings on the motions to dismiss, see *infra* Appendix I.

<sup>50</sup> See *infra* Appendix I. One case was dismissed pursuant to a stipulation between the parties after the court issued a tentative ruling dismissing the case with prejudice—this decision is included as an example of a dismissal with prejudice as the tentative ruling was published and other courts have cited it as precedent—even though it is not an operative ruling. See *Plan Check Downtown III, LLC v. Amguard Ins. Co.*, 485 F.Supp.3d 1225, 1226 (C.D. Cal. 2020); see also *CTT Comedy v. Nautilus Ins. Co.*, No. 21-CV-03064-SK, 2021 WL 3123898, at \*5 (N.D. Cal. July 13, 2021) (citing *Plan Check* and basing its decision on the reasoning in *Plan Check* and other cases).

<sup>51</sup> See *infra* Appendix II.

overruled or denied demurrers, motions for summary judgment, and motions for judgment on the pleadings in seven other cases.<sup>52</sup>

#### IV. CALIFORNIA’S RULE AGAINST CITING UNPUBLISHED CASES IN THE COVID-19 PANDEMIC

The legal landscape after nearly two years of COVID-19 litigation in California’s state and federal courts reveals a problem with California’s rule against citing unpublished state court caselaw. While the sample size of California state court cases is small, these courts’ treatment of COVID-19 business interruption claims is mixed—with a group of rulings favoring insureds—particularly at the earlier stages of the pandemic.<sup>53</sup> This is in stark contrast to the landscape of California’s federal court opinions, which overwhelmingly favor insurers.<sup>54</sup>

California’s prohibition on citing unpublished state court opinions prevents courts and litigants in state court from citing the more favorable state-level cases.<sup>55</sup> Instead, courts and litigants are restricted to unpublished federal court opinions, or unpublished opinions from other jurisdictions.<sup>56</sup> While both types of authority are persuasive, rather than binding, California federal authorities are generally preferable because they purport to apply California state law to the insurer’s claims.<sup>57</sup>

The rule against citing unpublished opinions leaves courts with a skewed picture of the law regarding business interruption coverage during the COVID-19 pandemic, with federal caselaw painting a far more restrictive picture than that of decisions in California state courts.<sup>58</sup> The rule also gives a disproportionate

<sup>52</sup> Citations to these cases and the dates of the rulings referenced are included in Appendix II, below. *See infra* pp. 124–26.

<sup>53</sup> *See infra* Appendix II.

<sup>54</sup> *See infra* Appendix I.

<sup>55</sup> *See* Lauren S. Wood, *Out of Cite, Out of Mind: Navigating the Labyrinth That Is State Appellate Courts’ Unpublished Opinion Practices*, 45 U. BALT. L. REV. 561, 578 (2016) (“No-citation rules serve as arbitrary barricades, preventing attorneys and courts from assessing valuable opinions merely because they were not marked for publication.”).

<sup>56</sup> *See* *Yvanova v. New Century Mortg. Corp.*, 365 P.3d 845, 859 (Cal. 2016) (permitting unreported federal court decisions to be cited as persuasive authority); *America Online, Inc. v. Superior Ct.*, 108 Cal. Rptr. 2d 699, 703 (Cal. Ct. App. 2001) (allowing the parties to reference unpublished opinions from out-of-state cases).

<sup>57</sup> Whether the courts are, in fact, applying state law remains a matter of debate. *See* Carl Salisbury, *Federal COVID-19 Insurance Decisions Ignore State Law*, LAW360 (Apr. 6, 2021, 4:12 PM), <http://www.law360.com/articles/1372499/federal-covid-19-insurance-decisions-ignore-state-law> [<http://perma.cc/ZGT5-4VRM>] (citing higher dismissal rates in federal courts and arguing that this is evidence that federal courts are not applying state law).

<sup>58</sup> *See infra* Appendices I, II.

advantage to insurers, who can muster a wealth of California federal authorities to claim that the status of the law is far more restrictive than it actually is (at least in state court).<sup>59</sup>

An additional side effect of California's citation rules in the COVID-19 context is that they may import the restrictive pleading standards of federal courts into state court proceedings through reliance on federal authorities. Since the United States Supreme Court's rulings in *Twombly*<sup>60</sup> and *Iqbal*,<sup>61</sup> complaints in federal court must contain "sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'"<sup>62</sup> No such plausibility requirement is included in California's law governing demurrers,<sup>63</sup> nor has the *Twombly-Iqbal* facial plausibility requirement been applied in California state court proceedings that do not involve claims arising from federal law.<sup>64</sup> Still, if California courts base their decisions on federal COVID-19 business insurance coverage claims, they are effectively importing the heightened pleading standards of those federal cases that make up the court's sole, COVID-19-specific authority.

One may argue that this effect can be mitigated by analogous California caselaw. In the COVID-19 context, however, there is a dearth of controlling authority. One of the key California cases at the center of most COVID-19 coverage disputes, *MRI Healthcare Center of Glendale, Inc. v. State Farm General Insurance Company*,<sup>65</sup> illustrates this.

In *MRI Healthcare*, the insured sought coverage for lost income after they had to power down an MRI machine, which was then unable to fully ramp up to full capacity until four months later.<sup>66</sup> The insured claimed that it had suffered an insured "physical loss" due to its inability to use the machine, while the insurer argued that there had been no loss, as the machine had failed to ramp up due to the "inherent nature" of the machine,

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<sup>59</sup> See *infra* Appendices I, II.

<sup>60</sup> Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570 (2007).

<sup>61</sup> Ashcroft v. Iqbal, 556 U.S. 662 (2009).

<sup>62</sup> *Id.* at 678 (quoting *Twombly*, 550 U.S. at 570).

<sup>63</sup> See CAL. CIV. PROC. CODE § 430.10(e) (West 2021) (permitting demurrers where "[t]he pleading does not state facts sufficient to constitute a cause of action.>").

<sup>64</sup> California courts only apply the *Twombly-Iqbal* pleading standards when they are explicitly applying federal law to general demurrers. See, e.g., *Marowitz v. County of Mariposa*, No. F077614, 2020 WL 4033170, at \*3 (Cal. Ct. App. July 17, 2020) ("In reviewing the sufficiency of a section 1983 cause of action on general demurrer, California courts apply federal law.>").

<sup>65</sup> 115 Cal. Rptr. 3d 27, 27 (Cal. Ct. App. 2010).

<sup>66</sup> *Id.* at 31-34.

along with the long time that it had been ramped up.<sup>67</sup> In its decision, the Court of Appeal sided with the insured and affirmed the trial court's grant of summary judgment, holding that "[f]or 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 . . . ."<sup>68</sup>

Insurers can cite *MRI Healthcare* to argue that tangible alteration to insured property is necessary for there to be covered physical loss or damage. This argument may succeed where plaintiffs do not allege that the virus was present at their property, as was often the case where the policies at issue include virus exclusions.<sup>69</sup> In cases where the insured argue that the virus was present at the property and rendered it infectious, however, *MRI Healthcare* may be cited in favor of finding that there was covered physical loss or damage, as the virus may be characterized as an external force that causes a physical change in the condition of the property by rendering it infectious. Beyond *MRI Healthcare*, and before November 15, 2021 when the California Court of Appeal finally issued a public opinion on whether COVID-19 and closure orders constituted a covered loss, there was little other state law on point for insureds or insurers.<sup>70</sup>

Because California's controlling authority may be cited favorably by insureds and insurers, California state courts will likely turn to unpublished California federal cases since they involve identical factual situations and insurance policy terms.

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<sup>67</sup> *Id.* at 32.

<sup>68</sup> *Id.* at 38.

<sup>69</sup> *See, e.g.*, Pappy's Barber Shops, Inc. v. Farmers Grp., Inc., 487 F. Supp. 3d 937, 944 (S.D. Cal. 2020) (noting where insured's policy contained a virus exclusion, the insured denied that its losses were caused by the virus, and the court cited a case relying on *MRI Healthcare* in granting motion to dismiss).

<sup>70</sup> The California Court of Appeal finally issued its first published opinion regarding business interruption claims by those affected by COVID-19 and closure orders in *Inns by the Sea v. California Mutual Ins. Co.* See 71 Cal. App. 5th 688 (2021). The court held that the insureds could not recover, noting that even if it were conceded that the COVID-19 virus were present at the property, once the property was cleaned, business would still remain closed due to state closure orders, meaning that it was not the physical presence of the virus, but state and local orders that caused the loss. *See id.* at 704. Prior to *Inns by the Sea*, insureds could also cite *Hughes v. Potomac Ins. Co. of D.C.*, where the court found that physical loss occurred where a landslide caused a house to lose support without causing physical damage to the structure. *See* 18 Cal. Rptr. 650, 655 (Cal. Ct. App. 1962). *But see* *Sabella v. Wisler*, 377 P.2d 889, 897 (Cal. 1963) (disapproving *Hughes* on other grounds). The nature of the facts in *Hughes* may prompt some courts to deem it distinguishable. *See, e.g.*, *Musso & Frank Grill Co., Inc. v. Mitsui Sumitomo Ins. USA Inc.*, No. 20STCV16681, 2020 WL 7346569, at \*5 (Cal. Super. Ct. L.A. Cnty. Nov. 9, 2020) (rejecting the plaintiff's reliance on *Hughes* and stating that *Hughes* involved tangible physical damage to property adjacent to the insured home).



Additionally, these cases are readily available for review on legal databases such as Westlaw and LexisNexis, a characteristic that is not always shared by California state superior court cases, or unpublished cases in other jurisdictions.

## VI. WHAT CAN BE DONE

COVID-19 revealed a pitfall in California's prohibition on citing unpublished opinions. The sudden, widespread pandemic prompted extensive litigation and gave rise to numerous unpublished federal court opinions in favor of insurers that may be cited in California court. Meanwhile, unpublished superior court decisions, which are generally more favorable to insureds, were not cited. As a result of the COVID-19 business interruption, the pool of available law is rich with restrictive federal court opinions, and the mixed results of California state court opinions are sparse.

### A. A Dramatic Solution: Permitting Citation to All Unpublished Opinions

One possible solution is to eliminate California's rule against citing unpublished state court opinions altogether. There are some advantages to this approach. Many unpublished opinions—particularly those issued by the California Court of Appeal—are readily available online through databases such as Westlaw and LexisNexis. Critics may argue against this approach for a few reasons. First, permitting citation of unpublished opinions would reduce efficient operations of courts and litigators during court proceedings. By expanding the pool of available law, both attorneys and courts would be inundated by more research to support arguments and opinions. Second, permitting citation to unpublished opinions could result in a decline in the quality of California's caselaw, as the reasoning of unpublished opinions may not be as thorough or attentive to potentially contradictory precedent as the reasoning in published cases. Third, if courts take measures to improve the analysis and reasoning behind unpublished cases, this could result in difficulty and inefficiency for the courts by causing them to invest more time in writing opinions.<sup>71</sup>

These concerns may be overstated, particularly in light of the possibility that unpublished cases be treated as persuasive, rather

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<sup>71</sup> See Payne, *supra* note 23, at 735 (recognizing the argument that judicial efficiency may be lost if judges are not permitted to use unpublished opinions).

than binding, authority.<sup>72</sup> While California trial courts remain bound by published courts of appeal opinions, this need not be the case with unpublished courts of appeal opinions (as well as superior courts opinions). This may assuage concerns that blanket allowance of citations to unpublished opinions could result in cases that are not as well analyzed or reasoned being cited as binding precedent. The lower stakes of such opinions may also mitigate the impact on judicial efficiency by still permitting unpublished opinions, with the understanding that such cases would not have the precedential effect of published opinions.

#### B. A Less-Dramatic Solution: Applying California Rule 8.1115 as Written

If permitting citation of all unpublished opinions is too dramatic for California's Judicial Council, a simpler, less dramatic solution can still fix the specific problems that COVID-19 reveals with California's law. COVID-19 was a sudden, widespread crisis that gave rise to numerous lawsuits around the State (and country). As time went on, numerous unpublished trial-court-level rulings were released, but only those from federal courts could be cited in California. If courts were able to cite California superior court opinions, however, this would have revealed that the restrictive California federal cases were not the entire picture.

The easiest solution to this problem is for courts and litigators to treat Rule 8.1115(a) as it is written and limit its non-citation mandate to unpublished opinions released by the California courts of appeal or superior court appellate divisions.<sup>73</sup> The text of the rule does not prohibit the citation of California superior court opinions (other than those issued by appellate divisions of those courts).<sup>74</sup> But Rule 8.1115(a) is perceived as a general prohibition on the citation of all unpublished California state court opinions, as demonstrated in a recent Court of Appeal opinion citing Rule 8.1115(a) as prohibiting citations of general superior court opinions.<sup>75</sup>

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<sup>72</sup> See Stephen R. Barnett, *From Anastasoff to Hart to West's Federal Appendix: The Ground Shifts Under No-Citation Rules*, 4 J. APP. PRAC. & PROCESS 1, 16 (2002) (noting that opposing no-citation rules does not necessitate the position that unpublished opinions be treated as "binding precedents," but only that they "be acknowledged and considered").

<sup>73</sup> See CAL. R. CT. 8.1115(a).

<sup>74</sup> See *id.*

<sup>75</sup> See *Aixtron, Inc. v. Veeco Instruments Inc.*, 265 Cal. Rptr. 3d 851, 881 (Cal. Ct. App. 2020) (citing California Rules of Court Rule 8.1115(a) in support of the conclusion that an unpublished, tentative decision from the superior court in Los Angeles County was not citable authority).

This Article's modest proposal is simply to do what the rule says: refrain from citing unpublished court of appeal or appellate division cases, but to the extent that a superior court ruling or opinion may be helpful, there is no bar against citing it as persuasive authority. In unexpected situations that give rise to widespread litigation (say, COVID-19, or the advent of a new, dangerous, or controversial technology), this reading of the rule will allow California superior courts to consider what other superior courts are doing, rather than resorting to reliance on federal court opinions alone.

Permitting the citation of unpublished California superior court opinions will give litigants the opportunity to keep courts apprised of trends in other trial courts. Where federal courts take a different (likely more restrictive) approach, allowing parties to cite state superior courts will balance out the skewed picture of the caselaw that courts would otherwise have. Additionally, this incremental change will allow courts and litigants to evaluate whether citing to unpublished caselaw is workable, which would provide some much-needed practical insight into the broader debate over citing unpublished opinions.

#### CONCLUSION

California Rule of Court 8.1115(a) prohibits citation of unpublished opinions issued by the California courts of appeal and the appellate divisions of superior courts. In certain circumstances, including those of the COVID-19 pandemic, this restriction results in an undue limitation on the precedent that courts can consider, and promotes an overreliance on federal district court rulings. This, in turn, may result in superior courts ignoring trends that exist in California state courts, and it may also result in the inappropriate importation of stricter procedural rules that operate in the background of federal court rulings.

Perhaps COVID-19 will prompt a rethinking of California's prohibition on citing unpublished opinions. Many of these opinions are readily available, and their consideration—particularly as persuasive, nonbinding authorities—may give litigants and courts a richer background of caselaw from which to draw.

If eliminating or revising the rule is too dramatic, courts should at least apply Rule 8.1115(a) as written: as applying only to opinions issued by the California courts of appeal and appellate divisions of superior courts. This leaves court with the option to cite and consider other superior court rulings and give courts and litigants a more complete picture of the state of California's law.

APPENDIX I: CALIFORNIA FEDERAL RULINGS REGARDING MOTIONS  
TO DISMISS AND MOTIONS FOR SUMMARY JUDGMENT IN COVID-19  
BUSINESS INTERRUPTION CASES

The cases below were identified using the University of Pennsylvania Carey Law School's COVID Litigation Tracker's data regarding rulings on motions to dismiss, motions for judgment on the pleadings, and motions for summary judgment.<sup>76</sup> The list of cases has been edited to remove redundant decisions (e.g., where a case was initially dismissed without prejudice, and was later dismissed with prejudice, only the dismissal with prejudice is included). The list has been further edited to remove cases that were mislabeled or incorrectly included in the Litigation Tracker list, and it also includes cases up until November 15, 2021, when California's first published appellate decision regarding COVID-19 business interruption claims was issued.<sup>77</sup> At that point, there was controlling, published state authority, thereby overriding any authoritative value of unpublished superior court cases.

Date	Case Citation	Outcome <sup>78</sup>
November 10, 2021	<i>Kuhen v. The Hartford Fin. Servs. Grp., Inc.</i> , No. 8:21-CV-00773-JLS-ADS, 2021 WL 5577012 (C.D. Cal. Nov. 10, 2021)	Court granted motion to dismiss with prejudice.
November 9, 2021	<i>Fed. Ins. Co. v. Simon Wiesenthal Ctr., Inc.</i> , No. 2:21-CV-04069-ODW (JEMx), 2021 WL 5370751 (C.D. Cal. Nov. 9, 2021)	Court granted motion to dismiss with prejudice.
October 27, 2021	<i>Create Advert. Grp., LLC v. Fed. Ins. Co.</i> , No. CV 21-5975 DSF (Ex), 2021 WL 5002416 (C.D. Cal. Oct. 27, 2021)	Court granted motion to dismiss without prejudice.
October 15, 2021	<i>Mostre Exhibits, LLC v. Sentinel Ins. Co., Ltd.</i> , No. 20-CV-1332-BAS-BLM, 2021 WL 4819411 (S.D. Cal. Oct. 15, 2021)	Court granted motion for judgment on the pleadings without prejudice.

<sup>76</sup> *Covid Coverage Litigation Tracker*, *supra* note 46.

<sup>77</sup> See *The Inns by the Sea v. California Mut. Ins. Co.*, 71 Cal. App. 5th 688 (Cal. Ct. App. 2021); see also Richman, *supra* note 48.

<sup>78</sup> Unless otherwise noted, the motion to dismiss or other motion described in the outcome was brought by the insurer.

Date	Case Citation	Outcome <sup>78</sup>
October 12, 2021	<i>HP Tower Invs., LLC v. Nationwide Mut. Ins. Co.</i> , No. SACV 21-01369-CJC(KESx), 2021 WL 4841054 (C.D. Cal. Oct. 12, 2021)	Court granted motion to dismiss with prejudice.
September 28, 2021	<i>Protégé Rest. Partners, LLC v. Sentinel Ins. Co., Ltd.</i> , No. 20-CV-03674-BLF, 2021 WL 4442652 (N.D. Cal. Sept. 28, 2021)	Court granted motion to dismiss with prejudice.
September 24, 2021	<i>Ragged Point Inn v. State Nat. Ins. Co.</i> , No. 2:21-CV-05386-RGK-JPR, 2021 WL 4391208 (C.D. Cal. Sept. 24, 2021)	Court granted motion to dismiss with prejudice.
September 9, 2021	<i>7020 Van Nuys Blvd. LLC v. Nationwide Mut. Ins. Co.</i> , No. CV 21-5657 DSF (ADSx), 2021 WL 4186688 (C.D. Cal. Sept. 9, 2021)	Court granted motion to dismiss with prejudice.
September 3, 2021	<i>Palomar Health v. Am. Guarantee &amp; Liab. Ins. Co.</i> , No. 3:21-CV-00490-BEN-BGS, 2021 WL 4035005 (S.D. Cal. Sept. 3, 2021)	Court granted motion to dismiss with prejudice.
August 27, 2021	<i>Ets-Hokin v. Sentinel Ins. Co., Ltd.</i> , No. 20-CV-06518, 2021 WL 4472692 (N.D. Cal. Aug. 27, 2021)	Court granted motion to dismiss without prejudice.
August 21, 2021	<i>Menominee Indian Tribe of Wis. v. Lexington Ins. Co.</i> , No. 21-CV-00231-WHO, 2021 WL 3727070 (N.D. Cal. Aug. 23, 2021)	Court granted motion to dismiss with prejudice.
August 17, 2021	<i>Gadi v. Nationwide Mutual Ins. Co.</i> , No. 2:21-cv-04591-SVW (C.D. Cal. Aug. 17, 2021)	Court granted motion to dismiss with prejudice.
August 16, 2021	<i>Typewritorium Co. v. Travelers Prop. Cas. Co. of Am., Inc.</i> , No. 20-cv-04816 (N.D. Cal. Aug. 16, 2021)	Court granted motion to dismiss without prejudice.
August 11, 2021	<i>Los Angeles Lakers, Inc. v. Fed. Ins. Co.</i> , No. CV 21-02281 TJH (MRWx), WL 4488591 (C.D. Cal. Aug. 11, 2021)	Court granted motion to dismiss without prejudice.
July 20, 2021	<i>Shouthouse Apparel, Inc. v. Travelers Indem. Co. of Conn.</i> , No. CV 20-11439 FMO (GJSx) (C.D. Cal. July 20, 2021)	Court granted motion to dismiss with prejudice.

<b>Date</b>	<b>Case Citation</b>	<b>Outcome<sup>78</sup></b>
July 13, 2021	<i>CTT Comedy v. Nautilus Ins. Co.</i> , No. 21-cv-03064, 2021 WL 3123898 (N.D. Cal. July 13, 2021)	Court granted motion to dismiss with prejudice.
July 7, 2021	<i>In-N-Out Burgers v. Zurich Am. Ins. Co.</i> , No. 8:20-cv-01000-JLS-ADS, (C.D. Cal. July 7, 2021)	Court granted motion to dismiss without prejudice.
July 2, 2021	<i>MGA Ent., Inc. v. Affiliated FM Ins. Co.</i> , No. CV 20-10499-MWF (JPRx), 2021 WL 2840456 (C.D. Cal. July 2, 2021)	Court granted motion to dismiss with prejudice.
June 30, 2021	<i>Park 101 LLC v. Liberty Mut. Grp., Inc.</i> , No. 3:20-cv-00972-AJB-BLM (S.D. Cal. June 30, 2021)	Court granted motion to dismiss with prejudice.
June 25, 2021	<i>Madera Group, LLC v. Mitsui Sumitomo Ins. USA, Inc.</i> , No. LA CV20-07132-JAK (AFMx), 2021 WL 2658498 (C.D. Cal. June 25, 2021)	Court granted motion to dismiss without prejudice.
June 21, 2021	<i>Another Planet Ent., LLC v. Vigilant Ins. Co.</i> , No. 20-cv-07476-VC, 2021 WL 774141 (N.D. Cal. Feb. 25, 2021)	Court granted motion to dismiss with prejudice.
May 21, 2021	<i>644 Broadway LLC v. Falls Lake Fire &amp; Cas. Co.</i> , No. 20-cv-08421, 2021 WL 3008309 (N.D. Cal. May 21, 2021)	Court granted motion to dismiss without prejudice.
May 20, 2021	<i>Hair Perfect Int'l, Inc. v. Sentinel Ins. Co., Ltd.</i> , No. LA CV20-03729 JAK (KSx), 2021 WL 2143459 (C.D. Cal. May 20, 2021)	Court granted motion to dismiss with prejudice.
May 20, 2021	<i>Flower Sisters LLC v. Great Am. Ins. Co.</i> , No. ED CV 20-01294-DMG (SPx) (C.D. Cal. May 20, 2021)	Court granted motion to dismiss with prejudice.
May 19, 2021	<i>G &amp; P Hosp., LLC v. Travelers Cas. Ins. Co. Am., Inc.</i> , No. CV 20-05148-DMG (ASx) (C.D. Cal. May 19, 2021)	Court granted motion to dismiss with prejudice.
May 18, 2021	<i>Garces v. Sentinel Ins. Co., Ltd.</i> , No. 5:21-cv-00189-JWH-SPx, 2021 WL 2010357 (C.D. Cal. May 18, 2021)	Court granted motion to dismiss with prejudice.

Date	Case Citation	Outcome <sup>78</sup>
April 27, 2021	<i>French Laundry Partners, LP v. Hartford Fire Ins. Co.</i> , No. 20-cv-04540-JSC, 2021 WL 1640994 (N.D. Cal. Apr. 27, 2021)	Court granted motion to dismiss with prejudice.
April 27, 2021	<i>Travelers Cas. Ins. Co. of Am. v. Geragos &amp; Geragos</i> , No. CV 20-3619 PSG (Ex), 2021 WL 1659844 (C.D. Cal. Apr. 27, 2021)	Court granted insurance company's motion for summary judgment in declaratory relief action brought by insurance company.
April 16, 2021	<i>Varel Inc. v. Hiscox Ins. Co., Inc.</i> , No. CV 20-9530-DMG (JPRX), 2021 WL 4472838 (C.D. Cal. Apr. 16, 2021)	Court granted motion for judgment on the pleadings with prejudice.
April 15, 2021	<i>Los Angeles Cnty. Museum of Nat. Hist. Found. v. Travelers Indem. Co. of Conn.</i> , No. 2:21-cv-01497-SVW-JPR, 2021 WL 1851028 (C.D. Cal. Apr. 15, 2021)	Court granted motion to dismiss with prejudice.
April 9, 2021	<i>Caribe Rest. &amp; Nightclub v. Topa Ins. Co.</i> , No. 2:20-cv-06570-ODW (MRWX), 2021 WL 1338439 (C.D. Cal. Apr. 9, 2021)	Court granted motion to dismiss with prejudice.
April 2, 2021	<i>Islands Rests., LP v. Affiliated FM Ins. Co.</i> , No. 3:20-cv-02013-H-JLB, 2021 WL 1238872 (S.D. Cal. Apr. 2, 2021)	Court granted motion for judgment on the pleadings with prejudice.
April 1, 2021	<i>Motiv Grp., Inc. v. Cont'l Cas. Co.</i> , No. 2:20-cv-09368-ODW (Ex), 2021 WL 1240779 (C.D. Cal. Apr. 1, 2021)	Court granted motion to dismiss with prejudice.
March 31, 2021	<i>Barbizon School of San Francisco, Inc. v. Sentinel Ins. Co., Ltd.</i> , No. 20-cv-08578-TSH, 2021 WL 1222161 (N.D. Cal. Mar. 31, 2021)	Court granted motion for judgment on the pleadings with prejudice.
March 26, 2021	<i>Sky Flowers Inc. v. Hiscox Ins. Co. Inc.</i> , No. 2:20-cv-05411-ODW (MAAx), 2021 WL 1164473 (C.D. Cal. Mar. 26, 2021)	Court granted motion to dismiss with prejudice.
March 25, 2021	<i>Baker v. Oregon Mut. Ins. Company</i> , No. 3:20-cv-05467-LB, 2021 WL 1145882 (N.D. Cal. Mar. 25, 2021)	Court granted motion to dismiss with prejudice.

Date	Case Citation	Outcome <sup>78</sup>
March 19, 2021	<i>Out West Rest. Grp/ v. Affiliated FM Ins. Co.</i> , No. 3:20-cv-06786-TSH, 2021 WL 1056627 (N.D. Cal. Mar. 19, 2021)	Court granted motion for judgment on the pleadings with prejudice.
March 19, 2021	<i>Westside Head &amp; Neck v. Hartford Fin. Serv. Grp. Inc.</i> , No. 2:20-cv-06132-JFW (JCx), 2021 WL 1060230 (C.D. Cal. Mar. 19, 2021)	Court granted motion for judgment on the pleadings with prejudice.
March 18, 2021	<i>Monarch Ballroom, LLC v. Farmers Ins. Co., Inc.</i> , No. 2:20-cv-05493-ODW-KK (C.D. Cal. Mar. 18, 2021)	Court granted motion to dismiss with prejudice.
March 17, 2021	<i>Daneli Shoe Co. v. Valley Forge Ins. Co.</i> , No. 3:20-cv-01195-TWR (WVG), 2021 WL 1112710 (S.D. Cal. Mar. 17, 2021)	Court granted motion to dismiss without prejudice.
March 4, 2021	<i>Kingray Inc. v. Farmers Grp. Inc.</i> , No. EDCV 20-963 JGB (SPx), 2021 WL 837622 (C.D. Cal. Mar. 4, 2021)	Court granted motion to dismiss with respect to one plaintiff due to virus exclusion; Court denied motion to dismiss with respect to plaintiff who did not have a virus exclusion, finding that there could be covered physical loss or damage due to COVID-19.
February 26, 2021	<i>Sunstone Hotel Investors, Inc. v. Endurance Am. Specialty Ins. Co.</i> , No. 8:20-cv-02185-CJC (KESx), 2021 WL 1152805 (C.D. Cal. Feb. 26, 2021)	Court denied motion to dismiss, finding that insurance policy provided coverage for cleanup costs resulting from biological agent conditions, and hotel's allegation that superspreader event occurred at hotel implicated this coverage provision. <sup>79</sup>

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<sup>79</sup> The court later denied the insurance company's motion to dismiss. See *Sunstone Hotel Invs., Inc. v. Endurance Am. Specialty Ins. Co.*, 522 F.Supp.3d 690, 695 (C.D. Cal. 2021).



Date	Case Citation	Outcome <sup>78</sup>
February 12, 2021	<i>Founder Inst. Inc. v. Hartford Fire Ins. Co.</i> , No. 20-cv-04466-VC, 2021 WL 869637 (N.D. Cal. Feb. 12, 2021)	Court granted motion to dismiss with prejudice.
February 11, 2021	<i>Fink v. Hanover Ins. Grp., Inc.</i> , No. 4:20-cv-03907-JST, 2021 WL 647374 (N.D. Cal. Feb. 11, 2021).	Court granted motion to dismiss with prejudice.
February 8, 2021	<i>Selane Prods., Inc. v. Cont'l Cas. Co.</i> , No. 2:20-cv-07834-MCS-AFM, 2021 WL 609257 (C.D. Cal. Feb. 8, 2021)	Court granted motion to dismiss with prejudice.
February 8, 2021	<i>Protégé Rest. Partners LLC v. Sentinel Ins. Co., Ltd.</i> , No. 20-cv-03674-BLF, 2021 WL 428653 (N.D. Cal. Feb. 8, 2021)	Court granted motion to dismiss without prejudice.
February 1, 2021	<i>Water Sports Kauai, Inc. v. Fireman's Fund Ins. Co.</i> , No. 3:20-cv-03750-WHO, 2021 WL 775397 (N.D. Cal. Feb. 1, 2021)	Court granted motion to dismiss with prejudice.
February 1, 2021	<i>Thomas Phan v. Nationwide General Ins. Co.</i> , No. CV 20-7616-MWF (JPRx), 2021 WL 609845 (C.D. Cal. Feb. 1, 2021)	Court granted motion to dismiss with prejudice.
February 1, 2021	<i>Gym Mgmt. Serv. Inc. v. Vantapro Specialty Ins. Co.</i> , No. CV 20-9541-GW-KSx, 2021 WL 647528 (C.D. Cal. Feb. 1, 2021)	Court granted motion for judgment on the pleadings with prejudice.
January 26, 2021	<i>Colgan v. Sentinel Ins. Co., Ltd.</i> , No. 20-cv-04780-HSG, 2021 WL 472964 (N.D. Cal. Jan. 26, 2021)	Court granted motion for judgment on the pleadings without prejudice.
January 22, 2021	<i>Unmasked Mgmt., Inc. v. Century-National Ins. Co.</i> , No. 3:20-cv-01129-H-MDD, 2021 WL 242979 (S.D. Cal. Jan. 22, 2021)	Court granted motion to dismiss with prejudice.
January 20, 2021	<i>Pez Seafood DTLA, LLC v. Travelers Indem. Co.</i> , CV 20-4699-DMG (GJSx), 2021 WL 234355 (C.D. Cal. Jan. 20, 2021)	Court granted motion to dismiss with prejudice.
January 12, 2021	<i>O'Brien Sales &amp; Mktg., Inc. v. Transp. Ins. Co.</i> , No. 20-cv-02951-MMC, 2021 WL 105772 (N.D. Cal. Jan. 12, 2021)	Court granted motion to dismiss with prejudice.

Date	Case Citation	Outcome <sup>78</sup>
January 12, 2021	<i>BA LAX, LLC v. Hartford Fire Ins. Co.</i> , No. 2:20-cv-06344-SVW-JPR, 2021 WL 144248 (C.D. Cal. Jan. 12, 2021)	Court granted insurer's motion for summary judgment.
January 7, 2021	<i>Rialto Pockets, Inc. v. Certain Underwriters at Lloyds London Including Beazley Furlonge, Ltd.</i> , No. CV 20-07709-DSF (JPRx), 2021 WL 267850 (C.D. Cal. Jan. 7, 2021)	Court granted motion to dismiss with prejudice.
January 4, 2021	<i>Palmdale Ests., Inc. v. Blackboard Ins. Co.</i> , No. 20-cv-06158-LB, 2021 WL 25048 (N.D. Cal. Jan. 4, 2021)	Court granted motion to dismiss without prejudice.
December 30, 2020	<i>Jonathan Oheb MD, Inc. v. Travelers Cas. Ins. Co. of Am.</i> , No. 2:20-cv-08478-JWH-RAOx, 2020 WL 7769880 (C.D. Cal. Dec. 30, 2020)	Court granted motion to dismiss with prejudice.
December 29, 2020	<i>Tralom, Inc. v. Beazley USA Servs., Inc.</i> , No. CV 20-8344-JFW(RAOx), 2020 WL 8269539 (C.D. Cal. Dec. 29, 2020)	Court granted motion to dismiss with prejudice.
December 28, 2020	<i>Karen Trinh, DDS v. State Farm Gen. Ins. Co.</i> , No. 5:20-cv-04265-BLF, 2020 WL 7696080 (N.D. Cal. Dec. 28, 2020)	Court granted motion to dismiss without prejudice.
December 21, 2020	<i>Posh Cafe Inc. v. Amguard Ins. Co.</i> , No. CV 20-8037 FMO (PVCx), 2020 WL 8184062 (C.D. Cal. Dec. 21, 2020)	Court granted motion to dismiss without prejudice.
December 21, 2020	<i>Baldwin Acad., Inc. v. Markel Ins. Co.</i> , No. 3:20-cv-02004-H-AGS, 2020 WL 7488945 (S.D. Cal. Dec. 21, 2020)	Court denied motion to dismiss, finding that policy provided specific coverage for an "outbreak" of a communicable disease, and plaintiff's allegation that there had been an outbreak at the school after a student's parent and grandparent tested positive, and the parent had repeatedly visited the campus sufficiently pled claim for coverage under the policy.

Date	Case Citation	Outcome <sup>78</sup>
December 21, 2021	<i>Mortar &amp; Pestle Corp. v. Atain Specialty Ins. Co.</i> , No. 20-cv-03461-MMC, 2020 WL 7495180 (N.D. Cal. Dec. 21, 2020)	Court granted motion to dismiss with prejudice.
December 14, 2021	<i>Franklin EWC, Inc. v. Hartford Fin. Servs. Grp., Inc.</i> , 488 F.Supp.3d 904 (N.D. Cal. 2020)	Court granted motion to dismiss with prejudice.
December 10, 2020	<i>HealthNOW Med. Ctr., Inc. v. State Farm Gen. Ins. Co.</i> , No. 20-cv-04340-HSG, 2020 WL 7260055 (N.D. Cal. Dec. 10, 2020)	Court granted motion to dismiss without prejudice.
December 9, 2020	<i>Robert W. Fountain, Inc. v. Citizens Ins. Co. of Am.</i> , No. 20-cv-05441-CRB, 2020 WL 7247207 (N.D. Cal. Dec. 9, 2020)	Court granted motion for judgment on the pleadings with prejudice.
December 3, 2020	<i>Geragos &amp; Geragos Engine Co. No. 28, LLC v. Hartford Fire Ins. Co.</i> , No. CV 20-4647-GW-MAAx, 2020 WL 7350413 (C.D. Cal. Dec. 3, 2020)	Court granted motion for judgment on the pleadings with prejudice.
November 13, 2020	<i>10E, LLC v. Travelers Indem. Co. of Conn.</i> , No. 2:20-cv-04418-SVW-AS, 2020 WL 6749361 (C.D. Cal. Nov. 13, 2020)	Court granted motion to dismiss with prejudice.
November 12, 2020	<i>Long Affair Carpet &amp; Rug, Inc. v. Liberty Mut. Ins. Co.</i> , No. SACV 20-01713-CJC(JDEx), 2020 WL 6865774 (C.D. Cal. Nov. 12, 2020)	Court granted motion to dismiss with prejudice.
October 27, 2020	<i>West Coast Hotel Mgmt., LLC v. Berkshire Hathaway Guard Ins. Cos.</i> , No. 2:20-cv-05663-VAP-DFMx, 2020 WL 6440037 (C.D. Cal. Oct. 27, 2020)	Court granted motion to dismiss with prejudice.
October 27, 2020	<i>Boxed Foods Co., LLC v. Cal. Cap. Ins. Co.</i> , No. 20-cv-04571-CRB, 2020 WL 6271021 (S.D. Cal. Oct. 26, 2020)	Court granted motion to dismiss with prejudice.
October 19, 2020	<i>Travelers Cas. Ins.e Co. of Am. v. Geragos &amp; Geragos</i> , No. CV 20-3619 PSG (Ex), 2020 WL 6156584 (C.D. Cal. Oct. 19, 2020)	Court granted motion to dismiss with prejudice.

Date	Case Citation	Outcome <sup>78</sup>
October 2, 2020	<i>Mark's Engine Co. No. 28 Rest., LLC v. Travelers Indem. Co. of Conn.</i> , 492 F. Supp. 3d 1051 (C.D. Cal. 2020)	Court granted motion to dismiss with prejudice.
October 1, 2020	<i>Pappy's Barber Shops, Inc. v. Farmers Grp., Inc.</i> , 487 F.Supp.3d 937 (S.D. Cal. 2020)	Court granted motion to dismiss with prejudice.
September 10, 2020	<i>Plan Check Downtown III, LLC v. Amguard Ins. Co.</i> , 485 F.Supp.3d 1225, 1226 (C.D. Cal. 2020)	In a tentative ruling, Court granted motion to dismiss with prejudice. Case was taken under advisement following hearing, after which the parties entered stipulation of dismissal.
September 14, 2020	<i>Mudpie, Inc. v. Travelers Cas. Ins. Co. of Am.</i> , 487 F. Supp. 3d 834 (N.D. Cal. 2020)	Court granted motion to dismiss with prejudice.

APPENDIX II: CALIFORNIA SUPERIOR COURT RULINGS REGARDING  
DEMURRERS, MOTIONS FOR JUDGMENT ON THE PLEADINGS, AND  
MOTIONS FOR SUMMARY JUDGMENT IN COVID-19 BUSINESS  
INTERRUPTION CASES

As with Appendix I, the information in Appendix II is based on the University of Pennsylvania Carey Law School's COVID Litigation Tracker.<sup>80</sup> This appendix also tracks cases up until November 21, 2021.

Date	Case Citation	Outcome
November 8, 2021	<i>AmeriMont Acad., Inc. v. Century-National Ins. Co.</i> , No. 30-2020-01158229-CU-BC-CJC (Cal. Super. Ct. Orange Cnty. Nov. 8, 2021)	Court sustained demurrer with prejudice.
November 1, 2021	<i>Best Rest Motel Inc. v. Sequoia Ins. Co.</i> , 37-2020-00015679-CU-IC-CTL (Cal. Super. Ct. San Diego Cnty. Nov. 1, 2021)	Court granted motion for summary judgment.
October 5, 2021	<i>Marina Pac. Hotel Suites LLC v. Fireman's Fund Ins. Co.</i> , No. 20SMCV00952 (Cal. Super. Ct. L.A. Cnty. Oct. 5, 2021)	Court sustained demurrer with prejudice.
October 1, 2021	<i>Anchors and Whales LLC v. Crusader Ins. Co.</i> , No. CGC-21-590559 (Cal. Super. Ct. S.F. Cnty. Oct. 1, 2021)	Court granted motion for judgment on the pleadings with prejudice.
September 28, 2021	<i>Chaos Enter., Inc. v. Hartford Fire Ins. Co.</i> , No. 20STCV33507 (Cal. Super. Ct. L.A. Cnty. Sept. 28, 2021)	Court sustained demurrer without prejudice.
September 23, 2021	<i>Hotel Adventures LLC v. Fireman's Fund Ins. Co.</i> , No. 30-2021-01188889-CU-CO-WJC (Cal. Super. Ct. Orange Cnty. Sept. 23, 2021)	Court overruled insurer's demurrer.

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<sup>80</sup> *Covid Coverage Litigation Tracker*, *supra* note 46.

Date	Case Citation	Outcome
September 10, 2021	<i>Pac. Lodging Grp. LP v. Sequoia Ins. Co.</i> , No. 21CV376099, 2021 WL 4932693 (Cal. Super. Ct. Santa Clara Cnty. Sept. 10, 2021)	Court sustained demurrer without prejudice.
July 28, 2021	<i>Child &amp; Marton LLP v. Sentinel Ins. Co., Ltd.</i> , No. 20STCV33799, 2021 WL 3834759 (Cal. Super. Ct. L.A. Cnty. May 12, 2021)	Court sustained demurrer with prejudice.
July 23, 2021	<i>Ross Stores, Inc. v. Zurich Am. Ins. Co.</i> , No. RG20-084158, 2021 WL 3700659 (Cal. Super. Ct. Alameda Cnty. July 13, 2021)	Court sustained two insurers' demurrers with leave to amend, with prejudice, and overruled another insurer's demurrer regarding various policy provisions.
July 1, 2021	<i>Metro Fitness, Inc. v. Vantapro Specialty Ins. Co.</i> , No. 20STCV27654, 2021 WL 3834764 (Cal. Super. Ct. L.A. Cnty. July 1, 2021)	Court granted motion for judgment on the pleadings with prejudice.
June 16, 2021	<i>Apple Annie LLC v. Or. Mut. Ins. Co.</i> , No. CGC-20-585712 (Cal. Super. Ct. S.F. Cnty. June 16, 2021)	Court granted motion for judgment on the pleadings with prejudice.
June 10, 2021	<i>2420 Honolulu Ave., LLC v. Travelers Indem. Co. of Conn.</i> , No. 20STCV14000, 2021 WL 34114038 (Cal. Super. Ct. L.A. Cnty. June 10, 2021)	Court granted motion for judgment on the pleadings with prejudice.
June 1, 2021	<i>George Gordon Enters., Inc. v. AGCS Marine Ins. Co.</i> , No. 21STCV02950, 2021 WL 3834768 (Cal. Super. Ct. L.A. Cnty., June 1, 2021)	Court overruled insurer's demurrer to cause of action for negligence. As noted below, a separate insurer defendant successfully demurred to plaintiff's breach of contract and bad faith claims several weeks before.
March 18, 2021	<i>Boardwalk Ventures CA, LLC v. Century-National Ins. Co.</i> , No. 20STCV27359, 2021 WL 1215892 (Cal. Super. Ct. L.A. Cnty. Mar. 18, 2021)	Court overruled insurer's demurrer.

Date	Case Citation	Outcome
March 10, 2021	<i>Tarrar Enterps., Inc. v. Assoc. Indem. Corp.</i> , No. MSC20-01776 (Cal. Super. Ct. Contra Costa Cnty. Mar. 10, 2021)	Court sustained demurrer with prejudice.
Feb 19, 2021	<i>Shusha Inc. v. Century-National Ins. Co.</i> , No. 20STCV25769, 2021 WL 3834761 (Cal. Super. Ct. L.A. Cnty. Feb. 19, 2021)	Court sustained demurrer with prejudice.
February 8, 2021	<i>Saddle Ranch Sunset, LLC v. Fireman's Fund Ins. Co.</i> , No. 20STCV36531 (Cal. Super. Ct. L.A. Cnty. Feb. 8, 2021)	Court sustained demurrer with prejudice.
February 4, 2021	<i>P.F. Chang's China Bistro, Inc. &amp; PFC Assocs. LLC v. Certain Underwriters at Lloyd's</i> , No. 20STCV17169, 2021 WL 818659 (Cal. Super. Ct. L.A. Cnty. Feb. 4, 2021)	Court overruled insurer's demurrer.
January 28, 2021	<i>Goodwill Indus. of Orange Cnty, Cal. v. Philadelphia Indem. Co.</i> , No. 30-2020-01169032-CU-IC-CXC, 2021 WL 476268 (Cal. Super. Ct. Orange Cnty. Jan. 28, 2021)	Court overruled insurer's demurrer.
December 23, 2020	<i>VStyles, Inc. v. Cont'l Cas. Co.</i> , No. RIC2003415, 2020 WL 10895579 (Cal. Super. Ct. Riverside Cnty. Dec. 23, 2021)	Court sustained insurer's demurrer without prejudice.
November 9, 2020	<i>Musso &amp; Frank Grill Co., Inc. v. Mitsui Sumitomo Ins. USA Inc.</i> , No. 20STCV16681, 2020 WL 2388958 (Cal. Super. Ct. L.A. Cnty. Nov. 9, 2020)	Court sustained insurer's demurrer with prejudice.
September 20, 2020	<i>Best Rest Motel Inc. v. Sequoia Ins. Co.</i> , No. 37-2020-00015679-CU-IC-CTL, 2020 WL 7229856 (Cal. Super. Ct. San Diego Cnty. Sept. 20, 2020)	Court overruled insurer's demurrer.
August 6, 2020	<i>Inns by the Sea v. Cal. Mut. Ins. Co.</i> , No. 20CV001274, 2020 WL 5868739 (Cal. Super. Ct. Monterey Cnty. Aug. 6, 2020)	Court sustained insurer's demurrer with prejudice.