THE HONORABLE DAVID WHEDBEE
Hearing Date: December 15, 2023
With Oral Argument

SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR KING COUNTY

THE BOARD OF REGENTS OF THE UNIVERSITY OF WASHINGTON, Plaintiff, v. EMPLOYERS INSURANCE COMPANY OF WAUSAU, A LIBERTY MUTUAL COMPANY, Defendant.	No. 22-2-15472-1 SEA AMENDED ORDER DENYING DEFENDANT'S CR 12(B)(6) MOTION TO DISMISS

This matter comes before the Court on Defendant Employers Insurance Company of Wausau's ("Insurer") CR 12(b)(6) Motion to Dismiss. The Court has considered the Motion and related supporting materials, Plaintiff The Board of Regents of the University of Washington's Opposition to the Motion and related supporting materials, and the Insurer's Reply and any related supporting materials, in addition to relevant records in the court file and the parties' oral arguments on December 15, 2023.

Based on that review, the Court finds and concludes as follows:

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1. Defendant Employers Insurance Company of Wausau ("Insurer") issued to Plaintiff The Board of Regents of the University of Washington ("UW"), during the relevant period, five insurance policies: Policy YAC-L9L-469720-039 to UWMC ("UWMC Policy"); Policy YAC-L9L-469720-029 to NWH ("NWH Policy"); Policy YAC-L9L-469720-049 to HMC ("HMC Policy"); Policy YAC-L9L-450425-020 to UW Husky Stadium UMHC ("Husky Stadium Policy"); and Policy YAC-L9L-450425-030 to UW Athletics Facilities ("Athletics Facilities Policy").
2. Collectively, these Policies provide UW with over $2 billion in coverage where applicable. In pertinent part, the Policies all include an agreement that the Insurer would cover "property, as described in [each] Policy, against all risks of direct and physical loss or damage, except as hereinafter excluded or limited, while located as described in this Policy." *See, e.g.*, Dkt. 11 (First Amended Complaint), Ex. 1 (UWMC Policy).
3. All five Policies contain various exclusions, including one that precludes coverage for "[c]ontamination, and any cost due to contamination including the inability to use or occupy property or any cost of making property safe or suitable for use or occupancy, except as provided elsewhere in this policy" and "unless directly resulting from a covered loss." Dkt. 28, Ex. A at 25.
4. These Policies also contain two pertinent endorsements: a "Communicable Disease Decontamination Cost Endorsement" ("Decontamination endorsement") and an endorsement for "Time Element Losses Due To Contamination By Communicable Disease" (Time Element Losses endorsement"). *See* discussion below.
5. The parties dispute whether these Policies cover losses sustained as the result of the outbreak of the COVID-19 pandemic—by which they mean the SARS-CoV-2 virus, its variants and the coronavirus disease—that purportedly caused UW to close or limit access

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to its healthcare facilities (*e.g.*, the UW Medical Center and Harborview Medical Center), Husky Stadium, and UW's Athletic Facilities in 2020 and thereafter, by government order and otherwise.

6. The Insurer takes the position that Washington courts and other state and federal courts have rejected such claims because litigants such as UW here cannot demonstrate any "direct and physical loss or damage" to property (including real property defined as "buildings and other structures" or personal property defined as "furniture, fixtures, machinery, . . . [m]aterials, [and] supplies"). *See* Dkt. 27 at 2-3, 6-7. UW counters that its First Amended Complaint ("FAC") alleges, specifically and explicitly, direct and physical loss and damage to property, with extensive citations to scientific studies to support its allegations, which should be sufficient to survive a motion under CR 12(b)(6). Dkt. 37 at 2.

7. The parties also dispute whether the "Contamination" exclusion applies. The Insurer argues, *inter alia*, that even if the Court accepted UW's coverage interpretation, UW has "pleaded itself right into the Contamination exclusion." UW resists this reading, claiming that the amendatory "Communicable Disease" endorsements set against the Contamination exclusion either encompass at least some of the factual scenarios here so as to warrant coverage or create ambiguities that must be construed against the Insurer in favor of coverage at the pleading stage.

8. Dismissal under CR 12 is "appropriate only when it appears beyond doubt that the plaintiff cannot prove any set of facts that "would justify recovery." *Washington Trucking Associations v. State Emp. Sec. Dep't.*, 188 Wn.2d 198, 207, 393 P.3d 761, 766 (2017) (internal quotation marks omitted). "All facts alleged in the complaint are taken as true, and [courts] may consider hypothetical facts supporting the plaintiff's claim." *FutureSelect*

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Portfolio Mgmt., Inc. v. Tremont Grp. Holdings, Inc., 180 Wn.2d 954, 962, 331 P.3d 29, 34 (2014).

9. Washington courts follow a policy of construing coverage provisions liberally in favor of coverage, *Bordeaux, Inc. v. Am. Safety Ins. Co.*, Wn. App. 687, 694 (2008), and mandating that exclusionary provisions must be construed narrowly. *Stuart v. Am. States Ins. Co.*, 134 Wn.2d 814, 818-19 (1998).

10. In support of their competing positions, both parties rely on *Hill & Stout, PLLC v. Mutual of Enumclaw Insurance Company*, 200 Wn.2d 208, 515 P.3d 525 (2022), a landmark case of insurance policy interpretation as applied to claims arising during the COVID era.

11. In *Hill & Stout*, two dentists heeded government orders issued to "curtail the spread of COVID-19 . . . [which] prohibit[ed] nonemergency dental care," and in early 2020 closed their business. 200 Wn.2d at 211. The dentists tendered a claim to their insurer for lost income suffered due to "direct physical loss of or damage to" their property. *Id.* at 211-212. A unanimous Supreme Court of Washington sided with the insurer, holding that "'physical loss of ... property' is a property that has been physically destroyed or that one is deprived of in that the property is no longer physically in their possession," *id.* at 219, and that the dentists'

> claim for loss of intended use and loss of business income is not a physical loss of property. HS was still able to physically use the property at issue. The property was in HS's possession, the property was still functional and able to be used, and HS was not prevented from entering the property.

Id. at 220.

12. In a long discussion in dicta, *Hill & Stout* also entertained potential claims under a "loss of functionality" test. *See* 200 Wn.2d at 220-225. Under this theory, a plaintiff might plead that an event like the COVID-19 pandemic caused "imminent danger to the property,"

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"contamination with a problematic substance," or an event "that physically prevented use of the property or rendered it useless" or "rendered [the property] unsafe or uninhabitable because of a dangerous physical condition." *Id.* at 221-222; *accord Seattle Tunnel Partners v. Great Lakes Reinsurance (UK) PLC*, 200 Wn.2d 315, 339, 516 P.3d 796, 809 (2022) (loss of functionality test may apply where "deprivation, dispossession, or injury. . . [is] physical," which "means the loss must have a material existence, be tangible, or be perceptible by the senses").

13. *Hill & Stout* rejected any claim by the dentists under this theory, based on an analysis by Judge Barbara Rothstein, that "[w]hile there may be some flexibility to a physical alteration requirement under a loss of functionality test, even under a loss of functionality test there must be some *physical* effect on the property that is not found in the present case." 200 Wn.2d at 223-224 (emphasis in original) (citing *Nguyen v. Travelers Cas. Ins. Co. of Am.*, 541 F. Supp.3d 1200 (W.D. Wash. 2021)).

14. No sooner did *Hill & Stout* raise the possibility of the "loss of functionality" test, did the court also appear to doubt its viability as applied to situations related to the COVID-19 pandemic: "As Judge Rothstein notes, it appears that the strong, if not unanimous, consensus around the country is that COVID-19 and related government closures do not amount to 'direct physical loss of property.'" 200 Wn.2d at 224 (citing also *Verveine Corp. v. Strathmore Ins. Co.*, 489 Mass. 534, 184 N.E.3d 1266, 1275-76 (2022) (collecting cases and applying similar insurance law structure to Washington, to hold "the COVID-19 orders standing alone cannot possibly constitute 'direct physical loss of or damage to' property, for the same reason that loss of legal title or other government restrictions cannot themselves physically alter property"). That said, the loss of functionality test in *Hill & Stout* remains valid and binding on this Court.

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UW may establish coverage under the "direct physical loss or damage" to property provision as alleged in the FAC.

15. UW seizes on the loss of functionality theory, claiming that the test on its face applies to the extensive allegations in its FAC. The Insurer counters, as in *Hill & Stout*, that UW cannot demonstrate that anything "physical" effected the UW properties in question (such as its medical and sports facilities) so as to trigger coverage even under this theory. As examples at oral argument, the Insurer argued that even if aerosols carrying the COVID-19 virus permeated the atmosphere of a UW building or settled as "fomites" on the surfaces inside UW buildings, UW was never deprived of possession or use of those properties. And, the Insurer claims, in no event was there any "physical" damage because at most UW was forced to ventilate those indoor spaces and clean those surfaces, without any necessary physical impact on or change to the property.

16. The fundamental flaw in this argument, as stressed by UW, is that it runs counter to the actual allegations in the FAC. These detailed allegations do describe how the SARS-CoV-2 virus can physically effect and transform both indoor environments and physical surfaces, with extensive quotations and other references to existing scientific data and related studies. *See*, *e.g.*, Dkt. 11, ¶¶ 39, 47, 50, 54-55, 65-72, 73-74. Even if invisible, or detectible only through magnification, the depicted effects on the air and hard surfaces have a "material existence" are "tangible, or [are] perceptible by the senses." *Seattle Tunnel Partners*, 200 Wn.2d at 339; *see also Hill & Stout*, 200 Wn.2d at 221 (recognizing "coverage for vandalism for the residue and vapors from a methamphetamine lab in a rental property [may apply] even though it caused 'no visible damage'") (quoting *Graff v. Allstate Ins. Co.*, 113 Wn. App. 799, 806, 54 P.3d 1266 (2002)); *see also Huntington Ingalls Indus., Inc. v. Ace Am. Ins. Co.*, 2022 VT 45, ¶ 41, 287 A.3d 515, 533–34 (Vt.

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2022) (crediting "loss of functionality" theory because the "process of the virus 'adhering' to surfaces caused 'detrimental physical effects' that 'altered and impaired the functioning of the tangible, material dimensions' of the property," and "property cannot function for its intended purpose and insured's business has had to operate at a reduced capacity").

17. UW pleaded a lengthy set of such factual allegations against the "loss of functionality" test factors recognized under *Hill & Stout*. *See id.*, *e.g.*, ¶¶ 75-78. UW urges that these allegations are sufficient to survive a CR 12 motion, and that the Insurer's arguments against coverage rest on facts not in the record or on characterizations of the factual allegations in the Insurer's favor, both of which are improper at the pleading stage. The Court agrees.

18. Noting that dismissals under Cr 12(b)(6) should be granted "only sparingly and with care," *Bravo v. Dolsen Companies*, 125 Wn.2d 745, 750, 888 P.2d 147, 151 (1995), the Court finds that the FAC, replete with detailed allegations about the SARS-CoV-2 virus's effect on the physical aspects of UW's property and citations to supporting scientific data, is sufficient to withstand the Insurer's motion to dismiss at the pleading stage. *See Huntington Ingalls*, 2022 VT at ¶ 42 (CR 12 dismissal improper where "statements in the complaint adequately allege that the virus physically altered property in insured's shipyards when it adhered to surfaces," in part because "allegations involve more than just a government order interfering with insured's use of its property").

19. Later in litigation, the Insurer might come forth with studies that debunk UW's scientific studies or otherwise prove more persuasive so as to preclude coverage as applied to the facts. In this procedural posture, however, the Insurer's positions rest on arguments or facts not in the record, which the Court cannot accept as true over the FAC's allegations.

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20. The Court finds that at least some of the FAC's allegations, accepted here as true, set forth a plausible claim for coverage against the loss of functionality test factors discussed in *Hill & Stout*.

The "Contamination" exclusion does not necessarily bar all coverage.

21. Even if the Policies might extend coverage per the "direct and physical loss or damage" to property provision and loss of functionality test, the Insurer may rightfully deny coverage where UW's claims fall under an exclusion.

22. Here, the Insurer claims that UW's claims fall squarely within the "Contamination" exclusion, and are not rescued by the "Communicable Disease" endorsements. UW argues that read together, these provisions permit coverage or create ambiguities that preclude the Court finding as a matter of law that the Insurer rightfully denied coverage.

23. "[I]f the policy language is clear and unambiguous, we must enforce it as written; we may not modify it or create ambiguity where none exists. . . . . Language in an insurance contract is ambiguous if, on its face, it is fairly susceptible to two different but reasonable interpretations." *Seattle Tunnel Partners*, 200 Wn. 2d at 321.

24. As noted, the exclusion at issue precludes coverage for "[c]ontamination, and any cost due to contamination including the inability to use or occupy property or any cost of making property safe or suitable for use or occupancy, *except as provided elsewhere in this policy*" and "unless directly resulting from a covered loss." Dkt. 11, Ex. A at 21 (emphasis added); *see also* Dkt. 28, Ex. A at 24-25.

25. The Policies define "contamination" as "[any] condition of property that results from a contaminant," and "contaminant" explicitly includes "[a]ny virus, [or] disease causing illness causing agent." *E.g.*, Dkt. 28, Ex. A at 57.

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26. These Policies also contain two pertinent endorsements. The "Communicable Disease Decontamination Cost Endorsement" provides for coverage as follows:

> If your covered property at a covered location shown on the Schedule of this endorsement is contaminated by a communicable disease as the direct result of a covered loss, and there is in force at the time of that covered loss a law or ordinance that requires you to decontaminate that covered property as a result of this contamination by communicable disease . . . .

See, e.g., Dkt. 11, Ex. A at 42; *see also* Dkt. 28, Ex. A at 62, 76, and 88. Under subsection (d), the endorsement defines "communicable disease" as "a viral or bacterial organism that is capable of inducing disease, illness, physical distress or death." Dkt. 28, Ex. A at 76.

27. The endorsement for "Time Element Losses Due To Contamination By Communicable Disease" provides for coverage as follows:

> If your covered property at a covered location is contaminated by a communicable disease as the direct result of a covered loss, and there is in force at the time of that covered loss a law or ordinance that requires you to suspend your operations on account of that contamination, we will pay the actual loss of GROSS PROFIT or GROSS EARNINGS you sustain due to the necessary suspension of your normal operations at that covered location because it is either partially or totally closed by order of authority described in b.

Dkt. 28, Ex. A at 88. Under subsection (b), this endorsement states in pertinent part that the "sole determinant of disease contamination of a magnitude great enough to either partially or totally close your normal operations will be either the . . . National Center for Disease Control or [t]he governmental authority having jurisdiction over your operations that relate to health and hygiene standards necessary to protect the general public." *Id.*

28. Under subsection (c), the Time Element Loss endorsement sets forth a limitation on liability. Dkt. 28, Ex. A at 88.

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29. Like the definitional section of the "Decontamination" endorsement, subsection (d) of the "Time Element Loss" endorsement defines "communicable disease" as "a viral or bacterial organism that is capable of inducing disease, illness, physical distress or death." Dkt. 28, Ex. A at 88.

The "Time Element Losses" endorsement defeats application of the "Contamination" exclusion.

30. UW claims under the "Communicable Disease" endorsements that the SARS-CoV-2 virus, which allegedly can physically damage property by settling on hard surfaces as "fomites" or by permeating indoor air spaces as "aerosols," is the covered loss that causes COVID-19 (the communicable disease). Dkt. 37 at 25. In the alternative, UW contends this exclusion at minimum creates an ambiguity as applied to "communicable diseases." *Id.* The Insurer relies on several out-of-state and federal precedents, published and unpublished, for its position that courts have rejected coverage, based on the same or similar exclusions as featured in the Wausau Policies here. *See* Dkt. 27 at 21-24; Dkt. 43 at 4-5.

31. The Court finds the precedents cited by the Insurer are materially distinguishable because they did not consider the "Communicable Disease" amendatory endorsements present here or are otherwise dissimilar. The Insurer mischaracterizes the existing persuasive case authority as a monolith that bars coverages categorically. In fact the case law consists of a patchwork of cases that arose under different insurance policies—with varying exclusionary provisions, or with distinct amendatory endorsements or no endorsements at all—not necessarily in the same procedural postures, under insurance law regimens unique to each state outside Washington, and often assuming coverage for "direct and physical damage or loss" to property claims that the Insurer here insists are untenable. As canvassed

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below, the cases cited by the Insurer do not necessarily foreclose UW's claims under these particular Policies.

32. In *AECOM v. Zurich American Insurance Company*, the Ninth Circuit precluded coverage because "the very thing that AECOM claims triggers coverage—the 'presence' of a 'virus' and the resulting 'condition of property' due to that presence—constitutes 'Contamination" under the plain language of the Contamination exclusion." No. 22-55092, 2023 WL 1281675, *1 (9th Cir. Jan. 31, 2023) (unpublished). The Insurer highlights this general principle, yet in *AECOM* there was no discussion of any endorsements except one that applied to Louisiana, which the Ninth Circuit validated without crediting the insured's claim that the whole police was ambiguous. *Id.* at *2; *see also Palomar Health v. Am. Guarantee & Liab. Ins. Co.*, No. 21-56073, 2022 WL 3006356, at *1 (9th Cir. July 28, 2022) ("Although each policy contains an amendatory endorsement that removes the word 'virus' from the exclusion, those special endorsements apply only to property in Louisiana. *Because Palomar does not allege any loss or harm to property in Louisiana, the contamination exclusion applies.*" (emphasis added) (unpublished); *see also Lindenwood Female Coll. v. Zurich Am. Ins. Co.*, 61 F.4th 572, 575 (8th Cir. 2023) (reaching same result because "it would simply make no sense to define a contamination exclusion with express reference to viral contamination in the main body of the policy only to wholly eliminate that same exclusion nationwide in later endorsement that references an individual state"); *Greenwood Racing Inc. v. Am. Guarantee & Liab. Ins. Co.*, No. CV 21-1682, 2022 WL 4133295, at *6 (E.D. Pa. Sept. 12, 2022) (same) (unpublished).

33. In *HT-Seattle Owner, LLC v. American Guarantee and Liability Insurance Company*, the Ninth Circuit similarly rejected a coverage claim per the "contamination exclusion" where

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"contaminant" did not include "virus" in the exclusion itself, but a definition of "contaminant" that expressly encompassed "virus" did appear in the "Louisiana Amendatory Endorsement for "Decontamination Costs." No. 21-35916, 2023 WL 3562996, *2 (9th Cir. May 19, 2023) (unpublished). *HT-Seattle Owner* held the Louisiana Endorsement "does not apply to claims arising in Washington."

34. Unlike *AECOM*, *Palomar Health*, *HT-Seattle Owner*, *Lindenwood Female Collage*, and *Greenwood Racing*, the "Communicable Disease" amendatory endorsements here apply generally and are not restricted to particular states. If anything, these cases tacitly acknowledge that courts may indeed find coverage per applicable endorsement provisions in spite of an otherwise broad "Contamination" exclusion.

35. In *TP Racing LLLP v. American Home Assurance Company*, the Ninth Circuit upheld the application of a "contaminant exclusion," which, as here, included "virus" in its definition. No. 21-16910, 2023 WL 3750395, *1 (9th Cir. June 1, 2023) ("Even assuming arguendo that the presence of Covid particles on qualifying premises constitutes 'direct physical loss or damage,' we conclude that the Contaminant Exclusion bars coverage on such a theory.") (unpublished). Yet *TPP Racing* entailed no analysis of endorsements at all.

36. In *Out West Restaurant Group, Inc. v. Affiliated FM Insurance Company*, the Ninth Circuit considered the insured's argument, similar to UW's here, that the policy there featured a "communicable disease" provision that conflicted with "contamination exclusion" defined to include "'virus [or] disease causing or illness causing agent, fungus, mold or mildew.'" No. 21-15585, 2022 WL 4007998, *2 (9th Cir. Sept. 2, 2022) (unpublished). *Out West Restaurant* resolved the purported conflict in this way: "The contamination exclusion bars coverage under the direct physical loss or damage provisions for damage caused by the presence of a virus," and the "communicable disease" provision

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addressed a subset of scenarios where "'access to [the insured property] is limited, restricted or prohibited by . . . order of an authorized governmental agency regulating or as [a] result of such presence of communicable disease; or . . . a decision of an Officer of the Insured as a result of such presence of communicable disease." *Id.*

37. In contrast to *Out West Restaurant*, the exclusion here is limited to where there is no "covered loss," *i.e.*, "direct and physical damage or loss" to the property "except as provided elsewhere in this policy" and "unless directly resulting from a covered loss." Dkt. 28, Ex. A at 88. As discussed above, the Court finds UW as the insured has adequately pleaded a "direct and physical damage or loss." The Time Element Losses endorsement corresponds to the clause "except as provided elsewhere in this policy." And that endorsement, under subsection (c), defines "communicable disease" as "a viral or bacterial organism that is capable of inducing disease, illness, physical distress or death." Dkt. 28, Ex. A at 88. This affirmative provision of coverage provides a subset of covered losses as an exception to the broad exclusion of losses that fall under the Contamination exclusion. *See Out West Restaurant*, 2022 WL 4007998, at *2 ("'An insurance policy may exclude coverage for particular injuries or damages in certain specified circumstances while providing coverage in other circumstances.'") (quoting *Julian v. Hartford Underwriters Ins. Co.*, 110 P.3d 903, 910 (Cal. 2005)).

38. The Insurer argues that the "Sixth, Seventh, and Eighth Circuits recently held that substantively identical contamination exclusions preclude coverage for business losses alleged to have been caused by the presence of the COVID-19 virus on covered property." Dkt. 27 at 22. This characterization is not accurate because the cited cases in question involve the interplay between a "contamination exclusion" and "Time Element *Exclusions*" (emphasis added), which is dissimilar to the *endorsements* here. *See Dana*

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Inc. v. Zurich Am. Ins. Co., No. 21-4150, 2022 WL 2452381, at *1, *3 (6th Cir. July 6, 2022) ("Despite this clear language, Dana contends the contamination exclusion does not apply to the time element section. In support, it points to other exclusions that discuss time element loss."). *Dana* is irrelevant because here there is an amendatory endorsement that limits coverage for time losses stemming from the outbreak of a communicable disease, whereas *Dana* simply rejected the insured's argument that language in different exclusionary provisions created ambiguity.

39. In *Froedtert Health, Incorporated. v. Factory Mutual Insurance Company*, the Seventh Circuit elucidated the interplay between general coverage provisions, broad exclusions, and "Additional Coverages," similar to the "Communicable Disease" endorsements here:

> The policy's general coverage is limited by accompanying exclusions, including the broad exclusion for contamination losses. In a later section, the policy then affords certain specified Additional Coverages, including for communicable disease response costs. That additional coverage is just that—additional coverage. It would not exist if it was not expressly delineated in the Additional Coverages section of the policy.

69 F.4th 466, 472–73 (7th Cir. 2023). *Froedtert Health* also highlighted that the "Additional Coverages" provisions did not conflict with the Contamination Exclusion because it functioned as limitation of coverage:

> Had COVID-19 losses constituted losses not already excluded by the broad contamination exclusion, the additional coverage for communicable disease response would have provided no new coverage. The $1 million sublimit for communicable disease response costs further reinforces this view. The parties contemplated coverage for the exact losses that Factory Mutual covered here—but they limited coverage to $1 million, a fraction of the broader $2 billion limit under the policy's general coverage provision.

Id. at 472.

40. Here, the Time Element Losses endorsement (like the Decontamination endorsement) contains a limitation of liability in subsection (c). *See* Dkt. 28, Ex. A at 12, 88 ("The most

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we will pay for this TIME ELEMENT COVERAGE AND LIMITATION in any one occurrence is the LIMIT OF LIABILITY specified in the LIMITS OF LIABILITY TABLE," *i.e.*, $10,000,000). To the extent COVID-19 is a communicable disease that related to a law or ordinance that required UW to suspend its operations on account of COVID-19, the Policy through this endorsement allows for coverage, but imposes a limit on liability of $10 million "per occurrence," on claims UW might make for lost gross profits; it does not necessarily conflict with the "Contamination" exclusion. *See Carilion Clinic v. Am. Guarantee & Liab. Ins. Co.*, No. 7:21-CV-00168, 2022 WL 16973256, *7 (W.D. Va. Nov. 16, 2022) ("[R]eading the terms consistently, the Interruption by Communicable Disease Special Coverage is best understood as a limited exception to the Contamination Exclusion.") (unpublished).

41. UW contends that the "Contamination" exclusion, when applied to this endorsement, may create an ambiguity "because it purports to exclude 'any condition of property that results from' a 'virus' or 'disease causing or illness causing agent," without specifically excluding 'communicable disease' while—at the same time—providing coverage for a communicable disease whose presence renders property unsafe to use." Dkt. 37 at 25.

42. UW is correct that the respective definitional sections for "contaminant" and "communicable disease" are in tension. Yet when one reads the "Communicable Disease" endorsements as a "limitation of liability" applicable only under certain narrow circumstances, that is not in conflict with the broad exclusion for "contaminants" (including a "virus") arising in circumstances outside the endorsement's scope.[1]

[1] Several cases cited by Insurer stand for this precise proposition (*see* Dkt. 37 at 23; Dkt. 37 at 4), and support a claim of limited coverage. *See Monarch Casino & Resort, Inc. v. Affiliated FM Ins. Co.*, No. 20-CV-1470, 2021 WL 4260785, *4 (D. Colo. Sept. 17, 2021), aff'd, 85 F.4th 1034 (10th Cir. 2023) ("While Plaintiff may be entitled to limited coverage under the Communicable Disease exemptions, Plaintiff's request for coverage for the full amount of the losses it has incurred

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43. Notwithstanding the maze of cases cited by the Insurer, UW has demonstrated a path to coverage. To recap, UW has pleaded detailed allegations of direct and physical damage or loss to property, namely that the SARS-CoV-2 virus physically altered real and personal property through the presence of aerosols suspended in interior environments or as viral particulate settled as "fomites" on hard surfaces within covered property. Further, the FAC cites extensive scientific data and literature that support UW's factual contentions. These detailed, supported allegations are more than "conclusory," as the Insurer argues. They set forth a covered loss under the "loss of functionality" test under *Hill v. Stout*, consistent with *Huntington Ingalls* (the Vermont precedent) and other cases discussed above that assumed a plaintiff might adequately plead the presence of COVID particulate as a form of physical damage or loss. *Compare Aspen Lodging Grp., LLC v. Affiliated FM Ins. Co.*, No. 21-35472, 2023 WL 3562998, *1 (9th Cir. May 19, 2023) ("Although the policy's Communicable Disease provision provides coverage even without physical loss or damage, it requires the actual presence of COVID-19, *which Aspen does not allege*.") (emphasis added). Here, in contrast to *Aspen Lodging*, UW extensively alleges the actual presence of COVID-19 as a communicable disease.[2]

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in connection with the COVID-19 pandemic is barred by the Contamination Exclusion.") (unpublished); *Carilion Clinic, supra; Rockhurst Univ. v. Factory Mut. Ins. Co.*, 582 F. Supp.3d 633, 640 (W.D. Mo. 2022) ("Reading the policy as a whole, there is no language prohibiting the possibility that Plaintiffs may recover under the communicable disease provisions and simultaneously not recover under provisions subject to the contamination exclusion for a particular occurrence.").

[2] The fact that UW pleaded specific allegations in support of its claim under the "direct and physical damage or loss" provision, and that there is a "communicable disease" amendatory endorsement, distinguishes this case from many cases the Insurer inaccurately argues are apt (Dkt. 37 at 22-23). *See One Grp. Hospitality, Inc. v. Employers Ins. Co. of Wausau*, 632 F. Supp.3d 962, 974 (W.D. Mo. 2022) (no specific allegation of harm to property and no discussion of endorsements); *Chef's Warehouse, Inc. v. Liberty Mut. Ins. Co.*, No. 20-cv-04825-KPF, 2022 WL 3097093, *8-9 (S.D.N.Y. May 2, 2022) (no discussion of endorsements) (unpublished); *OTG Mgmt. PHL LLC v. Emps. Ins. Co. of Wausau*, 557 F. Supp.3d 556, 565-566 (D.N.J. 2021) (no discussion of

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44. As to the Contamination and other exclusions, these are qualified by the clause "unless otherwise stated in this Policy." Dkt. 28, Ex. A at 22. As discussed above, the "Communicable Disease" endorsements are amendatory, and act as exceptions to these exclusions and a limitation on any liability that might attach under the endorsements. UW construes its claim in the FAC that SARS-CoV-2 is the virus that physically affects the property and COVID-19 is the communicable disease that may result from exposure to this virus. Although the Insurer argues that COVID-19 cannot be both "cause and effect," that is an argument for another day, when the Insurer might marshal evidence that support its contention. At this stage, just as the Court must reject the Insurer's characterization of the allegations that COVID-19 cannot physically alter property because one might simply wipe it away, the Court must similarly reject the Insurer's claim about "cause and effect" because it runs counter to UW's factual allegations. As pleaded, the nature and function of the SARS-CoV-2 virus qualifies as covered loss because it results in physical damage or loss to property, and the COVID-19 condition that may arise directly from this covered loss is the "communicable disease" that triggers the endorsement under the operational definition as "a viral or bacterial organism that is capable of inducing disease, illness, physical distress or death." Dkt. 28, Ex. A at 88.

45. Once the "Time Element Losses" endorsement is at play because of contamination of a "communicable disease," coverage may attach where "there is in force at the time of that

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endorsements, but similar to here allowing "for debris removal and decontamination costs resulting from a covered loss" because "[e]xclusion refers to specific forms of contamination which are expressly covered by the Policy"); *Ascent Hosp. Mgmt. Co., LLC v. Emps. Ins. Co. of Wausau*, 537 F. Supp.3d 1282, 1288 (N.D. Ala. 2021) (only where no allegations to the contrary are discussed assuming "viral contamination does not constitute direct physical loss or damage or amount to harm to property that requires repair or replacement"), aff'd, No. 21-11924, 2022 WL 130722 (11th Cir. Jan. 14, 2022); *Creative Artists Agency, LLC v. Affiliated FM Ins. Co.*, No. 22-1-cv-08314-ABG, 2022 WL 3097371, *7 (C.D. Cal. July 27, 2022) (no specific allegations under loss of functionality test or discussion of endorsements) (unpublished).

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covered loss a law or ordinance that requires you to suspend your operations on account of that contamination." Dkt. 28, Ex. A at 88. Here, the Insurer concedes that Governor Enslee's emergency proclamations qualify as a "law" or "ordinance."[3] Dkt. 27 at 24. UW's allegations specifically cite Governor Jay Inslee's "state of emergency" proclamations (which are also attached to the FAC), in which he invoked authority of the Washington State Department of Health and "exercise[ed] [his] emergency powers under RCW 43.06.220 by prohibiting certain activities," such as limiting public gathering, Washingtonians' ability to leave their homes, and access to nonemergency medical care. *See* Dkt. 11, ¶¶ 79-95, Exs. 7-13. These allegations also meet the endorsement criteria that Governor Inslee's orders stem from "[t]he governmental authority having jurisdiction over your operations that relate to health and hygiene standards necessary to protect the general public," and that he had authority to "determine[e] that the "disease contamination was "of magnitude great enough to [warrant] either partially or totally close [UW's] normal operations." Dkt. 28, Ex. A at 88.

46. The Court finds that the Time Element Losses endorsement may establish coverage based on pleaded facts that the Court must accept as true at this stage.

The "Decontamination" endorsement doesn't apply on its face.

47. As to the "Decontamination" endorsement, UW has failed to identify any "law or ordinance that require[d] [UW] to decontaminate" its affected properties in force at the time of the COVID-19 pandemic. *See* Dkt. 28, Ex. A at 76. At most, UW's allegations

[3] The Insurer attempts to block application of the Time Element Losses endorsement by citing exclusions that purport to preclude coverage for "[l]oss or damage from enforcement of any law or ordinance," including those "[r]egulating the . . . loss . . . of any property." *See* Dkt. 27 at 24 (citing Dkt. 28, Ex. A at 22). The obvious defect in this argument is that this exclusion, like the "Contamination" exclusion, is modified by the critical clause "except as otherwise provided in this Policy." The Communicable Disease" provision for Time Element Losses is the amendatory endorsement that falls within the exception.

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cover Governor Jay Inslee's "state of emergency" proclamations, where, as noted above, he limited public gatherings, Washingtonians' ability to leave their homes, and access to nonemergency medical care. *See* Dkt. 11, ¶¶ 79-95, Exs. 7-13. Yet none of these proclamations required decontamination. Thus UW falls short of pleading that its claims fall under the "Decontamination" amendatory endorsement.

48. UW has demonstrated that its allegations, as pleaded in the FAC, track at least one path to coverage as canvassed above, which is sufficient to defeat the Insurer's motion to dismiss. The extent to which the bulk of UW's coverage claims succeed or fail will hinge on supported or proven facts that correspond to applicable coverage provisions, and do not fall within any applicable exclusions, as to be determined in future proceedings.

49. The Court likewise finds any dismissal of Plaintiff's bad faith claims is premature. As may later be appropriate, resolution of this issue will await potential future motion practice based on evidence on the (un)reasonableness and other circumstances that informed the Insurer's decision to deny coverage.

50. The Court finds the Insurer's other arguments unavailing.

51. For the foregoing reasons, Defendant's motion to dismiss is DENIED.

52. This Amended Order supersedes the previous order issued on January 3, 2024, and corrects a typographical error.

SO ORDERED this 4th day of January, 2024.

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Judicial Electronic Signature Page

Case Number:	22-2-15472-1
Case Title:	THE BOARD OF REGENTS OF THE UNIVERSITY OF WASHINGTON VS EMPLOYERS INSURANCE COMPANY OF WAUSAU
Document Title:	ORDER RE AMENDED ORDER RE MTN TO DISMISS

Signed By:	David Whedbee
Date:	January 04, 2024

Judge: David Whedbee

This document is signed in accordance with the provisions in GR 30.

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