

The Honorable Barbara J. Rothstein

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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

HT-SEATTLE OWNER LLC,

Plaintiff,

v.

AMERICAN GUARANTEE AND
LIABILITY INSURANCE COMPANY,

Defendant.

No. 2:21-cv-00048-BJR

[PROPOSED] BRIEF OF AMICUS
CURIAE UNITED POLICYHOLDERS

TABLE OF CONTENTS

Page

I. INTRODUCTION 1

II. ARGUMENT 4

 A. Defendant Seeks to Upend Long-Established Rules of Insurance Policy Interpretation 4

 1. The Titles Provision expressly prohibits attaching meaning to Virus Deletion Endorsement’s title..... 4

 2. State-titled endorsements without geographic limitations – like the Virus Deletion Endorsement – apply to the entire policy. 6

 3. Other State-Titled Endorsements in the Zurich Edge Policy make clear the Virus Deletion Endorsement is not Limited to a Specific State..... 8

 B. Zurich’s Recently Amended Louisiana Endorsement Adding a Geographical Limitation Confirms the Virus Deletion Endorsement Has None..... 9

 C. Zurich’s Remaining Arguments Cannot Change the Meaning and Applicability of the Virus Deletion Endorsement..... 11

III. CONCLUSION 12

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

TABLE OF AUTHORITIES

Page(s)

Cases

1

2

3

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5 121 Wn.2d 869, 854 P.2d 622 (1993).....11

6 *Arch Specialty Ins. Co. v. Cline,*

7 No. 10-2114-STA-dkv, 2012 WL 12823706 (W.D. Tn. Dec. 4, 2012).....7

8 *Beaufort Rentals LLC v. Westchester Fire Ins. Co.,*

9 No. 9:18-cv-02658-DCN, 2018 WL 6248770 (D.S.C. Nov. 29, 2018).....6

10 *Churchill v. Factory Mut. Ins. Co.,*

11 234 F. Supp. 2d 1182 (W.D. Wash. 2002).....10

12 *John Akridge Co. v. Travelers Cos.,*

13 837 F. Supp. 6 (D.D.C. 1993).....6, 7, 12

14 *Kamp v. Empire Fire & Marine Ins. Co.,*

15 No. 3:12-CV-904-JFA, 2013 WL 310357 (D.S.C. Jan. 25, 2013)12

16 *McMahan & Baker, Inc. v. Continental Cas. Co.,*

17 68 Wn. App. 573, 843 P.2d 1133 (1993).....4

18 *MDL Capital Mgmt., Inc. v. Fed. Ins. Co.,*

19 274 F. App'x 169 (3d Cir. 2008)5

20 *Menard v. Gibson Applied Tech. & Eng'g, Inc.,*

21 No. 16-498, 2017 WL 6610466 (E.D. La. Dec. 27, 2017)12

22 *Miami-Luken, Inc. v. Navigators Ins. Co.,*

23 No. 1:16-cv-876, 2018 WL 3424448 (S.D. Ohio July 11, 2018)6

24 *Mount Zion Lutheran Church v. Church Mutual Insurance Company,*

25 8 Wn. App. 461, 442 P.3d 22 (2019).....5

26 *Pine Bluff Sch. Dist. v. Ace Am. Ins. Co.,*

984 F.3d 583 (8th Cir. 2020)5

Quadrant Corp. v. American States Ins. Co.,

154 Wn.2d 165, 110 P.3d 733 (2005).....4

Riley v. Viking Ins. Co. of Wisconsin,

46 Wn. App. 828, 733 P.2d 556 (1987).....11

1 *Safeco Ins. Co. of Am. v. Davis*,
 2 44 Wn. App. 161 (1986)8
 3 *United States v. Sanford*,
 4 No. CR19-0172JLR, 2020 WL 2114402 (W.D. Wash. May 4, 2020)2
 5 *Security Storage Properties v. Safeco Ins. Co. of Am.*,
 6 No. 09–1036– WEB–DWB, 2010 WL 1936127 (D. Kan. May 12, 2010).....7, 8
 7 *Sylvester & Sylvester, Inc. v. State Auto. Mut. Ins. Co.*,
 8 No. 2020-cv-00817, 2021 WL 137006 (Ohio Ct. Com. Pl. Jan. 7, 2021)5
 9 *Tomars v. United Fin. Cas. Co.*,
 10 No. 12-CV-2162 (JNE/HB), 2015 WL 3772024 (D. Minn. June 17, 2015)12
 11 *Transcontinental Ins. Co. v. Washington Public Utilities Districts’ Utility System*,
 12 111 Wn.2d 452, 760 P.2d 337 (1988).....4, 5
 13 *Vision One, LLC v. Philadelphia Indem. Ins. Co.*,
 14 174 Wn.2d 501, 276 P.3d 300 (2012).....8
 15 *Welch Foods, Inc. v. National Union Fire Ins. Co. of Pittsburgh, PA et al.*,
 16 659 F.3d 191 (1st Cir. 2011).....5
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1 United Policyholders (“UP”) submits the following brief as *Amicus Curiae* in connection
 2 with Defendant’s Motion to Dismiss and Plaintiff’s Opposition thereto.¹ In its brief, UP addresses
 3 issues specific to the Zurich Edge Policy, an “all-risk” policy that was issued to HT-Seattle in this
 4 case and that affects some of the largest policyholders and greatest property risks in the world.

5 I. INTRODUCTION

6 Notwithstanding that Zurich marketed its Edge Policy as “dramatically enhance[ing its]
 7 ability to serve customers” and “offer[ing] significant advantages for global property programs
 8 and global property fronting arrangements.”² Zurich is now attempting to upend long-standing
 9 principles of insurance contract interpretation to deny coverage to policyholders across
 10 Washington and North America for losses sustained as a result of the SARS-CoV-2 virus (the
 11 “Coronavirus”), the disease it causes, Coronavirus Disease 2019 (“COVID-19”) and the physical
 12 loss of or damage to property that they cause, and the accompanying government closure orders
 13 (“COVID Losses”).

14 The plain language of the Zurich Edge Policy dictates in favor of coverage. The Zurich
 15 Edge Policy – Zurich’s pre-printed policy form that it issues to only its very large property
 16 policyholders – includes an endorsement that deletes “virus” from the Policy’s Contamination
 17 Exclusion (the “Virus Deletion Endorsement”). Put simply, the “all-risk” policy provides
 18 coverage for COVID Losses because the exclusion upon which Zurich relies does not apply based
 19 upon the plain language of the Policy.

20 Nevertheless, in response to the deluge of claims under the Edge Policy seeking coverage
 21 for COVID Losses, Zurich has taken the position that the Virus Deletion Endorsement is limited
 22 in geographic scope to Louisiana locations based solely upon the title of the endorsement that
 23 refers to “Louisiana.”

24
 25 ¹ Unless indicated otherwise, as used herein capitalized terms such as “Policy” have the same meaning ascribed to them
 by Plaintiff’s Opposition to Defendant’s Rule 12(b)(6) Motion to Dismiss (“Opp. to MTD”), ECF No. 28.

26 ² See Ex. A, available at
http://www.zurichservices.com/zus/zna_config.nsf/pages/9123da88864cd81485257433006ed710!OpenDocument&Click=.

1 That argument fails because the Policy contains a clear and unambiguous provision stating
 2 that titles of endorsements “shall not in any way affect the provisions to which they relate” (the
 3 “Titles Provision”). Unlike other state-titled endorsements to the Zurich Edge Policy that
 4 expressly limit the geographical scope of their application within their provisions to one state (such
 5 as the New York and Connecticut Amendatory Endorsements), the Virus Deletion Endorsement
 6 does no such thing.

7 Indeed, Zurich’s position that the headings in the Policy should be used to define the scope
 8 of coverage is belied by long-established principles of insurance policy interpretation:

- 9 • Unambiguous policy language – such as the Titles Provision that says that titles
 10 may not be used to interpret the policy – must be enforced as written;
- 11 • Exclusionary clauses – such as the Virus Deletion Endorsement, which modifies
 12 the Contamination Exclusion to remove virus – must be strictly construed against
 the insurer in favor of coverage; and
- 13 • To the extent policy language is ambiguous, the ambiguity must be resolved in
 14 favor of the insured.

15 In defiance of these basic principles of insurance contract interpretation, when presented
 16 with claims for COVID Losses, Zurich turned its back on substantially all of its Zurich Edge
 17 policyholders who paid premiums believing that they had insurance coverage for precisely the type
 18 of losses they suffered.

19 Zurich’s position is undercut by its own conduct. Zurich attached the Virus Deletion
 20 Endorsement to its Zurich Edge Policies issued to policyholders with no Louisiana locations.³ But
 21 even worse for Zurich, in the Fall of 2020, Zurich sought and received approval for a revised
 22 Louisiana Amendatory Endorsement to the Zurich Edge Policy that now states: “**THIS**
 23

24 ³ See, e.g., Ex. B (policy filed in *Detroit Entertainment, L.L.C. v. American Guarantee & Liability Ins. Co.*, No. 21-
 25 002630-CB (Mich. Cir. Ct., Wayne Cty.)) and Ex. C (policy filed in *Empire Resorts, Inc., et al. v. American Guarantee
 & Liability Ins. Co.*, Index No. 704789/2021 (N.Y. Sup. Ct., Queens Cty.)). The Court may take judicial notice of the
 26 publicly available documents discussed in this brief. See *United States v. Sanford*, No. CR19-0172JLR, 2020 WL
 2114402, at *3 n.3 (W.D. Wash. May 4, 2020) (Court may “take judicial notice of the undisputed and publicly
 available information displayed on government websites”).

1 **ENDORSEMENT ONLY APPLIES TO LOCATIONS IN LOUISIANA**” (the “Modified
 2 Louisiana Endorsement”). This language is absent in the Virus Deletion Endorsement contained
 3 in the HT-Seattle Zurich Edge Policy and other Edge Policies for which Zurich has denied
 4 coverage across the country and around the globe.

5 Zurich’s conduct after the fact in adding an express geographical limitation in the new
 6 Modified Louisiana Endorsement absent from the Virus Deletion Endorsement is either conclusive
 7 evidence that the Virus Deletion Endorsement as it appears in the Zurich Edge Policy
 8 unambiguously applies to the whole Policy or, at a minimum, concedes a prior ambiguity that must
 9 be resolved in favor of coverage for the insured – the Plaintiff. At a minimum, this revelation
 10 requires discovery into the circumstances behind why, subsequent to the emergence of the COVID
 11 Losses, Zurich added a Louisiana geographical limitation into a Virus Deletion Endorsement that
 12 had no such limitation, but yet failed to add such a geographical limitation to its Edge Policy’s
 13 many other state-titled endorsements without such a limitation, and requires that Zurich’s motion
 14 to be dismiss be denied.

15 The proper application of the Virus Deletion Endorsement affects a significant number of
 16 policyholders and insured risks across the globe and currently is one of the most contested
 17 coverage issues concerning the COVID Losses, as the claims asserted under the Zurich Edge
 18 Policy are being litigated in state and federal courts across the country.⁴ Accordingly, below UP
 19

20 ⁴ See, e.g., *Capri Holdings Limited v. Zurich Am. Ins. Co., et al.*, No. BER-C-C21-21 (N.J. Sup. Ct., Bergen Cty.);
 21 *Detroit Entertainment, L.L.C. v. American Guarantee & Liability Ins. Co.*, No. 21-002630-CB (Mich. Cir. Ct., Wayne
 22 Cty.); *Empire Resorts, Inc., et al. v. American Guarantee & Liability Ins. Co.*, Index No. 704789/2021 (N.Y. Sup. Ct.,
 23 Queens Cty.); *Fitness International, LLC v. Zurich Am. Ins. Co., et al.*, No. 21-2-00261-3 SEA (Wash. Sup. Ct., King
 24 Cty.); *Watson Woods Healthcare, Inc., et al. v. Zurich Am. Ins. Co.*, No. 1:21-cv-01150 (N.D. Ill.); *Procaccianti*
 25 *Companies, Inc., et al. v. Zurich Am. Ins. Co.*, No. 1:20-cv-00512-WES-PAS (D.R.I.); *Lindenwood Female College*
 26 *v. Zurich Am. Ins. Co.*, No. 4:20-cv-01503 (E.D. Mo.); *P.F. Chang’s China Bistro, Inc., et al. v. Certain Underwriters*
at Lloyd’s of London, et al., No. 20STCV17169 (Cal. Sup. Ct, Los Angeles Cty.); *AECOM v. Zurich Am. Ins. Co.*,
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 Francisco Cty.); *Qdoba Restaurant Corp. v. Zurich Am. Ins. Co.*, No. 20-cv-3575 (D. Colo.); *Tavistock Restaurant*
Group, LLC v. Zurich Am. Ins. Co., No. 20-CH-5086 (Ill. Cir. Ct., Cook Cty.); *Tom James Co. v. Zurich Am. Ins. Co.*,
 No. 49D01-2004-PL-013613 (Ind., Marion Cty.); *WP 6 Restaurant Management Group, LLC v. Zurich Am. Ins. Co.*,
 No. 20-cv-01506 (D. Nev.); *Spottswood Companies, Inc. v. Zurich Am. Ins. Co.*, No. 20-cv-10077 (S.D. Fla.); *Ross*
Stores v. Zurich Am. Ins. Co., et al., No. RG20084158 (Ariz. Super. Ct., Alameda Cty.); *In-N-Out Burgers v. Zurich*
Amer. Ins. Co., No 8:20-cv-01000 (C.D. Cal.); *Firebirds International LLC v. Zurich Am. Ins.*, No. 2020-CH-05360

1 addresses each of Zurich’s arguments as to why the Virus Deletion Endorsement does not apply
 2 to the entire Policy. Each is meritless. It was incumbent upon Zurich, as the drafter of the Edge
 3 Policy, to clarify its intention within the plain language of the Policy. It cannot wait until after a
 4 claim is filed to craft its arguments to deny coverage. Indeed, the law of insurance policy
 5 interpretation requires the precise opposite result...in favor of coverage for the insured.

6 **II. ARGUMENT**

7 **A. Defendant Seeks to Upend Long-Established Rules of Insurance Policy** 8 **Interpretation**

9 **1. The Titles Provision expressly prohibits attaching meaning to Virus Deletion** 10 **Endorsement’s title.**

11 Under Washington law, when interpreting the language of an insurance policy, “the entire
 12 contract must be construed together so as to give force and effect to each clause.” *Transcontinental*
 13 *Ins. Co. v. Washington Public Utilities Districts’ Utility System*, 111 Wn.2d 452, 456, 760 P.2d
 14 337 (1988). The insurance policy “should be given a practical and reasonable interpretation that
 15 fulfills the intent of the parties, that is, a construction such as would be given by the average person
 16 purchasing insurance.” *McMahan & Baker, Inc. v. Continental Cas. Co.*, 68 Wn. App. 573, 578,
 17 843 P.2d 1133 (1993). Where the “policy language is clear and unambiguous,” the Supreme Court
 18 of Washington has held “we must enforce it as written; we may not modify it or create ambiguity
 19 where none exists.” *Quadrant Corp. v. American States Ins. Co.*, 154 Wn.2d 165, 171, 110 P.3d
 20 733 (2005).

21 According to the Policy’s plain language, titles cannot be used to interpret the Policy and
 22 must be given no meaning or effect:

23 6.20. TITLES

24 The titles of the various paragraphs and *endorsements* are solely for
 25 reference and *shall not in any way* affect the provisions to which

26 (Ill. Cir. Ct., Cook Cty.); *Foot Locker, Inc., et al. v. Zurich Am. Ins. Co.*, No. C-704784 (La.); *Designer Brands, Inc.*
v. Zurich Am. Ins. Co., No. 2021-CH-844 (Ill. Cir. Ct., Cook Cty.); *Wild Holdings LP, et al. v. Zurich Am. Ins. Co.*,
 No. 2021-CH-949 (Ill. Cir. Ct., Cook Cty.).

1 they relate.

2 (Policy § 6.20; ECF No. 19-1, p. 74) (emphasis added). Because this provision “is clear and
3 unambiguous, the court must enforce it as written and may not modify the contract or create
4 ambiguity where none exists.” *Mount Zion Lutheran Church v. Church Mutual Insurance*
5 *Company*, 8 Wn. App. 461, 467, 442 P.3d 22 (2019) (citing *Transcontinental Ins. Co. v.*
6 *Washington Public Utilities Districts’ Utility System*, 111 Wn.2d 452, 456, 760 P.2d 337 (1988)).

7 Thus, the fact that the Virus Deletion Endorsement in the Zurich Edge Policy is titled
8 “Amendatory Endorsement – Louisiana” has no relevance to, and should not be considered in,
9 determining the scope of the exclusion. Indeed, the insurance marketplace is full of provisions,
10 endorsements and policy forms whose titles and headings have no relevance to the actual scope
11 and meaning of the provisions themselves. *See, e.g., Sylvester & Sylvester, Inc. v. State Auto. Mut.*
12 *Ins. Co.*, No. 2020-cv-00817, 2021 WL 137006, at *5 (Ohio Ct. Com. Pl. Jan. 7, 2021) (applying
13 “Food-Borne Illness” endorsement to COVID-19 business interruption claim where endorsement
14 “contains no limitation that the risk must be related to food, but rather applies to ‘a contagious or
15 infectious disease,’” explaining “the scope of coverage is determined not by the headings or titles
16 used by the insurer, but by the policy language itself”).

17 Zurich seeks to have this Court ignore a standard policy provision (included in the policy
18 by Zurich itself) that directs policyholders to rely on the terms and conditions of the policy itself
19 to determine the scope of coverage without regard to headings and titles. Courts across the nation
20 have consistently rejected similar attempts. *See, e.g., Welch Foods, Inc. v. National Union Fire*
21 *Ins. Co. of Pittsburgh, PA et al.*, 659 F.3d 191, 193 (1st Cir. 2011) (enforcing provision stating
22 “[t]he descriptions in the headings of this policy are solely for convenience, and form no part of
23 the terms and conditions of coverage”); *MDL Capital Mgmt., Inc. v. Fed. Ins. Co.*, 274 F. App’x
24 169, 171 (3d Cir. 2008) (holding “District Court overlooked the caution in the binder providing
25 that the titles of the endorsements ‘are for convenience only’”); *Pine Bluff Sch. Dist. v. Ace Am.*
26 *Ins. Co.*, 984 F.3d 583, 593 (8th Cir. 2020) (rejecting use of section header to interpret coverage

1 where policy explicitly stated “[t]he titles and headings to [the] endorsements of the Policy are
2 included solely for ease of reference [and] do not in any way limit, expand or otherwise affect the
3 provisions of such parts, sections, subsections or endorsements.”); *Miami-Luken, Inc. v.*
4 *Navigators Ins. Co.*, No. 1:16-cv-876, 2018 WL 3424448, at *7 (S.D. Ohio July 11, 2018)
5 (rejecting argument that heading in policy is relevant to scope of coverage where policy explicitly
6 precluded headings from terms and conditions of coverage); *Beaufort Rentals LLC v. Westchester*
7 *Fire Ins. Co.*, No. 9:18-cv-02658-DCN, 2018 WL 6248770, at *4 (D.S.C. Nov. 29, 2018) (rejecting
8 argument that exclusion contained in endorsement titled “Property Manager and Real Estate” only
9 applied to property management when policy explicitly precluded headings from defining scope
10 of coverage).

11 This Court should likewise reject Zurich’s attempt to ignore this clear and unambiguous
12 policy provision.

13 **2. State-titled endorsements without geographic limitations – like the Virus**
14 **Deletion Endorsement – apply to the entire policy.**

15 Courts regularly apply state-titled endorsements to the entire policy where there is no
16 express geographical limitation within the provision.

17 Directly on all fours with this action is *John Akridge Co. v. Travelers Cos.*, 837 F. Supp. 6
18 (D.D.C. 1993). There, a property insurer asserted that a coverage action related to property damage
19 that occurred in Washington, D.C., was time-barred by the policy’s two-year contractual
20 limitations period. *Id.* at 7. The policyholder, on the other hand, argued that a three-year limitations
21 period in an endorsement titled “Maryland Changes” applied. *Id.* The parties advanced similar
22 arguments to those presented here:

23 Travelers maintains that the title of this endorsement—“Maryland
24 Changes”—makes it clear that this modification to the policy was intended
25 to apply only to properties located in Maryland. [The policyholder]
26 JAC contends that while the title of the endorsement indicates that it was
created because of changes in Maryland state law, neither the title nor the
language of the endorsement in any way limits its application to Maryland
properties. Hence, JAC argues, the endorsement changed the suit
limitations period to three years for all properties covered by the policy, not
just the Maryland properties, and the instant lawsuit cannot be time-barred.

1 *Id.* at 8. The *Akridge* court agreed with the policyholder’s interpretation for two reasons and held
2 that the “Maryland Changes” endorsement applied policy wide – not just to Maryland locations.
3 First, “no language in the endorsement limits its application to insured property located in
4 Maryland.” *Id.* Second, the court noted that other endorsements the insurer had issued in other
5 policies *did* use geographically limiting language. These other endorsements showed that “had
6 Travelers wished to limit its endorsement to insured property located in Maryland, it was more
7 than capable of doing so.” *Id.* Likewise, Zurich has included geographic limitations in some of
8 its state-titled endorsements in *this policy*, but *not* in the Virus Deletion Endorsement.

9 Thus, when insurers like Zurich fail to use geographically limiting language in the
10 endorsement itself, courts consistently refuse to read that limitation into the policy or, as the court
11 in *Arch Specialty Ins. Co. v. Cline* phrased it, refuse to make that “leap”:

12 Although the endorsement is titled “New York Amendatory
13 Endorsement,” nowhere in the Subject Policy or the endorsement is the
14 endorsement limited to applicability solely in New York State. Rather,
15 even above the title “New York Amendatory Endorsement” the
16 endorsement proclaims in bold, capital letters that “[t]his endorsement
17 changes the policy.” The Court simply cannot make the logical leap from
the document containing “New York” in its title to the document only
applying in New York, when no other language supports such a
construction and such a construction would make the entire endorsement
surplusage.

18 No. 10-2114-STA-dkv, 2012 WL 12823706 (W.D. Tn. Dec. 4, 2012) (applying “New York
19 Amendatory Endorsement” to exclude coverage policy wide even though claim arose in
20 Tennessee).

21 Indeed, an insurer’s failure to use geographically limiting language subjects the
22 endorsement to more than one reasonable interpretation – mandating its construction in favor of
23 the insured. In *Security Storage Properties v. Safeco Ins. Co. of Am.*, a Kansas federal court
24 analyzed this exact issue in a policy containing Texas and Kansas titled endorsements, neither of
25 which included geographically limiting language. No. 09–1036– WEB–DWB, 2010 WL 1936127,
26 at *5 (D. Kan. May 12, 2010). The court found the endorsements ambiguous, explaining “the

1 actual terms of this policy are susceptible to more than one reasonable construction, and nothing
2 in the policy necessarily ties application of the [state] endorsement to any damage claim arising
3 out of property located in that state,” thus “[t]he policy is ambiguous in this respect.” *Id.* at *5-6.
4 “Because the policy fails to make clear that the Texas rather than the Kansas endorsement must be
5 applied to the plaintiffs’ claim,” the court applied the interpretation favorable to the insured. *Id.*
6 at *6.

7 As these cases make clear, a court is required to look at the entire policy when enforcing
8 an insurance contract, including state-titled endorsements. Where such endorsements do not
9 include geographically limiting language, they apply policy wide. To the extent there is a conflict
10 between these provisions and the rest of the policy (including other endorsements), it must be
11 resolved in favor of the policyholder and against the insurer, who drafted the policy in the first
12 place. This makes sense. If the law were otherwise, it would allow insurers to consciously
13 introduce ambiguities and pivot as necessary to deny coverage. But the law prohibits this.

14 **3. Other State-Titled Endorsements in the Zurich Edge Policy make clear the**
15 **Virus Deletion Endorsement is not Limited to a Specific State.**

16 Exclusions – such as the Virus Deletion Endorsement, which modifies the Contamination
17 Exclusion by deleting virus, pathogen or pathogenic organism and disease causing or illness
18 causing agent from its ambit – must be strictly construed against the drafter because exclusions
19 are “contrary to the fundamental protective purpose of insurance.” *Vision One, LLC v.*
20 *Philadelphia Indem. Ins. Co.*, 174 Wn.2d 501, 512, 276 P.3d 300 (2012). *See also Safeco Ins. Co.*
21 *of Am. v. Davis*, 44 Wn. App. 161, 166 (1986) (“If Safeco intended to simply exclude coverage for
22 unlicensed and underage[] drivers, it could have done so in clear terms.”).

23 Had Zurich wanted to limit the Virus Deletion Endorsement’s geographic scope it could
24 have done so in the terms and conditions just as it did in other endorsements. For example, the
25 Policy’s Connecticut endorsement states: “**THIS ENDORSEMENT CHANGES THE POLICY**
26 **AND APPLIES TO THOSE RISKS IN CONNECTICUT.**” (Policy; ECF No. 19-1, p. 87) (italics)

1 added). The Policy’s New York endorsement similarly states: “**THIS ENDORSEMENT**
 2 **CHANGES THE POLICY AND APPLIES TO THOSE RISKS IN NEW YORK.**” (Policy; ECF
 3 No. 19-1, p. 135) (italics added).

4 Because other state-titled endorsements in the Zurich Edge Policy clearly and
 5 unambiguously limit their application to only property located in a specific state, and the Virus
 6 Deletion Endorsement *does not*, the Virus Deletion Endorsement must be construed strictly against
 7 Zurich to apply to the entire Policy.

8 **B. Zurich’s Recently Amended Louisiana Endorsement Adding a Geographical**
 9 **Limitation Confirms the Virus Deletion Endorsement Has None**

10 Zurich recently has been seeking regulatory approval for a new Edge II Policy form, which
 11 would re-insert virus, pathogen or pathogenic organism and disease causing or illness causing
 12 agent back into the Louisiana state-titled endorsement and therefore re-insert them into the
 13 Contamination Exclusion. At least one state regulator disapproved of the form in 2020.⁵

14 Notwithstanding, in the Fall of 2020, well after it began receiving claims for COVID
 15 Losses and being sued across the United States, Zurich sought and received approval for a revised
 16 Louisiana endorsement to the Zurich Edge Policy.⁶ In its regulatory filing, Zurich described the
 17 proposed amendment as follows:

18 Pursuant to La. Stat. § 22:885(B), Zurich North America and all affiliated companies
 19 are updating Louisiana Amendatory Endorsements. *The change removes language*
 20 *concerning premium refunds* attributable to mortgagees when there is a policy
 cancellation. *The only changes are those in the above referenced code.*

21 Ex. D at 3, 13 (emphasis added). However, in addition to removing the language concerning
 22

23 ⁵ See Ex. D (New York EDGE II Filing) at 2, 6 (submitted to New York on April 3, 2020; disapproved on September
 24 22, 2020). This document was retrieved from the System for Electronic Rate and Form Filing (SERFF) created by the
 National Association of Insurance Commissioners (NAIC) for submitting and accessing filings. SERFF is the official
 system used by most states in the United States.

25 ⁶ See Ex. E (Louisiana EDGE Endorsement Filing, the “Modified Louisiana Endorsement”) at 2, 6 (submitted to
 26 Louisiana on August 31, 2020; approved on September 8, 2020). This document was also retrieved from SERFF. See
 also Ex. F (Modified Louisiana Endorsement as filed as an exhibit to the complaint in *Watson Woods Healthcare,*
Inc., et al. v. Zurich Am. Ins. Co., No. 1:21-cv-01150 (N.D. Ill.)).

1 premium refunds, Zurich also added: “**THIS ENDORSEMENT ONLY APPLIES TO**
2 **LOCATIONS IN LOUISIANA.**” *Id.* at 14. This geographically limiting language is absent in
3 the Virus Deletion Endorsement contained in the HT-Seattle Zurich Edge Policy and other Edge
4 Policies for which Zurich has denied coverage across the country and around the globe. It is also
5 the only amendment to the Zurich Edge Policy that Zurich has sought and received since the
6 emergence of the Coronavirus, COVID-19 and the ensuing massive COVID Losses.

7 This Court may consider this extrinsic evidence in determining whether the Virus Deletion
8 Endorsement is ambiguous. *See Churchill v. Factory Mut. Ins. Co.*, 234 F. Supp. 2d 1182 (W.D.
9 Wash. 2002). Indeed, under analogous facts in *Churchill*, Judge Thomas S. Zilly of this Court
10 held that an insurer’s subsequent addition of exclusionary language in a policy supported the
11 policyholder’s position that the exclusion *did not* apply to the earlier policy issued to the
12 policyholder. *Churchill*, 234 F. Supp. 2d at 1190.

13 That is precisely the situation here – Zurich’s addition of the geographical limitation to the
14 Virus Deletion Endorsement in the Modified Louisiana Endorsement support’s HT-Seattle’s
15 position that *no such geographical limitation applied in the first place*. Specifically, Judge Zilly
16 explained:

17 The Estate points to FM’s removal of the mold exclusion in the transition from the
18 Form 2000 policy to the Form 3000 policy, and FM’s subsequent reinsertion of the
19 mold exclusion in the Global Advantage policies, as support for its position that the
20 Form 3000 does not contain a mold exclusion. FM claims that the reinsertion of
21 the mold exclusion into the Global Advantage policies was merely for emphasis
22 and that FM was being redundant. [...] **The Estate’s interpretation should**
23 **control because the Court must interpret a contract so as to give effect to each**
provision. *McDonald v. State Farm Fire & Cas. Co.*, 119 Wash.2d 724, 734, 837
P.2d 1000 (1992). **Thus, FM’s explanation that the reinsertion of the mold**
exclusion was redundant and merely for emphasis runs contrary to principles
of contract interpretation.

24 *Churchill*, 234 F. Supp. 2d at 1190 (emphasis added). Thus, any argument Zurich might make that
25 it merely inserted the new geographic restriction to be redundant or to emphasize a geographic
26 restriction that already existed in the endorsement is meritless. Such an interpretation would render

1 the newly inserted language meaningless surplusage, rather than giving every provision effect, in
2 violation of Washington law and general principles of insurance contract construction.

3 **C. Zurich’s Remaining Arguments Cannot Change the Meaning and Applicability of**
4 **the Virus Deletion Endorsement.**

5 Zurich’s remaining arguments are without merit. First, the McCarran-Ferguson Act has no
6 relevance here. (MTD p. 11; ECF No. 19). This is an insurance contract case – *not* an insurance
7 regulation case. The insured had nothing to do with any discussions between Zurich and the
8 regulators; nor is it asking the Court to allow Louisiana to regulate Zurich outside of Louisiana. It
9 is simply asking the Court to enforce the plain language of the pre-printed contract that Zurich
10 drafted.

11 Second, Zurich’s reliance on purported conflicting provisions among the endorsements
12 does not affect the application of the Virus Deletion Endorsement. (MTD p. 12; ECF No. 19). To
13 the extent there is a conflict between state-titled endorsements without express geographic
14 limitations, the insurer has created an ambiguity that must be resolved in favor of the policyholder.
15 *See Am. Star Ins. Co. v. Grice*, 121 Wn.2d 869, 875, 854 P.2d 622 (1993) (“ambiguity exists if the
16 language is fairly susceptible to two different reasonable interpretations [and] ambiguities in
17 insurance contracts are construed against the insurer.”); *Riley v. Viking Ins. Co. of Wisconsin*, 46
18 Wn. App. 828, 830, 733 P.2d 556 (1987) (most favorable meaning to the insured is applied “even
19 though the insurer may have intended another meaning”). For example, the Policy’s state-titled
20 endorsements have differing periods by which the policyholder must sue Zurich and under the
21 above principles, the policyholder would receive the *longest* time period in those provisions – the
22 one providing the broadest coverage.

23 Zurich ignores this bedrock principle of insurance contract construction in support of its
24 position, arguing “[i]f courts were to hold otherwise, policies would be reduced to conflicting
25 provisions making it *impossible* to issue a policy covering more than one state.” (MTD. p. 12;
26 ECF No. 19) (emphasis added). Zurich’s self-serving statement is not credible. Zurich, as the
Policy’s drafter, is in the best (and, indeed, the only) position to avoid these conflicts. Zurich

1 chose to include the Titles Provision in the Policy, and to include all of the state-titled
 2 Endorsements in the Policy – even to those issued to policyholders who have no property in
 3 Louisiana. Thus, Courts will properly apply state-titled endorsements to the entire policy even if
 4 there is a conflict, resolving the conflict in favor of coverage for the insured, not in favor of the
 5 insurer that drafted the policy and created the ambiguity. *See, e.g., John Akridge Co. v. Travelers*
 6 *Cos.*, 837 F. Supp. 6 (D.D.C. 1993).

7 Nevertheless, the Virus Deletion Endorsement is the only endorsement in the Zurich Edge
 8 Policy to delete virus, pathogen or pathogenic organism and disease causing or illness causing
 9 agent from the Contamination Exclusion, so as a practical matter there is no conflict. Indeed, it is
 10 the sole endorsement in the Zurich Edge Policy to even mention these things.

11 Finally, the only cases Zurich relies upon in support of its geographic limitation argument
 12 – three unpublished district court decisions – are distinguishable and irrelevant to the issues before
 13 this Court.⁷ In short, none of these cases involved “all-risk” policies, let alone any analysis of
 14 policies that included a Titles Provision expressly prohibiting consideration of state titles in the
 15 application of insurance coverage. Accordingly, Zurich’s reliance on these cases for the sweeping
 16 proposition that “courts recognize that state-specific amendatory endorsements are applied only to
 17 the state that the endorsement refers to” (MTD p. 11; ECF No. 19) is disingenuous at best.

18 **III. CONCLUSION**

19 On behalf of policyholders in Washington and nationwide, we trust this Court will find the
 20 above points helpful in resolving the issues raised in Defendant’s Motion to Dismiss.

21 DATED this 5th day of March, 2021.
 22

23 ⁷ See MTD pp. 11-12 (ECF No. 19) citing *Menard v. Gibson Applied Tech. & Eng’g, Inc.*, No. 16-498, 2017 WL
 24 6610466 (E.D. La. Dec. 27, 2017) (finding plaintiff had no right of direct action under Louisiana’s direct action statute
 25 nor a Louisiana direct action endorsement, because plaintiff was not an intended third-party beneficiary of the policy),
 26 *Tomars v. United Fin. Cas. Co.*, No. 12-CV-2162 (JNE/HB), 2015 WL 3772024 (D. Minn. June 17, 2015) (addressing
 whether Minnesota law superseded an Ohio endorsement as applied to risks in Minnesota, with no discussion of title
 of endorsement), and *Kamp v. Empire Fire & Marine Ins. Co.*, No. 3:12-CV-904-JFA, 2013 WL 310357 (D.S.C. Jan.
 25, 2013) (declining to extend excess UM benefits where form policy unambiguously excluded excess UM coverage
 and no state-specific endorsement granted UM coverage back).

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DATED this 5th day of March, 2021.

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CERTIFICATE OF SERVICE

I hereby certify that on March 5, 2021, a copy of the foregoing was filed electronically and served by mail on anyone unable to accept electronic filing. Notice of this filing will be sent by e-mail to all parties by operation of the court's electronic filing as indicated on the Notice of Electronic Filing. Parties may access this filing through the court's CM/ECF System.

Signed at Seattle, Washington this 5th day of March, 2021.

s/Maria Tiegen

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