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MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

HT-SEATTLE OWNER, LLC,

Plaintiff-Appellant,

v.

AMERICAN GUARANTEE AND LIABILITY INSURANCE COMPANY,

Defendant-Appellee.

No. 21-35916

D.C. No. 2:21-cv-00048-BJR

MEMORANDUM[*]

Appeal from the United States District Court
for the Western District of Washington
Barbara Jacobs Rothstein, District Judge, Presiding

Argued and Submitted March 30, 2023
Seattle, Washington

Before: NGUYEN and HURWITZ, Circuit Judges, and PREGERSON,[**] District Judge.

In this insurance coverage action, HT-Seattle Owner, LLC, seeks reimbursement from American Guarantee and Liability Insurance Company ("Zurich") for business losses incurred at a hotel during the COVID-19 pandemic.

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[*] This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

[**] The Honorable Dean D. Pregerson, United States District Judge for the Central District of California, sitting by designation.

Applying Washington law, the district court granted Zurich's motion to dismiss and denied HT's motion to alter or amend the judgment. We have jurisdiction under 28 U.S.C. § 1291. We review the Rule 12(b)(6) dismissal de novo and the order denying the motion to alter or amend for abuse of discretion. *Ta Chong Bank Ltd. v. Hitachi High Techs. Am., Inc.*, 610 F.3d 1063, 1066 (9th Cir. 2010). We affirm.

1. To establish coverage under Washington law, an "insured must show the loss falls within the scope of the policy's insured losses." *McDonald v. State Farm Fire & Cas. Co.*, 837 P.2d 1000, 1003–04 (Wash. 1992). Zurich's policy covers "direct physical loss of or damage . . . to Covered Property." The Washington Supreme Court recently observed that "in order to recover under a property insurance policy for physical loss of or damage to the property, something *physically* must happen to the property." *Hill & Stout, PLLC v. Mut. of Enumclaw Ins. Co.*, 515 P.3d 525, 533 (Wash. 2022). The court went on to hold that the "loss of intended use and loss of business income" caused by the Governor's orders "is not a *physical* loss of property," *id.* at 532, and stated that it agreed with the district court's conclusion in a related case that "there must be some *physical* effect on the property" to trigger coverage, *id.* at 534. Although *Hill & Stout* dealt only with a claim that the Governor's orders triggered coverage, the court also noted, as did the district court here, "the strong, if not unanimous, consensus around the country" that COVID-19 itself does not cause a direct physical loss of property. *Id.*

Hill & Stout acknowledged "that 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 533. But, in rejecting a claim by dentists for business losses caused by the COVID-19 pandemic, the court held that "this case is not one of them" because there was "no *physical* loss of functionality to the *property*." *Id.* "[T]here was no alleged imminent danger to the property, no contamination with a problematic substance, and nothing that *physically* prevented use of the property or rendered it useless; nor were the dental offices rendered unsafe or uninhabitable because of a dangerous physical condition." *Id.* The same is true here.

2. Even assuming that coverage was triggered under the Zurich policy, its Contamination exclusion applies. *See Overton v. Consol. Ins. Co.*, 38 P.3d 322, 329 (Wash. 2002); *Hill & Stout*, 515 P.3d at 536–37 (finding a virus exclusion applicable to a claim for property damage allegedly caused by COVID-19). The policy excludes coverage for "**Contamination**, 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." "**Contamination**" is defined as "Any condition of property due to the actual presence of any . . . pathogen or pathogenic organism, bacteria, virus, disease causing or illness causing agent."

The fact that the definition of "**contaminant**" in the Zurich policy does not expressly include viruses does not make HT's Contamination exclusion ambiguous.

The word "contaminant" does not appear in the Contamination exclusion; it instead appears in two policy provisions not relevant to this case—the "Decontamination Costs" and "Land and Water Contaminant Cleanup, Removal and Disposal" provisions. By its terms, the definition of "**contamination**" in the Louisiana Amendatory Endorsement does not apply to claims arising in Washington.

3. In light of the foregoing, the district court did not err in dismissing HT's statutory and common law bad-faith claims, which are all premised on the assertion that Zurich incorrectly denied coverage. And, as COVID-19 does not cause direct physical loss of covered property, the district court correctly concluded that any amendment of the operative complaint would be futile.[1]

AFFIRMED.

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[1] Given the guidance in *Hill & Stout*, we deny HT's motion to certify the coverage question to the Washington Supreme Court. **Dkt. 48**. We also deny HT's motion to take judicial notice of statements made by Zurich in other litigation. **Dkt. 19**. We grant Zurich's motion to take judicial notice of the Washington Court of Appeals's grant of interlocutory review of *Snoqualmie Entertainment Authority v. Affiliated FM Ins. Co.*, No. 21-2-03194-0, 2021 WL 4098938 (Wash. Super. Ct. Sept. 3, 2021). **Dkt. 29**. We grant HT's motion to file an oversized citation of supplemental authorities. **Dkt. 49**.