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No. 64063-1-I

COURT OF APPEALS, DIVISION
OF THE STATE OF WASHINGTON

MUTUAL OF ENUMCLAW INSURANCE COMPANY,
Plaintiff/Respondent

v.

ONEBEACON INSURANCE COMPANY
Defendant/Appellant

APPELLANT'S OPENING BRIEF

GORDON THOMAS HONEYWELL LLP
Joanne Thomas Blackburn, WSBA No. 21541
Michelle A. Menely, WSBA No. 28353
2100 One Union Square
Seattle WA 98101
(206) 676-7500
Attorneys for Appellant

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COURT OF APPEALS
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JENNIFER L. HARRIS
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A. ASSIGNMENT OF ERROR

Whether the trial court abused its discretion in determining the proper allocation of indemnity costs between two insurance carriers providing coverage for a mutual insured when the trial court based its determination of the proper allocation upon the number of months of construction at the project and not on the factual evidence submitted and, consequently, imposed indemnification obligations on a carrier to which the carrier did not contract to provide.

B. STATEMENT OF RELEVANT FACTS

1. Introduction/Procedural Background.

This is an action for equitable contribution of indemnification costs between two insurance carriers with a mutual insured. The parties brought cross-motions for summary judgment. In doing so, Appellant OneBeacon Insurance Company ("OneBeacon") argued that the allocation of indemnification costs should be based on the terms of the insurance contract, including all applicable exclusions to coverage. OneBeacon further asserted that due to the applicable policy language that its share of the underlying indemnification costs should be pro-rata, time-on-the-risk based upon the two carriers' policy periods that applied to the project.

Respondent Mutual of Enumclaw ("MOE") agreed the insurance policy language applied but argued that the two carriers should share the

costs of indemnification on a equal share basis pursuant to the "other insurance" clauses contained in the two carriers respective policies and further argued that the claim was for an indivisible injury so the Court should find OneBeacon jointly and severably liable with MOE.

The trial court agreed with OneBeacon and specifically held that "[t]he 'other insurance' clauses do not control the determination of contribution in this case."¹ As a result, the trial court correctly denied MOE's motion for summary judgment "to the extent MOE seeks a 50% contribution" from OneBeacon.² The trial court also agreed that an equitable allocation of indemnification costs should be imposed on these two carriers. The Court rejected MOE's joint and several argument.³ Unfortunately, in imposing what the trial court deemed was OneBeacon's "fair and equitable"⁴ contribution amount, the trial court erroneously determined that the time-on-risk should be apportioned based on the amount of time that the underlying construction actually occurred as opposed to the period of time property damage was occurring (as is required by Washington law). Moreover, and probably more importantly, the trial court erred by failing to correctly analyze the effect of applicable

¹ CP 365 – 367 at CP 366. Court Opinion, pg. 2. Moreover, MOE did not appeal this ruling by the trial court.

² CP 365 – 367 at CP 366. Court Opinion, pg. 2.

³ CP 365 – 367 at CP 366. Court Opinion, pg. 2.

⁴ *Id.*

exclusions to coverage. As a result, the trial court's determination of the proper allocation of indemnification costs between two carriers covering a mutual insured was erroneous and contrary to Washington law.

Consequently, OneBeacon respectfully requests that this Court affirm the trial court's determination that the loss between the two carriers should be allocated based on principles of equitable contribution, but should reverse the trial court's determination as to the calculation of that amount based upon actual construction time of the project, and instead, apply a time-on-risk analysis reflective of the coverage afforded to the insured.

2. Agreed Upon Facts.

OneBeacon insured Saltaire Craftsman PLLC ("Saltire") under a commercial general liability insurance policy from September 16, 1999 through September 16, 2000.⁵ Mutual of Enumclaw ("MOE") insured Saltaire for the next two years, from September 16, 2000 through September 16, 2002.⁶

During OneBeacon's policy period, Saltaire contracted with QAS Residential, LLC ("QAS"), to perform work necessary to convert the 75-unit Queen Anne Square apartments into a condominium complex (the

⁵ CP 57 – 94 at CP 58. **Exhibit A** to Declaration of Joanne Thomas Blackburn filed in Support of OneBeacon's Motion for Partial Summary Judgment ("Blackburn Decl.").

⁶ CP 95 - 97. **Exhibit B** to Blackburn Decl.

"Project"). Saltaire began work on the Project in approximately November 1999⁷ and continued into the time MOE was providing the insurance. As Saltaire completed its work on specific units within the complex, the units were sold to third parties. Saltaire sold the first unit in June of 2000.⁸ By the date of the expiration of OneBeacon's policy – September 16, 2000 – only 25 of the 75 units had been sold. *Id.*

In March of 2002, the Courtyard at Queen Anne Square Condominium Association ("the Association") filed a lawsuit against QAS asserting, among other things, that construction defects existed at the Project.⁹ On October 19, 2004 – QAS brought action against Saltaire who, in turn, brought action against the various subcontractors it had hired to work on the Project. QAS' claims against Saltaire were settled at mediation for \$800,000. As part of its agreement with Saltaire, MOE agreed to fund the entire settlement and to thereafter seek contribution from the various subcontractors on the Project. Notably, MOE made this agreement knowing that OneBeacon did not agree with MOE's position on how the settlement proceeds should be allocated between the two

⁷ CP 98 – 109 at CP 100. *See* Declaration of Michael Alford, ¶3 (filed in underlying case), attached as **Exhibit C** to Blackburn Decl.

⁸ CP 114 – 118 at CP 117. *See* **Exhibit A** to Declaration of Anthony Riggio ("Riggio Decl."), filed herewith, at p. 3, Unit 302.

⁹ CP 55 – 109 at CP 56. Blackburn Decl., ¶4. Moreover, neither MOE nor OneBeacon presented evidence or argument on the insurance coverage after MOE's two policies expired. Therefore, the subsequent coverage is not at issue in this appeal.

carriers.¹⁰ That is, during the mediation MOE proposed that the settlement be funded equally as between it and OneBeacon and OneBeacon declined the offer. Moreover, before the mediation OneBeacon communicated its position that time-on-risk allocation should be utilized and the allocation should be three months based upon the date of June of 2000 when the first unit closed escrow.¹¹ Despite being so advised, MOE, on its own accord, committed to resolve the matter for \$800,000 less any contribution it could obtain from the subcontractor defendants.¹²

MOE was able to recover \$263,500 from the various subcontractors, leaving a deficit of \$536,500. The parties agree that the \$536,500 is the amount at issue in this lawsuit. Despite knowing that OneBeacon did not agree to MOE's settlement position, MOE sought to recover one-half of that amount from OneBeacon¹³ and then filed this declaratory judgment action to ask the Court to settle this dispute.

¹⁰ CP 110 – 118 at CP 111. However, it should be noted that OneBeacon not only participated in the mediation of the underlying claim but also came to mediation prepared to offer sufficient funds to settle the underlying case. In fact, Saltaire's defense counsel received the settlement authority from OneBeacon in the exact amount requested. Riggio Decl., ¶3-4

¹¹ CP 164 – 165 at CP 165. *See* Declaration of Matt Adler filed in Support of OneBeacon's Opposition to Plaintiff MOE's Motion for Partial Summary Judgment (hereinafter "Adler Decl."), ¶ 3.

¹² CP 110 – 118 at CP 111. Riggio Decl., ¶¶3-4.

¹³ CP 110 – 118 at CP 111. Riggio Decl., ¶5.

3. Applicable Policy Provisions.

The insuring agreement contained in OneBeacon's policy provided:

1. INSURING AGREEMENT

- a. We will pay those sums that the insured becomes legally obligated to pay as damages because of 'bodily injury' or 'property damage' to which this insurance applies. We will have the right and duty to defend the insured against any 'suit' seeking those damages. However, we will have no duty to defend the insured against any 'suit' seeking damages for 'bodily injury' or 'property damage' to which this insurance does not apply. . . .
- b. This insurance applies to 'bodily injury' and 'property damage' only if
 - (1) . . .
 - (2) The 'bodily injury' or 'property damage' **occurs during the policy period.**

The policy also contained certain exclusions to coverage, including:

j. DAMAGE TO PROPERTY

"Property damage" to:

- (1) Property you own, rent or occupy;

. . .

- (5) that particular part of real property on which you or any contractors or subcontractors working directly or indirectly on your behalf are performing operations, if the 'property damage' arises out of those operations; or
- (6) That particular part of any property that must be restored, repaired or replaced because 'your work' was incorrectly performed on it.

...

Paragraph (6) of this exclusion does not apply to 'property damage' included in the 'products-completed operations hazard.'

k. DAMAGE TO YOUR PRODUCT

'Property damage' to 'your product' arising out of it or any part of it.

l. DAMAGE TO YOUR WORK

'Property damage' to 'your work' arising out of it or any part of it and included in the 'products-completed operations hazard.'

This exclusion does not apply if the damaged work or the work out of which the damage arises was performed on your behalf by a subcontractor.

As indicated by the policy language, the "your work" exclusions (exclusions j and l) are limited by the "Products-Completed Operations

Hazard." The Products-Completed Operations Hazard negates the applicability of the exclusions **in certain circumstances**; however, even when the Products Completed Operations Hazard applies, it also has exceptions.

The applicability of the "Products-Completed Operations Hazard" is wholly dependent upon its definition:

SECTION V – DEFINITIONS

...

14. 'Products-completed operations hazard:'

- a. includes all 'bodily injury' and 'property damage' occurring away from premises you own or rent and arising out of 'your product' or 'your work' **except:**

- (1) ...

- (2) Work that has not been completed or abandoned. However, 'your work' will be deemed completed at the earliest of the following times:

- ...

- (c) When that part of the work done at a job site has been put to its intended use by any person or organization other than another contractor or subcontractor working on the same project.

Here, the language of the insuring clause, coupled with the exclusions, as well as the exceptions to the exclusions, demonstrates that OneBeacon agreed to indemnify its insured for only a small portion of the property damages which may have existed at the Queen Anne Square Condominiums. Simply put, OneBeacon's policy excluded coverage for the work Saltaire and other subcontractors performed during the course of construction (j, k and l exclusions). The "Products-Completed Operations Hazard" limitation does not provide coverage for "your work" or "your product" "until the work is deemed completed", which is when the work is put to its intended use by another party. Thus, OneBeacon's policy was not applicable until the first unit was sold in June of 2000 because that was when it was put to the intended use by another party. OneBeacon's policy period ended on September 16, 2000, so OneBeacon only provided coverage for 3 months. Thus, this Court should uphold the trial's court determination that the indemnification costs should be equitably divided between the two carriers and based upon an acceptable legal standard in Washington, that being time-on-risk based upon when the construction began and the applicable exclusions and definitions in the OneBeacon insurance policy.

C. ARGUMENT

1. Standard of Review.

The interpretation of an insurance policy is a question of law which is reviewed *de novo*. *Butzberger v. Foster*, 151 Wn.2d 396, 401, 89 P.3d 689 (2004). The determination of whether any principles of equitable contribution should be imposed as between two carriers with a mutual insured is an equitable decision and is, therefore, reviewed for abuse of discretion. *Polygon Northwest Co. NW Co. vs. American Nat'l. Fire Ins. Co.*, 143 Wn. App. 753, 767, 189 P.3d 777 (2008). A trial court necessarily abuses its discretion "if it base[s] its ruling on an erroneous view of the law." *Id.*, quoting *Wash. State Physicians Ins. Exch. & Ass'n. v. Fisons Corp.*, 122 Wn.2d 299, 339, 858 P.2d 1054 (1993).

Here, the trial court determined that the appropriate allocation of indemnification costs between two insurance carriers with a mutual insured should be determined by the length of time that construction occurred at the project and should be determined without regard to applicable exclusions to coverage. Because such determinations were contrary to Washington law, the trial court, by definition, abused its discretion.

2. The Trial Court Correctly Determined an Allocation of Indemnification Costs Between Two Carriers With a Mutual Insured Should be on a Pro-Rata, Time-on-the-Risk Basis.

The trial court "grant[ed] OneBeacon's motion for allocation"¹⁴ and, thus, correctly determined that allocation of indemnification costs between two carriers with a mutual insured should be based on a pro-rata, time-on-the-risk basis. Unfortunately, in doing so, the trial court committed two errors: (1) the trial court erroneously determined that the period of coverage was limited to the time the underlying construction contract was executory in nature, actually occurring at the project; and (2) the trial court failed to analyze or apply certain exclusions to OneBeacon's applicable time-on-risk.¹⁵ As a result of these two errors, the trial court's ultimate determination as to the allocation each of Saltaire's carriers should contribute to the underlying loss was erroneous. For these reasons, OneBeacon respectfully requests that this Court affirm the trial court's determination that a pro-rata, time-on-the-risk allocation is the correct allocation method but also reverse and remand for re-determination of the correct allocation amount and explain the correct application for the trial court to use in its next review.

¹⁴ CP 363 - 364. Court Order.

¹⁵ MOE agreed to the settlement amount at mediation and agreed to pay all of it, thereby carving out OneBeacon from the settlement. MOE never argued that its policies had any applicable exclusions, so none were at issue in this Declaratory Relief action or in this Appeal.

3. The Trial Court Erred in Determining that the Allocation of Indemnification Costs Should be Determined by Reference to the Period of the Time the Underlying Construction Contract was Executory in Nature.

Washington case law unequivocally holds that when continuing property damage occurs (as is the case at bar), all insurers on the risk during the time of ongoing damage are obligated to provide coverage for all damages. This principal was first adopted in *Gruol Constr. Co., Inc. vs. Ins. Co. of North Am.*, 11 Wn. App. 632, 524 P.2d 427, rev. denied, 84 Wn.2d 1014 (1974). In *Gruol*, the insured built an apartment building in 1963, and in the process negligently piled dirt against the box sills of the building thereby causing dry rot that progressively become worse until its discovery in 1968. One insurer provided coverage at the time the dry rot first began, a second insurer provided coverage while the dry rot was in progress (but yet undiscovered) and a third insurer provided coverage during the time the damage was actually discovered. *Id.* at 633.

The issue presented to the appellate court in *Gruol* was which insurer covered the damage – "the insurer at the time of the defective backfilling, at the time of discovery of the dry rot, or all insurers providing coverage during the total time period of the undiscovered condition which progressively worsened." *Id.* at 635. The appellate court chose the third alternative – ruling that because the damage was continuous, all three insurers had an obligation to provide coverage. *Id.* at 636.

Here, there was no dispute – or even argument – but that damage was occurring during a portion of OneBeacon's policy and, thus, that OneBeacon's policy was triggered. However, as discussed below, due to applicable exclusions the only period of time that coverage was available to Saltaire under the OneBeacon policy was the last three months of the policy.¹⁶ There was no argument, and by necessity, could not have been any argument, but that the damage was continuing in nature and was also occurring throughout the period of **both** of MOE's two policies (a period of 24 months).

Thus, the trial court erred in deciding to apply the time period of actual construction as the "time-on-risk" when that goes against *Gruol* and its subsequent cases that all upheld Washington law that property damage is covered continually until the defect is discovered. As noted above, MOE issued two 12 month policies to the insured, (9/16/00 to 9/16/02), yet the Court only applied one policy period, 12 months, to the time-on-risk allocation.¹⁷ The Court's decision contradicts the holding in *Gruol* and constituted reversible error.

¹⁶ CP 164 – 165 at CP 165. Adler Decl., ¶3.

¹⁷ CP 363 – 364 at CP 364. Court Order, pg. 2.

4. The Trial Court Ignored Policy Exclusions Contained in the OneBeacon Policy Which Exclusions Negated Coverage for a Portion of the Underlying Loss.

In addition to erroneously limiting the period of coverage to the dates during which the actual construction of the project occurred, the trial court also erred by disregarding the exclusion contained in OneBeacon's policy.

Insurers are permitted to limit their liability under policies of insurance unless to do so would violate public policy. *Findlay v. United Pacific Ins. Co.*, 129 Wn.2d 368, 379, 917 P.2d 116 (1996) ("We have repeatedly held that an insurer, as a private contractor, is ordinarily permitted to limit its liability unless to do so would be inconsistent with public policy"). The insurer in this instance, OneBeacon, specifically limited its coverage and the trial court erred in failing to fully recognize and apply the applicable exclusions.

The determination of a carrier's indemnification obligations must, of course, begin with the determination of what claims are covered under a given policy. *See, e.g., Waite v. Aetna Cas. & Sur. Co.*, 77 Wn.2d 850, 858-59, 467 P.2d 847 (1970) (allocating defense costs between insured and insurer is permissible when certain items claimed by the insured under the policy were not covered claims but were excluded). Thus, the determination of the amount of OneBeacon's indemnification obligation in

this case necessarily depends on the interpretation of both the insuring clause and the exclusions contained within OneBeacon's policy.

Interpreting an insurance policy is a legal matter for the court and the principles governing the interpretation of insurance policies are well-settled. First, insurance policies are construed as contracts. *Findlay*, 129 Wn.2d at 378. An insurance policy is construed as a whole, with the policy being given a "fair, reasonable, and sensible construction as would be given to the contract by the average person purchasing insurance." *Key Tronic Corp., Inc. v. Aetna (CIGNA) Fire Underwriters Ins. Co.*, 124 Wn.2d 618, 627, 881 P.2d 201 (1994). If the language is clear and unambiguous, the court must enforce it as written and may not modify it or create ambiguity where none exists. *McDonald v. State Farm Fire & Cas. Co.*, 119 Wn.2d 724, 733, 837 P.2d 1000 (1992). MOE never argued that the exclusions argued by OneBeacon were ambiguous. Instead, MOE argued that the "other insurance clause" and joint and several liability applied.

It is undisputed that Saltaire began work on the underlying project in November 1999 – nine months before the OneBeacon policy expired. The trial court relied upon this fact to determine that OneBeacon's indemnification obligation was triggered for that entire nine months. However, even assuming *arguendo* that property damage began on the first date of Saltaire's work on the project such concession would not

support the conclusion that coverage was available as of that date. Instead, the correct analysis as to coverage under OneBeacon's policy had to include an analysis of whether any such property damage was excluded from coverage. The trial court refused to analyze OneBeacon's exclusions to coverage and, thus, incorrectly determined the allocation of indemnification costs between these two carriers.

As demonstrated by the language of the insuring clause, OneBeacon's obligation to indemnify its insured was limited to "property damage" occurring "during its policy period." In this respect the trial court correctly determined that OneBeacon should share in the costs of indemnification of Saltaire. However, the trial court erred when it failed to analyze the meaning or effect of the applicable exclusions to coverage and those exclusions demonstrates that coverage was only available under OneBeacon's policy for a three-month period and during that time period, for only 25 of the 75 units.

First, there is no dispute but that the damages for which Saltaire sought to obtain indemnity from OneBeacon (and MOE) was for damage to units upon which Saltaire and/or its subcontractors performed work. Thus, on its face, exclusion J5¹⁸ excludes coverage for such claims.

¹⁸ Exclusion J5 excludes coverage for "that particular part of real property on which you or any contractors or subcontractors working directly or indirectly on your behalf are performing operations, if the 'property damage' arises out of those operations."

The Washington Supreme Court addressed the scope of the J5 exclusion in *Truck Ins. Exchange v. VanPort Homes, Inc.*, 147 Wn.2d 751, 58 P.3d (2002). In that case, the Supreme Court held that the determination of whether the J5 Exclusion applied was a factual question. However, the critical factor leading to the *VanPort Homes* court's decision was that the insured, VanPort, provided "services" in connection with the construction of new homes. In providing these "services," VanPort acted **either** as general contractor **or** a construction consultant. *Id.* at 755 (*emphasis added*). When the homeowners for whom VanPort provided these "services," later sought damages for construction defects the insurer argued, among other things, that the J5 exclusion (which the court referred to as the "operation exclusion") applied to defeat coverage. *Id.* at 763. The Supreme Court determined that in the circumstances of that case the determination of whether the "operation exclusion" applied was a factual question. However, the basis for the Court's decision was the dual roles the insured undertook with respect to the construction of the homes, stating:

If, as the customers allege, the property damage was caused by the work of others and VanPort's role was to inspect, then it would appear that the exclusion would not apply. Once again, the applicability of the exclusion depends on a factual determination of VanPort's role or operation and requires an examination of facts beyond the complaint.

Id. at 763. In this case there was no need to examine "facts" outside the complaint as, there is no dispute but that at all times, Saltaire was the general contractor performing work on the individual condominium units during the time period before and after the expiration of OneBeacon's policy. Thus, the J5 Exclusion applied to limit coverage for any claims for repair to "property damage" that arose because of Saltaire's (and/or its subcontractors') work.

Second, coverage under the OneBeacon policy was excluded under exclusion J6 – the "your work" exclusion. The "your work" exclusion limited coverage for "that particular part of any property that must be restored, repaired or replaced because '[the insured's] work' was incorrectly performed on it." While this exclusion is limited by an exception to the exclusion – the exclusion does not apply until the work has been put to its intended use¹⁹ – the exception does not swallow the whole. That is, because the insured's work caused the property damage that must be "restored, repaired or replaced" the exclusion applies unless the work – here each of the individual condominium units comprising the Queen Anne Square Condominiums – has been put to its "intended use."

By the date of expiration of OneBeacon's policy, Saltaire had not completed its work on each of the individual units comprising the Queen

¹⁹ See Products-Completed Operations Hazard definition.

Anne Square Condominiums. In fact, only 25 of the 75 units had been completed and/or sold by that date; stated otherwise, only 25 of the 75 units had been "put to their intended use." In the absence of a unit being put to its "intended use," coverage under the OneBeacon policy was simply not available for claims relating to Saltaire's allegedly defective work. Thus, of the 3 months of potential coverage, only one-third of that was covered due to the sale of only 25 of the 75 units.

Despite these exclusions, the trial court determined that the critical factor was whether Saltaire, itself, had completed its work on any given unit. (CP 365 - 367.) However, as discussed herein, the question is not when Saltaire completed its work on any given unit; instead the critical question is when was a given unit "put to its intended use," or, stated otherwise, when was a given unit sold to a third party. The only evidence before this court is that 25 of 75 of the units comprising the Queen Anne Square condominiums had been sold by the time the OneBeacon policy expired. Thus, coverage for the 3 months under the OneBeacon policy could exist for, at best, one-third of the units comprising the Queen Anne Square condominiums. To do otherwise is inequitable because it would require OneBeacon to pay for damages it did agree to insure Saltaire for in the insurance contract.

The trial court's failure to apply and to take into account the applicable exclusions had the effect of requiring OneBeacon to indemnify

for a loss it did not contractually agree to undertake. This is contrary to well established Washington law. See e.g. *Farmers Ins. Co. of Washington v. Miller*, 87 Wn.2d 70, 73, 549 P.2d 9 (1976), where the Court addressed whether the automobile in the accident fell within the definition of an 'automobile' within the terms of the insurance policy. The Court explained Washington law on the review and application of insurance policies. The Court noted that "it must be recognized that insurance policies are to be construed in accordance with the general rules applicable to all other contracts. *Jeffries v. General Cas. Co. of Am.*, 46 Wn.2d 543, 283 P.2d 128 (1955). The courts in construing the contract must interpret them according to the intent of the parties. *Ames v. Baker*, 68 Wn.2d 713, 415 P.2d 74 (1966). However, the court cannot rule out of the contract language which the parties thereto have put into it, nor can the court revise the contract under the theory of construing it, nor can the court create a contract for the parties which they did not make themselves, nor can the court impose obligations which never before existed. *Evans v. Metropolitan Life Ins. Co.*, 26 Wn.2d 594, 174 P.2d 961 (1946). The terms of the policy must be understood in their plain, ordinary and popular sense. *Thompson v. Ezzell*, 61 Wn.2d 685, 379 P.2d 983 (1963). Clear and unambiguous language is not to be modified under the guise of construing the policy. *West Am. Ins. Co. v. State Farm Mut. Auto. Ins. Co.*, 80 Wn.2d 38, 491 P.2d 641 (1971). Thus, the trial court erred in

deciding to not apply the exclusions in the OneBeacon policy, as the court's ruling effectively modified the OneBeacon policy, which is against Washington law and grounds for reversal.

5. Time-on-Risk is Determined by the Time Period of Each Carrier's Applicable Policy Period.

The California Appellate Court has addressed the concept of equitable contribution between insurers covering the same risk on multiple occasions and circumstances, including when the underlying action involves claims for construction defects. In doing so, California courts have held that in such a circumstance the insurer's indemnification obligations are to be determined on a pro rata, time-on-the-risk approach. *Centennial Ins. Co. v. U.S. Fire Ins. Co.*, 88 Cal. App. 4th 105, 105 Cal. Rptr. 2d 559 (2001).

Centennial, like the case at bar, involved claims for construction defects. Three insurers, Centennial, Travelers and U.S. Fire, each insured the developer, each accepted the insured's tender of defense and each contributed to the ultimate settlement of the underlying claim. *Id.* at 109. When a disagreement arose as to whether U.S. Fire had sufficiently contributed to the defense of the underlying claim, Centennial (on its own behalf and on behalf of Travelers) brought action against U.S. Fire. *Id.* at 109-10. In doing so, Centennial argued that the defense costs should be shared equally rather than on the basis of time-on-the-risk. *Id.* at 110.

The California court summarily rejected Centennial's position and in doing so noted the critical factor underlying its determination -- that U.S. Fire's coverage of the insured was a "relatively small fraction of the overall period of coverage compared to that provided by Centennial and Travelers." *Id.* The court went on to explain the proper determination of allocation between insurers requires a trial court to exercise discretion and to:

determine which method of allocation will most equitably distribute the obligation among the insurers "pro rata in proportion to their respective coverage of the risk," as "a matter of distributive justice and equity." (*Citation omitted.*) As such, the trial court's determination of which method of allocation will produce the most equitable results is necessarily a matter of its equitable judicial discretion. (*Citation omitted.*)

Id. at 111.

Several other California courts have followed *Centennial* in determining that the time-on-risk allocation method applies to the obligations of multiple insurers who may potentially cover a claim arising out of construction defects. *See, e.g., USF Ins. Co. vs. Clarendon Am. Ins. Co.*, 452 F. Supp. 2d 972 (C.D. Cal. 2006).

Other jurisdictions have imposed similar (if not identical) holdings. For example, in *Sentinel Insurance Co. Ltd. v. First Ins. Co. of Hawaii, Ltd.*, 875 P.2d 894 (Haw. 1994), the Supreme Court of Hawaii adopted a

pro rata, time-on-the-risk allocation for indemnification in a declaratory judgment action for contribution filed by one insurer against another. The underlying plaintiff, an apartment owners' association, brought suit against the policyholder, a developer, and others, alleging that design and construction defects results in water damage to its apartment building. The water damage was continuous. Two insurers -- Sentinel and First Insurance -- had issued successive comprehensive general liability policies to the policyholder. Sentinel provided the policyholder with a defense, but First Insurance declined. Sentinel (and the policyholder) settled the underlying case for payment of \$75,000. Sentinel thereafter filed a declaratory judgment action, seeking contribution from the second insurer for the settlement and defense costs. *Id.* at 902-03.

The issue of proper allocation of indemnity costs was addressed by the Hawaii Supreme Court during its review. The Hawaii Supreme Court reversed the lower court's determination regarding First Insurance's duty to indemnify and remanded the issue of the proper allocation to the lower court. In doing so, the Supreme Court specifically addressed the proper method of allocation of indemnity to be applied and specifically adopted a time-on-the-risk approach, stating:

When it is finally determined which policies were triggered, the liability for the total loss, according to the continuous injury trigger, must be equitably apportioned between Sentinel and First Insurance. . . . Equity, under the circumstances of

this case, dictates that the court allocate contribution among the liable insurers in proportion to the time periods their policies covered.

Id. at 918-19.

The time-on-risk approach was also utilized in *Scottsdale Insurance Co. v. American Empire Surplus Lines Ins. Co.*, 811 F. Supp. 210 (D. Md. 1993). The underling action involved a claim for bodily injury as a result of a young child's consumption of lead paint at the policyholder's property. The child lived at the property for approximately 13 months (from June 6, 1985 through July 1986) and, according to the expert testimony, had been continuously exposed to lead while living at the property. *Id.* at 211. American Empire and Scottsdale had issued successive general liability policies to the policyholder. Scottsdale provided the mutual insured with a defense, funded the majority²⁰ of ultimate settlement, and then brought an action for indemnification²¹ and/or contribution against American Empire. *Id.* at 211. With respect to the contribution claim, Scottsdale argued that it was entitled to 50% of the funds it paid in settlement; American Empire, in turn, asserted it should contribute a 4/13 share as it had insured the policyholder for only four months out of the 13 months the child had resided at the property. In

²⁰ For reasons which are unclear in the opinion, a third carrier, Geico, also contributed to the settlement.

²¹ Scottsdale attempted to claim indemnification by asserting that the child's injuries were the result of a "single occurrence." The United States District Court wholly rejected this contention. *Id.* at 216.

making this argument, Scottsdale relied upon the language of the identical "other insurance" clauses contained in both its and American Empire's policies, which according to Scottsdale provided for "equal shares" between the two carriers. *Id.* at 217. The Maryland District Court rejected Scottsdale's theory and, in doing so, explained:

The flaw in Scottsdale's argument is that . . . the standard 'other insurance' clause deal with the question of whether there should be equal contribution or contribution based upon policy limits. They do not address the question here presented: whether, where insurers' liability is based upon an exposure theory, there should be equal contribution or contribution based upon the respective lengths of exposure during the different policy periods.

Id. Consequently, the court held:

While an equal apportionment rule would be easier to apply, it would be entirely inequitable in cases where one insurer had provided coverage during almost the entire period during which damage from exposure had occurred while another insurer had provided coverage only for a brief moment during that period.

Id. See also, *Maremount Corp. v. Continental Cas. Co.*, 760 N.E.2d 550 (Ill. App. 2001) (pro rata, time-on-the-risk allocation of policy coverage among insurers of corporation was appropriate, where corporation did not identify when any particular spill or dump took place at a particular site); *Diocese of Winona v. Interstate Fire & Cas. Co.*, 89 F.3d 1386 (8th Cir. 1996) (applying Minnesota law and holding that where consecutive

liability insurers must provide coverage for continuous occurrence, and there is no evidence allocating timing of actual damages, proper method is to allocate damage pro rata by each insurer's "time-on-the-risk").

Thus, as the above cases illustrate, OneBeacon's share of the indemnification costs should be limited by a pro-rata determination of the time on the risk. However, in making this calculation, this Court should not simply review the policy periods themselves but, as other courts have done, should look to the actual time on the risk. Here, OneBeacon's actual time on the risk was less than the policy period and, in determining extent of its indemnity obligation, this fact must be considered. To explain, as indicated above, the OneBeacon policy had the "your work" exclusions, j and l that excluded coverage until the Products-Completed Operations Hazard acted to negate these exclusions. Thus, for purposes of determining the "time-on-the-risk," the Court should measure the months on the risk and OneBeacon's share of the indemnification obligation should be 3 months compared to MOE's 24 months.

However, the inquiry does not end at simply time-on-the-risk. Instead, in determining the amount of indemnification the Court must also review whether any applicable exclusions to coverage apply. As discussed herein, applicable exclusions limited coverage to only 25 of the 75 units at issue.

By limiting the period of coverage to the period of time that the underlying contract was executory in nature is contrary to established case law in Washington. Thus, this Court should reverse the trial court's determination and remand for recalculation of the period of coverage applicable to a time-on-risk allocation, and explain to the trial court that exclusions within an insurance policy do apply when calculating the time-on-risk allocation.

As noted above, OneBeacon's policy did not apply until the first unit was sold in June of 2000. As OneBeacon's policy ended in September of 2000, OneBeacon only had 3 months of coverage applicable to the claim, which was further limited by the exclusions.

The trial court correctly determined that there was a rational basis for allocation of the indemnification costs between OneBeacon and MOE and, consequently, imposed what the trial court deemed to be a pro-rata, time-on-the-risk allocation.

D. APPLICATION OF TIME-ON-RISK TO CASE

This is a case between two insurance carriers who potentially provided general liability coverage for the work their mutual insured, Saltaire, performed at the Queen Anne Square condominiums. The total time period of coverage between the two insurers was 27 months (3 months for OneBeacon and 24 months for MOE). While OneBeacon potentially provided coverage for Saltaire's work on the Queen Anne

Square condominiums for 9 months, exclusions to coverage limited OneBeacon's coverage obligation to Saltaire to the last 3 months that its policy was in effect. As the first unit was not sold until June 2000, and the policy expired in September 2000, there were only 3 months of potential coverage. Thus, the total time period that coverage could exist between these two carriers was 27 months.

However, determining the total period of potential coverage is not the end of the analysis. Once the potential period of coverage is established, the exclusions must be examined to determine whether OneBeacon owes coverage for any work during this time period. As explained above, the exclusions continue to operate during the 3 month time period but only for those 25 units sold. Therefore the Court needs to take the 27 months and further limit its application of time-on-risk against OneBeacon to another one-third due to the applicable exclusions in the policy.

The trial court erred in applying an allocation based upon when the construction contract was executory as the court in *Gruol* and the subsequent cases held otherwise.

E. CONCLUSION

For the above stated reasons, OneBeacon respectfully requests that this Court reverse the trial court on its inappropriate application of a time-on-risk allocation.

RESPECTFULLY SUBMITTED this 17th day of December,
2009.

GORDON THOMAS HONEYWELL,
LLP

By



Joanne T. Blackburn, WSBA No. 21541
jblackburn@gth-law.com
Michelle A. Menely, WSBA No. 28353
mmenely@gth-law.com
Attorneys for Appellant