No. 861158

IN THE COURT OF APPEALS FOR THE
STATE OF WASHINGTON, DIVISION I

TULALIP TRIBES OF WASHINGTON, federally recognized Indian Tribes, and TULALIP GAMING ORGANIZATION, an instrumentality and enterprise of Tulalip Tribes of Washington,
Appellants,
v.
LEXINGTON INSURANCE COMPANY; et al.
Respondent.

UNITED POLICYHOLDERS' AMICUS CURIAE BRIEF IN SUPPORT OF APPELLANTS

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INTEREST OF *AMICUS CURIAE*

United Policyholders ("UP") is a non-profit organization whose mission is to serve as an effective voice and a source of information for insurance consumers around the country. UP is funded by donations and grants. It does not sell insurance or accept money from insurers.

Unlike insurers, individual policyholders are not repeat players on insurance coverage issues. UP works to provide an intellectual counterweight to the legal arguments made by the insurance industry, in order to help facilitate the evenhanded development of insurance law. During the COVID-19 pandemic, UP's commitment to advocating for policyholders' rights to coverage for their devastating losses is more vital than ever. With the Court's leave, UP seeks to assist the Court on an issue of immense public importance—coverage for losses

caused by SARS-CoV-2 and COVID-19—by identifying arguments and authorities that have escaped the Court's attention to date, including the history of the relevant policy language and responses to points made by the insurer and insurance industry generally in COVID-19 coverage suits. *See* RAP 10.6(a)-(b).

MEMORANDUM OF POINTS AND AUTHORITIES

INTRODUCTION

UP, by and through the undersigned counsel, respectfully submits this Memorandum of Points and Authorities *Amicus Curiae* in support of Appellants Tulalip Tribes of Washington and Tulalip Gaming Organization (the "Tribes"). *Amicus* support in this matter seeks to enforce the goals of Washington insurance law, which protects policyholders and seeks to promote a fair insurance marketplace. This memorandum reaches the Court at a moment when

established state law and appellate authority are at risk of erosion due to the misapplication of Washington Supreme Court precedent. Course correction is possible and necessary to protect Washington policyholders from overreach by insurers.

ARGUMENT

I. The district court erred in holding that COVID-19/SARS-CoV-2 could not cause "direct physical loss or damage" to property, which remains an open question in Washington.

Whether communicable diseases, like COVID-19, and viruses that transmit them, like SARS-CoV-2, can result in "direct physical loss or damage" sufficient to trigger a standard "all-risk" commercial property insurance policy is not entirely settled as a matter of law in Washington.

A. The Washington Supreme Court created a pathway to answer whether communicable diseases can physically alter property to the extent of causing physical loss or damage to the property.

The Washington Supreme Court invited litigation to answer whether communicable diseases like COVID-19 (or viruses like SARS-CoV-2) can trigger coverage under a loss of functionality theory. The Appellants here bring forth such a claim. *See* TAC ¶¶ 125, 127, 129.

In *Hill & Stout, PLLC v. Mutual of Enumclaw Insurance Company*, a dental practice ("HS") sued its insurer for denying coverage for losses incurred due to Governor Inslee's COVID-related prohibitions on nonemergency dental care. The insurance policies in question provided coverage for business income lost due to "direct physical loss of or damage to" the properties, and importantly, contained an exclusion barring coverage for damage or loss caused "directly or indirectly

by… [a]ny virus…" (the "Virus Exclusion") *Id.* at 212. HS argued the Governor's Proclamation had interfered with the intended use of its property. The court dismissed HS's claim because the Proclamation itself did not cause "direct *physical* loss…" but rather, "*constructive* loss of" the property's intended use. *Id.* (emphasis added). Further, because the causal chain of loss was "initiated by COVID-19," the policy's standard Virus Exclusion prevented recovery. *Id.*

The Supreme Court in *Hill & Stout* declined to consider whether *the presence of COVID-19 itself* could cause "direct physical loss or damage" to property because the insured did not bring a claim under that theory of coverage—the insured's theory was based only on government orders depriving it of the use of its property. *Id.* at 217, n.4. In declining to stretch HS's case beyond its facts, the Supreme Court carved out an

important path to coverage for COVID-19-related losses where (1) there is no Virus Exclusion, and (2) the policyholder bases its claim on the actual presence of COVID-19 and its impact on property. The Supreme Court critically rejected the insurer's contention that a hazard must cause "physical alteration" to property to have caused "direct physical loss or damage," explaining "there are likely cases in which there is *no physical alteration* to the property but there is a direct physical loss under a theory of loss of functionality." *Id.* at 221-22 (emphasis added).

In so holding, the Supreme Court set forth a pathway to coverage by providing a non-exhaustive list of ways in which a policyholder could show "direct physical loss" through a "loss of functionality." *Id.* These include: (1) "alleged imminent danger to the property;" (2) "contamination with a problematic substance;" (3)

something "that physically prevented use of the property or rendered it useless;" or (4) where property is "rendered unsafe or uninhabitable because of a dangerous physical condition." *Id.* Moreover, the Supreme Court concluded that "direct physical loss" may be ambiguous "to the extent that this phrase could mean the property is completely physically destroyed or is no longer physically in the insured's possession, or the insured is physically incapable of using the property" due to some physical phenomenon. *Id*. at 225.

The Washington Supreme Court reinforced a pathway to coverage via showing a "loss of functionality" in *Seattle Tunnel Partners v. Great Lakes Reinsurance (UK) PLC*, 200 Wn.2d 315 (2022) ("*STP*"). There, policyholders sought to recover losses under a builder's risk policy triggered by "direct physical loss" after losing use of a traffic tunnel for two years due to a failure of a

tunnel boring machine. *Id*. at 319. The insurer argued that "direct physical loss" required a "physical alteration" of property—*i.e.*, more than a mere "loss of use" of property. *Id*. at 338. The Supreme Court disagreed. Instead, the Court held that "direct physical loss" can encompass a "Loss of Use or Functionality" so long as the loss was "a result of or caused by some physical condition that impacts the property." *Id*. at 340-43 (presenting dictionary definitions and case law).

As the Appellant Tribes have explained in their briefing, they have pleaded the precise type of "direct physical loss" via a "loss of functionality" that the Supreme Court outlined in *Hill & Stout* and *STP*.

B. The "loss of functionality" test is consistent with the broad promise of policies covering "all-risks" of "direct physical loss or damage."

The phrase "direct physical loss or damage" forms the core organizing principle of present-day "all-risks"

property insurance policies. In first-party insurance, as with the TPIP program the Tribes purchased here, it is well-settled that "direct" under Washington law means that a non-excluded risk has proximately caused the loss or damage. *See McDonald v. State Farm Fire & Cas. Co.*, 837 P.2d 1000, 1004 (Wash. 1992). "Physical" means "having material existence; … of or relating to material things."[1] Its use indicates that the program covers risks to material objects (*e.g.*, a building) from material risks (*e.g.*, a fire, or as here, COVID-19). The use of "physical" makes clear the policy does not cover legal or abstract types of damage or loss, *e.g.*, loss of title. *Nevers v. Aetna Ins.*, 546 P.2d 1240, 1240 (Wash. Ct. App. 1976) (loss of boat due to defective title not physical loss or damage).

[1] Physical, *Merriam-Webster.com*, https://www.merriam-webster.com/dictionary/physical (last visited June 12, 2024).

When interpreting a policy, courts must "give[] meaning to all provisions" and cannot "render some superfluous or meaningless." *Bogomolov v. Lake Villas Condo. Ass'n of Apartment Owners*, 127 P.3d 762, 766 (Wash. Ct. App. 2006). Where all-risk policies like the TPIP program at issue here uses the word "*or*" between the words "loss" or "damage," then the words "loss" and "damage" must given different, independent meanings.

Physical "loss" focuses on the inability of property to fulfill its intended function due to physical impairment; whereas physical "damage" focuses on injury that impairs value or usefulness relating to material things. "Loss" means "the partial or complete deterioration or *absence of physical capability or function*."[2] In other words, "loss" means "being deprived

[2] Loss, *Merriam-Webster.com*, https://www.merriam-webster.com/dictionary/loss (last visited June 12, 2024)

of, or the failure to keep" some object. In common speech, loss means no longer having effective possession of something. An incumbent's loss of her office does not imply, in common speech, damage to that office; simply that she no longer possesses it. Moreover, one may "lose" something without suffering a complete dispossession, particularly when it relates to physical spaces, as in, "I was going to watch the game, but I lost the living room to my in-laws."

"*Damage*" means "loss or harm resulting from injury to person, property, or reputation."[3] It can also mean "[i]njury, harm; esp. *physical injury* to a thing, such as *impairs its value or usefulness*."[4] By its plain

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(emphasis added).

[3] Damage, *Merriam-Webster.com*, https://www.merriam-webster.com/dictionary/damage (last visited June 12, 2024).

[4] Damage, *OED.com*, https://www.oed.com/view/Entry/47005 (last visited

terms, then, the insuring clause covers both loss of property and damage to it originating from a physical phenomenon. *See STP*, 200 Wn.2d at 340-43. Indeed, an ordinary person would understand that a first-party policy covers, for example, both damage to his or her property ("physical damage") and partial or complete "physical loss" of the same. This language must, as a matter of law, be interpreted broadly in favor of the policyholder. *Feenix Parkside LLC v. Berkley N. Pac.*, 8 Wash. App. 2d 381, 394 (2019) (property insurance policies "are liberally construed to provide coverage wherever possible").

C. Decades of decisions confirm that property rendered unfit for its intended use (*i.e.*, property that has lost its functionality) has suffered "physical loss or damage."

Before the COVID-19 pandemic, courts

June 12, 2024) (emphasis added).

consistently held that "direct physical loss or damage"—a term commonly used in property insurance policies since the 1950s—applies to situations in which the functional use of real property is limited by the presence of an unpleasant or deadly substance ***regardless*** of structural alteration.[5] While COVID-19 was a novel communicable disease, the physical impacts on property the SARS-CoV-2 virus that spreads the disease are comparable to prior court decisions finding that property rendered unfit for its intended use because of a physical risk—as by smoke from forest fires, toxic dust, or potentially deadly microscopic viruses—was entitled to coverage even if the property had not been

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[5] *See* Richard P. Lewis, et al., *Couch's "Physical Alteration" Fallacy: Its Origins and Consequences*, 56:3 Tort, Trial & Insurance Practice Law Journal 621 (Fall 2021), available at https://ssrn.com/abstract=3916391.

structurally altered.[6] Indeed, from the 1950s through the 1990s, courts consistently have found non-structural losses to be covered under "physical loss or damage."[7]

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[6] *See, e.g.*, *Gregory Packaging, Inc. v. Travelers Prop. Cas. Co. of Am.*, No. 2:12-cv-04418 (WHW)(CLW), 2014 WL 6675934, at *5-6 (D.N.J. Nov. 25, 2014) (concluding that "property can sustain physical loss or damage without [] structural alteration" and holding that ammonia discharge caused "direct physical loss or damage" because "heightened [] levels rendered the facility unfit for occupancy until the ammonia could be dissipated"); *Or. Shakespeare Festival Ass'n v. Great Am. Ins.*, No. 1:15-cv-01932-CL, 2016 WL 3267247, at *5-6 (D. Or. June 7, 2016) (smoke from wildfires), *vacated by joint stipulation*, No. 1:15-cv-01934203 (D. Or. Mar. 6, 2017).

[7] *See, e.g., Am. All Ins. V. Keleket X-Ray Corp.*, 248 F.2d 920, 925 (6th Cir. 1957) (release of radon dust and gas); *W. Fire Ins. V. First Presbyterian Church*, 437 P.2d 52, 54 (Colo. 1968) (en banc) (gasoline vapors making "use of the building dangerous" amounted to a "direct physical loss"); *Cyclops Corp. v. Homes Ins.*, 352 F. Supp. 931, 937 (W.D. Pa. 1973) (coverage for loss caused by vibration of a motor); *Largent v. State Farm Fire & Cas. Co.*, 842 P.2d 445-446 (Or. Ct. App. 1992) (insurer conceded methamphetamine fumes could cause "direct physical loss"); *Farmers Ins. v. Trutanich*, 858 P.2d 1332, 1335 (Or. Ct. App. 1993) (methamphetamine odor); *Arbeiter v. Cambridge Mut.*

Similar rulings continued into the 2000s,[8] when insurers paid claims for losses caused by an earlier novel coronavirus, SARS-CoV-1.[9] Respondents are well aware

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Fire Ins., No. 9400837, 1996 WL 1250616, at *2 (Mass. Super. Mar. 15, 1996) (oil fumes constituted physical damage); *Murray v. State Farm Fire & Cas. Co.*, 509 S.E.2d 1, 17 (W. Va. 1998) (home rendered unlivable by falling rocks suffered "direct physical loss"); *Columbiaknit, Inc. v. Affiliated FM Ins.*, No. 98—434—HU, 1999 WL 619100, at *7-8 (D. Or. Aug. 4, 1999) (policyholder could show that clothes containing mold or mildew suffered "direct physical loss or damage" if it established "at trial a class of garments which has increased microbial counts and that will, as a result, develop either an odor or mold or mildew").

[8] *See, e.g., Sentinel Mgmt. Co. v. Aetna Cas. & Sur. Co.*, 615 N.W.2d 819, 825-26 (Minn. 2000) (asbestos fibers that "seriously impaired" function of property); *Prudential Prop. & Cas. Ins. V. Lillard-Roberts*, No. CV—01—1362—ST, 2002 WL 31495830, at *8-9 (D. Or. June 18, 2002) (inability to inhabit a building due to mold damage may constitute "direct, physical loss"); *Cooper v. Travelers Indem. Co of Ill.*, No. 01-cv-2400-VRW, 2002 WL 32775680, at *1 (N.D. Cal. Nov. 4, 2002) (coliform bacteria and E. coli could constitute physical loss or damage).

[9] *See, e.g.*, Gavin Souter, *Hotel Chain to get Payout for SARS-Related Losses*, BUSINESS INSURANCE (Nov. 02, 2003),

of these pre-COVID-19 decisions. In fact, after SARS-CoV-1, the Insurance Services Office—an insurance industry trade organization—admitted that its responsibilities include updating industry-standard policy forms in response to such rulings (including recommendations for "virus and bacteria" exclusions).[10]

Insurers continued to use "physical loss or damage" in their policies even after that outbreak, and courts continued to find coverage for policyholders' business interruption losses.[11] The substantial

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https://www.businessinsurance.com/article/20031102/story/100013638/hotel-chain-to-get-payout-for-sars-related-losses.

[10] ISO Circular dated July 6, 2006, at 2 of 12. https://www.propertyinsurancecoveragelaw.com/wp-content/uploads/2020/03/ISO-Circular-LI-CF-2006-175-Virus-1.pdf. (last visited June 12, 2024).

[11] *See, e.g.*, *Motorist Mut. Ins. v. Hardinger*, 131 F. App'x 823, 824-27 (3d Cir. 2005) (presence of E. coli could constitute physical loss or damage); *de Laurentis v. United Servs. Auto. Ass'n*, 162 S. W. 3d 714, 722-23 (Tex. Ct. App. 2005) (mold damage constituted

precedent on this issue was followed by courts nationwide leading up to the COVID-19 pandemic.[12]

"physical loss to property"); *Schlamm Stone & Dolan, LLP v. Seneca Ins.*, 2005 WL 600021, at *5 (N.Y. Sup. Ct. Mar. 4, 2005) ("the presence of noxious particles, both in the air and on surfaces of the plaintiff's premises, would constitute property damage under the terms of the policy"); *Brand Mgmt., Inc. v. Md. Cas. Co.*, No.05-cv-02293-REB-MEH, 2007 WL 1772063, at *2 (D. Colo. June 18, 2007) (insurer paid business income losses for manufacturer which closed for 15 days to disinfect premises after discovering listeria contamination).

[12] *Wakefern Food Corp. v. Liberty Mut. Fire Ins.*, 968 A.2d 724, 734 (N.J. Super. Ct. App. Div. 2009) ("electrical grid was 'physically damaged' because, due to a physical incident or series of incidents, the grid and its component generators … were physically incapable of performing their essential function of providing electricity"); *Manpower Inc. v. Ins. Co. of the State of Pa.*, No. 08C0085, 2009 WL 3738099, at *1 (E.D. Wis. Nov. 3, 2009) (finding "direct physical loss… or damage to" a building adjacent to one that collapsed, despite collapse not noticeably damaging policyholder's space); *Travco Ins. V. Ward*, 715 F. Supp. 2d 699, 708 (E.D. Va. 2010), *aff'd*, 504 F. App'x 251 (4th Cir. 2013) (house built with drywall that emitted toxic gases causing the policyholder to move out suffered direct physical loss, although it was "physically intact, functional and ha[d] no visible damage"; noting

D. Recent rulings from this Court and the Ninth Circuit ignored the well-established history interpreting "direct physical loss or damage" and import of *Hill & Stout*.

Recent rulings threaten to undo the obvious implications of the Supreme Court taking the time in *Hill & Stout* to outline the "loss of functionality" test; as well as decades of precedent supporting the pathway to coverage through a "loss of functionality" standard. Recently, this Court released an unpublished opinion affirming dismissal of a policyholder's claim at the pleading stage. *Quest Diagnostics, Inc. v. AIG Specialty Insurance Co.*, 2024 WL 2744058 (Wash. Ct. App. May, 28, 2024). There, the insured sought relief against its insurers for denying coverage to losses accrued in

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majority of cases nationwide hold that "physical damage to the property is not necessary, at least where the building in question has been rendered unusable by physical forces"); *Mellin v. N. Sec. Ins.*, 115 A.3d 799, 803-05 (N.H. 2015) (pervasive odor of cat urine was "physical loss").

response to the Governor Inslee's COVID-19 shut-down proclamations.[13] The insurers argued that the COVID-19 pandemic did not cause any physical loss or damage to property, and even if it had, the policy at issue excluded losses tied to contaminants or pollutants. The insured responded that the policy provisions they purchased provided coverage *beyond* physical damage or loss to property and extended to human health or human welfare. The Court disagreed, finding no reasonable interpretation extended the policy language covering "physical loss or damage to property" as including damage or loss to "human health or human welfare." *Id.* at *4.

The Court, however, went even further, rejecting

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[13] Governor Inslee issued several proclamations in early 2020 to contain the spread of COVID-19, a highly contagious and deadly disease that, at that time, had no known cure.

the facts pled by the insured (which should have been taken as true) regarding the physical effect of COVID-19 on property, which rendered it "'physically uninhabitable, unsafe, and unfit' for their intended uses." *Id.* at *5. The Court appeared to hold as a matter of law that COVID-19 could never amount to "direct physical loss or damage" despite such facts. *Id.*

While the Court's refusal to interpret damage or loss to property as inclusive of loss or damage to human health or human welfare fits the norms of policy interpretation, the Court's secondary reasoning for denial was premature. The question of whether the presence of a communicable disease such as COVID-19 or a virus like SARS-CoV-2 can cause a loss of functionality should not be decided as a matter of law, because it is a factual question that turns on scientific and expert evidence of whether the properties of the

disease or virus can cause the types of "loss of functionality" outlined in *Hill & Stout*. Indeed, as explained above, COVID-19 and SARS-CoV-2 fit well within the types of hazards historically considered to cause a "loss of functionality." *See supra* Section I.C.

Moreover, the Ninth Circuit recently affirmed a ruling dismissing claims brought by two groups of hotels and restaurants that raises similar jurisprudential concerns. *See Worthy Hotels, Inc., et al. v. Fireman's Fund Ins. Co., et al*, 2024 WL 2182838 (9th Cir. 2024). In *Worthy*, the Ninth Circuit relied on *Hill & Stout* (as this Court did in *Quest*) to reason that the policyholders failed to show a physical loss because (1) they continued using their properties "while the virus or its risk was present" and (2) failed to demonstrate the virus "caused any physical damage to their properties." *Id.* But this ruling did not require a legal bar of *any* possible virus-

related claims; the Ninth Circuit ruled based on the specific evidence presented. A dismissal on the pleadings forecloses the ability to examine such evidence. What is more, this ruling (as in *Quest*) took *Hill & Stout* to be a *de facto* categorical bar to COVID-19 coverage. That was far from the Supreme Court's intent given that it devoted space in the opinion to outlining the "loss of functionality" standard.

II. Appellants sufficiently allege COVID-19 caused "direct physical loss or physical damage" to property indemnified in all-risk insurance.

Well-established Washington pleading standards require that a complaint only provide notice of the general nature of its claim and the ground upon which it rests. CR 8(a); *Dewey v. Tacoma Sch. Dist. No. 10*, 95 Wn. App. 18, 23 (1999); *see also Champagne v. Thurston Cnty.*, 163 Wn.2d 69, 84 (2008) (notice pleading rules "simply require[] a concise statement of the claim and

the relief sought").

Granting a CR 12(b)(6) motion to dismiss "is appropriate only when it appears beyond doubt that the plaintiff cannot prove any set of facts that would justify recovery." *Wash. Trucking Ass'ns. v. State Emp. Sec. Dep't.*, 188 Wn2d 198, 207 (2017) (quotation marks omitted). In other words, a complaint should only be dismissed "when it does not give the opposing party fair notice of what the claim is and the ground upon which it rests." *Dewey*, 95 Wn. App. at 23. Indeed, motions to dismiss "should be granted 'sparingly and with care' and 'only in the unusual case in which plaintiff includes allegations that show on the face of the complaint that there is some insuperable bar to relief.'" *Tenore v. AT & T Wireless Servs.*, 136 Wn.2d 322, 330 (1998). Where, as here, "an area of the law involved is in the process of development," the Washington Supreme Court instructs

that courts should be "reluctant to dismiss an action on the pleadings alone by way of a CR 12(b)(6) motion." *Haberman v. Washington Pub. Power Supply Sys.*, 109 Wn.2d 107, 120 (1987), *amended*, 109 Wn.2d 107 (1988).

In reviewing a CR 12(b)(6) motion, the Court must accept the University's pleaded facts as true and "may consider hypothetical facts not included in the record." *Id.*; *see also Halvorson v. Dahl*, 89 Wn.2d 673, 674 (1978) (noting that "any hypothetical situation conceivably raised by the complaint defeats a 12(b)(6) motion if it is legally sufficient to support plaintiff's claim").

It is indisputable that the Tribes pled the presence of COVID-19, a physical condition that was present at and caused direct physical loss to their properties. CP 957 (TAC ¶¶ 112, 127, 129). It is also indisputable that Tribes purchased all-risk insurance that covers direct physical loss or physical damage to its properties, which

was effective throughout the claim period. CP 932 (TAC ¶ 29). The all-risk insurance Tribes purchased, unlike "named-perils" coverage, is characterized and marketed as providing coverage for any risk of direct physical loss not expressly excluded. TAC ¶¶ 30-35. Moreover, the insurance policies in question did not contain a Virus Exclusion (unlike the policy in *Hill & Stout*) nor a "communicable disease" exclusion. *Id.* The Tribes have provided the insurer with fair notice of its claims and the grounds on which the claims rest. *Id.* These allegations, which the court must accept as true under CR 12(b)(6), fit the "loss of functionality" test for "direct physical loss" established in *Hill & Stout* and *STP*.

Even if this Court finds that the Tribes' allegations are insufficient to show "direct physical loss" under the "loss of use or functionality" test, the Tribes pled facts averring that COVID-19 caused "direct physical

damage" to the properties during the relevant times. *See* TAC ¶ 125 ("the presence of the Covid-19 virus physically transformed the content of the air in any insured location where it was present, rendering the air unsafe for individuals to breathe"); *see also* TAC ¶ 127 ("the Covid-19 virus caused direct physical damage to Plaintiff's insured property by transforming physical objects, materials, or surfaces into 'fomites'"). The Tribes also cited scientific and medical sources to shed light on how communicable diseases like COVID-19 spread across spaces by latching onto surfaces, materials, and air particles. *See* TAC ¶ 76-77, ¶¶ 125, 127, 129.

While there is a significant body of research showcasing COVID-19's contaminating effects,[14] the

[14] *Study Reveals Details of How the Coronavirus Spike Protein Persists on Common Surfaces*, Environmental Molecular Sciences Laboratory (Nov. 30, 2021), https://www.emsl.pnnl.gov/news/study-reveals-details-how-coronavirus-spike-protein-persists-common-

Tribes are not required to plead every evidentiary fact it may rely on in this case in minute detail. At this stage, the Tribes have met their burden to state a claim, and

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surfaces; *Transmission of Sars-CoV-2: Implications for Infection Prevention Precautions*, World Health Organization (July 6, 2020), https://www.who.int/news-room/commentaries/detail/transmission-of-sars-cov-2-implications-for-infection-prevention-precautions; David Shukman, *Covid: Fresh air 'key to safer classrooms,'* BBC (March 5, 2021), https://www.bbc.com/news/health-56268188; Jianyun Lu et al., *COVID-19 Outbreak Associated with Air Conditioning in Restaurant, Guangzhou, China, CDC,* 26(7) Emerging Infectious Diseases J. 1628, 1629 (July 2020), https://wwwnc.cdc.gov/eid/article/26/7/20-0764_article; *How COVID-19 Spreads*, Centers for Disease Control, March 15, 2024. https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/how-covid-spreads.html; Neelje van Doremalen, et al., *Aerosol and Surface Stability of SARS-CoV-2 as Compared with SARS-CoV-1*, The New England Journal of Medicine, VOL. 382 No. 16, March 17, 2020, https://www.nejm.org/doi/10.1056/NEJMc2004973; *see also Here's How Long COVID-19 Lasts on Surfaces*, Cleveland Clinic, November 13, 2023, https://health.clevelandclinic.org/how-long-will-coronavirus-survive-on-surfaces (last visited June 12, 2024).

the lower court erred by holding otherwise.

III. The insurance industry has a duty to honor its policies, and the Court should not be cowed by the industry "crying wolf".

Insurance industry trade associations have repeatedly asserted in *amicus* briefs for COVID-19 cases that finding coverage would bankrupt the industry.[15] Not only are these claims unlikely, given the record-profits captured by insurers in the wake of COVID-19 and other disasters,[16] but insurers' profitability is irrelevant to policy analysis.

It is standard practice for insurers to make risk determinations in issuing policies and—as the drafters

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[15] *See, e.g.*, Eli Flesch, *Trade Group Tells 1st Cir. Eateries Not Owed Virus Coverage*, Law360.com (Sept. 15, 2021), https://www.law360.com/insurance-authority/property/articles/1422231/trade-group-tells-1st-circ-eateries-not-owed-virus-coverage.

[16] Reed Abelson, *Major U.S. Health Insurers Report Big Profits, Benefiting From the Pandemic,* The New York Times (Aug. 5, 2020), https://www.nytimes.com/2020/08/05/health/covid-

of the policy—insurers hold the burden to show their interpretation of policy terms is the only reasonable reading. *See Miller v. Republic Nat'l Life Ins.*, 714 F2d 958, 961 (9th Cir. 1983) ("[I]nsurance policies are 'contracts of adhesion,' i.e., standardized contracts prepared entirely by one party to the transaction for acceptance by the other").

When the terms are fair and the policies are honored as written, insurance policies provide a stabilizing force for individual customers, small businesses, and large corporations alike. Indeed, policyholders often pay premiums for years before an event triggers the need for their insurer to provide coverage. The delayed nature of insurance gives insurers incentives to commit an "efficient breach,"

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insurance-profits.html.

leaving policyholders without a safety net in their time of greatest need. The very promise of insurance is to protect policyholders from risks. Any efforts to deviate from this obligation must be set forth unambiguously in the policy language.

In times of crisis, insurers frequently assert that they may be forced into bankruptcy if they are required to provide the coverage their policyholders paid for. *See* J. Robert Hunter, *the Insurance Industry's Incredible Disappearing Weather Catastrophe Risk: How Insurers Have Shifted Risk and Costs Associated with Weather Catastrophes to Consumers and Taxpayers* (2012) at 1.[17] Insurers used the same threats of bankruptcy in

[17] "[I]ndustry data demonstrates that insurers have significantly and methodically decreased their financial responsibility for [catastrophic] events in recent years and shifted much of the risk to consumers and taxpayers."

response to property claims arising from the COVID-19 pandemic. Yet these fears are hyperbolic at best and, at worst, false deceptions.

While COVID-19 was a novel risk, the expectation of business interruptions from disease outbreaks was well-known by the insurance industry. The industry, for example, popularized "virus exclusions" after the SARS epidemic of the early 2000s. *See* Erik S. Knutsen & Jeffrey W. Stempel, *Infected Judgment: Problematic Rush to Conventional Wisdom and Insurance Coverage Denial in a Pandemic*, 27 CONN. INS. L.J. 185, 196 (2020). As virus exclusions became standardized in the marketplace, prospective policyholders responded by turning towards buying "all-risks" policies as a more robust alternative to "specified perils" forms.[18]

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[18] Todd C. Frankel, *Insurers Knew the Damage a Viral Pandemic Could Wreak on Businesses. So They Excluded Coverage.*, Washington Post (April 2, 2020),

To the knowledge of UP, no insurer has become insolvent due to pandemic-related claims, even as thousands of policyholders suffered crippling losses that insurers refused to cover. Insurers have instead enjoyed enormous windfalls. For example, Allianz, a global insurance conglomerate, reported on November 10, 2021 that operating profits "grew by 11% to EUR3.2bn ($4.3bn) in the third quarter with high claims from natural catastrophes offset by negligible Covid-19 losses and a considerably improved run-off result."[19] While millions were still sheltering at home, Progressive

https://www.washingtonpost.com/business/2020/04/02/insurers-knew-damage-viral-pandemic-could-wreak-businesses-so-they-excluded-coverage/.

[19] Samuel Casey, *Allianz Q3 Profits up 11% to EUR2.2bn Despite EUR659mn Cat Claims*, Ins. Insider (Nov. 10, 2021), https://www.insuranceinsider.com/article/29au3jdu73ih6iyfktreo/allianz-q3-profits-up-11-to-eur3-2bn-despite-eur659mn-cat-claims.

Insurance Company reported an "83% increase in net income."[20] Chubb Limited reported net income of $1.19 billion for third quarter 2020—up 9.4%, or $100 million, from the year before.[21] CNA also reported a $106 million increase in net income during the same time period.[22] Following suit, W.R. Berkley Corporation reported a massive 161% increase in its fourth quarter, in 2020.[23]

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[20] Richard Holober, *Progressive Insurance Hoards Covid-19 Windfall Profits*, Consumer Federation of Cal. (Aug. 13, 2020), https://uphelp.org/wp-content/uploads/2021/02/cfc_progressive.pdf.

[21] Claire Wilkinson, *Chubb Reports Gains in Q3 Profit, Net Premium Written*, Bus. Ins. (Oct. 28, 2020), https://www.businessinsurance.com/article/20201028/NEWS06/912337411/Chubb-reports-gains-in-Q3-profit,-net-premium-written.

[22] Angela Childers, *CAN Reports Higher Net Income Despite Cat Losses*, Bus. Ins. (Nov. 2, 2020), https://www.businessinsurance.com/article/00010101?NEWS06/912337508/CNA-reports-higher-net-income-despite-cat-losses.

[23] Judy Greenwald, *Berkley Reports 161% Jump in Profits*, Bus. Ins. (Jan. 26, 2021), https://www.businessinsurance.com/article/00010101/NEWS06/912339367/Berkley-reports-161-jump-in-

All the while, it was financial carnage for small insured businesses, many of which permanently closed.[24]

Insurers also used the pandemic to significantly increase premiums across all lines of business. One large broker reported that 89% of its clients saw a rate increase for their property insurance, reaching the "highest [rates] recorded since the early 2000s."[25] Pandemic-related premiums have continued to climb since 2020, while insurers continue to spend millions of dollars defending coverage denials, rather than

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profits.

[24] Mary Williams Walsh, *Businesses Thought They Were Covered for the Pandemic. Insurers Say No.*, The New York Times (Aug. 5, 2020), https://www.nytimes.com/2020/08/05/business/business-interruption-insurance-pandemic.html.

[25] Matthew Lerner, *Most Policyholders See Rate Hikes Across Multiple Lines*, Bus. Ins. (Oct. 26, 2020), https://www.businessinsurance.com/article/20201026/NEWS06/912337341/Most-policyholders-see-rates-hike-across-multiple-lines-Arthur-J-Gallagher-Re.

providing relief to their customers.

The Court should not listen to the false cries of destitution from an industry that lined its pockets during one of the most devastating times in recent memory. The time is long overdue for insurers to fulfill their obligations to their policyholders and provide the "all-risk" coverage that policyholders purchased.

CONCLUSION

For the reasons described above, the trial court's dismissal should be reversed.

RESPECTFULLY SUBMITTED this 17th day of June, 2024

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I certify, under penalty of perjury under the laws of the state of Washington, that on June 17, 2024, I electronically filed the foregoing document via the Washington State Appellate Courts' Secure Portal which will send a copy of the document to all parties of record via electronic mail.

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June 17, 2024 - 2:29 PM

Transmittal Information

Filed with Court:	Court of Appeals Division I
Appellate Court Case Number:	86115-8
Appellate Court Case Title:	Tulalip Tribes of Washington et ano, Appellants v. Lexington Insurance Company et al, Respondents
Superior Court Case Number:	20-2-03604-6

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