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No. 69569-0-I

IN THE COURT OF APPEALS  
OF THE STATE OF WASHINGTON

DIVISION 1

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GULL INDUSTRIES, INC.

Plaintiff-Appellant,

v.

STATE FARM FIRE AND CASUALTY COMPANY and  
TIG INSURANCE COMPANY,

Defendants / Respondents,

and

ALLIANZ UNDERWRITERS INSURANCE COMPANY, ET AL.,

Defendants.

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**BRIEF OF RESPONDENT TIG INSURANCE COMPANY**

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ORIGINAL

## TABLE OF CONTENTS

TABLE OF CONTENTS.....	i
TABLE OF AUTHORITIES .....	iii
I. INTRODUCTION .....	1
II. ASSIGNMENT OF ERRORS .....	3
III. STATEMENT OF THE ISSUES.....	3
IV. STATEMENT OF THE CASE.....	4
A. The Skagit Coverage Action.....	4
B. The Instant Coverage Action .....	5
C. The TIG Policies .....	6
D. Sedro-Woolley Station.....	8
E. Gull Undertakes “Independent Remedial Actions” Without The State Of Washington Department Of Ecology’s Review And Approval .....	9
F. TIG Seeks Partial Summary Judgment.....	10
G. The Trial Court Grants Partial Summary Judgment To State Farm And TIG And Makes The CR 54(b) Finding Requested By Gull Over TIG’s Objection .....	11
V. SUMMARY OF ARGUMENT .....	11
VI. ARGUMENT .....	12
A. The Duty To Defend Under The TIG Policies’ Insuring Agreement Rquires A “Suit” Against Gull.....	12
B. No “Suit” Has Been Filed By The DOE Against Gull To Trigger The Duty To Defend.....	14

C.	<i>Weyerhaeuser</i> Did Not Address What Constitutes A “Suit” In The Context Of The Environmental Liability Laws .....	19
D.	The “Suit” Requirement Is Not Ambiguous Based On TIG’s Reservation Of Rights As To Other Sites .....	26
E.	The Trial Court Erred In Granting Gull’s Request For A CR 54(b) Certification.....	28
VII.	CONCLUSION.....	33

## TABLE OF AUTHORITIES

### Washington Cases

<i>Brower v. Ackerley</i> , 88 Wash.App.2d 87, 943 P.2d 1141 (1997).....	18
<i>Buchanan v. Switzerland General Insurance Co.</i> , 76 Wash.2d 100, 455 P.2d 244 (1969).....	28
<i>Carew, Shaw &amp; Bernasconi, Inc. v. General Casualty Co. of America</i> , 189 Wash. 329, 65 P.2d 689 (1937).....	28
<i>Cutter &amp; Buck, Inc. v. Genesis Ins. Co.</i> , 306 F.Supp.2d 988 (W.D.Wash. 2004).....	26
<i>Doerflinger v. New York Life Insurance Co.</i> , 88 Wash.2d 878, 567 P.2d 230 (1977).....	31, 32, 33
<i>Fox v. Sunmaster Products, Inc.</i> , 115 Wash.2d 498, 798 P.2d 808 (1990).....	32, 33
<i>Frank Coluccio Construction Co., Inc. v. King County</i> , 136 Wash.App. 751, 150 P.3d 1147 (2007).....	26
<i>Heringlake v. State Farm Fire &amp; Casualty Co., Inc.</i> , 74 Wash.App. 179, 872 P.2d 539 (1994).....	15
<i>King Aircraft Sales, Inc. v. Lane</i> , 68 Wash.App. 706, 846 P.2d 550 (1993).....	26
<i>Lindsay Credit Corp. v Skarperud</i> , 33 Wash.App. 788, 657 P.2d 804 (1983).....	28-29
<i>Logan v. Northwest Insurance Co.</i> , 45 Wash.App. 95, 724 P.2d 1059 (1986).....	28
<i>Nelbro Packing Co. v. Baypack Fisheries, LLC</i> , 101 Wash.App. 517, 6 P.3d 22 (2000).....	30, 31, 33
<i>North Pacific Ins. Co. v. Christensen</i> , 143 Wash.2d 43, 17 P.3d 596 (2001).....	15

<i>Olds-Olympic, Inc. v. Commercial Union Insurance Co.</i> , 129 Wash.2d 464, 918 P.2d 923 .....	13
<i>Pepper v King County</i> , 61 Wash. App. 339, 810 P.2d 527 (1991).....	28
<i>Quadrant Corp. v. American States Insurance Co.</i> , 154 Wash.2d 165, 110 P.3d 733 (2005).....	13
<i>Queen City Farms, Inc. v. Central National Co.</i> , 126 Wash.2d 50, 882 P.2d 703 (1994).....	15
<i>Rones v. Safeco Insurance Co.</i> , 119 Wash.2d 650, 835 P.2d 1036 (1992).....	13
<i>Safeco Title Insurance Co. v. Gannon</i> , 54 Wash.App. 330, 774 P.2d 30 (1989).....	15
<i>Schiffman v. Hanson Excavating Co.</i> , 82 Wash.2d 681, 513 P.2d 29 (1973).....	32
<i>Sullivan v. Great American Insurance Co.</i> , 23 Wash.App. 242, 594 P.2d 454 (1979).....	28
<i>Time Oil Co. v. Cigna Property &amp; Casualty Co.</i> , 743 F.Supp. 1400 1420 (W.D. Wash 1990).....	16, 28
<i>Transcontinental Insurance Co. v. Washington Public Utility District</i> , 111 Wash.2d 452, 760 P.2d 337 (1988).....	15
<i>Underwriters at Lloyd's v. Denali Seafoods, Inc.</i> , 729 F.Supp. 721 (W.D.Wash. 1989).....	28
<i>Weyerhaeuser Co. v. Aetna Casualty and Surety Co.</i> , 123 Wash 2d 891, 874 P.2d 142 (1994).....	<i>Passim</i>

#### **Other Jurisdictions**

<i>Airborne Freight Corp. v. St. Paul Fire &amp; Marine Insurance Co.</i> , 472 F.3d 634 (9th Cir. 2006) .....	15
<i>Bausch &amp; Lomb Inc. v. Utica Mutual Insurance Co.</i> , 330 Md. 758, 625 A.2d 1021 (1993).....	21

*National Bank of Washington v. Dolgov*, 853 F.2d 57 (2d Cir. 1988).....32

*Windham Solid Waste Management District v. National Casualty Co.*,  
146 F.3d 131 (2d Cir. 1998).....15

**Statutes**

42 U.S.C. § 9601 *et seq.* .....16

RCW 70.105D .....5

RCW 19.86 *et seq.* .....6

RCW 70.105D.040(2) .....21

**Rules**

CR 54(b) .....2, 3, 11, 12, 28, 29, 32, 33

CR 56 .....27

RAP 2.2(d) .....29, 32

**Regulations**

WAC 284.30-930(3) .....25

**Other Authorities**

XVII Oxford English Dictionary (2d ed. 1989) .....16

Webster’s Third New International Dictionary (1986) .....16

## **I. INTRODUCTION**

The plaintiff, Gull Industries, Inc. (Gull), filed this action seeking a declaratory judgment and other relief under primary and excess liability policies issued by the defendants between 1966 and 1986 in connection with the alleged release of gasoline and other hydrocarbons into the soil and groundwater arising from operations at over 200 properties at which Gull, its lessees and/or consignees conducted fuel or fueling-related operations.

One of the defendants in this coverage action, TIG Insurance Company (TIG), as successor-in-interest to Transamerica Insurance Company, issued five liability policies to Gull between 1981 and 1986. Another defendant, State Farm Fire & Casualty Company (State Farm), issued two liability policies to the service station operator at one of the subject sites at 21481 Highway 20, Sedro-Woolley, Washington, 98284 (referred to as the Highway 20 or Sedro-Woolley site).

State Farm filed a motion for partial summary judgment seeking a determination that it owed no duty to defend Gull in connection with the Highway 20 site because no “suit” had been filed against Gull as required under the State Farm policies. TIG joined State Farm’s motion for partial summary judgment. The trial court properly granted partial summary judgment to State Farm and TIG and found that they owed no duty to

defend where (1) no government agency has sued Gull for property damage at the Highway 20 site; (2) Gull has not been determined to be a “potentially liable person” under Model Toxics Control Act, RCW 70.105D (MTCA), by a government agency; (3) Gull has not submitted its remediation under any government voluntary cleanup program; (4) no governmental agency has ever reviewed or approved the remediation system installed at the particular site; (5) Gull claimed that the costs were not related to the defense but covered as part of the policies’ indemnity obligation; and (6) TIG’s response to Gull’s tenders at other sites did not make the “suit” requirement ambiguous where its answer filed herein raised the “suit” requirement as to all sites and its response was based on limited and incomplete information, without knowledge of all of the facts, and under a full reservation of rights.

Although the trial court correctly granted partial summary judgment to TIG and State Farm, the court should not have granted Gull’s request for CR 54(b) certification because it ruled only that the duty to defend did not apply absent a “suit” against Gull; this ruling may become moot if the trial court later determines that no expenditures by Gull at Sedro-Woolley would have qualified as defense costs in any event; and the trial court did not find that immediate appeal was necessary to prevent hardship and injustice.

## **II. ASSIGNMENT OF ERROR**

TIG does not assign error to the trial court's orders granting partial summary judgment in favor of State Farm and TIG, but does so as to its later order finding no just reason to stay enforcement or delay appeal pursuant to CR 54(b). CP 793-95, CP 796-98, CP 941-47.

## **III. STATEMENT OF THE ISSUES**

The first issue is whether the trial court properly determined that TIG did not owe Gull a duty to defend in connection with the Sedro-Woolley site under the policies' insuring agreement where no administrative or judicial proceedings have been instituted against Gull, Gull has not been determined to be a potentially liable person, the costs incurred by Gull for investigation and remediation at the site were not in response to any government action, and Gull has admitted that it has incurred no attorney's fees or other costs in the defense but has claimed that its investigation costs are covered as "damages" under the duty to indemnify provision of the insurance policies.

The second issue is whether the trial court should have granted Gull's request for CR 54(b) certification when the court did not decide whether any costs were not covered as part of its ruling, its ruling may become moot if the court later determines that no expenditures by Gull at Sedro-Woolley would have qualified as defense costs in any event, and the

court did not find that immediate appeal was necessary to prevent hardship and injustice.

#### **IV. STATEMENT OF THE CASE**

##### **A. The Skagit Coverage Action**

Gull previously filed an action in Skagit County against certain insurers in connection with the release of gasoline and other hydrocarbons into the soil and groundwater at a former Gull service station located at 21481 Highway 20, Sedro-Woolley, Washington, 98284 (the Highway 20 or Sedro-Woolley site). CP 64-84. The Skagit County action sought a declaratory judgment and damages for breach of contract and fiduciary duty, and for bad faith against TIG, three of its excess insurers (Allianz Underwriters Insurance Company (Allianz), Swiss Reinsurance America Corporation (Swiss Re), and American International Group, Inc. (AIG)), and three other insurers (State Farm Fire & Casualty Company (State Farm), Safeco Insurance Company of American (Safeco), and Unigard Insurance Company (Unigard)) as to which Gull claimed that it was an additional insured under policies issued to the service station operators. CP 64-84.

Gull alleged that it had tendered its claims regarding the Highway 20 site to TIG on October 23, 2009, but that TIG had not accepted its request for defense and indemnification. CP 77. Gull alleged that it was

strictly liable under MTCA, RCW 70.105D, and that the policies issued by TIG and other insurers afford coverage for its liabilities. CP 81. Finally, Gull alleged that it had incurred approximately \$381,000 in investigation and remediation costs to date, and that it anticipated additional investigation and remediation costs in excess of three million dollars to complete on- and off-site remediation at the site. CP 76

The Skagit County action was later transferred from Skagit County to King County and consolidated with the instant action below.

**B. The Instant Coverage Action**

Gull later filed a broader action in King County, seeking similar relief under primary and excess liability policies issued between 1966 and 1986 in connection with the alleged release of gasoline and other hydrocarbons into the soil and groundwater resulting from its operations at over 200 properties (including the highway 20 site) at which Gull, its lessees and/or consignees conducted fuel or fueling-related operations. CP 817-32.

Gull's first claim sought a declaratory judgment against all of the insurers, including TIG, and alleged that the carriers were in breach of their policies by their failure to pay costs incurred by Gull with respect to its underlying liabilities and to acknowledge that those liabilities are covered under the insurance policies at all sites. CP 824-25. Gull's

second claim incorporated the same allegations and alleged that all of the carriers were in breach of the insurance contracts. CP 826. Gull's third, fourth and fifth claims alleged insurance bad faith (claims 3 and 4) against TIG and Federal Insurance Company, respectively, as to certain tenders for defense and indemnification, whereas its fifth claim alleged violation of the Washington Consumer Protection Act (RCW 19.86 *et seq.*) based on the same allegations. CP 826-32.

TIG's answer admitted that it issued the subject policies and that Gull had previously provided notice of its liability for certain of the sites (excluding Highway 20), but denied all allegations of liability and set forth defenses and affirmative defenses. CP 1-19. As to Highway 20, TIG admitted that Gull first provided notice to TIG in October 2009, but as to all sites asserted that it had no duty to defend unless and until a suit had been filed against Gull for covered damages. CP 10, 13, 17. TIG further sought a declaration that it had no obligation to reimburse Gull for defense and indemnity costs with respect to the sites at issue. CP 1-19.

### **C. The TIG Policies**

TIG issued five liability policies to Gull between 1981 and 1986. CP 156-77. Although the record does not contain the complete policies, the parties agree that they provide in relevant part:

#### **1. COVERAGE A—BODILY INJURY**

## **COVERAGE B—PROPERTY DAMAGE**

The company will pay on behalf of the insured all sums which the insured shall become legally obligated to pay as damages because of bodily injury or property damage to which this insurance applies, caused by an occurrence. The company shall have the right and duty to defend any suit against the insured seeking damages on account of such bodily injury or property damage, even if any of the allegations of the suit are groundless, false or fraudulent, and may make such investigation and settlement of any claim or suit as it deems expedient.

(emphasis in the original). CP 161, 171. The TIG policies contain the following additional conditions:

### **VIII. ADDITIONAL CONDITIONS**

\* \* \* \*

#### **4. The Insured's Duties in the Event of Occurrences, Claim or Suit.**

- (a) In the event of an occurrence, written notice containing particular sufficient to identify the Insured and also reasonably obtainable information with respect to the time, place, and circumstances thereof, and the names and addresses of the Insured and of available witnesses, shall be given by or for the insured, to the company or for any of its authorized agents as soon as practicable.
- (b) If claim is made or suit is brought against the Insured, the Insured shall immediately forward to the company every demand, notice, summons, or other process received by him or his representative.

- (c) . . . the Insured shall not, except at his own cost, voluntarily make any payment, assume any obligation or incur any expense other than for first aid to others at the time of the accident.

(emphasis in the original). CP 165, 175-76.

**D. Sedro-Woolley Station**

Gull owned a service station, known as Sedro-Woolley located on Highway 20, and leased it to Hayes Johnson and Mary Johnson for ten years between September 1972 and September 1982. CP 65, CP 184-88. Gull alleged that it first tendered claims arising from property damage at Sedro-Woolley Station in 2009. CP 65, CP 827.

In this action, Gull alleged that gasoline and other hydrocarbons were released into the environment at the Highway 20 site during the periods covered by the TIG policies. CP 75. As relevant, Gull alleged that it contracted with Norton Corrosion to “perform analysis of leakage of USTs [underground storage tanks] at a number of Gull’s stations, including the Highway 20 site.” CP 76. Norton Corrosion installed borings adjacent to each UST, and found the presence of hydrocarbons in the soil at the Highway 20 site. CP 76. A March 1985 report prepared by Norton Corrosion provided “conclusive evidence that hydrocarbons were present in the soil at the Highway 20 site in December 1984.” CP 76. Gull alleged that it undertook voluntary remediation of hazardous

substances released at the site, including investigation and cleanup of the soil and ground water. CP 76. It further alleged that it had installed dual-purpose soil vapor and ground water extraction wells and a treatment system to remediate the contamination. CP 76.

**E. Gull Undertakes “Independent Remedial Actions” Without The State Of Washington Department Of Ecology’s Review And Approval**

According to a letter sent by The State of Washington Department of Ecology (the DOE) to Gull on November 29, 2005, Gull had given the DOE verbal notification of a release of petroleum product at the Sedro-Woolley site in February 2005. CP142. The letter from the DOE went on to state that, although the site was being added to the Leaking Underground Storage Tank (LUST) database, this “does not mean that [the DOE] has determined that [Gull is] a potentially liable person under MTCA [administered under Chapter 173-340 of the Washington Administrative Code (WAC)].” CP 142. The letter went on to state that the DOE had not reviewed and approved the remediation action. CP 142. “Independent remedial actions are done at the potentially liable person’s own risk.” CP 142.

Gull’s environmental consultants agreed that the DOE has never determined that Gull is a potentially liable person under MTCA, Gull has not submitted remediation under the DOE’s voluntary cleanup program,

and the DOE has never reviewed or approved the remediation at the site. CP 131-33, CP 140-41.

**F. TIG Seeks Partial Summary Judgment**

TIG and State Farm, which insured the lessees, Hayes Johnson and Mary Johnson, under two liability policies, sought partial summary judgment on grounds that they owe no duty to defend because no “suit” was ever brought against an insured under their liability policies for property damage at the Sedro-Woolley site. CP 15-143, CP 147-177. Gull filed an amended opposing response (CP 408-26) and a supplemental opposing response. CP 480-99. As part of its amended response, Gull admitted that:

Gull has incurred no traditional ‘defense’ costs at the Sedro-Woolley Site and claims no attorney’s fees related to the ‘defense’ of any environmental liability—whether imposed through ‘suit’ or as a result of Gull’s statutory liability under MTCA.

\* \* \* \*

The only costs that Gull has tendered to State Farm, or to any carrier at the Sedro-Woolley site, are those incurred to characterize the contamination, evaluate remediation options, and implement and run a cleanup operation. Those costs fall within the indemnity coverage of the State Farm policies.

CP 420-21. TIG and State Farm filed supporting replies and State Farm filed a supplemental reply. CP 436-41, 463-67, 728-33.

**G. The Trial Court Grants Partial Summary Judgment To State Farm and TIG And Makes The CR 54(b) Finding Requested By Gull Over TIG's Objection**

On September 28, 2012, the trial court held that State Farm owed no duty to defend Gull in connection with the Sedro-Woolley site. CP 793-95. It entered the same order granting TIG's joinder two weeks later on October 12, 2012. CP 796-98. Thereafter, on October 24, 2012, Gull requested the trial court to enter a final judgment and certification pursuant to CR 54(b). CP 804-10. State Farm took no position in response to Gull's motion. CP 909-11. TIG filed an opposition and asserted that a CR 54(b) certification was inappropriate as giving rise to piecemeal appeals on a number of grounds. CP 915-26.

On November 13, 2012, the trial court granted Gull's motion for the entry of a final judgment pursuant to CR 54(b). CP 941-47. Gull thereafter filed this appeal. CP 948-67.

**V. SUMMARY OF ARGUMENT**

The TIG liability policies require a "suit"—as opposed to a "claim"—to be brought against an insured to trigger the duty to defend. Here, under any definition of "suit," there has been no "suit" and the trial court properly determined that TIG owed no duty to defend Gull with respect to the Sedro-Woolley site. Gull has never been sued in court or

administrative proceedings, or named a “potentially liable person” under MTCA, and the costs that Gull incurred at the site were not the result of any action by the DOE and without its involvement. TIG’s response to Gull’s tenders at other sites did not make the “suit” requirement ambiguous where its answer filed herein raised the “suit” requirement as to all sites and its response was based on limited and incomplete information, without knowledge of all of the facts, and under a full reservation of rights.

Although the trial court correctly granted partial summary judgment to TIG and State Farm, the court should not have granted Gull’s request for CR 54(b) certification because it ruled only that the duty to defend did not apply absent a “suit”; this ruling may become moot if the court later determines that no expenditures by Gull at Sedro-Woolley would have qualified as defense costs; and the trial court did not find that immediate appeal was necessary to prevent hardship and injustice.

## **VI. ARGUMENT**

### **A. The Duty To Defend Under The TIG Policies’ Insuring Agreement Requires A “Suit” Against Gull**

The issue on appeal involves the question of what constitutes a “suit” triggering an insurer’s duty to defend an insured under the insuring agreement of a third-party liability policy.

As the interpretation of an insurance policy is a question of law, *Quadrant Corp. v. American States Ins. Co.*, 154 Wash.2d 165, 171, 110 P.3d 733 (2005), it is appropriately decided, as it was here, on summary judgment. *Rones v. Safeco Ins. Co.*, 119 Wash.2d 650, 654, 835 P.2d 1036 (1992).

Generally, third-party insurance involves protection for the policyholder for liability it incurs to someone else, whereas first-party insurance involves protection for losses to the policyholder's own property. *Olds-Olympic, Inc. v. Commercial Union Ins. Co.*, 129 Wash.2d 464, 479, 918 P.2d 923 (1996), citing *Weyerhaeuser Co. v. Aetna Casualty and Surety Co.*, 123 Wash.2d 891, 909, 874 P.2d 142 (1994).

In this case, the insuring clause of the TIG liability policies gave rise to different duties. *Weyerhaeuser*, 123 Wash.2d at 902. First, the duty to indemnify Gull for all "damages" that Gull became "legally obligated to pay" because of bodily injury or property damage to which the insurance applied, caused by an "occurrence"; this duty to pay "damages" for which Gull was "legally obligated" includes cleanup costs imposed for environmental property damage under MTCA. *Olds-Olympic*, 129 Wash.2d at 473, citing *Weyerhaeuser*, 123 Wash.2d at 913. The duty to indemnify for "damages" was expressly not at issue in State

Farm’s motion for partial summary judgment and TIG’s joinder, as Gull concedes (Br., at 11), nor is it an issue on appeal.

What *is* at issue was TIG’s other duty under the insuring clause—to defend any “suit” brought against Gull seeking covered damages, even if the allegations of the “suit” were groundless, false or fraudulent. The policies clearly and unambiguously required a “suit” against Gull—not merely a “claim” or legal liability for covered “damages”—to trigger the duty to defend. Gull has not been sued, and without a “suit” by the DOE, TIG’s duty to defend Gull was not triggered at the Sedro-Woolley site.

**B. No “Suit” Has Been Filed By The DOE Against Gull To Trigger The Duty To Defend**

The TIG policies distinguish between a “suit,” “damages,” and a “claim”: while TIG was entitled to “make such investigation and settlement of any claim or suit” as it deemed expedient, including “damages” which Gull was “legally obligated” to pay, its duty to defend was triggered only by a “suit” against Gull.

Neither “claim” nor “suit” is defined in the TIG and State Farm policies, but that does not make either of the words as used in the policies ambiguous.

In construing an insurance policy, the court gives the policy language the same “fair, reasonable, and sensible construction as would be

given to the contract by the average person purchasing insurance.” *Queen City Farms, Inc. v. Central National Co.*, 126 Wash.2d 50, 65, 882 P.2d 703 (1994). “[T]he entire contract must be construed together so as to give force and effect to each clause.” *Transcontinental Ins. Co. v. Washington Pub. Util. Dist.*, 111 Wash.2d 452, 456, 760 P.2d 337 (1988). “Undefined words and terms used in an insurance policy should be understood in their ordinary, plain, and popular sense.” *Heringlake v. State Farm Fire & Cas. Co., Inc.*, 74 Wash.App. 179, 185, 872 P.2d 539 (1994). A dictionary may be used to determine the ordinary meaning of an undefined term in an insurance policy. *North Pacific Ins. Co. v. Christensen*, 143 Wash.2d 43, 48, 17 P.3d 596 (2001).

Although “claim” is not defined, the courts have relied on dictionary definitions and held that “the plain, ordinary meaning of claim is a demand for compensation.” *Safeco Title Ins. Co. v. Gannon*, 54 Wash.App. 330, 774 P.2d 30 (1989); see also *Airborne Freight Corp. v. St. Paul Fire & Marine Ins. Co.*, 472 F.3d 634, 637 (9th Cir. 2006)(applying Washington law), citing *Windham Solid Waste Mgmt. Dist. v. National Casualty Co.*, 146 F.3d 131, 134 (2d Cir. 1998)(referring to insurance case law across numerous states and holding that “[a] ‘claim’ may be something other than a formal lawsuit” and require simply “a specific demand for relief”).

By comparison, dictionary definitions of “suit” refer to judicial proceedings. *See, e.g.*, XVII Oxford English Dictionary 147 (2d ed. 1989) (“[t]he action of suing in a court of law...litigation”); Webster’s Third New International Dictionary 2286 (1986)(“an action or process in court for the recovery of a right or claim”). In *Time Oil Co. v. Cigna Property & Casualty Co.*, 743 F.Supp. 1400, 1420 (W.D.Wash. 1990)(applying Washington law), the district court more broadly read the “suit” requirement to include a PRP letter (*i.e.*, an EPA notice under the Comprehensive Environmental Response, Compensation, and Recovery Act of 1980 (CERCLA), 42 U.S.C. § 9601 *et seq.*, that someone is a “potentially responsible party”). Even so, Gull has cited no case that has held that a “suit” arises without any action by a government agency—that is, a PRP letter, a consent order, formal notice of violation which threatens enforcement, or some other action.

Gull argues that because MTCA imposes strict liability, “suit” is ambiguous, citing *Weyerhaeuser*, 123 Wash.2d 891 (Br., at 12). But not even MTCA is self-enforcing. As it stands, the DOE has taken no action against Gull for the release of hazardous substances at the Sedro-Woolley site. The DOE did not sue Gull or initiate enforcement proceedings. The DOE has demanded nothing from Gull. The DOE has made no determination that Gull is a potentially liable person. The DOE has not

threatened action if Gull does not initiate a cleanup program. No letter from the DOE has warned of possible violations of environmental regulations or penalties. Indeed, the only letter from the DOE documented its *lack* of involvement with Gull's "[i]ndependent remedial actions" which it cautioned were being done at "[Gull's] own risk." CP 142.

Not surprisingly, in the absence of any action taken by the DOE, Gull admits that the cleanup "work done [was] not for the purpose of 'defending' against anything." CP 419. As further relevant, Gull admits:

Gull has incurred no traditional 'defense' costs at the Sedro-Woolley Site and claims no attorney's fees related to the 'defense' of any environmental liability—whether imposed through 'suit' or as a result of Gull's statutory liability under MTCA.

\* \* \* \*

The only costs that Gull has tendered to State Farm, or to any carrier at the Sedro-Woolley site, are those incurred to characterize the contamination, evaluate remediation options, and implement and run a cleanup operation. Those costs fall within the indemnity coverage of the State Farm policies.

CP 420-21. If these costs are "damages" within the indemnity provisions, as Gull asserted below, then they can't also fall within the defense provision of the policies (which requires a "suit"). Gull can't have it both ways.

The trial court was not asked to decide, and did not decide, whether the investigation and remediation costs that Gull has incurred at the site are covered as “damages” as part of the duty to indemnify under the policies. This court should decline Gull’s invitation to weigh in on this issue at this stage of the proceedings. An issue not briefed or argued in the trial court will not be considered on appeal. *Brower v. Ackerley*, 88 Wash.App.2d 87, 97, 943 P.2d 1141 (1997). Ultimately, whether the costs are covered at all under the policies will depend on other defenses that TIG has asserted, including, among others, late notice.<sup>1</sup> CP 14. But this much is clear: in the absence of *any* action by the DOE, there has been no “suit” against Gull and nothing for TIG (and the others insurers) to defend. As further demonstrated below, *Weyerhaeuser* does not require a different result.

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<sup>1</sup>The policies contain provisions that required Gull to provide written notice of an occurrence, claim or suit “as soon as practicable” and, in the event of a claim or suit, to forward immediately every “demand, notice, summons or other process received....” CP 165. Here, Gull tendered the Sedro-Woolley claim in October 2009, approximately four to five years after it initiated a cleanup program without the DOE’s involvement, and some twenty years after it first knew of contamination as a result of the Norton Corrosion study done in March 1985. CP 76.

**C. *Weyerhaeuser* Did Not Address What Constitutes A “Suit” In The Context Of Environmental Liability Laws**

Gull argues that the logic of *Weyerhaeuser* required TIG and State Farm to defend and reimburse it with respect to certain costs incurred at the Sedro-Woolley site. But the Supreme Court in *Weyerhaeuser* took pains to note that the duty to defend was *not* at issue because the excess policies that were the subject of the appeal had no duty to defend or “suit” language as part of the insuring agreement:

In the present case (presumably because the remaining defendants are excess insurers) there is no argument regarding the ‘duty to defend’ nor on the legal meaning of the word ‘suit’. The insurers are not arguing there is no duty to defend; they are arguing that there is no duty to indemnify.

\* \* \* \*

The insuring clause here...does not require a ‘suit’; it requires coverage for all sums the insured shall be obligated to pay by reason of the liability imposed upon the insured by law. We therefore decline to hold that the standard used...to determine the duty to defend against a suit should be used to determine whether there may be a duty to indemnify....*The two duties, to defend and to indemnify, should be examined independently.*

(emphasis added). 123 Wash.2d at 902. Despite the Supreme Court’s admonition, Gull has not analyzed the duty to defend independently of the duty to indemnify. It is equally clear that *Weyerhaeuser* dealt with only the latter and refused to equate the duty to indemnify with the duty to

defend.

In *Weyerhaeuser*, Weyerhaeuser filed a declaratory judgment action against many of its insurers seeking liability coverage with respect to expenses incurred in remediating a variety of its polluted sites. The policies involved were excess liability policies that did not contain the same duty-to-defend-suit language at issue in the policies in this case. Instead, under the policies, the insurers agreed to “indemnify the Assured for all sums which the Assured shall be obligated to pay by reason of liability...(a) ...for damages,...on account of: (ii) Property Damage.” 123 Wash.2d at 897. Weyerhaeuser site remediation managers submitted affidavits that the work undertaken was mandated by state and federal statutes which imposed strict and joint and several liability for pollution damage and in cooperation with government environmental agencies. 123 Wash.2d at 895-96.

Weyerhaeuser’s insurers filed a motion for summary judgment with respect to eighteen sites on the basis that the government environmental agencies involved had not yet filed legal actions or threatened to do so. 123 Wash.2d at 894. The trial court granted summary judgment on that ground with respect to fifteen sites. Under MTCA, based, in part, upon CERCLA, owners and operators of contaminated facilities are strictly liable for remediation costs resulting from the release

or threat of release of hazardous substances. 123 Wash.2d at 898, citing RCW 70.105D.040(2).

The question presented in *Weyerhaeuser* was whether a duty to indemnify, as opposed to a duty to defend, existed under the excess liability policies for property damage when the insured had incurred approximately \$28 million in remediation costs, but the involved governmental agency had made no overt threat of formal legal action—there had been no PRP letter, no consent order, no formal notice of violation which threatened enforcement action, and no third-party demand letter. 123 Wash.2d at 899. Relying on *Bausch & Lomb Inc. v. Utica Mutual Ins. Co.*, 330 Md. 758, 625 A.2d 1021 (1993), the Supreme Court in *Weyerhaeuser* held that an insurer may be legally obligated to pay remediation costs for property damage by reason of state environmental statutes when an insured engages in the voluntary cleanup of contamination in cooperation with an environmental agency. 123 Wash.2d at 903-05. Otherwise, the Supreme Court expressed the concern that insureds would not conduct voluntary cleanups and await formal government action by the State to avoid losing any potential insurance coverage. 123 Wash.2d at 907-13.

At the end of its opinion, the Supreme Court concluded that the policy language could be reasonably read to extend to remedial actions

taken at hazardous waste sites under environmental statutes that impose liability. 123 Wash.2d at 912-13. The Supreme Court stressed that:

The insurance contracts provide coverage when the policyholder becomes obligated to pay by reason of the liability ‘imposed by law’. The policy language does not specify whether this liability must be imposed by formal legal action (or threat of such) or by a statute which imposes liability. In the case where there has been property damage [footnote omitted] and where a policyholder is liable pursuant to an environmental statute, a reasonable reading of the policy language is that coverage is available, if it is not otherwise excluded.

There is nothing in the insurance policy language which requires a ‘claim’ or an overt threat of legal action and, therefore, the insurers’ argument that a claim is a prerequisite to coverage seems to us to be an effort to add to the language of the policies. *If the insurers intended to provide coverage only if there were a lawsuit or a threat of such, that requirement could have been included in the policy. In this case, the policy language does not require an adversarial claim or a third party threat or a formal threat of legal action. We decline to add language to the words of an insurance contract that are not contained in the parties’ agreement.*

(emphasis added). 123 Wash.2d at 913. In its conclusion, the Supreme Court noted that the result reached allowed for the possibility of an “ultimate determination of coverage for property damage when a policyholder acts cooperatively with an environmental agency to comply with statutes which impose liability on polluting parties.” 123 Wash.2d at 913-14.

Most of Gull’s brief ignores the actual language of the policies and

instead parrots *Weyerhaeuser's* public policy concerns (Br., at 11-26). According to Gull, because the DOE lacks the resources to actively compel cleanups of thousands of contaminated sites, “more than 90 percent” of environmental cleanups in Washington are completed on a voluntary basis: the owner completes the investigation and remediation, presents the results to the DOE, and “seeks DOE’s approval and undertaking not to seek further remediation” (Br., at 13-14). Gull points out that an owner who fails to discharge MTCA’s strict liability through a voluntary cleanup but who awaits formal government enforcement action risks increasing the owner’s exposure to costs for remediation and litigation, and loss of coverage for failing to mitigate the damages (Br., at 14-19). Gull insists that the same “perverse incentives” apply to the duty to defend as with the duty to indemnify (Br., at 20-27).

Gull’s “mitigation” arguments are a mismatch for this case. All that the trial court decided was that Gull’s voluntary cleanup program that was not in response to any action by the DOE and without its involvement did not meet the “suit” requirement in the policies. The trial court decided no other issue. In granting partial summary judgment, the trial court stated:

With regard to the duty to defend issue. This is a partial summary judgment. It has nothing to do with the duty to indemnify. I want to be absolutely clear on that.

That is not argued, absolutely.

It is a very interesting argument that the plaintiff makes. There is lots [sic] of good public policy in support of that. Pollution is obviously a major issue. That is why we have a Department of Energy [sic], that is why the people voted to adopt MTCA as they did and other federal legislation was adopted.

It is also clear that the public entities don't have the time and the resources to investigate all of the sites.

Having said that, I just cannot find that the mere enactment of the MTCA and the related federal statute, for that matter, specifically abrogated or created a new rule with regard to the duty to defend, which is triggered by the language in the insurance policies themselves.

So because of the language in the State Farm policies currently before the court, I am going to find that there was no duty to defend in this case. But, again, that has nothing to do with the duty to indemnify.

*Also, I am reserving any issue on what a particular recoverable cost would be under the indemnification prong as opposed to the duty to defend prong.*

I hope that is clear, because I don't think that we argued that. I don't feel briefed on that.

(emphasis added). Report of Proceedings, September 28, 2012, RP at 46-47. The limited scope of the trial court's ruling could not be any clearer.

Gull's "mitigation" arguments are speculative and premature. As Gull concedes, "insureds incur few true costs of defense" in voluntary cleanups, "for there is little to defend" (Br., at 21n.4). Gull argues that professional engineering and consultant's fees incurred as part of an

investigation to learn the extent of the contamination should be considered part of the “remedy” (Br., at 20-21n.4), notwithstanding that WAC 284.30-930(3) treats them as defense costs where there is a duty to defend under the policy. If the duty to defend applies, defense costs may include certain reasonable expenditures to investigate the type, source and extent of contamination. If the duty to indemnify applies, covered “damages” may include certain reasonable expenditures for remediation. The same expenditures cannot qualify as both defense and remediation, and they cannot be switched from one category to the other to gain tactical advantage. The determination of what costs, if any, are covered under the policies has not been decided; it is a separate issue beyond this appeal and necessitates further proceedings in the trial court.

Given the procedural posture of the appeal, *Weyerhaeuser* is not controlling here. *Weyerhaeuser* decided a different issue based on policy language not present in this case. The policy language at issue in *Weyerhaeuser* required only “liability imposed by law” to trigger the duty to indemnify under the excess policies. If the insurers intended to afford coverage only if there was a lawsuit, the Supreme Court reasoned, “that requirement could have been included in the policy.” 123 Wash.2d at 913. But that is precisely what TIG wrote into the policies here: TIG has a duty to defend only a “suit” against Gull. Without the DOE having taken *any*

action, there has been no “suit” against Gull and nothing for TIG (and the others insurers) to defend as to the Sedro-Woolley site.

**D. The “Suit” Requirement Is Not Ambiguous Based On TIG’s Reservation Of Rights As To Other Sites**

Without citing any relevant case law, Gull claims that the “suit” requirement is ambiguous because TIG accepted its tender at other sites where the DOE has not taken any action (Br., at 32-33).

Gull’s argument that extrinsic evidence is admissible to prove that a policy term is ambiguous is unsupported by any citation to authority, amounts to no argument at all, and should not be considered on appeal. *Frank Coluccio Construction Co., Inc. v. King County*, 136 Wash.App. 751, 778, 150 P.3d 1147 (2007); *King Aircraft Sales, Inc. v. Lane*, 68 Wash.App. 706, 717-18, 846 P.2d 550 (1993). Extrinsic evidence is “...inadmissible...because contract interpretation is a matter of law to be determined by the Court.” *Cutter & Buck, Inc. v. Genesis Ins. Co.*, 306 F.Supp.2d 988, 999 (W.D.Wash. 2004).

Even if Gull’s argument were considered, TIG’s acceptance of the tenders at other sites did not make the “suit” requirement ambiguous. TIG’s answer filed herein raised the “suit” requirement as to all sites. CP 10, 13, 17. Furthermore, TIG’s response to the tenders was based on limited and incomplete information, without knowledge of all of the facts,

and under a full reservation of rights. CP 464.

Gull's argument ignores the reservation of rights letters sent by TIG. On January 17, 2012, TIG accepted Gull's tenders as to certain sites, pursuant to a reservation of rights that was not meant to be exhaustive, and TIG reserved the right to assert additional defenses as they became known. CP 1166, 1178, 1195, 1211, 1269. TIG made clear in its correspondence to Gull that its "continued investigation . . . is subject to a full reservation of all rights available to TIG under the terms and conditions" of the policies and that "[a]ny actions that may be by or on behalf of TIG shall not be deemed a waiver or estoppel of these rights." CP 1166, 1178, 1195, 1211, 1269. In view of the reservation of rights letters and based on the limited and incomplete documentation provided by Gull at this early stage of the litigation, TIG's response to the tenders did not make the "suit" requirement ambiguous for Sedro-Woolley or for any other site.<sup>2</sup>

Finally, Gull's argument cannot be construed as suggesting that TIG has waived the "suit" requirement for Sedro-Woolley. Waiver, either express or implied, is defined as the voluntary and intentional relinquishment or abandonment of a known right; it is unilateral in that it

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<sup>2</sup> Gull also ignores that the trial court denied Gull's motion for a summary determination of TIG's defense obligations as to other sites, pursuant to CR 56, on September 28, 2012, pending completion of discovery. Report of Proceedings, RP at 48-49.

arises out of either action or nonaction on the part of the insurer and rests upon circumstances indicating that the relinquishment of the right was voluntarily intended by the insurer with full knowledge of the facts pertaining thereto. *See, e.g., Time Oil Co.*, 743 F.Supp. at 1419, citing *Buchanan v. Switzerland General Ins. Co.*, 76 Wash.2d 100, 108, 455 P.2d 244 (1969); *Logan v. North-West Ins. Co.*, 45 Wash App. 95, 724 P.2d 1059 (1986). The terms and coverage of a policy may not be expanded through application of waiver or estoppel. *See, e.g., Time Oil Co.*, 743 F.Supp. 1400, 1418, citing *Underwriters at Lloyd's v. Denali Seafoods, Inc.*, 729 F.Supp. 721, 726-27 (W.D.Wash. 1989)(citing *Sullivan v. Great American Ins. Co.*, 23 Wash. App. 242, 247, 594 P.2d 454 (1979)); *Carew, Shaw & Bernasconi, Inc. v. General Casualty Co. of America*, 189 Wash. 329, 336, 65 P.2d 689 (1937). Nonwaivable defenses include those based on trigger of coverage. *Time Oil Co.*, 743 F.Supp. at 1418. That would include the “suit” requirement of the policies.

**E. The Trial Court Erred In Granting Gull’s Request For The CR 54(b) Certification**

TIG objected to Gull’s motion for CR 54(b) certification on a number of grounds. CP 915-26. TIG respectfully submits that the certification was improper. *Pepper v King County*, 61 Wash.App. 339, 350-51, 810 P.2d 527 (1991); *Lindsay Credit Corp. v Skarperud*, 33

Wash.App. 788, 772-73, 657 P.2d 804 (1983). On appeal, Gull's brief only demonstrates that CR 54(b) certification should have been denied.

Although the trial court correctly ruled that in the absence of government involvement there is no duty to defend, State Farm's motion for partial summary judgment which TIG joined expressly took no position on what costs constituted defense and what costs constituted "damages" for which indemnification is sought under the policies. In response, Gull argued that the costs were part of the indemnity obligation, or in the alternative, that the costs were part of the defense obligation. CP 419-25. Gull acknowledges that this appeal will not decide the characterization of the costs at Sedro-Wooley as either defense or indemnity (Br., at 11), noting "that neither the motions below nor this appeal address the nature of work and costs that fall on one side or the other side of the line between defense and indemnity" (Br., at 21n.4). As the orders granting State Farm and TIG partial summary judgment do not address the issue of what constitutes defense versus indemnity costs, the trial court's ruling is incomplete until it is applied to the costs that Gull has incurred for Sedro-Woolley.

CR 54(b) and RAP 2.2(d) permit piecemeal appeal of a ruling on fewer than all claims only when it would be unjust to delay entering final judgment on that claim until the entire case has been fully adjudicated.

*Nelbro Packing Co. v. Baypack Fisheries, LLC*, 101 Wash. App. 517, 525, 6 P.3d 22 (2000). There, the Court of Appeals held that a trial court abused its discretion in certifying partial summary judgment in rulings for review:

Even if individual claims are in some sense separable from the remaining unresolved claims, not all final judgments should be immediately appealable [footnote omitted]. The trial court should consider judicial administrative interest, as well as equity [footnote omitted]. The factors relevant to the determination whether there is no just reason for delay include:

(1) [t]he relationship between the adjudicated and the unadjudicated claims, (2) whether questions which would be reviewed on appeal are still before the trial court for determination in the unadjudicated portion of the case, (3) whether it is likely that the need for review may be mooted by future developments in the trial court, (4) whether an immediate appeal would delay the trial of the unadjudicated matters without gaining any offsetting advantage in terms of the simplification and facilitation of that trial, and (5) the practical effects of allowing an immediate appeal.

101 Wash.App. at 525. The court then found that immediate appeal would violate the first and second factors:

When adjudicated and pending claims are closely related and stem from essentially the same factual allegations, judicial economy generally is best served by delaying the appeal until all the issues can be considered by the appellate court in a unified package.

101 Wash.App. at 526. The court also found “the claims dismissed on summary judgment and the unadjudicated claims are closely

intertwined....[T]herefore...judicial economy would best be served by delaying the appeal.” 101 Wash.App. at 527-28.

*Doerflinger v. New York Life Ins. Co.*, 88 Wash.2d 878, 567 P.2d 230 (1977), is also instructive. There, the plaintiff alleged legal theories against an insurer for breach of contract, breach of fiduciary duty to act in good faith, outrage, negligent infliction of emotional distress, and intentional infliction of emotional distress. The trial court granted summary judgment to the insurer on all claims except breach of contract and outrage, and certified its order for immediate review. The Court of Appeals held that “the separate legal theories [against the insurance company] are not multiple claims and thus are not subject to the entry of a final judgment upon dismissal by the trial court.” 88 Wash.2d at 882.

*Doerflinger* found “substantial reason to follow the overall policy against piecemeal appeals....To lay down general principles of law...without having the entire matter before us, including all the essential facts and testimony, would require this court to act in a vacuum. This we decline to do.” 88 Wash.2d at 882-83. Like the plaintiff in *Doerflinger*, Gull here alleges an assortment of legal theories against multiple insurers, which are not separate claims and should not be appealed piecemeal.

Finally, Gull did not make any showing of hardship or injustice that this appeal would prevent. “There must be some danger of hardship

or injustice through delay which would be alleviated by immediate appeal.” *Doerflinger*, 88 Wash.2d at 882. As one court has specifically explained:

CR 54(b) certification will not be accepted by an appellate court unless there is a demonstrated basis for the trial court finding of no just reason for delay. This means that the record must affirmatively show that there is in fact some danger of hardship or injustice that will be alleviated by an immediate appeal....Nothing in the record here suggests a delay in entry of a final judgment posed any such danger of hardship....

...[O]ne of the strong policies underlying *Doerflinger* is the undesirability of piecemeal review. Piecemeal review is of equal concern in multi-party and multi-claim cases.

In short, for any case to come within the provisions of CR 54(b) and RAP 2.2(d), there must in fact be no just reason for delaying entry of final judgment, not simply pro forma language to that effect in the trial court’s order. See *National Bank of Washington v. Dolgov*, 853 F.2d 57, 58 (2d Cir. 1988) (dismissing appeal from partial summary judgment order resolving claims against all but one defendant because the order ‘merely repeated the language of Rule 54(b) *in haec verba*’); *Schiffman v. Hanson Excavating Co.*, 82 Wash.2d 681, 689, 513 P.2d 29 (1973) (also a multi-party case). Since Ladder Industries has made no showing of hardship and the trial court’s order does not describe any, the pro forma CR 54(b) certification is of no effect. *Doerflinger, et al. v. New York Life Ins. Co., supra*.

*Fox v. Sunmaster Products, Inc.*, 115 Wash.2d 498, 503-04, 798 P.2d 808 (1990). Those concerns are equally valid here.

TIG respectfully submits that the trial court’s ruling that there has been no “suit” against Gull at Sedro-Woolley was correct. That ruling

may be applied to all sites where there has been no government action or involvement, but to date it has not been applied to determine what costs, if any, are reimbursable for Sedro-Woolley or any other site. Gull made no showing of material hardship or injustice in the absence of an immediate appeal. Speculation aside, Gull never presented any evidence in the trial court showing that its investigation and clean-up of environmental property damage at sites throughout Washington will be affected if it cannot take this immediate appeal. Gull's arguments did not justify taking a piecemeal appeal in this case involving multiple claims and multiple parties under *Nelbro Packing Co.*, *Doerflinger* and *Fox*. The trial court's order made no finding of hardship or injustice if immediate appeal were delayed. CP 941-47. Because Gull did not satisfy its burden of demonstrating material hardship or injustice, the CR 54(b) certification should be vacated and the appeal dismissed.

## **VII. CONCLUSION**

For all the foregoing reasons, the defendant/respondent, TIG Insurance Company, respectfully requests that this Court affirm the order granting partial summary judgment in its favor against the plaintiff/appellant, Gull Industries, Inc., on October 12, 2012, and remand for further proceedings, or alternatively, vacate the CR 54(b) order and

certification entered on November 13, 2012, dismiss the appeal and remand for further proceedings.

Respectfully submitted this 10<sup>th</sup> day of May, 2013.

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**CERTIFICATE OF SERVICE**

The undersigned certifies under the penalty of perjury under the laws of the State of Washington that I am now and at all times herein mentioned, a citizen of the United States, a resident of the State of Washington, over the age of eighteen years, not a party to or interested in the above-entitled action, and competent to be a witness herein.

On the date given below I caused to be served the foregoing BRIEF OF RESPONDENT TIG INSURANCE COMPANY on the following individuals in the manner indicated:

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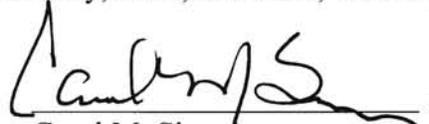
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SIGNED this 10<sup>th</sup> day of May, 2013, at Seattle, Washington.

  
Carol M. Simpson