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5 UNITED STATES DISTRICT COURT  
6 EASTERN DISTRICT OF WASHINGTON

7 CINCINNATI INSURANCE  
8 COMPANY,

Case No. 4:16-CV-5090-LRS

9 Plaintiff/Counterclaim Defendant,

10 v.

ORDER DENYING MOTION FOR  
SUMMARY JUDGMENT

11 HARRY JOHNSON PLUMBING &  
12 EXCAVATING CO., INC.,

13 Defendant/Counterclaimant.  
14

15 BEFORE THE COURT is Harry Johnson Plumbing & Excavating Co., Inc.'s  
16 ("HJPE") Motion for Summary Judgment (ECF No. 9). The Motion seeks dismissal  
17 of Cincinnati Insurance Company's ("CIC") claims for declaratory judgment  
18 asserted in the Complaint (ECF No. 1). CIC is opposed (ECF No. 14-17). Defendant  
19 has filed a Reply (ECF Nos. 19-23). Telephonic oral argument on the matter was  
20 heard on October 4, 2016. Plaintiff was represented by Bryana L Blessinger.  
21 Defendant was represented by Brian Sheldon.  
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24 **I. BACKGROUND**

25 HJPE's initial Statement of Facts (ECF No. 10) are undisputed. *See* L.R. 56.1(d);  
26 ECF No. 17 (CIC's Statement of Facts acknowledging HJPE's Statement of Facts  
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1 and setting forth “additional pertinent facts.”). In Reply, HJPE disputes and/or  
2 clarifies the additional facts alleged by CIC. (ECF No. 22). The parties do not  
3 contest the validity or authenticity of the insurance policy upon which CIC has relied  
4 for its claims (ECF No. 1, Ex. 1), although the parties’ contest the policy’s  
5 interpretation. The following facts are undisputed, unless otherwise noted.  
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### 7 **A. The CIC Policy**

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9 Plaintiff Cincinnati Insurance Company (“CIC”) issued Policy Number  
10 ENP0227281 with effective dates of December 31, 2014 to December 31, 2015 (“the  
11 CIC Policy” or the “Policy”) to Defendant/counterclaimant Harry Johnson Plumbing  
12 & Excavation (“HJPE”) as the named insured. A copy of the Policy that CIC alleges  
13 to be true and correct is attached to and incorporated by reference in the Complaint.  
14  
15 (ECF No. 1, Ex. 1). The policy insured “Contractors’ Equipment (and Tools).”  
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#### 17 **1. Initial Pages**

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19 The Policy is allegedly 24-pages long. It begins with “Common Policy  
20 Declarations,” followed by sections titled: “Washington Common Policy  
21 Conditions”; “Summary of Premiums Charged”; “Notice to Policyholders”;  
22 “Washington Exclusion of Certified Acts and Other Acts of Terrorism”; “Signature  
23 Endorsement”; “Contractors’ Equipment (and Tools) Coverage Part Declarations”;  
24  
25 and “Contractors’ Equipment (and Tools) Coverage Form Washington.”  
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27 The “Contractors’ Equipment (and Tools) Coverage Part Declarations” states in  
28

1 part:

2 FORMS AND/OR ENDORSEMENTS APPLICABLE TO CONTRACTORS'  
3 EQUIPMENT (AND TOOLS)

4 MA108WA 06/07 CONTRACTORS' EQUIPMENT (AND TOOLS)  
5 COVERAGE FORM WASHINGTON

6 MA135WA 02/12 COMMERCIAL INLAND MARINE CONDITIONS  
7 WASHINGTON

8 MA4061WA 02/12 WASHINGTON CHANGES.

9 ECF No. 1, Ex. A at 18. *See* ECF No. 10, SOF 1.

10 The next pages are a series of endorsements, including the "Commercial  
11 Inland Marine Conditions Washington" endorsement (the "Inland Marine  
12 endorsement"), containing the "Concealment, Misrepresentation or Fraud"  
13 provision upon which CIC relies in its Complaint seeking declaratory relief.

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15 **2. The Commercial Inland Marine Conditions Washington Endorsement**

16 The first words at the top of the Inland Marine endorsement read: "**THIS**  
17 **ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT**  
18 **CAREFULLY.**" The introductory phrase of the endorsement states as follows:  
19

20 The following conditions apply in addition to the Common Policy Conditions  
21 and applicable Additional Conditions in Commercial Inland Marine Coverage  
22 Forms. These conditions replace any similar conditions or clauses in any  
23 Commercial Inland Marine Coverage forms:

24 (ECF No. 1, Ex. A at 26).

25 This endorsement's "General Conditions" provision states:

26  
27 **A. Concealment, Misrepresentation or Fraud**

28 This Coverage Part is void in any case of fraud,  
intentional concealment or misrepresentation of a

1 material fact, by you or any other insured, at any time,  
2 concerning:

- 3 1. This Coverage Part;
- 4 2. The Covered Property;
- 5 3. Your interest in the Covered Property; or
- 6 4. A claim under this Coverage Part.

7 *Id.* at 27 (the “CMF provision”)

### 8 **B. CIC’s Complaint for Declaratory Judgment**

9 This dispute arises out HJPE’s reported theft and claim for coverage for the loss  
10 of a 1996 14H Caterpillar Road Grader from a location in Whitman County, near a  
11 bridge reconstruction project HJPE had performed for the County known as “the  
12 Hatley Bridge project.” HJPE reported the loss on or about September 8, 2015.  
13 CIC investigated the claim. On March 21, 2016, CIC’s counsel sent a letter to  
14 HJPE’s counsel agreeing to “extend coverage for the 12G Grader that is scheduled  
15 on the Policy.” (ECF No. 10, SOF No. 8; ECF No. 11 at 31). On April 1, 2016,  
16 HJPE’s counsel informed CIC that its 12G grader had not been stolen and was still  
17 being used by HJPE. (ECF No. 10, SOF No. 9). By letter dated July 1, 2016, CIC  
18 denied coverage for the 14H Grader. (ECF No. 11 at 5-14). On July 6, 2016, CIC  
19 filed its Complaint for Declaratory Judgment (ECF No. 1) incorporating by reference  
20 an attached copy of the insurance policy.

21 The Complaint alleges, among other allegations, that during the course of its  
22 investigation CIC discovered:

- 23 1. HJPE initially reported loss of a 12G road grader SN#61M6164, then later

1 that same day reported it was a 14H Grader instead of a 12G (¶¶5, 7);

2 2. HJPE could not provide a serial number for the 14H Grader;

3 3. HJPE's October 16, 2015 Proof of Loss form alleged the purchase of the 14H  
4 Grader in 2004 for \$197,500, but in his examination under oath on February  
5 8, 2016, HJPE owner Mark Johnson stated the purchase was in 2002 for  
6 \$147,500 (¶¶8, 9).

7 4. "HJPE used a 12G Grader on the project," but no one CIC interviewed  
8 "recalled seeing a 14H Grader at the project site." (¶ 10)

9 5. Tax returns provided to CIC did not enable CIC "to determine what equipment  
10 HJPE had claim[] depreciation on" (¶ 13); and

11 6. HJPE refused to allow CIC to speak directly with HJPE's accountant. (¶ 13).

12 The Complaint seeks declaration that coverage is not owed for the alleged theft  
13 of the 14H Grader. It alleges HJPE breached a policy condition:

14 Mr. Johnson breached the Concealment, Misrepresentation or Fraud condition  
15 by, among other things: (a) intentionally providing a false account of the  
16 alleged purchase of a 14H Grader; (b) intentionally providing a false account  
17 of the alleged occurrence of a theft of a 14H Grader from a jobsite in Whitman  
18 County, Washington; (c) intentionally providing false information on HJPE's  
19 proof of loss.

20 (ECF No. 1, ¶ 15). The Complaint also alleges coverage is precluded because of the  
21 lack of sufficient evidence of an ownership interest in a 14H Grader, as well as an  
22 inadequate explanation of what happened to it:

23 HJPE cannot meet its burden of proving (a) that it owned a 14H Grader; (b)

1 the occurrence of a theft of a 14H Grader on or about September 4, 2015 from  
2 its jobsite in Whitman County, Washington.

3 (ECF No. 1, ¶16).

4 On July 15, 2016, HJPE responded with its Answer, Affirmative Defenses and  
5 Counterclaims. On August 4, 2016, HJPE filed the present Motion for Summary  
6 Judgment. On September 1, 2016, the court entered its Scheduling Order. At the  
7 time of the filing and Plaintiff's response, Plaintiff had served but not reviewed  
8 responses to discovery and no depositions had taken place.  
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10 HJPE seeks summary judgment in its favor on several affirmative defenses it  
11 asserts against CIC's coverage defenses. HJPE makes four arguments. First, HJPE  
12 contends that as a matter of law, the Inland Marine endorsement upon which CIC  
13 relies does not apply to the Policy. Second, it contends CIC is "estopped" from  
14 asserting additional coverage defenses under the "mend the hold" doctrine  
15 (Affirmative Defense No. 5). Third, HJPE claims that if the Concealment,  
16 Misrepresentation or Fraud ("CMF") provision applies, CIC was required to tender  
17 back the premiums to HJPE (Affirmative Defense No. 2). Finally, HJPE claims CIC  
18 has waived its right to enforce the CMF provision by extending an offer of coverage  
19 for the 12G Grader (Affirmative Defense No. 4). In response, CIC opposes the  
20 merits of the contentions and advocates for restraint on these issues until the  
21 resolution of threshold issues of coverage are addressed.  
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28 **II. STANDARD OF REVIEW**

1 In deciding motions under Federal Rule of Civil Procedure 56, the Court applies  
2 *Anderson, Celotex*, and their Ninth Circuit progeny. *Anderson v. Liberty Lobby, Inc.*,  
3 477 U.S. 242 (1986); *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986). “The court shall  
4 grant summary judgment if the movant shows that there is no genuine dispute as to  
5 any material fact and the movant is entitled to judgment as a matter of law.” Fed. R.  
6 Civ. P. 56(a). The moving party bears the initial burden of “informing the district  
7 court of the basis for its motion, and identifying those portions of the [record] which  
8 it believes demonstrate the absence of a genuine issue of material fact.” *Celotex*, 477  
9 U.S. at 323. The burden then shifts to the nonmoving party to “go beyond the  
10 pleadings” and “designate specific facts” in the record to show a trial is necessary to  
11 resolve genuine disputes of material fact. *Id.* The nonmoving party “must do more  
12 than simply show that there is some metaphysical doubt as to the material facts.”  
13 *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986).  
14 Summary judgment is mandated if the non-moving party fails to make a showing  
15 sufficient to establish the existence of an element which is essential to the non-  
16 moving party's case and upon which the non-moving party will bear the burden of  
17 proof at trial. *See Celotex*, 477 U.S. at 322.

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24 Generally, when a defendant moves for summary judgment on an affirmative  
25 defense on which he bears the burden of proof at trial, he must come forward with  
26 evidence which would entitle him to a directed verdict if the evidence went  
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1 uncontroverted at trial. *See Houghton v. South*, 965 F.2d 1532, 1536 (9th Cir. 1992).  
2 “Only disputes over facts that might affect the outcome of the suit under the  
3 governing law will properly preclude the entry of summary judgment.” *Anderson v.*  
4 *Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). For summary judgment purposes, an  
5 issue must be both “material” and “genuine.” An issue is “material” if it affects the  
6 outcome of the litigation. An issue is “genuine” if it must be established by  
7 “sufficient evidence supporting the claimed factual dispute...to require a jury or  
8 judge to resolve the parties' differing versions of the truth at trial.” *Hahn v. Sargent*,  
9 523 F.3d 461, 464 (1st Cir. 1975) (*quoting First Nat. Bank v. Cities Serv. Co. Inc.*,  
10 391 U.S. 253, 289 (1968)); *see also British Motor. Car Distrib. v. San Francisco*  
11 *Auto. Indus. Welfare Fund*, 883 F.2d 371, 374 (9th Cir. 1989). “Where the record  
12 taken as a whole could not lead a rational trier of fact to find for the non-moving  
13 party, there is no genuine issue for trial.” *Matsushita*, 475 U.S. at 587 (citation  
14 omitted).

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16 In considering a motion for summary judgment, the court does not make findings  
17 of fact or determine the credibility of witnesses, *Anderson*, 477 U.S. at 255; rather,  
18 it must draw all inferences and view all evidence in the light most favorable to the  
19 nonmoving party. *Matsushita*, 475 U.S. at 587–88; *Whitman v. Mineta*, 541 F.3d  
20 929, 931 (9th Cir. 2008).

### 21 22 23 24 25 26 27 **III. DISCUSSION** 28



1           **A. Choice of Law, Burdens of Proof, and Judicial Restraint**

2           As a threshold matter, it is of consequence to point out that this court has subject  
3 matter jurisdiction based upon diversity of citizenship. There is no question that the  
4 law of the forum state applies and, as such, the court will apply the law of  
5 Washington in a manner as the Washington Supreme Court would apply it. Under  
6 Washington law, the interpretation of an insurance policy presents a question of law  
7 to be decided by the court. *Moeller v. Farmers Ins. Co. of Wash.*, 173 Wash.2d 264,  
8 267 (2011). Generally, in Washington, contracts for insurance are subject to the  
9 same rules of interpretation as are other contracts.  
10

11           Analysis of a contract is a two-step process. The court *first* examines the policy  
12 provisions to determine if “the loss falls within the scope of the policy's covered  
13 losses.” *Nw. Bedding Co. v. Nat'l Fire Ins. Co. of Hartford*, 154 Wash.App. 787  
14 (Wash.Ct.App. 2010). If the party contesting the denial of coverage shows that the  
15 loss is within the scope of covered losses, “[t]he insurer then must show that the  
16 claim of loss is excluded.” *Id.*  
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18           When, as here, the insurance company seeks only a declaration of non-liability  
19 and the insured asserts coverage under the policy and a counterclaim for money  
20 damages, the insured is in reality seeking recovery under the policy and the insurer  
21 is denying the liability. *See e.g., Am. Eagle Ins. Co. v. Thompson*, 85 F.3d 327, 331  
22 (8th Cir.1996) (“Stripped of its procedural posture, this action is, at base, a claim by  
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1 Thompson [the insured who ultimately bore the burden] that he is covered under an  
2 insurance policy and a denial by the insurer [declaratory judgment plaintiff] that  
3 coverage properly exists.”). Even though the insurer has initiated this declaratory  
4 judgment action and is the plaintiff, the court still adheres to the fundamental rule  
5 that the burden of proof rests on the policyholder to establish its claim is within  
6 coverage of the policy, and once it has done so, the insurer bears the burden of proof  
7 of establishing that the claim is within an exclusion. *See Queen City Farms, Inc. v.*  
8 *Central Nat. Ins. Co. of Omaha*, 126 Wash.2d 50 (1994).

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12 Defendant’s Motion for Summary Judgment focuses entirely on the second step  
13 of the contract analysis – the exclusion of coverage. The parties agree, contested  
14 issues of fact exist in step one—whether a covered loss exists. CIC’s Complaint  
15 contends that HJPE cannot show that it owned a 14H Grader at the time of the  
16 claimed loss and under the insurance policy, it will not pay more than an amount  
17 equal to the insured’s interest. (ECF No. 1, ¶16). Property insurance is a contract for  
18 indemnity. As such, it entitles the insured to recover for actual loss and to the extent  
19 coverage anticipates an advantage or benefit to the insured, it is void against public  
20 policy. RCW 48.18.040(1) provides that [n]o contract of insurance on  
21 property...shall be enforceable except for the benefit of persons have an insurable  
22 interest in the things insured.” Pursuant to RCW 48.18.040(2), an “insurable  
23 interest” is “any lawful and substantial economic interest in the safety or  
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1 preservation of the subject of the insurance free from loss, destruction, or pecuniary  
2 damage.”

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4 This issue merits mention because a claimant’s burden of demonstrating an  
5 insurable interest serves a significant and fundamental public policy underlying  
6 insurance law which prevents insureds from using their coverage for illegitimate  
7 purposes. *See Gossett v. Farmers Ins. Co. of Washington*, 133 Wash.2d 954, 968  
8 (1997), reconsideration denied (“opportunities for net gain to an insured through  
9 receipt of insurance proceeds exceeding a loss should be regarded as inimical to the  
10 public interest...”). Payment of insurance premiums on property does not give rise  
11 to insurable interest where ownership of property belongs elsewhere. *Gossett v.*  
12 *Farmers Ins. Co. of Washington*, 133 Wash.2d 954 (1997), reconsideration denied.  
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16 The court views much of Defendant’s Motion as asking the court to put the  
17 proverbial cart before the horse and decide the second step before the first. Put  
18 another way, if HPJE cannot meet its burden of demonstrating that it had an insurable  
19 interest against theft of a 14H grader, then the claimed illegitimacy of CIC’s defense  
20 based upon the Inland Marine endorsement is not relevant and needs no ruling from  
21 the court. In resolving the Defendant’s Motion the court seeks not to delay  
22 disposition of the litigation nor offend the principle of judicial restraint.  
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### 26 **B. Applicability of Inland Marine Endorsement**

27 HJPE contends CIC’s request for declaratory judgment based on a provision  
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1 contained within the Commercial Inland Marine Conditions Washington  
2 Endorsement, as alleged in ¶15 of the Complaint, fails as a matter of law and should  
3 be dismissed. HJPE asks this court to decide that the Inland Marine endorsement  
4 does not apply to CIC Policy No. ENP 227281 providing coverage for Contractors'  
5 Equipment (and Tools). In response, CIC argues that the Inland Marine endorsement  
6 (and its provisions) is unambiguously part of the policy.  
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9 Final resolution of the party's policy arguments regarding CIC's defense to  
10 coverage is premature, when questions of whether the policy even covers the 14H  
11 Grader remain outstanding. Even assuming the policy applies to the claimed loss of  
12 the 14H Grader and the applicability of the Inland Marine endorsement becomes  
13 relevant, the courts notes that the endorsement is repeatedly referenced throughout  
14 the policy: it is explicitly named in the list of applicable endorsements in the  
15 language of the Contractors Equipment (and Tools) Coverage part; and the  
16 applicability (and inapplicability) of specific provisions are discussed in the  
17 Contractors' Equipment (and Tools) Coverage Form Washington, both in Section B  
18 (Valuation) and Section C ("How Much We Pay"). (ECF No. 1, Ex. A at 23-24).  
19 The endorsement's introductory language states it applies "in addition to the  
20 Common Policy Conditions," which the parties seem to agree apply to the Policy.  
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22 See ECF No. 19 at 3("For example, the Washington Common Policy Conditions  
23 endorsement...unambiguously applies to all policies."). Though HJPE contends an  
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1 “average purchaser of inland marine coverage would expect the policy to cover risks  
2 inherent with land transportation of goods...” (ECF No. 9 at 4), in fact, the current  
3 concept of “inland marine” “is very broad, encompassing a range of specific risks  
4 that is so wide...” 11 Couch on Ins. § 154:3. Property that can be insured under  
5 inland marine contracts falls into categories, which can include “mobile equipment  
6 and property, such as a tractor, crane, or bulldozer while being moved from one  
7 location to another.” 11 Couch on Ins. § 154:3; *see also* Williston on Contracts  
8 §49:27 (stating the term inland marine is “broad” and citing case law describing it as  
9 encompassing a “variety of specialized insurance coverage,” functioning “basically  
10 as a form of property insurance...”).  
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15 Whether and how the Inland Marine endorsement applies to this insurance policy  
16 is not an issue appropriate for resolution at this time. The court declines Defendant’s  
17 requested dismissal of CIC’s declaratory judgment action or any of CIC’s coverage  
18 defenses based upon the alleged inapplicability of the Inland Marine endorsement.  
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### 20 **C. Estoppel Under the Mend the Hold Doctrine**

21 HJPE asks the court to estop CIC from denying coverage based upon any other  
22 reason than the Concealment, Misrepresentation or Fraud provision contained in the  
23 Inland Marine endorsement. It relies upon the “mend the hold” doctrine, which  
24 prevents an insurance company from denying coverage on one basis and then  
25 asserting new and different grounds for its denial when the original ground is  
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1 challenged or fails. *Karpenski v. Am. Gen. Life Cos.*, 999 F.Supp.2d 1235, 1245  
2 (W.D.Wash.2014) (citing Washington and federal common law and holding the  
3 doctrine prevents an “insurer from changing the basis for avoiding liability after the  
4 onset of litigation.”). The mend the hold doctrine in Washington, requires the  
5 insured to demonstrate that it either suffered prejudice as a result of the insurer's  
6 failure to raise sooner a ground for denying coverage or that the insurer acted in bad  
7 faith when it failed to raise that ground sooner. *Id.* (citing *Hayden v. Mut. of*  
8 *Enumclaw Ins. Co.*, 141 Wash.2d 55 (Wash. 2000)); *see also*, *Ryerson Inc. v.*  
9 *Federal Ins. Co.*, 676 F.3d 610, 614 (7th Cir.2012) (“When there is no prejudice to  
10 the opposing party, invoking the doctrine of mend the hold to bar a valid defense is  
11 overkill.”).

12 HJPE has not demonstrated unfair surprise and cannot persuasively argue that the  
13 defense of lack of insurable interest is an “entirely new defense.” (ECF No. 19 at 7).  
14 CIC’s declination letter sets forth a number of policy provisions (including the  
15 insurable interest provision) and grounds sufficient to preserve its right to articulate  
16 additional bases for the denial of coverage. *See* ECF No. 11 (Sheldon Aff.), Ex. A  
17 at 4-5, 13-14. Ultimately the denial letter concludes that the CIC is denying coverage  
18 because there “is no evidence HJPE owned a 14H grader at the time of loss.” *Id.*  
19 CIC’s Declaratory Judgment Complaint is consistent with its declination letter. The  
20 money, time and effort spent responding to CIC’s requests during its 9-month period  
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1 of investigation is insufficient to justify application of the equitable mend the hold  
2 doctrine.

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4 **D. Return of Premiums Paid**

5 HJPE's Motion also contends that 1) *if* the Concealment, Misrepresentation and  
6 Fraud provision applies, then under HJPE's interpretation of the language of the  
7 policy, CIC must void the entire policy (not deny coverage); and 2) CIC is  
8 "precluded from voiding the policy" because it has failed to tender back HJPE's  
9 premium. Again, this argument places the cart before the horse. Whether the CMF  
10 provision even applies, if it does, when the alleged concealment occurred (at contract  
11 formation or during loss reporting), and the appropriate remedy are all questions that  
12 cannot be determined on the present record.  
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16 **E. Waiver**

17 Finally, HJPE contends CIC waived its defense based upon the CMF provision  
18 because "with full knowledge of the purported misrepresentations," it nevertheless  
19 "attempted to settle a claim" for the 12G Grader in March 2016. (ECF No. 19 at 8).  
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CIC contends it made a good faith offer to provide coverage for a grader it confirmed  
was on the job site and owned by HPJE; however, it did not confirm HJPE was still  
in possession of the 12G grader until after the offer. Defendant's waiver argument  
is rejected. An insurer cannot waive policy coverage issues when a policy does not  
provide coverage. *See Transamerica Ins. Group v. Chubb & Son, Inc.*, 16 Wn.App.

1 247, 253, (1976) (holding that an insurer could not waive the right to deny coverage  
2 if there was no coverage to deny). CIC could not have waived its right to deny  
3 coverage for the 14H grader, if its policy does not cover the 14H grader, which is an  
4 outstanding question not before the court today.  
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6 **IV. CONCLUSION**  
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8 Defendant's Motion for Summary Judgment (ECF No. 9) is **DENIED**.

9 DATED this 24<sup>th</sup> day of October, 2016.  
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11 *s/Lonny R. Suko*

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12 LONNY R. SUKO  
13 Senior U.S. District Court Judge  
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