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NO. 66102-7-I  
COURT OF APPEALS, DIVISION I  
OF THE STATE OF WASHINGTON

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IMU, a division of One Beacon America Insurance Company, a Massachusetts  
Insurance Company,

Respondent,

v.

ABCD, LLC a Washington LLC; ABCD, a Washington partnership and  
ALBERT BOOGAARD, an individual domiciled in Washington,

Appellants,

v.

ALLIANCE INSURANCE CORP. a/k/a ALLIANCE INSURANCE, INC.,

Respondent

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APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY  
THE HONORABLE SUSAN CRAIGHEAD

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**APPELLANTS' OPENING BRIEF**

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FILED  
JUN 11 2013  
CLERK OF COURT  
KING COUNTY  
SEATTLE, WA  
X

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## **I. INTRODUCTION**

Albert Boogaard (hereinafter referred to as Boogaard) was a general partner in the partnership known as ABCD Marine (hereinafter referred to as ABCD). ABCD contracted exclusively with the Northland entities which were the operators of Pier 115 for welding services. Boogaard was speared by a forklift operated by an employee of one of the companies involved in the Pier 115 operations. Boogaard's serious injuries included, but not limited to \$90,000 of medical bills, an inability to work for a year and brain damage.

The port engineer of Pier 115, Ed Hiersche, acting in the name of Northland Holdings, Inc. and Nanknek Barge Lines LLC (hereinafter referred to as Naknek), in 2001 required ABCD to obtain liability insurance which covered not only ABCD but which would also provide Northland/Naknek with first party coverage for the negligence of their employees arising from any operations of ABCD on the pier. From the beginning of their operations in 2000, ABCD hired Alliance Insurance Corporation (hereinafter referred to as Alliance) to provide for their insurance needs. Alliance arranged for a liability policy covering ABCD with International Marine Underwriters (hereinafter referred to as IMU). The original annual policy was effective on April 3, 2000 and was

renewed annually thereafter through the date of Boogaard's injury on October 14, 2004. When Boogaard sued Northland Holdings, Inc., Northland Services, Inc., and the forklift operator for his personal injuries, he faced a counterclaim alleging that he had contractually assumed the tort liability of Northland Services, Inc. and all its affiliated companies for his own injuries. This contractual assumption of liability was contained in an agreement called an "Access Agreement," which was in effect a few days before he was injured.<sup>1</sup>

The underlying personal injury case finally was resolved by a judgment entered against Northland Holdings, Inc. and Northland Services, Inc. for Boogaard's personal injuries but with an offsetting judgment against ABCD and Boogaard for breach of contract. This case was finally resolved by a settlement approved at a reasonableness hearing, in which IMU was made a party.

Alliance and IMU were notified immediately following Boogaard's injury in October 2004. They were notified both about the injuries and the Northland Companies' assertion of their contractual claim for assumption of their tort liability. IMU waited three and half years until Judge Spector

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<sup>1</sup> Much has been made by IMU and Alliance that they never were notified of this contractual assumption of tort liability which is in law and in industry practice called an "assumed contract." However, these are so common in the industry that the insurance contract automatically covered them and the insurance agreement does not require any notice. This is discussed below.

entered a summary judgment affirming the validity of the Access Agreement before it denied coverage and filed this declaratory judgment action on April 22, 2008.<sup>2</sup> Boogaard defended on the basis that there was, in fact, coverage. He then interpleaded Alliance alleging that if additional insured coverage did *not* exist covering the negligence of the forklift driver then his broker, Alliance, was negligent in failing to procure it as demanded in August 2001 and for Alliance certifying that they had procured the coverage. IMU then filed a summary judgment motion for declaration of noncoverage, which was granted. Alliance, thereafter, brought its own summary judgment motion, which was actually *three* summary judgment motions combined into one, which was granted.

## **II. STANDARD OF REVIEW**

The standard of review is de novo because the appeals are from two separate summary judgment orders. Additionally, the trial judge interpreted various contracts, and this court is in the same position to interpret contracts as was the trial court.

## **III. RECORD ON APPEAL**

The relevant Clerks' Papers have been provided to the court. This is

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<sup>2</sup> At summary judgment, IMU asserted lack of coverage based *solely on the language of the contract*. They claimed no ambiguities or doubts about the meaning of the contract but, looking at IMU's actions, if it really was so clear, then why did IMU wait three-and-one-half years before denying coverage? As briefed below, if there is clearly no coverage then there is no duty even to defend.

believed to comprise the total record available to the trial judge in granting the summary judgments. In regard to the IMU summary judgment, there were efforts by both sides to exclude evidence. The judge denied the motions by both parties to that summary judgment proceeding and, accordingly, that entire record is also available to this Court of Appeals (CP 436-437).

After each summary judgment ABCD and Boogaard requested discretionary review by this Court which were both denied on the basis that there were remaining issues of procedural bad faith as to IMU before the trial court. See case numbers 64876-4-I and 65371-7-I. Those remaining issues were dismissed by stipulation (CP 1050-1053).

The Appendices: There are four appendices attached for the convenience of the Court because they are key documents and are referred to so often. Appendix A is the August 27, 2001 memo to subcontractors from Ed Hiersche demanding 'name and waive' insurance covering Northland Holdings, Inc. and Naknek Barge Lines LLC (CP 328). Appendix B is the Access Agreement of September 29, 2004 (CP 708-709). Appendix C is the first declaration of insurance industry expert Robert A. Sedillo (herein after referred to as Sedillo) in opposition to IMU's summary judgment motion, dated November 27, 2009 (CP 410-423). Appendix D is Sedillo's declaration in opposition to the Alliance

summary judgment motion (without duplicative CV exhibits), dated March 15, 2010 (CP 964-970).

#### **IV. ASSIGNMENTS OF ERROR**

1. The Trial Court made numerous errors of law as to the interpretation of Insurance Contracts as detailed below.
2. The Trial Court failed to consider disputed issues of material fact in its decision as detailed below.

#### **V. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR**

##### **A. IMU Summary Judgment**

1. Was the Access Agreement an “Insured Contract” under the IMU policy which would have provided coverage to Northland? LAW
2. As an insured contract did the “Access Agreement “ provide coverage by IMU to all of the Northland subsidiaries for the injuries to Boogaard by a Northland subsidiary employee? LAW and FACT
3. Was the legal entity, ABCD, the named insured in the IMU policy? LAW
4. Was Boogaard an “automatic insured” and not a “named insured” under the IMU policy? LAW & FACT
5. Was Boogaard a third party to Northland’s liability for the negligence of a Northland employee, which ABCD was required to indemnify against? LAW and FACT

6. Was Northland intended to be indemnified by ABCD for injuries to Boogaard by Northland employees arising out of ABCD's operations? FACT and LAW
7. Did IMU have notice that ABCD and Northland Holdings, Inc. required a policy endorsement adding Northland Holdings and Naknek as additional insureds? FACT
8. Did IMU give Alliance actual and apparent authority to issue a certificate of insurance amending the policy to include Northland Holdings and Naknek as additional insureds? FACT
9. Was IMU liable for failing to produce an endorsement to the ABCD policy adding Northland Holdings and Naknek as additional insureds to the IMU general liability policy after have been given notice by Alliance and giving authority to Alliance? FACT and LAW
10. Did the authority given to Alliance by IMU bind IMU to amend the policy to add the additional insureds? FACT and LAW
11. Is IMU estopped to deny additional insured status to Northland Holdings, Inc/Naknek for torts arising out of ABCD's operations after giving authority to Alliance to so represent to Northland/Naknek and to ABCD and its general partners? LAW
12. Should the IMU general liability policy be reformed to reflect the intent of the parties to add Northland Holdings/Naknek as additional insureds? LAW
13. Did the court fail to consider the undisputed expert evidence of insurance industry practice and procedures? FACT

#### **B. Alliance Summary Judgment**

14. Did the statute of limitations begin to run against Alliance before IMU denied coverage in 2008? FACT and LAW

15. Is Alliance barred from claiming the Statute of Limitations began to run in 2004 when, without authority or notice to ABCD, Alliance notified IMU that ABCD was abandoning its claims and as a result IMU stopped processing the claim? LAW
16. Did Alliance waive its right to claim failure of service and, accordingly, the passage of the statute of limitations when Alliance delayed for eight months answering the Complaint that was served on it without the Summons. LAW
17. Can Alliance argue that the Settlement Agreement between Boogaard and Northland barred claims against Alliance where the settlement agreement by its terms reserved claims against Boogaard's insurance broker (Alliance)? FACT and LAW
18. Was Alliance negligent for unilaterally and without notice to Boogaard or Northland dropping Northland Holdings and Naknek as additional insureds on the ABCD general liability policy? FACT and LAW
19. Did Boogaard, ABCD and/or Northland reasonably rely on Alliance's issuances of Certificates of Liability Insurance to their detriment? FACT
20. Where the intent of the parties is clear will the court reform an insurance contract to express the intent of the parties? LAW
21. Where the parties have made a mutual mistake and where there is no increased risk should the court enforce a general liability in favor of the intended beneficiaries of an insurance contract? LAW and FACT
22. Did the Court fail to consider undisputed expert evidence regarding insurance industry broker responsibility and practice? FACT

**VI. STATEMENT OF FACTS/CHRONOLOGY**  
**APPLICABLE TO BOTH SUMMARY JUDGMENTS**

It would be useful for this Court to have summary of material facts

and a chronology of key events and documents referenced to the Clerks' Papers. This case is an appeal from summary judgments rendered in favor of IMU and Alliance and, therefore, the facts should have been viewed from the perspective of the nonmoving party, with all factual disputes and doubts resolved in favor of the nonmoving party. See, *Vasquez v. Hawthorne*, 145 Wn.2d 103, 33 P.3d 735 (2001). It was error for the judge to weigh evidence and dismiss the cases.

**1. 2000.** The ABCD partnership was formed in 2000. ABCD was general partnership engaged in the welding business. The general partners of ABCD were Albert Boogaard and Cecil Dahl. ABCD's only customer was the Northland/Naknek entities described below (CP 843 and CP 163-164).

**2.** Boogaard and Mr. Dahl were welders with no particular sophistication (CP 163-164). The ABCD partners didn't know about the roles or interrelationships of these various entities. The operators of Pier 115 acted corporately through Barry Hachler for all entities. All operations, including work on barges, were in the charge of the same man, Ed Hiersche. For example, an entity known as "Northland Terminal Services, Inc. actually had the lease with the Port of Seattle to operate Pier 115 (CP 810-831). Barry Hachler signed said lease on behalf of said corporation (CP 831). These various corporate names and interrelationships were outlined in a chart submitted to the trial judge (CP 907), followed by the bewildering array of corporate filings (CP 908-963). The operations of the Naknek and Northland shared employees and management. Typically if ABCD worked on a barge it was paid by Naknek, and if it worked on the pier it was paid by Northland Services, Inc. (CP 843).

**3. 2000.** ABCD stored its welding equipment in its truck located at the Northland Pier. Each morning when the ABCD partners arrived at the Northland Pier with the other subcontractors they would be given a job to do on the barges or on the pier by the Northland supervisor (CP 843).

4. **2000.** Ed Hiersche required each of the pier subcontractors to provide evidence that they had a policy of general liability insurance. ABCD hired and relied upon defendant Alliance to secure a General Liability policy which they secured from Defendant, IMU. Boogaard dealt exclusively with Tammy Hausinger at Alliance (CP 841-844). ABCD relied on Alliance to comply with all insurance requirements of Northland. (CP 845). The first IMU/ABCD policy was for the period 4/3/00 to 4/3/01, and was renewed annually thereafter.

5. **8/27/01.** Ed Hiersche handed ABCD a letter which required all subcontractors, including ABCD, to obtain “name and waive” general insurance coverage for Naknek and Northland Holdings, Inc. (CP 328 and CP 734, attached as Appendix A). Until that coverage was secured, ABCD was kicked off the job site (CP 846-851). ABCD provided this requirement letter to Alliance (CP 847 and CP 849-851).

The demand required a statement of insurance, stating “this certificate must name and waive Naknek Barge Lines, LLC and Northland Holdings, Inc.” It goes on to say :

...“you must always have a valid certificate on file. If you’re certificate expires you will be terminated until which time you can provide a current certificate...certificates must be delivered in person or mailed to Ed Hiersche at the address listed below by September 1, 2001 or prior to re-employment.”

6. **8/27/01 to 9/17/01.** It took Alliance three weeks to secure authority from IMU to add NorthlandHoldings/Naknek as named additional insureds. In its answers to interrogatories (CP 345-346) and the deposition of the Alliance representative, Tammy Hausinger (at CP 859-861), Alliance testified that it notified IMU and secured IMU’s authority to issue a certificate naming Naknek/Northland Holdings, Inc. as additional insureds, as demanded by Mr. Hiersche. Alliance expressly obtained the authority to do so from IMU and in fact got the language for the certificate of insurance provided to Northland/Naknek from IMU (CP 345-346 and CP 859-861). When the certificate was supplied (CP 330 and 736), ABCD was then allowed back to work on the pier. Boogaard testified that he was assured there was coverage (CP 846-851). ABCD, its partners, and even Alliance, had no reason to question this document, and no right to question the corporate identities who were to be added to the IMU policy

as additional insureds.

**7. 9/17/01.** Alliance secured the authority from IMU to add Naknek and Northland Holdings, Inc. as additional insureds, and Alliance issued a certificate of liability insurance to ABCD and to Northland/Naknek certifying that the coverage had been secured.(CP 330 and 736). Alliance, with authority from IMU issued a certificate naming Naknek and Northland Holdings, Inc. as additional insureds (CP 330).

**8. 8/20/02,** Alliance issues another certification that there was additional insured coverage for Naknek and Northland Holdings. (CP 332).

**9. 8/20/02 to 10/14/04.** In the meantime, all was well with ABCD and they were allowed to continuously work under the assumption that between IMU, Alliance, and the operators of the pier, that all paperwork was in order. Everyone involved, including ABCD and the pier operators reasonably relied on the certificate of insurance certifying that Northland Holdings, Inc. and Naknek were now “additional insureds.” The Alliance representative who issued the certifications of coverage knew that ABCD and Northland would rely on them (CP 866).

**10. 8/20/02 to October 14, 2004.** At no time did ABCD ask Alliance or IMU to drop Northland/Naknek as additional insureds or to change coverage in any way (CP 846 – Boogaard, and CP 862 and 865 – Hausinger). Without the permission, or even the knowledge, of their insured, IMU/Alliance dropped Naknek and Northland during the policy as additional insureds for the 2004-2005 policy during which this injury occurred (CP 349-351). IMU negligently failed to issue policy endorsements for the additional insureds (first dec. of Sedillo, CP 410-419).<sup>3</sup> This duty to follow through to secure a formal endorsement was acknowledged by the Alliance representative (CP 861). As Sedillo points out, these “name and waive” agreements and access/ indemnity agreements are quite common in the commercial/maritime business and so IMU cannot claim surprise or ignorance of these requirements. According to industry practice, once IMU gave authority to Alliance to certify Northland Holdings/Nakek as first party additional insureds, they had a duty to issue a formal endorsement to the policy so stating.

According to Sedillo (CP 967, para.13) , Alliance also had a duty in

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<sup>3</sup> This declaration is attached hereto as Appendix C.

August/September 2001 not only to secure the express agreement of IMU to add Northland Holdings, Inc./Naknek as additional insureds but they further had the duty to make sure that they followed through and secured an actual endorsement to the policy. When Alliance negligently failed to perform their duties as the brokers for ABCD, it allowed IMU to point to the simple fact that—in the policy that was in effect at the time of Boogaard’s injury—there was no additional insured endorsement to cover the negligence of the employee who injured Boogaard.

**11.** No one disputes the factual meaning of having been named as an “additional insured” as described in the certificates issued to Northland Holdings/Naknek. It means in fact and in law, and also in accordance with industry standards, that Northland Holdings, Inc./Naknek are first party insureds for any acts of negligence they cause in any way arising out of the operations of ABCD.<sup>4</sup> As additional insureds, the negligence of their employee in injuring Boogaard would have been covered (Sedillo dec., App.C, para.s 7 and 8, and CP 413).

**12. 9/24/04.** On September 29, 2004 Ed Hiersche gave Boogaard an “Access Agreement” to sign (CP 274-275 and CP 708-709), Attached as Appendix B). The agreement again required that ABCD provide name and waive general liability coverage for Northland Services, Inc. (and all affiliates) for accidents at the pier relating to ABCD’s business activity at the pier. In addition to this requirement to be named as additional insureds, it required ABCD to assume the tort liability of Northland Services and all affiliated companies. The language is contained in paragraph numbered 10, labeled insurance:

“User shall obtain and maintain, at its own expense, public liability insurance for personal injuries and property damages covering user’s operations under this agreement including a contractual liability endorsement which specifically ensures users liabilities pursuant hereto. Such insurance must have minimum

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<sup>4</sup> After the accident, IMU did issue a new endorsement naming Northland Services, Inc. as an additional insured (CP 107). This clearly shows that IMU understood the industry standard and the legal effect of an entity being named as an “additional insured.” It makes the named entity an insured for any acts of negligence they cause as if they were a named insured.

limits per occurrence of one million dollars and shall be evidenced by an insurance certificate provided to NSI prior to commencement of operations. The insurance must specifically name NSI as additional insured and must waive subrogation against NSI (and its officers, directors, employees, agents, and subsidiaries or affiliated companies...)” (emphasis added)

Boogaard believed that he already had the coverage requested by Northland and signed the agreement (CP 847-851). A reasonable implication is that Northland believed this as well because ABCD was allowed to continue its operations which would have been forbidden if they did not have a certificate on file as required by the above quoted language. Mr. Hiersche did not sign the agreement and did not give Boogaard a copy of the Access Agreement.

13. The general liability policy of IMU provided automatic insurance coverage for any of ABCD’s customers, including Northland/Naknek, who had insurance/indemnity requirements in their contracts with ABCD. Northland Services and all their affiliated companies were, even without the additional insured endorsements, therefore, covered under the provisions of the Northland contract as “insured contracts.” (CP 114-coverage and CP 136-def. of ‘insured contract’).

14. Since “insured contracts” are covered automatically by the policy, there is no provision in the policy requiring notification to IMU of the details of insured contracts, or even of their existence (CP 110-146 and CP 205-243).

15. **10/14/04.** On October 14, 2004 Boogaard was in the ABCD welding truck on Pier 115 when it was speared by a large forklift driven by one of the employees of Northland Services, severely injuring him (CP 553-559).

16. **11/1/04.** After notice of the accident by Boogaard (CP 547 and 711), on November 1, 2004 Northland’s attorney notified Boogaard that under the terms of the “Access Agreement” he was responsible for indemnifying and insuring Northland against his own claim (CP 549).

**17. 11/4/04.** Boogaard tendered Northland's letter and assertions to Alliance (CP 100-101).

**18. 11/10/04.** Alliance tendered the Northland claim to IMU together with a claim form. It noted that Boogaard was represented by an attorney (CP 553-559).

**19. 11/16/04.** David O'Loughlin, the local IMU manager, sent Tammy Hausinger, the Alliance representative, an email allegedly confirming a telephone conversation with her that no claim is being asserted for coverage and so IMU is closing its file (CP 78).<sup>5</sup>

**20. 11/6/06.** Boogaard filed a lawsuit for negligence against Northland Services, Inc. and Northland Holdings, Inc. (and the forklift driver) for his injuries of October 14, 2004 under King County Cause No. 06-2-3554-7 , amended on November 21, 2006 (CP 566-569 and CP 984-987).

**21. 12/11/06.** Northland filed a counterclaim against Boogaard for breach of contract (the Access Agreement) and, among other things, for failure to have named them as additional insureds. The counterclaim included a request for indemnification and reasonable attorneys' fees under the "Access Agreement" (CP 571-576 and 988-993).

**22. 3/22/07.** Boogaard tendered the counterclaim to IMU (CP 578 and CP 398).

**23. 5/4/07.** IMU accepted defense of the counterclaim under a reservation of rights and hired Louis Shields to defend the counterclaim (CP 81, CP 580 and CP 400). Shields participated in all discovery from March 2007 until February 2008. In February, Shields and Northland filed cross motions for summary judgment to be heard on 3/16/08.

**24. 3/16/08.** Judge Spector ruled that ABCD had breached its contract with Northland to provide insurance/indemnification to Northland for Boogaard's injuries and that Boogaard was liable to Northland in an

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<sup>5</sup> Alliance denies that this conversation took place and both Alliance and Boogaard allege that, in any case, Ms. Hausinger had no authority to make this kind of representation, especially because IMU already had a claim letter from Boogaard's attorneys.

amount equal to his own damages together with Northland's reasonable attorneys' fees of \$112,000 (CP 277-278 and CP 802-804).

**25. 3/20/08.** Four days later, on March 20, 2008, IMU notified Boogaard that it was denying coverage for Northland's counterclaim (CP 83-84 and CP 402-403). IMU also notified Boogaard that it would not pay for an appeal that contained any issues on appeal that alleged as a defense that the IMU general liability policy did provide coverage for Northland. Boogaard was also notified by IMU for the first time that he would be personally responsible for Northland's attorneys' fees defending the lawsuit and on appeal if the appeal were lost (CP 582-583).

**26. 4/10/08.** Boogaard, ABCD, Northland, and IMU attempted to mediate the case (CP 740). IMU did not participate in the settlement reached at mediation. Boogaard and Northland entered into a binding CR 2A agreement (handwritten) providing that each would have a judgment against the other: Boogaard for his damages in the amount of \$600,000, and Northland against Boogaard for breach of contract in the amount of his own damages and Northland's attorneys fees (\$712,000) (CP 595-596). In addition, Northland would pay Boogaard \$50,000 to forego his appellate rights. Approval of the CR 2A agreement was conditioned on approval of the agreement by Judge Spector at a reasonableness hearing with notice given to IMU (CP 595-596).

**27. 4/22/08.** IMU files the underlying declaratory judgment against ABCD/Boogaard seeking a declaration of no coverage (CP 1-7).

**28. 4/28/08.** The handwritten CR 2A agreement is typed and signed to be submitted to the court for approval in the subsequent reasonableness hearing (CP 740-744). It provided in relevant part as follows (at CP 742):

“(1) Albert Boogaard agrees not to execute or enforce his judgment against Northland or Northland's insurance carriers because Albert Boogaard is required to assume Northland's liability. Albert Boogaard agrees to seek any recovery for this judgment only against his insurance carrier International Marine Underwriters/OneBeacon America Insurance Company, his insurance broker, or assigned counsel.”

**29. 8/29/08.** Judge Spector approved the CR2A agreement as

reasonable after adding IMU as a party to the reasonableness proceedings. IMU did not appeal Judge Spector's rulings in the case and is bound by her decision (CP 405-409 and CP 893-897).

**30. 9/11/08.** Judge Spector entered an order enforcing the Settlement Agreement and applying it to all defendants including Northland Holdings, Inc. (CP 746-749).

**31. 12/24/08.** IMU and Boogaard entered into a stipulation allowing for the addition of the third party defendant, Alliance (CP 33-41).

**32. 12/29/08.** ABCD/ Boogaard files crossclaim against Alliance (CP 33-41).

**33. 1/5/09.** The Complaint naming Alliance was served on Alliance but without a separate Summons. Alliance appeared on January 7, 2009 (CP 44 and CP 42-43).

**34. 8/24/09.** Alliance did not file an Answer to the Complaint until August 24, 2009 (CP 45-51). Alliance filed an Amended Answer a few days later on August 27, 2009 (CP 52-58). For the first time, Alliance alleged failure of service due to the lack of Summons. A Summons was issued and Acceptance of Service was signed for by Alliance on September 4, 2009 (CP 767-768, CP 59-62 and CP 765-766).

**35. 11/25/09.** IMU moved for summary judgment (CP 63-73).

**36. 1/5/10.** The trial Judge issued a summary judgment declaring that there was no coverage for anyone for Boogaard's injuries under the IMU policy.<sup>6</sup>

**37. 2/26/10.** Alliance filed its summary judgment motion (actually three summary judgment motions rolled into one). (a) Alliance alleged the passage of the statute of limitations. (b) A separate ground was that even had they been negligent by representing to the world that Northland Holding, Inc. was an additional insured, since the employee who injured Boogaard was a Northland Services, Inc. employee, Alliances's

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<sup>6</sup> The order was inadvertently omitted from the original designation of clerks papers; a supplemental designation has been filed. The summary judgment order is also attached as Exhibit 1 to the Notice of Appeal.

negligence had no proximate cause effect. (c) Finally, Alliance alleged that the settlement between Boogaard and Northland, Services, Inc., and Northland Holdings, Inc. relieved them of any liability (CP 606-626).

**38. 4/9/10.** The trial Judge granted Alliance its summary judgment motion of dismissal but the order was deficient in several particulars (CP 1025-1026). A motion was made to amend the summary judgment order to comply with proper formatting and description of what was considered (CP 1027-1028). The judge was asked to specify which of the three summary judgments she was granting. An amended summary judgment order was issued but the judge refused to specify which of the three summary judgment motions (or all of them) were granted. The judge, in essence, ruled that all three summary judgment motions of Alliance were well taken and that there were no material issues of fact in regard to any of the three (CP 1047-1049).

## **VII. ARGUMENT RE IMU SUMMARY JUDGMENT**

### **A. Summary of Argument for Coverage—Two Independent Grounds: (1) Insured Contract; (2) Additional Insured**

#### **(1) Coverage for Northland By Reason of ‘Insured Contract’**

Northland Services was entitled to coverage for its tort on Boogaard automatically when ABCD signed the Access Agreement on September 24, 2004. The Access Agreement between Northland and ABCD is an “insured contract” under the IMU policy. “Insured contract” is a term of art and court construction. See Sedillo declaration (App. C). It was defined in the applicable IMU insurance contract (CP 136). The effect is that ABCD’s agreement to indemnify and hold harmless Northland (and all its affiliates) from any acts of negligence of its employees is an automatically included contract in the IMU coverage as long as they arose out of

ABCD's activities on Pier 115. This is a three party agreement in which the indemnitor is ABCD, a general partnership, and the indemnitees are Northland/Naknek affiliated companies, and the injured party is a third party as to these two contracting parties. Boogaard is not the "named insured" (another technical definition) and is a third party both to ABCD Marine and (especially) to Northland/Naknek. This was clearly explained by Sedillo in his declaration considered by the trial judge but apparently ignored (App.C).

**(2) Coverage for Northland By Reason of 'Additional Insured' Status**

In September, 2001 Northland Holdings, Inc./Naknek were added as additional insureds to the IMU contract with ABCD (CP 330 and CP 736). As additional insureds, Northland had absolute right against the insurance contract for the injuries caused by any of their employees to anyone. No one is excluded. The additional insured status can be thought of as insurance covering Northland for any injuries its employees might cause. Stated another way, the additional insured status made Northland a first party insured for any damages they caused as long as they arose in connection with ABCD's activities. By answers to interrogatories Alliance, as the broker for ABCD, testified that it had specific authority from IMU for binding coverage by adding Northland/Naknek as additional

insureds. Alliance was given *actual* authority rather than merely apparent authority to add Northland/Naknek as additional insureds.<sup>7</sup> This authority was confirmed in the deposition of the Alliance representative (CP 859 and 861).

IMU negligently failed to issue an actual endorsement adding Northland/Naknek as additional insureds (App. C, CP 414-415). The Alliance representative acknowledged Alliance's duty to make sure that their authority to issue the certificates of insurance to Northland Holdings/Naknek was documented by an IMU endorsement (CP 859).

From September 2001, when Northland/Naknek were certified as additional insureds, until the time of the injury nothing changed. For the subsequent year, an identical Certificate of Liability Insurance was issued by Alliance reaffirming the additional insureds status of Northland/Naknek (CP 332). ABCD never asked or even implied that Northland and Naknek should be dropped from coverage as additional insureds and they were never given notice by Alliance or by IMU that they had failed to continue the coverage in later years (CP 861).

The law prohibits insurance companies from changing the nature of their relationship without any notice. No one gave notice to

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<sup>7</sup> IMU denies giving Alliance authority to bind this coverage. This is a classic question of fact.

Northland/Naknek or to ABCD or any of its principles that the status of Northland/Naknek as additional insureds was changed. See *McGreevy v. Oregon Mutual Insurance Company*, 141 Wn. App. 858, 876 P.2d 463(1994), discussed below.

### **B. Introduction: Rules of Insurance Contract Interpretation**

In its motion for partial summary judgment, IMU provided no context either factual or legal in which the insurance contract between ABCD and IMU arose. According to the declaration of Sedillo (App. C), the language used in parts of these common commercial contracts sometimes have a particular usage. The marine contract business in general also has particular and common requirements such as access agreements. The general rules relating to interpretation of these types of commercial insurance contracts and how they are understood in the industry are crucial.

A good summary of the rules of construction of insurance contracts can be found in *Mercer Place Condominium Ass'n v. State Farm Fire & Cas. Co.*, 104 Wn. App. 597, 602-603, 17 P.3d 626 (2000):

“If terms in an insurance policy are ambiguous, those terms are construed against the drafter. *McDonald v. State Farm Fire & Cas. Co.*, 119 Wash.2d 724, 733, 837 P.2d 1000 (1992)...’If there be any ambiguity in a contract, the interpretation which the parties have placed upon it is entitled to great, if not controlling,

weight in determining its meaning.’ *Toulouse v. New York Life Ins. Co.*, 40 Wash.2d 538, 541, 245 P.2d 205 (1952) (citing *Thayer v. Brady*, 28 Wash.2d 767, 770, 184 P.2d 50 (1947)).

‘In construing the language of an insurance policy, the entire contract must be construed together so as to give force and effect to each clause.’ *Transcontinental Ins. Co. v. Utilities Sys.*, 111 Wash.2d 452, 456, 760 P.2d 337 (1988) (citing *Morgan v. Prudential Ins. Co. of Am.*, 86 Wash.2d 432, 434, 545 P.2d 1193 (1976)). ‘An inclusionary clause in insurance contracts should be liberally construed to provide coverage whenever possible.’ *Riley v. Viking Ins. Co.*, 46 Wash.App. 828, 829, 733 P.2d 556 (1987) (citing 603 *Pierce v. Aetna Cas. & Sur. Co.*, 29 Wash.App. 32, 627 P.2d 152 (1981)).

‘[E]xclusionary clauses are to be construed strictly against the insurer.’ *Eurick v. Pemco Ins. Co.*, 108 Wash.2d 338, 340, 738 P.2d 251 (1987) (citing *Farmers Ins. Co. v. Clure*, 41 Wash.App. 212, 215, 702 P.2d 1247 (1985)). ‘Overall, a policy should be given a practical and reasonable interpretation rather than a strained or forced construction that leads to an absurd conclusion, or that renders the policy nonsensical or ineffective.’ *Transcontinental Ins. Co.*, 111 Wash.2d at 457, 760 P.2d 337 (citing *Morgan*, 86 Wash.2d at 434-35, 545 P.2d 1193). However, ‘a clause or phrase cannot be considered in isolation, but should be considered in context, including the purpose of the provision.’ *Riordan v. Commercial Travelers Mut. Ins. Co.*, 11 Wash.App. 707, 711, 525 P.2d 804 (1974).”

If there are terms contained in the policy that are defined they must be followed, but if terms are not defined, they must be given their plain, ordinary, popular meaning. *Bordeaux, Inc. v. American Safety Ins. Co.*, 145 Wn. App. 687, 186 P.3d 1188 (2008). Any remaining ambiguity must be given a meaning and construction most favorable to the insured.

Coverage exclusions “are contrary to the fundamental protective purpose of insurance and will not be extended beyond their clear and unequivocal meaning. Exclusions should also be strictly construed against the insurer.” *Bordeaux* at 694.

It has been consistently held in Washington that in actions against an insurer, while the claimant under the policy has the initial burden of showing that the loss comes within the coverage of the policy, once the claimant has met this burden and established a prima facie case, the burden shifts to the insurer to prove, if it can, the applicability of particular exclusions in the policy, in order to avoid an adverse judgment, *Starr v. Aetna Life Insurance Co.*, 41 Wash.199, 83 P. 113 (1905), *Aetna Insurance Co. of Hartford v. Kent*, 12 Wn. App. 442, 530 P.2d 672, rev. 85 Wn.2d 942, 540 P.2d 1383 (1975):

The court in *Holter v. National Union Fire Ins. of Pittsburgh, Pa.*, 1 Wn. App. 46, 459 P.2d 61 (1969) held that exclusionary clauses in policies are construed most strongly against the insurer. Additionally the *Holter* court, citing *Brown v. Underwriters of Lloyd's*, 53 Wn.2d 142, 332 P.2d 228 (1958), found that if there is room for two constructions--one favorable to the insured and the other in favor of the insurer, the court must adopt the construction favorable to the insured. *Holter* at 51.

The bottom line when interpreting a contract is to construe the parties' intent. As cited above, the context in which the contract arose can be considered. IMU specializes in contracts relating to docks and dock workers.<sup>8</sup> They knew the type of business that ABCD and its two partners engaged in. They knew, or should have known, that it was standard practice to have such independent contractors to have "name and waive" coverage and for indemnity requirements such as those spelled out in the access agreement (Sedillo dec, App.C at CP 412-414). This is the only explanation for the definition and coverage for "insured contracts" as quoted above.

*Spectrum Glass Co., Inc. v. Public Utility Dist. No. 1 of Snohomish County*, 129 Wn. App. 303, 310, 311, 119 P.3d 854 (2005), holds:

"A court's purpose in interpreting a written contract is to ascertain the parties' intent. *U.S. Life Credit Life Ins. Co. v. Williams*, 129 Wn.2d 565, 569, 919 P.2d 594 (1996). To aid in ascertaining the contracting parties intent, the Court adopted the "context rule" in *Berg v. Hudesman*, 115 Wn.2d 657, 667, 801 P.2d 222 (1990). See also *Diaz v. Natl. Car Rental Sys., Inc.*, 143 Wn.2d 57, 66, 17 P.3d 603 (2001). Under the context rule, extrinsic evidence is admissible to assist the court in ascertaining the parties intent and in interpreting the contract. *Williams*, 129 Wn.2d at 569,

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<sup>8</sup> IMU never disclosed to its insured or to Alliance that it had a clear conflict of interest because IMU also shared in the liability insurance coverage of the Northland/Naknek companies (all of them). The cover pages of this policy was produced as part of discovery in the Alliance Summary Judgment regarding corporate status of the various Northland and Naknek entities. (CP 873-876).

919 P.2d 594. The court may consider (1) the subject matter and objective of the contract, (2) the circumstances surrounding the making of the contract, (3) the subsequent conduct of the parties to the contract, (4) the reasonableness of the parties' respective interpretations, (5) statements made by the parties in preliminary negotiations, (6) usages of trade, and (7) the course of dealing between the parties. *Berg*, 115 Wn.2d at 666-68, 801 P.2d 222. Such evidence is admissible regardless of whether the contract language is deemed ambiguous. *Id.*

With these rules of interpretation of insurance contracts in mind, we can proceed with the particulars of the case against IMU.

IMU's position in its motion for partial summary judgment was that the "Access Agreement" between ABCD and Northland/Naknek was, by definition, an "insured contract," but that Boogaard is impliedly excluded from coverage caused by the indemnitee, Northland Services. An insured contract, they admit, is a contract in which ABCD assumes the tort liability of another, and in this case that would be of Northland/Naknek and all affiliated companies. However, IMU's one and only argument is that the language of the definition of insured contract in conjunction with the definition section of insureds eliminates Mr. Boogaard, one of the owners of ABCD, from coverage. This exclusion is not explicit but IMU asserts this result through tortured (and erroneous) definitional gymnastics.

**C. Access Agreement is a Covered "Insured Contract"**

Section II of the policy (CP 110-146, specifically starting at CP 114)

is labeled “Exclusions.” Subpart A states:

“...notwithstanding anything to the contrary contained in this policy, it is hereby understood and agreed that this policy is subject to the following exclusions and that this policy shall not apply to:

...

2. ‘Bodily injury’ or ‘property damages’ for which the insured is obligated to pay damages by reason of the assumption of liability in a contract or agreement. **This exclusion does not apply to liability for damages:**

a. **Assumed in a contract or agreement that is an ‘insured contract,’** provided the ‘bodily injury’ or ‘property damage’ occurs subsequent to the execution of the contract or agreement...” (CP 114) (emphasis added)

This has to be interpreted by the definitions contained in the insurance contract itself. On page 25, Definition Number 9 (CP 136-137) defines “*insured contract*” in relevant part as follows:

“9. ‘Insured contract’ means:

... f. That part of any other contract or agreement pertaining to your business (including an indemnification of a municipality in connection with work performed for a municipality) under which you assume the tort liability of another party to pay for ‘bodily injury’ or ‘property damage’ to a third person or organization. Tort liability means a liability that would be imposed by law in the absence of any contract or agreement.” [Emphasis added.] (CP 136)

In *Truck Insurance Exchange v. BRE Properties, Inc.*, 119 Wn. App. 582, 81 P.3d 929 (2003), the Court found that insurance coverage was available for the injured employee of the insured, as the indemnification agreement between the parties was deemed by the Court

an “insured contract.” The insurance company in *Truck* argued no “insured contract” was created because tort liability was not assumed. The Court disagreed, analyzing cases from other states, and found an insured contract present. *Id.* at 595-596.

In *John Deere Insurance v. De Smet Insurance*, 650 N.W.2d 601 (Iowa Supreme Court, 2002), the Court held that an insured contract was created between two parties through an oral agreement between the parties. The policy definition of “insured contract” in *John Deere* is identical to the definition of ABCD’s policy with IMU. The Court found that the only questions to be answered in determining whether an insured contract existed was “whether (1) an agreement was reached, (2) pertaining to the business, (3) by which the insured (Pedersen Machine) [ABCD] assumed the tort liability of another [Northland] for bodily injury.” *Id.* at 608. The *John Deere* Court also noted that “the insurance company is its own lexicographer and can define ‘insured contract’ as it chooses.” *Id.* at 607.

The key element to the formation of an insured contract is whether the insured party assumed the tort liability of the other party. *Golden Eagle Insurance Co. v. Insurance Company of the West*, 99 Cal.App.4<sup>th</sup> 837, 121 Cal.Rptr.2d 682 (2002), *Garnet Construction v. Arcardia Insurance Co.*, 61 Mass.App.Ct. 705, 814 N.E.2d 23 (2004). In analyzing

whether an “insured contract” existed the *Garnet* Court stated “Even if we accept that the policy does not require the contract to be in writing, the parties nevertheless had to reach an explicit agreement that the insured would hold the other party harmless for its tort liability.” *Garnet* at 709.

In *Golden Eagle Insurance Co. v. Insurance Company of the West*, 99 Cal.App.4<sup>th</sup> 837, 121 Cal.Rptr.2d 706 (2002), the Court analyzed whether a subcontract would be considered an insured contract. The Court, in holding an insured contract existed, found:

“If there is a single key factor or element on which to focus when trying to determine whether a contract is an insured contract, it is the insured’s assumption of liability under the contract at issue...[T]he insured must assume the other contracting party’s tort liability to third parties in order for the insured contract coverage to attach.”

*Golden Eagle* at 846-847 (quoting Richmond & Black, *Expanding Liability Coverage: Insured Contracts and Additional Insured* (1996) 44 Drake L.Rev. 781, 787). The *Golden Eagle* Court, in determining the extent of coverage provided by the insured contract stated “[C]ourts should construe ‘insured contract’ provisions broadly in favor of coverage.” *Golden Eagle* at 851 (citing *Ryland Mortgage Co., v. Travelers Indemnity Co. of Illinois*, (D.Md.2001), 177 F.Supp.2d 435 (2001)). The Court went on to quote:

”In determining the insured’s objectively reasonable expectations of coverage, “the disputed policy language

must be examined in context with regard to its intended function in the policy. This requires a consideration of the policy as a whole, the circumstances of the case...and ‘common sense.’” *Golden Eagle* at 851 (citing *Maryland Casualty Co. v Nationwide Ins. Co.*, 65 Cal.App.4<sup>th</sup> 21, 76 Cal.Rptr.2d 113 (1998)).

The Access Agreement (Appendix B) obligated ABCD to buy insurance for Northland and all its affiliated companies and to indemnify Northland for any losses caused by Northland or its employees. The policy excludes liabilities assumed by contract but the policy goes on to except from the exclusion an “insured contract.” Filling in the names of the parties otherwise just described generally in the above definition, it would read as follows:

“that part of any other contract...pertaining to [ABCD’s business...] under which [ABCD] assumed the tort liability of [Northland Services] to pay for “bodily injury” to a third person...”

As Sedillo declared (App. C), regarding the industry usage of this form of insurance contract, there are three parties to the Access Agreement as it applies to these commercial insurance contracts. The first is the indemnitor, which is the partnership ABCD. The indemnitee are all the Northland companies. The individual partners of ABCD are not named insured but rather have the status of “automatic insureds.” Within the industry, a partner is not within the confines of named insureds as these

policies are issued; rather, they are always third parties to the indemnitor and indemnitee (App. C., CP 415-419).

If that paragraph ended right after “bodily injury,” this is clearly an *insured contract*. What is the meaning of “to a third person..”? “Third person” means, and can only mean, a “third person” as to Northland Services which obviously includes Boogaard. *If* it had said “first person,” it would make no sense, and therefore has to apply to Northland Service’s obligations to any third persons. If the IMU wanted to define “third person” in some other way, then they could have. For example, they could have defined it as a “third person” to the indemnitor and indemnitee, or “third person” as to the insured. They didn’t—Boogaard is a third person to Northland as that would be commonly understood. This is the only way to logically and grammatically read this paragraph. It is also consistent with the usage of the industry in the maritime insurance area (see Sedillo dec., App. C). It is also consistent with every reported case which has considered it.

It does not avail IMU to argue that other interpretations are possible. For, if IMU so argues, it runs afoul of a cardinal rule of insurance contract interpretation (briefed above) which holds that ambiguities in an insurance contract are construed against the *insurer*. Further, since IMU argued that a partner is excluded from this coverage,

they violate the rules of construction that they have the burden of proof of exclusions and that exclusions shall be narrowly construed. In order to find Boogaard excluded from the coverage of insured contracts, they have to resort to convoluted interpretation of various parts of the insurance contract. It would have been so simple to exclude partners by express language, thereby making it clear. IMU failed to spell out this exclusion.

Obviously, Boogaard was on the Northland/ Naknek property to do welding as an independent contractor. He was there under agreement with Northland/Naknek to do work pertaining to his business.

The critical language in the Access Agreement provides as follows:

“8. Personal injuries: User shall be responsible for all bodily and personal injuries to all persons arising out of or resulting from its operations and/or use of the Property, including bodily and personal injuries to its own employees, except if caused by the sole intentional negligence of NSI. User shall indemnify and hold harmless (including costs and legal fees) NSI of and from all losses, damages, claims and suits for bodily and personal injury, whether direct or indirect, arising out of or relating to its operations or use of the Property, except such bodily and personal injuries caused directly from the sole intentional negligence of NSI. This indemnification agreement includes all claims and suits against NSI by any employee (present or former) of User, and User expressly waives all immunity and/or limitation on liability under any workers’ compensation, disability benefit or other employee or employment-related act of any jurisdiction.” (CP 709)

Since Boogaard was there only doing the business that ABCD was hired to do, and since ABCD indemnified Northland for all of Northland's torts, this is, by definition, an insured contract and therefore not subject to the exclusion in the policy. Boogaard's injury occurred arising out of his work on the premises.

Boogaard's presence on Pier 115 at the time he was injured arose out of operations on the site. The case of *Equilon Enterprises, LLC v. Great American Alliance Insurance Company*, 132 Wn. App. 430, 132 P.3d 758 (2000), held that in the insurance context the expression "arising out of operations," has a broad connotation and application.

**D. Coverage Because of Northland's Status as "Additional Insured"**

If the pier operators had been designated by IMU as "additional insureds," then any argument over whether a contract is an insured contract is irrelevant. An "additional insured" is a contractually covered insured for all acts of liability. As an additional insured, Northland/Naknek even has a direct cause of action, had they chosen to assert it, against IMU for its tortious misconduct toward Boogaard. (See Sedillo dec at CP 413).

In this case, Northland Holdings, Inc. and Naknek demanded that they be added as additional insureds in 2001 (CP 328 and CP 734). ABCD was removed from the job site and forbidden to re-enter until it did

secure such coverage from IMU. Alliance maintains in their answers to interrogatories (CP 345-346) that they had specific authority from IMU to designate Northland Holdings/Naknek as additional insureds and they did so. Alliance's representative, Tammy Hausinger, testified and verified this authority (CP 859-861). In fact, Alliance did so for two successive periods (CP 330 and CP 332). Alliance claims that IMU did not want copies of any of the certificates of insurance it was issuing, which is standard practice in the insurance industry (see Sedillo dec. at 414-415).

If the primary intent of the court is to ascertain the intent of the parties, then the evidence before the trial judge was that all the participants to this case intended in September 2001 that the IMU policy include Northland Holdings/Naknek as additional insured. That evidence of intent, if believed ultimately by the trier of fact, includes Boogaard, ABCD, Alliance and, most importantly, IMU.

It was negligent of IMU to not follow the industry standard of issuing formal policy endorsements adding additional insureds once IMU gave authority to Alliance to bind that coverage. According Alliance's answers to interrogatories, this was so specific that the language included in those two certificates (CP 330 and CP 332) was provided by IMU. There is no proof of a request that the additional insured status of Northland/Naknek would be excluded from subsequent editions of the

same insurance policy. ABCD did not give permission nor were they ever given notice by IMU or Alliance that Northland/Naknek was not named as additional insured for the policy period in which the injury occurred.

The law is protective of individuals who buy insurance from insurance companies changing the nature of their relationship without any notice. No one gave notice to Northland/Naknek or to ABCD or any of its principals that the status of Northland/Naknek as additional insureds was changed. In the case of *McGreevy v. Oregon Mutual Insurance Company*, 141 Wn. App. 858, 876 P.2d 463 (1994), our court distinguished earlier authority and held:

“Notice and agreement must be obtained before amendments or modifications to insurance policies can be made by the insurer. *Orsi v. Aetna Ins. Co.*, 41 Wash.App. 233, 240, 703 P.2d 1053 (1985) (before a policy can be modified, there must be an actual agreement or understanding that the policy will be or is modified) (relying on *Grand Lodge of Scandinavian Fraternity of Am., Dist. 7 v. United States Fid. & Guar. Co.*, 2 Wash.2d 56, 572, 98 P.2d 971 (1940) (in order to modify the bond, there must be an agreement to modify, supported by consideration).”

IMU (or Alliance) may argue that the ABCD partners should have noticed that an endorsement was not formally issued or that certification of additional insured status was not provided for the policy period encompassing October 2004. The *McGreevy* court, at 866, held that the

standard is whether an ‘average policy holder’ would notice a change in coverage

RCW 48.18.290 prohibits cancellation of policies without notice to the insured and to any entity shown to have an interest in any loss which might be covered (RCW 48.18.290 (1)(e)).

Alliance had express authority and, at least, apparent authority, to bind coverage as well as their authority to act as an agent for this limited purpose. They provided Certificates of Liability Insurance naming Northland Holdings/Naknek as additional insureds, exactly as the Port Engineer demanded. In their answers to ABCD’s 2<sup>nd</sup> Interrogatories, Alliance asserts that they *had* specific permission to add Northland/Naknek as additional insureds (CP 345-346). This was affirmed by the testimony of Ms. Hausinger.

It is important to note that when this “additional insured” coverage was bound there was no requirement to pay an extra premium. This is probably because such contracts in the commercial/construction/marine industry are usual and common.

In the present case it is undisputed that both Boogaard and Northland believed that ABCD had the proper insurance to fulfill Northland's requirements on the date of Boogaard's accident on October 14, 2004. Tammy Hausinger, on behalf of Alliance, agreed under oath

that ABCD and the certificate holders, Northland Holdings and Naknek, would rely on the accuracy of the certificates of liability insurance that she issued with the permission and authority of IMU (CP 866). Northland would not allow subcontractors to work without insurance endorsed to their specification. In fact, ABCD had been previously taken off the job until ABCD did get the name and waive coverage in 2001. When Boogaard signed the Access Agreement on behalf of ABCD, he believed that he already had been required coverage and did not have to get any further changes in his policy (CP 847-851).

The court should reform the IMU insurance policy and add the pier operators as additional insured to comply with the intent of all the participants to this lawsuit.

In *Fanning v. Guardian Life Insurance Company*, 59 Wn.2d. 101, 104, 366 P.2d.207 (1961), the court upheld the following jury instruction:

“An insurance company is bound by all acts, contracts or representations of its agent, which are within the scope of his apparent authority, notwithstanding the fact that they may be in violation of private instructions or limitations upon his authority, unless the person with whom the agent is dealing has either actual or constructive knowledge of the agent's limitation of authority. *Fletcher vs. West American Insurance Company*, 59 Wn. App. 533, 558, 799 P.2d 740, 742-7 43 (1990).”

Where the intent of the parties to the insurance contract is clear and the authority of the agent to bind the company is undisputed, the court will reform the insurance contract to match the intent of the parties. *Rocky Mountain Fire and Casualty Company v. Rose*, 62 Wn.2d 896, 905, 385 P.2d 45, 50 (1963). Other than the accident there was no change in the parties' status between August 2001 and the accident of October 14, 2004. In *Rocky Mountain, supra*. as here, the parties were found to have made a mutual mistake and the court found that the insured should not be the one who was prejudiced by the mistake of the agent and the carrier, who had knowledge of the intention of the insured.

An insurance company has an obligation to act in good faith towards its insured both before and after the acceptance of the tender defense under a reservation of rights. IMU's stated reasons for denial of coverage were strictly contractual. There is no factual reason that Boogaard could not have been informed of the reasons for the denial of coverage within 30 days of his second tender on March 22, 2007.

WAC 284-30-370 provides that every insurer must complete its investigation of the claim within 30 days after notification of the claim unless investigation cannot be reasonably completed within that time frame. The 30 day requirement found in WAC 284-30-370 is an expression of the requirement found in WAC 284-30-330 (3) that the

carrier must have standards for prompt investigation of claims, and a breach thereof is an unfair practice under a RCW 48.30.010. Failure to affirm or deny coverage within reasonable time after proof of claim statements were submitted is an unfair practice. WAC 284-30-330 (5).

In *Truck Insurance Exchange v. VanPort*, 147 Wn.2d. 751, 58 P.3d 276 (2002), Vanport, Truck's insured, was a construction company sued by several of its customers for violation of the Consumer Protection Act, misrepresentation, usury, breach of contract and negligence. Vanport tendered the lawsuits to Truck, which denied coverage approximately one year later. When Vanport requested a meeting with the insurer to discuss the denial, Truck never responded. Truck did not explain its denial of coverage until almost two years later when it filed for declaratory judgment. The Washington Supreme Court held that the insurance company had denied coverage in bad faith under WAC 284-330. It cited "Truck's unconscionable delay in responding" to VanPort's tender to support its holding. Truck, *supra*. p.764.

In this case IMU waited almost 4 years after the official claim was made in 2004, and a year after the complaint was originally tendered to deny the claim on a purely contractual basis to the prejudice of its insureds, ABCD and Boogaard. In its motion for summary judgment IMU does not explain or discuss the cause for its delay in denying coverage.

IMU's delay in denying coverage, despite what it says now was independent of any facts, prejudiced Boogaard severely because by the time it issued the denial, summary judgment had been ordered against him in the underlying case and he became liable for \$112,000 in attorneys' fees. This prejudice under Washington law should estop IMU from denying coverage. See *Transamerica Ins. Gr. v. Chubb & Son, Inc.*, 16 Wn. App. 247, 251-252, 554 P.2d 1080 (1977) and *Waite v. Aetna Cas. & Sur. Co.*, 77 Wn.2d 850, 855, 467 P.2d 847 (1970).

IMU asserted in its motion documents for summary judgment that coverage under the contract excluding Boogaard is clear. One important question they fail to answer is: *Why* then did it take them so long—if everything was so clear—to deny coverage? As contained in the factual discussion above, IMU was given notice of the injury on November 10, 2004. After the suit was filed and Northland/Naknek counterclaimed against Boogaard on December 11, 2006, Mr. Fox on behalf of the defendants, tendered the defense of the counterclaim to IMU on March 22, 2007. If coverage was so clear, then why did IMU not, on May 4, 2007, simply deny coverage? Why did it on that date instead issue a notice accepting defense with reservation of rights? If coverage was so clear, why did it take them yet *another* year before they issued formal denial of coverage on March 20, 2008, which was four days after summary

judgment was issued against the injured person, Boogaard, in the Northland/Naknek counterclaim? Why did it take IMU three-and-one-half years to figure out the meaning of its own insurance contract? And why did it take them a year after they were given formal notice of a claim to deny coverage? IMU argues that their duty to defend is broader than the duty to pay. This is correct as a general proposition. **But** it is universally held that where there is clearly no coverage there is no duty to defend. See, e.g., *Goodstein v. Continental Cas. Co.*, 509 F.3d 1042 (9<sup>th</sup> Cir., 2007) and *Kirk v. Mt. Airy Ins. Co.*, 134 Wn.2d 558, 951 P.2d 1124 (1998).

IMU committed to adding Northland Holdings, Inc. and Naknek Barge Lines, LLC as additional insureds. They negligently failed to do so, and no one bothered to inform ABCD of this. They represented to third parties (Northland/Naknek) that there *was* such by issuing a Certificate of Liability Insurance. By negligently (or even intentionally) failing to issue formal endorsements, IMU was able to escape the Northland claim directly in the underlying action. The courts should not continue to reward IMU for its misconduct.

In the commercial industry these “name and waive” and indemnity agreements, as contained in the Access Agreement, are common—so common that there is not a requirement in the insurance policy to notify

IMU that they exist. The policy therefore covers all acts of negligence of Northland/Naknek; Boogaard is included by law, by industry standards, and by proper construction of insurance contract, including the rules relating to ambiguities and the necessity that insurance companies be explicit about any coverage exclusions they intend.

## **VIII. THE SUMMARY JUDGMENT MOTIONS OF ALLIANCE**

### **A. Introduction**

ABCD relied on Alliance to secure its insurance needs (CP 153-184). This was acknowledged by Alliance (CP 861 and CP 866).

If there *is* additional insured coverage by IMU for Northland's torts, as ultimately to be determined after reversal and a full trial, then, in essence, Alliance did its job. But if this court and the ultimate trial court determines there is no additional insured coverage provided for Northland Holdings, Inc/Naknek, then Alliance was negligent in not securing it.<sup>9</sup>

The 2004 Access Agreement required additional insured coverage for Northland Services, Inc. and its affiliated companies. The Access Agreement also required other coverages. Alliance was not provided with

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<sup>9</sup> Alliance, through Tammy Hausinger, admitted that it had a duty to formalize the binding of coverage by IMU for Northland Holdings, Inc and Naknek as additional insureds in September 2001. Had the additional insured endorsement been secured as both IMU was required to do and IMU was duty bound to follow through on for ABCD, then there would have been no question of coverage either in the underlying action or in this lawsuit. Nevertheless, Alliance may still be responsible even if coverage is affirmed for the intervening attorneys fees and costs of this entire litigation (CP 861).

this document and, therefore, has no independent responsibility or liability in this case under the Access Agreement. **However, the IMU policy did not require notification to IMU of “assumed contracts.”** The lack of notice to Alliance or IMU is a non-issue, a red herring.

Alliance presented three independent grounds for summary judgment of dismissal. These will be discussed in order. The trial court apparently found an absence of material issues of fact on all three issues and the court declined the opportunity to clarify its ruling.

#### **B. Non Issues for the Alliance Summary Judgment**

For purposes of their summary judgment motion Alliance did not contest the proposition, as contained in Sedillo’s declaration (App. C at CP 412-414) that an “additional insured” is entitled to the same coverage as a named insured. In other words, that had Boogaard’s injury occurred from a Northland Holdings, Inc. employee then they would have been liable (at least for the sake of argument on summary judgment), for their failure to have more fully documenting the IMU authority to add Northland as an additional insured, which would have made Northland a first party insured for their torts.

Also a non-issue, at least for the summary judgment motion is the proposition that Alliance had an obligation to secure “additional insured” status for Northland Holdings, Inc. and Naknek in August of 2001, and

that they so certified that they had obtained this coverage, on which certification ABCD, Northland Holdings, Inc. and Naknek all relied.

Furthermore, Alliance did not contest (for the purposes of the summary judgment) the requirement of the law (and industry standards – see Sedillo dec., App. D, at CP 968) that any changes in a coverage be first agreed to by the insured, and that Alliance had an obligation to make sure that an additional insured endorsement was issued in favor of Northland Holdings, Inc. and Naknek, and that they had no right to change that coverage without notice to ABCD.

In summary, for purposes of the summary judgment, Alliance simply argued that even if they had complied with their duties, and even if Northland Holdings, Inc. had been an *additional insured* as of the date of the accident, there would have been no liability for failure to secure insurance because they did what they were told, i.e., they secured additional insured status for Northland Holdings, Inc.

### **C. Duties of Insurance Brokers – Liability of Alliance**

The duties of a broker, and the liability of Alliance, according to the industry standards is detailed in the second Sedillo declaration (CP 964-970, Appendix D). The following is an outline of Alliance’s liability under the law.

Boogaard's primary complaint against Alliance was that they negligently failed to protect ABDC's interest and procure the insurance that was needed and wanted. In August of 2001, he gave his broker the demand from Northland Holdings, Inc. to add them and Naknek as additional insureds. Even though Alliance certified that they had done so, in actual fact they had negligently failed to follow through with IMU to secure an official endorsement. Alliance also failed to notify ABCD, Mr. Boogaard, or Northland, when they stopped issuing certificates showing Northland Holdings, Inc./Naknek as additional insureds. This is in violation of law and of industry standards:

“It is my opinion that Alliance did not meet the standard of reasonable care and diligence by failing to procure an additional insured coverage endorsement for the 4/3/01– 4/3/02 IMU policy and all subsequent policies, up to the 4/3/04 – 4/3/05 IMU policy. The accepted standard of care within the insurance industry is that a certificate should not list the holder as an additional insured unless the policy is endorsed to that effect. This lapse could have been easily avoided if Alliance had requested IMU to issue the additional insured endorsement and followed up with them in a timely manner to ensure receipt and transmittal of the additional insured endorsement to ABCD Marine. Finally, on 12/7/04 (which was after the date of Mr. Boogaard's injury) the policy was finally endorsed, listing **Northland Services** as an additional insured.” (second Sedillo dec., App. D at CP 967).

A broker is liable if it fails to secure insurance requested by the insured. *Hardcastle v. Greenwood Sav. & Loan*, 9 Wn. App. 884, 516 P.2d 228 (1973). Brokers can be liable both in contract (whether written

or oral) and/or in negligence. *Peterson v. Big Bend Ins. Agency, Inc.*, 150 Wn. App. 504, 202 P.3d 372 (2009). In this case, Alliance was recommended by a friend of Boogaard's as being a broker experienced in marine insurance. Boogaard went to Alliance and explained ABCD's needs for insurance and that ABCD would be doing work for only 'employer.' Boogaard had a right to rely on their expertise in securing exactly the type of insurance that was required. See *Hardt v. Brink*, 192 F. Supp. 879 (Western District Washington, 1961); *Anderson Feed & Produce Co. v. Moore*, 66 Wn.2d 237, 401 P.2d 964 (1965); *Bates v. Bowles White & Co.*, 56 Wn.2d 374, 353 P.2d 663 (1960). See second Sedillo dec, App. D.

The case of *Kim v. O'Sullivan*, 133 Wn. App. 557, 137 P.3d 61 (2006) involved an attorney malpractice action and not an insurance claim.

“The Supreme Court held in *Tank* that in a reservation of rights case, the potential conflicts of interest between insurer and insured mandate imposing upon the insurer, as part of its duty of good faith, an even higher standard than in other cases. The court also set forth the distinct duties owed to the insured by retained defense counsel in such cases. *Tank*, 105 Wash.2d at 387-89, 715 P.2d 1133. But in doing so the court recognized that the responsibilities of attorneys and insurers are distinct, and referred to the former as “defense counsel's duties *as an attorney*.” *Tank*, 105 Wash.2d at 390, 715 P.2d 1133 (emphasis added). O'Sullivan owed Kim a duty as his attorney, not as his insurer.” At 565-566.

Boogaard and his partner were welders by trade and, since their inception in 2000, they relied upon Alliance for all of the insurance needs of ABCD including their General Liability Policy and bonding. Alliance was in contact directly with IMU on ABCD's behalf. Alliance admits that they contacted IMU to add Northand Holdings and Naknek to the first party coverage. Alliance had much more than a mere agency relationship with ABCD and Boogaard. It was a fiduciary relationship.

“But when an insurance buyer and his agent or broker have a special relationship, courts have declared that the broker or agent owes an enhanced duty of care. This enhanced duty may include the obligation to render advice to the principal. This enhanced duty has been termed a fiduciary duty. We have recognized two situations giving rise to a fiduciary duty of care in this context. First, a duty may arise when “an agent holds himself out as an insurance specialist and receives compensation for consultation and advice apart from the premiums paid by the insured.” Second, a special relationship may be shown by a longstanding relationship, and some type of interaction on the question of coverage, coupled with the insured's reliance on the expertise of the insurance agent, to the insured's detriment.” *AAS-DMP Management, L.P. Liquidating Trust v. Acordia Northwest, Inc.* 115 Wash.App. 833, 839, 63 P.3d 860, 863 – 864.

The measure of damages for the negligence of this type of insurance agent is measured by the loss of coverage that the insured would have received had the agent done his job properly.

“The measure of damages for breach of the duty to place fire insurance is the amount that would have been due under the policy if it had been obtained. Annot., 29 A.L.R.2d 203 (1953); *Estes v. Lloyd Hammerstad, Inc.*, *Supra*; *Graddon v. Knight*, 138 Cal.App.2d 577, 292 P.2d 632 (1956). *Hardcastle v. Greenwood Sav. & Loan Ass'n* 9, Wash.App. 884, 890, 516 P.2d 228, 233 (1973)”

In a case on all fours with this case on its facts, an insurance broker was found to be liable for damages in the amount its client was required to pay presently which would have been covered had a requested additional insured endorsement been obtained. *U.S. Oil & Refining Co. v. Lee & Eastes Tank Lines, Inc.*, 104 Wn..App. 823, 840, 16 P.3d 1278, 1287 (2001). In that case Lee & Eastes, an oil trucking company, hired Petit Morry, as its insurance broker. Lee & Estes requested that their broker add U.S. Oil Company as additional insured to their policy. US Oil had demanded this coverage to protect it from claims of negligence in case damages were caused by Lee & at the US Oil depot. The original coverage secured by Petit Morry automatically provided the coverage under a blanket endorsement. However, Petit Morry changed insurance carriers and the new carrier’s policy did not have the blanket endorsement nor was US Oil added to the new policy as an additional insured. Unfortunately, one of US Oil’s employees, Bliss, was injured on the job and he sued US Oil for damages. US Oil tendered the claim to Lee &

Eastes and the its insurance company, which did not accept the tender. Ultimately, US Oil settled with Bliss for \$275,000. US Oil then sued Lee & Eastes for reimbursement arising out of a breach of contract. This breach of contract is the same issue for which Judge Spector found Boogard liable to Northland. On the breach of contract claim the court found as follows (at 840):

“Lee & Eastes argues that even if the self-load agreement required coverage for U.S. Oil for the Bliss claim, questions of fact remain regarding the reasonableness of the Bliss settlement and the relative fault of U.S. Oil, Bliss, and Lee & Eastes. It asserts that it is not “bound by” the terms of U.S. Oil's settlement with Bliss, because U.S. Oil unreasonably excluded Lee & Eastes from settlement negotiations. We reject these arguments. Lee & Eastes declined U.S. Oil's tender of defense, and cannot now insist upon reexamining the settlement in the complete absence of any evidence suggesting the settlement was unreasonable. Nor is there any issue requiring a determination of relative fault. Relative fault is a tort law concept. Lee & Eastes breached a contract, and the only question is whether the insurance it failed to procure would have covered U.S. Oil's liability on the Bliss claim. On this question, there is no genuine issue of material fact.”

At the hearing Judge Spector noted that she had reviewed all of the pleadings, and that all of Boogard's medical records were available for her to review at the hearing. She went through all of the *Chausee* factors in detail. *Chausee v. Maryland Cas. Co.*, 60 Wn. App. 504, 803 P.2d 1339 (1991) reasonable; she found that Boogard had \$90,000 of uninsured

medical bills, and that he lost over a year of work. She found that he had suffered permanent injury. The findings are specific (CP 405-409). Judge Spector approved the settlement agreement between the parties (CP 740-744) which contained a clear reservation of rights against Alliance (at CP 742):

“(1) Albert Boogaard agrees not to execute or enforce his judgment against Northland or Northland’s insurance carriers because Albert Boogaard is required to assume Northland’s liability. Albert Boogaard agrees to seek any recovery for this judgment only against his insurance carrier International Marine Underwriters/OneBeacon America Insurance Company, his insurance broker, or assigned counsel.”

**D. The Statute of Limitations Does not Begin to Run Until there is Damage and a Cause of Action Accrues**

ABCD and Boogaard suffered no injury because of Alliance’s negligence until March 16, 2008 when Judge Spector ruled that the “Access Agreement” was enforceable, and finally on March 20, 2008 when IMU denied coverage under its General Liability Policy. Simply put, had the Access Agreement been invalidated, or had IMU accepted coverage there would have been no grounds to make a claim against Alliance.

As a general principle, a liability policy promises two things, i.e., to pay for defense and to pay out according to the terms of the policy. IMU provided a free defense, albeit under a reservation of rights.

It was not until IMU finally denied coverage, on March 20, 2008, that harm was suffered by Boogaard because not until IMU declared coverage could Boogaard claim that but for Alliance's negligence he would have been covered by insurance. The court in *AAS-DMP Management, L.P. v. Acordia Northwest, Inc.*, 115 Wn. App. 833, 843, 63 P.3d 860 (2003) (Rev. den., 150 Wn.2d 1011) held that:

“The statute of limitations begins to run from the time an action accrues, and a cause of action accrues when a party has a right to apply to a court for relief. Here, AAS-DMP could not sue Acordia until AAS-DMP missed the suit deadline. The statute of limitations thus began to run when the two-year suit and action clause expired on July 25, 1998, and does not bar AAS-DMP's claim.”

AAS was a large crab processor that placed all of its insurance needs with one agent, Mr. Evich of Acordia, an insurance broker. AAS's original policy provided that AAS had a two year limitation upon which to make claims for loss of profits, but the customer was not given a copy of the policy. AAS suffered a fire loss in July of 1996 in which one of its processors was out of commission for a month due to repairs. In February of 1998 AAS submitted its claim for loss of profits to Mr. Evich and

Acordia and asked them if there was any time limitation on making the claim. AAS was informed that there was no such limitation, and subsequently the claim was not made to the insurer until September of 1998, whereupon the insurance company denied the claim as being untimely. The insurance company ultimately settled the claim for pennies on the dollar due to the late filing, and AAS sued its broker for the difference in its damages. Among many defenses the broker argued was that the statute of limitations had run on the claim. The appellate court disagreed and held that the statute of limitations began when the two year time limitation to file a claim expired, i.e. when the loss occurred, and not when the negligent advice was given.

The major case relied upon by Alliance in the trial court was *Huff v. Roach*, 125 Wn. App. 724, 106 P.2d 268 (2005). The *Huff* decision echoes the AAS case holding that the statute of limitations does not begin until plaintiff cause of action accrues which includes the essential element that plaintiff suffered damages. *Huff* cites *Gazija v. Nicholas Jerns Co.*, 86 Wn.2d 215, 219, 543 P.2d 338, 341 (1975), an insurance case which held that the plaintiff's cause of action did not accrue until the insurer denied coverage for the loss of his fishing gear because he was not suing merely for the return of his premiums.

The premise of *Gazija* is that there must be actual loss and not just some possibility of future loss. The court said:

“Statutes of limitation do not begin to run until a cause of action has ‘accrued’. RCW 4.16.010. In most circumstances, a cause of action accrues when its holder has the right to apply to a court for relief. *Lybecker v. United Pacific Ins. Co.*, 67 Wash.2d 11, 15, 406 P.2d 945 (1965); *State ex rel. McMillan v. Miller*, 108 Wash. 390, 400, 184 P. 352 (1919). Actual loss or damage is an essential element in the formulation of the traditional elements necessary for a cause of action in negligence. *Lewis v. Scott*, supra 54 Wash.2d at 856, 341 P.2d 488; *Lindquist v. Mullen*, 45 Wash.2d 675, 677, 277 P.2d 724 (1954); Cf. Restatement (Second of Torts ss 281, 7 (1965). The difficulty in applying this principle to statutes of limitation problems is created by conceptualization of when the damage has occurred. See *Budd v. Nixen*, 6 Cal.3d 195, 200-02, 98 Cal.Rptr. 849, 491 P.2d 433 (1971). The mere danger of future harm, unaccompanied by present damage, will not support a negligence action. *Prosser, Supra* s 30, at 143. Until a plaintiff suffers appreciable harm as a consequence of negligence, he cannot establish a cause of action. Thus, although a right to recover nominal damages will not commence the period of limitation, the infliction of actual and appreciable damage will trigger the running of the statute of limitations. *Davies v. Krasna*, 14 Cal.3d 502, 121 Cal.Rptr. 705, 535 P.2d 1161 (1975).”

In *Huff* it was clear that the defendant attorney missed the two year statute of limitations for filing an action in Oregon, and a claim accrued against him at that time. The *Huff* case itself recognizes that the assessment of the amount of monetary damages and the fact of injury may be different.

“Here, malpractice refers to legal negligence. “The elements of negligence are duty, breach, causation, and injury.” *Keller v. City of Spokane*, 146 Wash.2d 237, 242, 44 P.3d 845 (2002) (emphasis added). The “injury” element refers to “damage,” as opposed to “damages.” “Damages” are the monetary value of the injury or damage proximately caused by the breach of alleged duty. Frequently, recitations of the negligence elements inaptly refer to “damages” as an element of negligence rather than damage or injury. See *Janicki Logging*, 109 Wash.App. at 660, 37 P.3d 309 (using the terminology “damages” rather than injury or damage). Although “injury” and “damages” are often used interchangeably, an important difference exists in meaning. See *Lavigne*, 112 Wash.App. at 683, 50 P.3d 306 (citing 3 RODNEY E. MALLEEN & JEFFREY M. SMITH, LEGAL MALPRACTICE § 20.1, at 119 (5th ed.2000)). In the legal malpractice context, injury is the invasion of another’s legal interest, while damages are the monetary value of those injuries. *Id.* Mr. and Mrs. Huff were injured by Mr. Roach when he missed the statute of limitations, effectively invading their legal interests. *Huff* at 729-730.”

The primary basis of Boogaard’s claim against Alliance was that in 2001 Alliance assured ABCD that they had added Northland Holdings, Inc. and Naknek as insureds on the ABCD policy with IMU. The defendant Alliance admits that Boogaard thought ABCD already had the required coverage when Northland gave him the Access Agreement,<sup>10</sup> in

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<sup>10</sup> If Northland Holdings had been an additional insured beginning in 2001, then the Access Agreement requirements of additional insured were superfluous. As to the identity of the additional insured, see discussion below. This concept was put before the court clearly in the declaration of the expert, Sedillo, at CP 413: “Enforceability issues are the reason it is common to require that the indemnitee be included as an additional insured on the indemnitor’s liability insurance. Doing so means that the

2004. Acting on that assumption Boogaard tendered the claim to Alliance and IMU. In 2006 when Northland counterclaimed against Boogaard and Boogaard tendered the coverage to IMU under the ABCD policy, IMU did not outright reject coverage. They defended under a reservation of rights. How was ABCD or Boogaard supposed to know that IMU would later deny coverage for the claim, and/or that he would be damaged by that denial? Until March of 2008 there were essential facts about the claim against Alliance that were simply unknown and unknowable to Boogaard, and did not then support a cause of action against Alliance.

A more complicated case that illustrates the fact that accrual of a claim for misrepresentation or negligence may occur over a longer period of time is *Sabey v. Howard Johnson*, 101 Wn. App. 575, 5 P.3d 730 (2000). In 1989, Sabey invested in a company relying on an actuarial firm's (Howard Johnson) negligent statement that Fredrick and Nelson's company's pension plan was adequately funded. Sabey owned 100% of the shares of company purchasing Fredricks. Later that year, Sabey learned that the company's plan was actually significantly under-funded.

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indemnatee has some protection to fall back on in the event there is a problem with the enforceability of the hold harmless agreement. This, in effect, is what is known as the "belt and suspenders" concept. Thus, if contractual liability insurance applies, there is no need to rely on additional insured status. Conversely, if contractual liability coverage does not apply for some reason, additional insured status can be relied on for the protection of the indemnatee."

The company went bankrupt two years later, and the Pension Benefits Guaranty Corporation (PBGC) paid the shortfall in the pension funding. PBGC then notified Sabey in 1993 that he was potentially liable for the shortfall, and confirmed in 1995 that it would hold Sabey liable. In 1998, Sabey settled PBGC's claim. Later that year, Sabey sued the actuarial firm on a negligence theory to recover the settlement loss. The actuarial firm argued that Sabey's claim was time-barred because Sabey knew of the alleged negligence in 1989, and knew of his potential liability in 1993 and 1995, but did not sue the actuarial firm until 1998. The court held that "knowledge of potential liability is not the equivalent of actual harm," and until Sabey agreed to settle with PBGC, his personal liability was purely speculative. *Sabey*, 101 Wn. App. at 579-81.

Before a statute of limitations begins to run a plaintiff must suffer actual and appreciable damages. In *Gausvik v. Abbey*, 126 Wn. App. 868, 880, 107 P.3d 98 (2005) the court held:

“Generally, the statute of limitations begins to run when a party has a right to apply to a court for relief. *U.S. Oil & Refining Co. v. State Dep't of Ecology*, 96 Wash.2d 85, 91, 633 P.2d 1329 (1981). To apply for relief, each element of the cause of action must be susceptible of proof. *Haslund v. City of Seattle*, 86 Wash.2d 607, 619, 547 P.2d 1221 (1976). A plaintiff cannot maintain a negligence action, and the statute of limitations will not begin to run, until the plaintiff has suffered "actual and appreciable" damage. *Haslund*, 86 Wash.2d at 620, 547 P.2d 1221. RCW 4.16.080.

The determination of the time at which a plaintiff suffered actual and appreciable damage is a question of fact. Since the statute of limitations is an affirmative defense, CR 8(c), the burden was on respondent Alliance to prove those facts which established the defense. *Haslund v. City of Seattle*, 86 Wn.2d 607, 620-621, 547 P.2d 1221 (1976). Further, whether the plaintiff used due diligence to discover all of the facts necessary to determine if there is a claim is also a question of fact. *Crisman v. Crisman*, 85 Wn. App. 15, 20, 931 P.2d 163, 166 (1997).

Even if Alliance was to argue that Boogaard should have known he had a problem when he received a reservation of coverage from IMU, and that the reservation should have put Boogaard on notice that something was up, IMU's reservation did not occur until May of 2007, which would extend the statute of limitations to May of 2010.

Alliance argues that the statute of limitations began within days or weeks of the injury to Boogaard in October of 2004. However, it is a factual dispute as to whether Alliance participated in the delay by IMU in disaffirming coverage. At CP 78 is an email from IMU to Alliance confirming an alleged telephone conversation with Tammy Hausinger of Alliance, to the effect that Boogaard is not making a claim under the IMU policy. The email goes on to say that IMU is, accordingly, closing its file.

They already had a claim from Boogaard's attorneys (CP 553-559) but, nevertheless, it is a material issue of fact. They cannot be heard to say that no claim has been filed and then later assert that the statute of limitations was running at that time because Boogaard should have known that the claim was being denied on the basis of no coverage.

In any event, Alliance waived the right to claim insufficiency of process when it delayed for eight months, even submitting an answer to the Complaint. The Complaint was served without Summons on Alliance on January 5, 2009 (CP 42-44). An Answer was not filed until August 24, 2009 (CP 45-51). This Answer notified Boogaard that no Summons had been attached to the Complaint. This was rectified and there was Acceptance of Service on September 4, 2009 (CP 767-768, CP 59-62, CP 765-766). Under these circumstances, the Court in *Lybbert v. Grant County*, 141 Wn.2d 29, 38-39, 1 P.3d 1124 (2000) affirmed the doctrine in these circumstances as follows:

“This court has discussed the doctrine of waiver in this context on only one occasion. *See French v. Gabriel*, 116 Wash.2d 584, 806 P.2d 1234 (1991). In that case we recognized the viability of the doctrine, but concluded that under the facts of that case the defendant had not waived the defense. Significantly, all three divisions of the Court of Appeals of this state have also recognized the common law doctrine of waiver. *See Clark v. Falling*, 92 Wash.App. 805, 813, 965 P.2d 644 (1998) (Division One); *Davidheiser*

*v. Pierce County*, 92 Wash.App. 146, 155, 960 P.2d 998 (1998), *review denied*, 137 Wash.2d 1016, 978 P.2d 1097 (1999) (Division Two); *Romjue v. Fairchild*, 60 Wash.App. 278, 281, 803 P.2d 57, *review denied*, 116 Wash.2d 1026, 812 P.2d 102 (1991) (Division Three). Under the doctrine, affirmative defenses such as insufficient service of process may, in certain circumstances, be considered to have been waived by a defendant as a matter of law. The waiver can occur in two ways. It can occur if the defendant's assertion of the defense is inconsistent with the defendant's previous behavior. *Romjue*, 60 Wash.App. at 281, 803 P.2d 57. It can also occur if the defendant's counsel has been dilatory in asserting the defense. *Raymond v. Fleming*, 24 Wash.App. 112, 115, 600 P.2d 614 (1979) (citing 5 Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 1344, at 526 (1969)), *review denied*, 93 Wash.2d 1004 (1980).

We believe the doctrine of waiver is sensible and consistent with the policy and spirit behind our modern day procedural rules, which exist to foster and promote “the just, speedy, and inexpensive determination of every action.” CR 1(1). If litigants are at liberty to act in an inconsistent fashion or employ delaying tactics, the purpose behind the procedural rules may be compromised. We note, also, that the common law doctrine of waiver enjoys a healthy existence in courts throughout the country, with numerous federal and state courts having embraced it.”

**E. Alliance Does Not Benefit from Boogaard Settlements with  
Northland Holdings, Inc. and Northland Services, Inc.**

In the present case Boogaard suffered severe damages. The eventual settlement between Boogaard and Northland Holdings, Inc., Northland Services, Inc. and the forklift driver, was specifically approved in a reasonableness hearing before Judge Spector which was a condition of the settlement (CP 405-409). Further, the agreement specifically provided that the parties would be bound if the court found a lesser amount to be reasonable other than the \$600,000 judgment. In particular the settlement agreement provided as follows:

“E. (1). Albert Boogaard agrees not to execute or enforce his judgment against Northland or Northland’s Insurance Carriers because Albert Boogaard is required to assume Northland’s liability. Albert Boogaard agrees to seek any recovery for this judgment only against his insurance carrier IMU/One Beacon American Insurance Company, **his insurance broker**, or assigned counsel.”  
(emphasis added)

The court specifically preserved any claims Boogaard had against Alliance.

It is also important to understand as a party which was adverse to the settlement and reasonableness hearing, IMU, appeared in the underlying action and attacked the settlement. This is not a case where a confessed judgment was entered unopposed.

### **F. Summary Judgment Based on Corporate Status**

Alliance contends that even had they done their job properly and arranged for additional insured coverage for Northland Holdings, Inc., their negligence did not proximately cause injuries to Boogaard. They allege it was the employee of Northland Services, Inc. that hurt Boogaard. Their argument ignores the fact that the lawsuit by Boogaard was against both entities, Northland Holdings, Inc. and Northland Services, Inc. (CP 566-569, CP 899-902 and CP 984-987). Furthermore, the settlement approved by the court covered both Northland Holdings, Inc. and Northland Services. After the reasonableness hearing it was noted that Northland Holdings was not expressly mentioned. Proceedings were brought by the defendants in that case (Northland Services, Northland Holdings and the fork lift driver) to enforce the settlement agreement to include Northland Holdings. This relief was expressed by defense counsel as part of his brief to Judge Spector in which he asks:

“Plaintiff’s opposition raises no legitimate legal or factual support his position that the C2A agreement did not apply to the claims against Northland Holdings, Inc. Defendants ask the Court to issue an order stating that the C2A agreement applies to all claims and all defendants in this litigation.” (CP 1019).

The judge agreed and so ordered. (CP 1020-1021)

Furthermore, Alliance offers no evidence regarding: (as of August and September 2001) which of the multiple entities under the

Northland/Naknek banner were in charge of the pier and needed the additional insured coverage? Ed Hiersche, on behalf of Naknek and Northland Holdings, Inc. was in charge of the workplace as ‘port engineer.’ If the insurable risk was later transferred to another operating entity by the time of the accident, this cannot avail Alliance because it would not have availed IMU (CP 968-969, App. D).

On August 27, 2001, Ed Hiersche, representing himself to be the “Port Engineer,” required ABCD to change its insurance policy to name Northland Holdings, Inc. and Naknek as first party “additional insureds.”

Following his injury, Mr. Boogaard sued both Northland Holdings, Inc. and Northland Services, Inc. As he testified in his deposition, to him they were all one and the same because they had the same personnel, almost the same names, and no one ever tried to differentiate Northland Holdings, Inc. from Northland Services, Inc.

According to the declaration of Rheagan Sparks by the time Boogaard was injured, Naknek was a wholly owned subsidiary of Northland Holdings, Inc.. There were no additional employees, managers, telephone numbers—nothing (CP 292-296). The question becomes: if the operators of the pier represented that Northland Holdings was the responsible entity and demanded additional insured status, could they have

escaped liability on the basis that they fooled Boogaard and that the real entity was, all along, Northland Services, Inc.?

Northland Holdings, Inc. and Northland Services, Inc. would be estopped to take that position once Alliance, IMU, and ABCD, the general partnership, relied on the representations.

In fact, the real operator of the Pier 115 was an entity (with the same ownership), “Northland Terminal Services, Inc.” which had the lease with the Port of Seattle, Paragraph 21 of which forbade any assignments or subleases (including substantial change in ownership of Northland Terminal Services, Inc.) (CP 810-831 at 820).

Though we do not have all of the insurance policies (including the insurance policy issued by IMU as part of its overall coverage of Northland) we do have one of the policies, the facing page of which shows that insurance was issued for all of the corporations, including Northland Holdings, Inc. and Northland Services, Inc., Naknek, Northland Terminal Services, Inc. and others (CP 873).

In this case, Northland Holdings, Inc. represented itself to ABCD and, through ABCD, to Alliance and to IMU as the necessary and sufficient party demanding to be named as an additional insured on ABCD’s insurance policy with IMU. Alliance issued a certificate of

liability insurance certifying that Northland Holdings, Inc. and Naknek were additional insureds.

Later, just before he was injured, Mr. Hiersche required Boogaard sign an additional agreement called an “Access Agreement” in the name of Northland Services, Inc. although it covered all related and affiliated companies (App. B hereto).

The general rule is as set forth in the annotation at 7 ALR.3d 1343 (1966):

“The law recognizes, as a broad proposition, that a parent corporation will be responsible for the obligations of its subsidiary to third parties, when the subsidiary has become a mere instrumentality of the parent corporation.”  
(at 1347)

Generally mere common stock ownership is not enough. However, according to the ALR factors used by courts in determining whether the parent company has such control over the subsidiary such that it should be held liable for the subsidiary’s torts are:

“Whether or not the factor of controlling stock ownership has been present, other intercorporate connections, alternatively or additionally, have been considered by the courts as factors in their determination of the question whether the subsidiary constitutes such a mere instrumentality of the parent as to establish the parent’s liability for the torts of the subsidiary. Among the factors deemed relevant in the determination of whether the requisite degree of control is maintained by the corporation are (1) the presence in both corporations of the same officers or directors; (2) common shareholders; (3) financial support of the subsidiary’s operations by the parent; (4)

underwriting the incorporation and purchase of all the capital stock of the subsidiary by the parent corporation; (5) the fact that the subsidiary was organized with a grossly inadequate capital structure; (6) a joint accounting and payroll system; (7) the subsidiary lacks substantial business contacts with any save the parent and operates solely with assets conveyed by the parent corporation; (8) in the financial statements of the parent, the subsidiary is referred to as a division of the parent corporation or obligations are assumed to be those of the parent; (9) the property of the subsidiary is used by the parent corporation as its own; (10) the individuals who exercise operating control over the subsidiary exercise it in the interest of the parent; (11) failure to observe the formal requirements attributable to the operation of a subsidiary.”

In this case, there are a large number of corporate entities and shells, with the same officers and directors with similar names and responsibilities and interrelationships. There was Northland Holdings, Inc., Northland Services, Inc., Northland Transportation, Inc., Northland Marine Services, Inc., and others (CP 903-963 with summary chart at CP907). The day to day management was by Ed Hiersche. He was in charge of all of the job assignments, such as for the entity called Northland Services, Inc. or Naknek. Oftentimes, in mergers and acquisitions, the same person signed for both entities—Barry Hachler.

The following summary of facts helps frame the issue: There are various corporations, all interrelated, all with the same shareholders and managers, with the same employees. One of them, Northland Holdings, Inc., represents that it is in control of the job site and demands that ABCD

revise its insurance policy to name them as *additional insureds*. They exclude ABCD partners from the job site until the insurance is procured. Alliance represents to ABCD and to Northland Holdings, Inc. that the *additional insured* status has been achieved. Then an employee, whose paycheck came from Northland Services, Inc., injures someone in connection with the activities of ABCD on Pier 115. So, would there be no coverage for the loss? Or would Northland Services, Inc. be bound by (or, alternatively, estopped from denying) liability because they made the demand for the additional insured status in the name of a related (parent) corporation?

In other words, would IMU, the insurance company, be able to escape liability because additional insured status was given, as requested, to the entity that represented itself as being in charge of the site?

In this case, the circumstances are even more egregious, because the actual job site was not in the control, technically, of Northland Holdings, Inc., nor of Northland Services, Inc., nor of Naknek. Rather, the contractual obligation to manage the Pier 115 was held by Northland Terminal Services, Inc., by agreement with the Port of Seattle.

Rheagan Sparks identifies herself the risk manager for all of the Northland entities operating out of Pier 115. Ms. Sparks signed a declaration regarding the various companies (CP 728-732). In paragraph 5 of the Sparks

declaration she states, “Northland Holdings, Inc. had no employees and conducted no operations with respect to Terminal 115 or any other property. It had no operational control over terminal 115.” This is contradicted by the very terms of the Hiersche demand of August 2001 signed on behalf of Northland Holdings and Naknek as the ‘Port Engineer.’ As can be seen from excerpts from Ms. Sparks deposition, CP 884-886, neither did Northland Services, Inc. nor Naknek, nor several other entities, have operational control over Pier 115. Rather, the entity that *had* control was one not even mentioned in the Sparks declaration, namely, Northland Terminal Services, Inc. Northland Terminal Services, Inc. *is* included in the companies covered by the insurance policy covering any and all the entities associated with the operation on Pier 115 (CP 873), one of which insurance companies was IMU. In fact, by the testimony of Boogaard, the manager of the Pier was Ed Hiersche, who apparently worked for *all* of the companies.

**G. Had Alliance Added Northland Holdings Inc. in 2001 the Insurance Contract Could have Been Reformed and Northland Services Inc been Substituted.**

The evidence is uncontradicted that in 2001 when Ed Hiersche requested that Northland Holdings and Naknek be added to the ABCD Policy that Northland wanted insurance for ABCD’s welding activity on barges and at the pier. It is also uncontroverted that at the time of the accident Mr. Boogaard thought that ABCD had the required coverage, and

Northland's Ed Hiersche thought ABCD had the coverage or he would not have let Boogaard work.

Where the intent of the parties is clear to adding an additional insured and through mutual mistake the wrong party is added to the policy as an additional insured the contract can be reformed to add the proper party in the event of a loss.

“To support a reformation of contract, there must be a showing of either fraud or mutual mistake. There is no suggestion of fraud in the instant case, so it must be conceded that the only ground for reformation is that of mutual mistake. In the case of *Tenco, Inc. v. Manning*, 59 Wash.2d 479, 483, 368 P.2d 372, 374 (1962), we stated:

‘If the intention of the parties is identical at the time of the transaction, and the written agreement does not express that intention, then a mutual mistake has occurred. *Bergstrom v. Olson* (1951), 39 Wash.2d 536, 236 P.2d 1052; *Keesling v. Pehling* (1950), 35 Wash.2d 624, 214 P.2d 506.’”  
*Rocky Mountain Fire & Cas. Co. v. Rose*, 62 Wn.2d 896, 902-903, 385 P.2d 45, 49 (1963)

If Mr. Hiersche was mistaken as to the Northland entity which was operating the terminal at the time it is clear that the parties made a mistake about who needed to be named as an insured.<sup>11</sup> Clearly, in 2004 when the access agreement was formally adopted there was an acknowledgment of who needed to be named in the first place, Northland Services Inc.

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<sup>11</sup> Alliance presents no proof as to who the operating entities were in August 2001.

Thus, had Alliance secured the endorsement as requested the contract could have been reformed to reflect the intent of the parties and there would have been coverage for the Boogaard accident for Northland Services, Inc.

According to the declaration of Rheagan Sparks, Northland Holdings, Inc. had no operational day to day management of Pier 115. This is disputed but, if true, then *why* did Northland Holdings, Inc. demand additional insured status from ABCD's IMU insurance policy? Obviously, the intent was to protect the pier management (whomever that entity might be). Had Alliance done its job by securing additional insured status for Northland Holdings, Inc., there would have been coverage, as intended, for the operator (which may be one of the other Northland companies such as Northland Terminal Services, Inc., or Northland Services, Inc., or any of the other Northland-interrelated entities).

### **IX. CONCLUSION**

The trial court erred in granting summary judgment to IMU holding that their policy issued to ABCD did not provide coverage for the injuries caused to Mr. Boogard by the forklift operator on October 14, 2004. There are two completely independent bases providing coverage to the tortfeasor, both of which apply. The Access Agreement signed by ABCD a few days before the injury to Mr. Boogard, was an "insured

contract” per industry standards as well as under the definition contained in the policy. This assumption of tort liability by ABCD is common in commercial policies, and so there is no provision whatsoever in the pages of the policy or anywhere else for notification to the insurance company that their injured contractually assumed tort liability of another. The only requirement was that the injury arise out of the activities of ABCD on the work site. IMU contends that the injuries to Mr. Boogard were excluded from the coverage afforded by the insured contract clause to Northland Services and its affiliated companies. Instead of the clear exclusion IMU tortures the policy language and ignores the industry practices and constructions by saying that Mr. Boogard was not a “third-party” the trial court erred in interpreting the contract this way from ignoring the factual context from which it arose, the named insured was a partnership, not Mr. Boogard. Mr. Boogard was certainly a third-party as to Northland Services and partners are separate and distinct from their legal partnership. In a summary judgment context the trial court should have resolved disputed issues of fact in favor of Mr. Boogard and certainly exclusionary clauses in insurance contracts should be narrowly construed and any ambiguities in an insurance contract resolved in favor of an insured whether that insured was Northland, ABCD or Boogard.

Secondly, there were material facts before the trial judge that IMU had expressly agreed in September 2001 to add Northland Holdings and Naknek as additional insureds and gave specific authority to Alliance to issue certificates to Northland and to ABCD that this coverage was in effect. The language for the certificates was provided by IMU. They should have issued a formal endorsement and they had no right to change this policy for the 2004-2005 policy period without notification to anyone. Additional insured status would have provided coverage for Northland's employee when it caused harm to anyone so long as the harm arose out of the legitimate activities of ABCD on the work site.

ABCD totally relied on Alliance for all of its insurance needs. Boogaard, on behalf of ABCD, specifically handed to Tammy Hausinger of Alliance the memo from Ed Hiersche demanding first party insurance coverage for Northland Holdings, Inc. and Naknek. Alliance made the representation by certifying to ABCD and to Northland/Naknek that there was in fact coverage. Everyone, including Northland/Naknek relied on this representation to allow ABCD back onto the job site. Alliance screwed up, depriving Mr. Boogaard of coverage just when it was most needed. Alliance maintains the statute of limitations has passed. How could it have passed until there was a denial of coverage? Had there been a determination of coverage there would have been no lawsuit against Alliance. The settlement

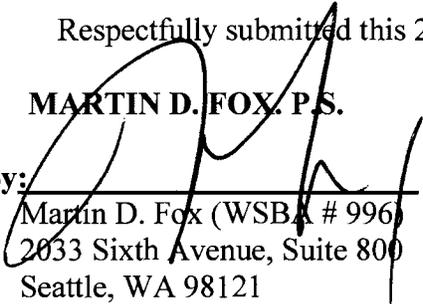
agreement between Mr. Boogaard and ABCD with Northland Holdings, Inc. and Northland Services, Inc. (and the forklift driver) expressly excluded benefits to third parties including Boogaard's insurance broker Alliance. Judge Spector approved that limitation. No one intended to benefit Alliance by the underlying settlement.

As to corporate status, there are material issues of fact relating to the confusing array of Northland entities intending to be insured. Northland Holdings, Inc. is the entity requesting coverage and Alliance was supposed to have secured that coverage. By not doing so, Mr. Boogaard was denied insurance, to his detriment.

There are material issues of fact and summary judgment should have been denied. Petitioners request that the summary judgments be reversed and the case be remanded to the Superior Court for trial with guidance by the Court to the trial Court as to the crucial issues of law.

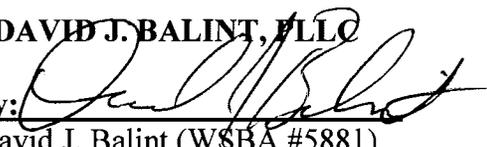
Respectfully submitted this 22nd day of February, 2011.

**MARTIN D. FOX, P.S.**

By: 

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(206) 728-7799, Ext. 117  
Of Attorneys for Appellants/  
Defendants ABCD Marine,  
A Washington Partnership/Albert  
Boogaard

**DECLARATION OF SERVICE**

I certify that on the 22nd day of February, 2011, I caused true and correct copies of the following:

- 1) APPELLANTS' OPENING BRIEF; and
- 2) MOTION, DECLARATION AND PROOF OF SERVICE FOR LEAVE TO FILE OVERLENGTH BRIEF;

to be served on the following in the manner indicated below:

- 1) Counsel for plaintiffs/respondents
  - Dennis M. Moran (X) US Mail
  - Moran Windes & Wong, PLLC ( ) Hand Delivery
  - 5608 – 17<sup>th</sup> Ave. Northwest (X) ABC Legal Messenger
  - Seattle, WA 98107 (X) Email
  
- 2) Counsel for third party defendants ( ) US Mail
  - Steven A. Rockey ( ) Hand Delivery
  - Eklund Rockey Stratton, P.S. (X) ABC Legal Messenger
  - 521 Second Avenue West (X) Email
  - Seattle, WA 98119-3927

DATED this 22nd day of February 2011 at Seattle, Washington.

**DAVID J. BALINT, PLLC**

**By:** 

David J. Balint (WSBA #5881)  
2033 Sixth Avenue, Suite 800  
Seattle, WA 98121  
(206) 728-7799, Ext. 111  
Of Attorneys for Appellants/Defendants  
ABCD Marine, A Washington Partnership/  
Albert Boogaard

# Appendix A

NAKNEK BARGE LINES LLC

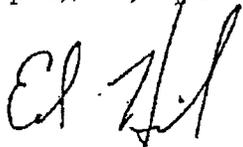
TO: ALL NAKNEK BARGE LINES CONTRACTORS  
FROM: ED HIERSCHE  
SUBJECT: NEW INSURANCE REQUIREMENTS  
DATE: 8/27/01  
CC: BARRY HACHLER, MIKE CLEVINGER, JANET STEBBINS, MARK BOUFFIOU, STEVE CLOUD

Due to changes in Naknek Barge Lines General liability coverage, it has become necessary to require all sub contractors, labor contractors and other on site vendors to provide proof of General Liability coverage in the amount of \$1,000,000.

As of Sept. 1, 2001, all NBL contractors will provide a certificate of insurance. This certificate must name and waive Naknek Barge Lines LLC and Northland Holdings Inc. It shall also list your coverage limits, and include your company name, your policy number and the effective dates of the coverage.

You must always have a valid certificate on file. If your certificate expires you will be terminated until which time you can provide a current certificate. Please make note of your effective dates as NBL is not responsible to notify you prior to the expiration of your certificate

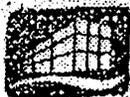
Certificates must be delivered in person, or mailed to Ed Hiersche at the address listed below by Sept. 1, 2001, or prior to re-employment.



Ed Hiersche  
Port Engineer  
Naknek Barge Lines LLC

NAKNEK BARGE LINES LLC  
218 SOUTH BRANDON  
SEATTLE WA 98108  
PHONE: 206 762 3957

# Appendix B



**Northland Services**  
MARINE TRANSPORTATION

P.O. BOX 24527  
SEATTLE, WA 98124  
PHONE: (206) 763-3000  
FAX: (206) 767-5579

## ACCESS AGREEMENT

|  |  |
|--|--|
| IDENTIFICATION OF USER   |  |
| <u>ABC Marine</u><br><small>Name of Company</small>                  |  |
| <u>346 N.W. 89th St.</u><br><small>Street Address</small>            |  |
| <u>Seattle, Wa. 98117</u><br><small>City, State and Zip Code</small> |  |
| <u>Albert Boogaard</u><br><small>Contact Person</small>              |  |
| <u>206-782-5229</u><br><small>Phone Number</small>                   |  |

|                        |  |
|------------------------|--|
| PERSONS ALLOWED ACCESS |  |
| <u>Albert Boogaard</u> |  |
| <u>Wes Dahl</u>        |  |
|                        |  |
|                        |  |
|                        |  |
|                        |  |
|                        |  |

Vessel, Facility and/or Premises :  
Times and Dates of allowed access :  
Access charge and/or other charges :

|   |
|---|
| All Vessels, All Premises and all Job sites   |
| From today's date forward, Monday through Friday 6:30 AM through 4:00 PM. Access at other times by advance permission only. |
| None  |

|  |  |
|--|--|
| PURPOSE OF ACCESS, PERMITTED USE AND/OR SPECIAL CONDITIONS   |  |
| Work relating to the completion of tasks as defined by Northland Services Marine Maintenance Manager, Maintenance Supervisor or Port Engineer. |  |
|  |  |
|  |  |

User agrees with Northland Services, Inc. (NSI) that access to and use of the vessel(s), facility(ies) and/or premises identified above (the "Property") shall be for the limited purposes identified above and shall be subject to the terms and conditions set forth in this agreement. User has read the reverse side of this agreement, and understands that it limits the liability of NSI and places certain liabilities and responsibilities upon User, including responsibilities to insure and be responsible for all persons accessing the Property.

DATED this 29 day of Sept., 2004

NORTHLAND SERVICES, INC.

USER

By: \_\_\_\_\_

Albert Boogaard / Wes Dahl

Its: \_\_\_\_\_

By: Albert Boogaard

Its: Senior Partner

Badge Number: 64/69

Returned:  Yes  No

|                       |
|-----------------------|
| Exhibit: <u>8</u>     |
| Wit: <u>Boogaard</u>  |
| Date: <u>10-21-09</u> |
| Mary Miller, RPR, CRP |

1. **Non-Exclusive Access:** The access granted on-exclusive, is for the limited purposes set forth in the **VEE SHIP LICENSE WITH AN ATTACHED TO THE Vessel, Facility and/or Premises** (the Property) identified above. User understands and acknowledges that **line and heavy equipment utilization and cargo operations, and the inherent dangers associated therewith, may be occurring concurrently with User's access.**
2. **Inspection:** Prior to beginning operations each day, User shall conduct a thorough inspection of the Property and areas adjacent thereto for the purpose of safety to personnel and equipment and for suitability for its proposed work and activities (hereinafter operations). If User believes there are problems as to safety or suitability (including for its personnel and equipment or for others), it must notify NSI prior to beginning operations. If such conditions cannot be changed by mutual agreement such as to assure safety and suitability of operations, then User shall promptly withdraw its tools, materials, equipment and personnel and this agreement shall be deemed voluntarily terminated. Similarly, if problems with safety or suitability develop during the working day while operations are being conducted, User shall immediately cease operations, notify NSI and attempt to work out the problems. If the problems cannot be worked out, User shall withdraw its tools, materials, personnel and equipment and this agreement shall be deemed voluntarily terminated. If User begins its operations whether with or without such daily inspection, or continues to conduct operations, including while aware of safety or suitability problems, it shall be irrevocably presumed that the Property was accepted as both safe and suitable for User's operations. NSI makes no warranties whatsoever with respect to the Property and/or with respect to User's operations or intended use thereof.
3. **Time/Cleanup:** User is allowed access only to the Property identified and only for the limited scope identified on the face of this document, with User's access to be limited to normal working hours unless otherwise identified on the face hereof. All User's tools, materials, equipment and personnel must be removed daily from the Property and all areas utilized by User must be cleaned of debris. Any dunnage, cargo handling gear and other materials relating to User's operations, or generated as a consequence of these operations, must be removed daily.
4. **Rules:** User shall be responsible for ensuring that its employees, agents and subcontractors obey all rules and regulations promulgated by NSI or others with respect to the Property, whether posted or advised verbally. Rules and regulations handed out shall be deemed posted. User is required to observe any load limit requirement imposed by NSI or any authority having jurisdiction with respect to the Property or any equipment thereon.
5. **Interference:** In addition to obeying rules and regulations, User agrees that its personnel and equipment will not interfere with operations being conducted by others. User also agrees that its personnel and equipment will not be utilized such as to create a safety hazard for others.
6. **Security:** NSI will not provide security for tools, materials, personnel, equipment or items of User on the Property. User shall be solely responsible for security with respect to the Property, and is cautioned to watch carefully all materials, tools, personal items and equipment and to remove the same daily. User assumes all risk of loss of, and agrees to hold NSI harmless from, all loss, injury and/or damage (including, without limitation, theft, vandalism and malicious mischief) to its equipment, materials, tools and property, including those of its employees.
7. **Property Damage:** User shall be responsible for all property damage to the Property or equipment of NSI and all others caused by User, its tools, materials, equipment or personnel, while operating on the Property, including all consequential damages resulting therefrom. User agrees that in the event any such property damage occurs, it shall immediately repair or restore the damaged property to its pre-existing condition with no reduction for depreciation. If User fails to do so, NSI may proceed to do so, in which event User shall pay or reimburse NSI for its actual costs plus an additional fifteen percent (15%) markup for handling and overhead and interest at one percent (1%) per month to accrue on all charges until fully paid. NSI shall be responsible only for property damage caused by its sole intentional negligence, and then shall be responsible only for direct physical damage and not for any consequential or intangible damages of any kind or nature whatsoever. User shall indemnify and hold harmless (including costs and legal fees) NSI of and from all losses, damages, claims and suits of property damage, whether direct or indirect, arising out of or relating to User's utilization or access hereunder, except such damage resulting solely and directly from NSI's sole intentional negligence.
8. **Personal Injuries:** User shall be responsible for all bodily and personal injuries to all persons arising out of or resulting from its operations and/or use of the Property, including bodily and personal injuries to its own employees, except if caused by the sole intentional negligence of NSI. User shall indemnify and hold harmless (including costs and legal fees) NSI of and from all losses, damages, claims and suits for bodily and personal injury, whether direct or indirect, arising out of or relating to its operations or use of the Property, except such bodily and personal injuries caused directly from the sole intentional negligence of NSI. This indemnification agreement includes all claims and suits against NSI by any employee (present or former) of User, and User expressly waives all immunity and/or limitation on liability under any workers' compensation, disability benefit or other employee or employment-related act of any jurisdiction.
9. **Notification:** User shall notify NSI of every instance of bodily or personal injury and property damage relating in any fashion to its operations conducted on the Property. User shall also promptly provide NSI with written accident reports of all bodily or personal injuries and property damages, and will cooperate fully with NSI in any investigation, including allowing inspection of property and access to personnel.
10. **Insurance:** User shall obtain and maintain, at its own expense, public liability insurance for personal injuries and property damage covering User's operations under this agreement including a contractual liability endorsement which specifically insures User's liabilities pursuant hereto. Such insurance must have minimum limits per occurrence of \$1,000,000 and shall be evidenced by a insurance certificate provided to NSI prior to commencement of operations. The insurance must specifically name NSI as additional insured and must waive subrogation against NSI (and its officers, directors, employees, agents, and subsidiary or affiliated companies), with the waiver to include any claim relative to policy deductibles, and must also be primary to any other insurance which may be maintained by NSI. Further, the insurance shall be endorsed such that it may not be canceled or changed materially except on thirty (30) days notice to NSI. User shall also procure and maintain, at its own expense, state and federal, as applicable, standard workers' compensation liability insurance covering all its employees, subcontractors and agents, but neither User nor its workers' compensation insurer shall have any right of action against NSI for subrogation or reimbursement of any payments made pursuant to that policy (including payments within any policy deductible).
11. **Extension of Benefits:** All exceptions, exemptions, defenses, immunities, limitations of liability, privileges and conditions provided by this agreement or any applicable statute, regulation or law for the benefit of NSI shall be automatically extended to and for the benefit and to all business entities parent of, subsidiary to, affiliated with or under the management of NSI, including their respective members, directors, officers, employees and agents.
12. **Law/Jurisdiction:** This agreement shall be construed and interpreted pursuant to the laws of the State of Washington. The parties agree that with respect to any litigation arising out of this agreement or performance under it, the federal and/or state courts located in Seattle, Washington shall have exclusive personal and subject matter jurisdiction. The prevailing party in any suit or proceeding shall be entitled to recover its legal fees and costs.
13. **Entire Agreement:** This constitutes the complete agreement between the parties with respect to matters addressed herein, and supersedes any prior written or oral agreements. This agreement may only be modified by a writing signed by both parties.

# Appendix C

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THE HONORABLE SUSAN CRAIGHEAD

Hearing: IMU's MRS Sedillo for

December 2009 @ 11:00 AM

With Oral Argument

CASE NUMBER: 08-2-13632-9 SEA

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IN THE SUPERIOR COURT OF WASHINGTON  
IN AND FOR THE COUNTY OF KING

INTERNATIONAL MARINE UNDERWRITERS,  
a division of One Beacon America Insurance  
Company, a Massachusetts insurance company,

Plaintiff,

v.

ABCD MARINE, LLC, a Washington LLC; ABCD  
MARINE, a Washington partnership and ALBERT  
BOOGAARD, an individual domiciled in Washington,

Defendants,

v.

ALLIANCE INSURANCE CORP. a/k/a  
ALLIANCE INSURANCE, INC.,

Cross-Claim Defendant.

NO. 08-2-13632-9 SEA

DECLARATION OF ROBERT A.  
SEDILLO

Attached is the sworn declaration of Robert A. Sedillo dated November 27, 2009 in  
opposition to International Marine Underwriters' motion for partial summary judgment.

DECLARATION OF ROBERT A. SEDILLO - 1

MARTIN D. FOX, P.S.  
2033 SIXTH AVENUE, SUITE 800  
SEATTLE, WA 98121  
PHONE: (206)728-0588

**COPY RECEIVED**

NOV 10 2013

**DECLARATION OF ROBERT A. SEDILLO**

DAVID J. BALINT, PLLC  
ATTORNEY AT LAW

I, Robert A. Sedillo, under penalty of perjury, hereby declare as follows:

1. I am over the age of 18 and have personal knowledge of the facts stated in this declaration. If called as a witness, I could and would competently testify thereto.

2. I am the owner and principal consultant of an independent risk management consulting firm called Sedillo Risk Services, located in Redmond, Washington. I have over 35 years experience in risk management consulting, insurance brokerage, and underwriting. I have earned the following designations: Associate in Risk Management (ARM); Chartered Property Casualty Underwriter (CPCU); Associate in Underwriting (AU); and Certified Insurance Counselor (CIC). I hold a Bachelor of Arts from the University of Arizona and am a faculty member of the American Management Association and past faculty member of Bellevue Community College, teaching risk management and insurance courses. I have testified multiple times in the Superior Courts in the State of Washington and in other jurisdictions as an expert regarding insurance related issues. A copy of my curriculum vitae is attached hereto as Exhibit "A." Documents provided to me by the attorneys for the Defendants which I have reviewed in making this Declaration are attached as Exhibit "B."

3. I have been asked by the attorneys for ABCD Marine, a Washington partnership, to consult as an expert regarding underwriting issues and specifically the meaning of the "insured contracts" clause at issue. My testimony set forth in this declaration is based on my experience in risk management consulting, insurance brokerage, and underwriting, which include underwriting and drafting of insurance clauses, as well as my research

concerning the customs and practices of the property/casualty insurance industry. With over 35 years of industry experience and teaching, I have an excellent understanding of what insurance companies mean when they write such clauses and how they apply such clauses to the claims process.

4. On September 29, 2004, ABCD Marine entered into an Access Agreement with Northland Services, Inc. which included a hold harmless and indemnity clause in favor of Northland Services, Inc. as well as insurance requirements (including adding Northland Services, Inc. as an additional insured on ABCD's liability insurance policies) in order for ABCD Marine to perform work on Northland's premises. The Access Agreement was signed by Mr. Albert Boogaard on behalf of ABCD Marine.

5. Hold harmless and indemnity clauses are included in contracts, such as the Access Agreement between Northland and ABCD, to transfer the liability risk of one of the contracting parties (the indemnitee – Northland Services, Inc.) to the other party (the indemnitor – ABCD Marine). Typically, the financial consequences of potential legal liability to a third party are the risk being transferred. It is the customs and practices of the insurance industry that the contract does not absolve the liable party from its legal obligation to an injured third party; it merely makes the indemnitor responsible for meeting the financial obligation on the liable party's behalf. If the indemnitor does not have the financial resources to meet the legal obligation, it remains the obligation of the liable party.

6. To reduce the possibility that an indemnitor will not have the financial resources and thus will be unable to respond to its contractual obligation, it is common to require liability insurance to reinforce the legal liabilities transferred in hold harmless agreements. One of the drawbacks to relying solely on the contractual liability coverage feature of these liability policies

is that this coverage relies on the enforceability of the indemnity provision. Many states have enacted anti-indemnity statutes that limit the enforceability of some types of hold harmless provisions. This was not an issue for this particular Access Agreement between Northland and ABCD Marine, after the Summary Judgment.

7. Enforceability issues are the reasons it is common to require that the indemnitee be included as an additional insured on the indemnitor's liability insurance. Doing so means that the indemnitee has some protection to fall back on in the event there is a problem with the enforceability of the hold harmless agreement. This, in effect, is what is known as the "belt and suspenders" concept. Thus, if contractual liability insurance applies, there is no need to rely on additional insured status. Conversely, if contractual liability coverage does not apply for some reason, additional insured status can be relied on for the protection of the indemnitee.

8. Securing Direct Rights in the Policy – When another party is entitled to indemnification that may be covered by the named insured's contractual liability insurance, some insurers refuse to step in and indemnify the other party. Instead, they prefer to wait until the underlying action is settled and then reimburse the indemnitee or challenge the validity of the indemnification clause. In the meantime, someone else, such as the indemnitee, must fund the defense costs and pay any settlements or judgments. Therefore, one of the most important reasons for seeking additional insured status in addition to contractual indemnification is to secure direct rights in the indemnitor's insurance policy. This will allow the indemnitee to pursue its right to coverage directly with the indemnitor's insurer rather than rely solely on the rights outlined in the indemnification clause of the underlying business contract.

9. It is very common and ordinary in the stream of commerce for

organizations to demand and/or receive demands concerning insurance requirements, such as additional insured status, hold harmless & indemnity, waivers of subrogation, and certificates of insurance. In theory, the party that has the most control over the risk should be responsible for suffering the financial loss should it fail to prevent losses from occurring. Of course, the relative bargaining positions of the contracting parties also play a key role in determining the extent of any such transfers.

10. A brief word needs to be made regarding certificates of insurance and how they're handled. Faced with increasing administrative burdens involving certificates of insurance, it's very commonplace today for insurers to direct their agents not to forward copies of "standard" insurance certificates. The insurers indicate the agents are responsible for issuing and maintaining "standard" certificates. What is considered a "standard" certificate may vary from carrier to carrier, and therefore needs to be defined. However, as a rule, certificates do not amend, extend, or alter the insurance policies they document. Therefore, if a certificate of insurance reflects an individual or organization as an additional insured, the policy must reflect this coverage either in the coverage form itself or by an endorsement. If it became necessary to add an additional insured to the policy and issue a certificate reflecting that addition, normally, the agent would bind the coverage, instruct the underwriter to issue the necessary endorsement and then, a certificate would be issued. On or about September 17, 2001, the agent, Alliance, requested and received from IMU, specific additional insured wording to be used on the certificate of insurance. Alliance followed IMU's instructions by using the following wording on the certificate of insurance: *"Certificate holder is included as additional insured but only with respects to named insured's operations."* The certificate holders were Naknek Barge Lines, LLC and Northland Holdings, Inc. It would be reasonable to expect, from that

exchange between Alliance and IMU, knowing that Alliance would be issuing a certificate of insurance reflecting Northland Holdings was an additional insured, that IMU would have gone ahead and issued the additional insured endorsement to the policy, naming Northland Holdings, Inc., but IMU never did. Had IMU done this, it is more likely than not the IMU policy for the 4/3/2004 – 4/3/2005 policy period would have contained an endorsement naming Northland Holdings, Inc. as an additional insured (Northland Holdings, Inc. evidently owned Northland Services, a new entity that took over the operation of the piers). The reason why this would be the likely outcome is that unless and/or until the insured (ABCD Marine) requests the additional insured endorsement deleted, the endorsement would continue to be attached to the current policy and carried forward for all future policies.

11. On October 19, 2004 Boogaard was severely injured by a forklift that was negligently operated by an employee of Northland Services. Boogaard filed a claim against Northland Services, Inc., Northland Holdings, Inc. and the forklift driver. Northland Services, Inc. responded that under the Access Agreement ABCD was to indemnify and hold Northland Services, Inc. harmless, as well as add Northland Services, Inc. as an additional insured under ABCD's liability insurance policy.

12. The insurance policy in effect for ABCD Marine at the time Boogaard was injured was a "Comprehensive Marine Liability and Ship Repairers Legal Liability policy, issued by International Marine Underwriters (IMU), a division of One Beacon America Insurance Company, a Massachusetts insurance company, for the policy period April 3, 2004 to April 3, 2005. This policy did not have Northland Services, Inc. named as an additional insured (refer to previous discussion under paragraph 10), but the policy did provide contractual liability coverage for "insured contracts."

13. The term “insured contract” is a defined term in the Comprehensive Marine policy issued by IMU. Under Section IX – Definitions, 9. “Insured Contract” means: (f.) That part of any other contract or agreement pertaining to **your** business (including an indemnification of a municipality in connection with work performed for a municipality) under which **you** assume the tort liability of **another party** to pay for “bodily injury” or “property damage” to a **third person** or **organization**. **Tort liability means a liability that would be imposed by law in the absence of any contract or agreement** (emphasis added).

14. To fully understand this definition of “insured contract” one must also examine the meaning of several terms used within that definition. Page 1, second paragraph of the IMU policy states the words “you” and “your” refer specifically to the Named Insured shown on the declarations page. Note that the Named Insured on the declarations page is ABCD Marine. Therefore, throughout the policy, any time the terms “you” or “your” are used, these terms are synonymous and interchangeable with the Named Insured, ABCD Marine.

15. The third paragraph of Page 1 goes on to state the word “Insured” means any person or organization qualifying as such under WHO IS AN INSURED (SECTION IV). This paragraph (the 3<sup>rd</sup> paragraph on Page 1) introduces the concept that in addition to the Named Insured, there may be other individuals or entities that qualify as insureds (but not as Named Insureds) because they are automatically included as insureds under SECTION IV - WHO IS AN INSURED. Some of the main differences between Named Insured and Insured status are:

- The named insured (NI) has more stringent occurrence reporting requirements;
- The NI's employees, executive officers, and directors are insureds;
- Certain exclusions apply only to the NI (e.g. property damage);

- The NI must reimburse the amount of any deductible paid by the insurer;
- The *First* NI is required to pay the premium;
- The *First* NI receives any premium return;
- The *First* NI may cancel the policy;
- The *First* NI receives cancellation notice.

16. There are a total of 3 types of insureds under any liability policy including the IMU Comprehensive Marine Liability policy, and so far, we've discussed two of the three – named insured and automatic insured. The third and final type of insured is the additional insured. Additional insureds are those insureds that generally are not automatically included as insureds under the liability policy of another but for whom the named insured desires or is required to provide a certain degree of protection under its (the named insured's) liability policy. An endorsement usually is used to effect additional insured status for these parties. This additional insured endorsement may specifically name the additional insured or it may provide blanket additional insured status to entities with whom the named insured agrees in a contract to provide additional insured status. Of course, it is also possible for a provision providing such blanket additional insured status to be incorporated directly into a nonstandard or manuscript liability insurance form, eliminating the need for an endorsement.

17. Going back to the definition of an "insured contract" found in the IMU policy issued to ABCD Marine, and substituting the names of the parties in the appropriate places, the definition would read as follows: (f.) That part of any other contract or agreement pertaining to your (ABCD Marine's/named insured/indemnitor) business . . . . . under which you (ABCD Marine /named insured/indemnitor) assume the tort liability of another party (Northland Holdings, Inc./indemnatee) to pay for "bodily injury" or "property damage" to a

third person or organization (Mr. Albert Boogaard). Tort liability means a liability that would be imposed by law in the absence of any contract or agreement.

18. Plaintiff, IMU, incorrectly argues that Mr. Boogaard is not a “third person,” therefore the Access Agreement is not an “insured contract,” thus Mr. Boogaard’s claim is not covered by the IMU policy. The plain, simple truth is that Mr. Boogaard is a “third person,” making the Access Agreement an “insured contract,” thus triggering the contractual liability coverage under the IMU policy.

19. In the March, 2007 edition of Malecki on Insurance (written by Donald S. Malecki, CPCU and Pet Ligeros, JD) there was a piece, entitled “Contractual Liability – Tort Liability Assumed – Who is A Third Party?” *The question is who can a third party be? The answer is, the one who has sustained injury or damage at the hands of the indemnitee, and that means it can be almost anyone, even an employee of the indemnitor.* Both Mr. Malecki and Mr. Ligeros are recognized authorities regarding property and casualty coverage issues.

20. Plaintiff, IMU mistakenly believes that because Mr. Boogaard signed the Access Agreement, he is a first party insured and a first party to the Access Agreement, and therefore, cannot be a third person (see IMU’s Motion for Partial Summary Judgment). However, it appears Plaintiff may have overlooked Section IV – Who Is An Insured in the IMU policy, which reads as follows:

1. If you are designated in the Declarations as:

b. A partnership or joint venture, you are an insured. Your members, your partners, and their spouses are also insureds, but only with respect to the conduct of your business (emphasis added).

We’ve already covered the meaning of you and your in the policy, which refer to the named insured, ABCD Marine. Therefore if ABCD Marine is the named

insured and ABCD Marine is designated as a partnership in the Declarations, ABCD (the entity) is an insured; the next sentence states your partners are also insureds. The word also means in addition. Therefore, the partners, Mr. Boogaard and Mr. Dahl (and their spouses) are insureds in addition to and separate from, ABCD Marine, the partnership entity (see SECTION VIII – CONDITIONS PRECEDENT TO COVERAGE, 14, Separation of Insureds, of the IMU Comprehensive Marine Liability policy).

21. In conclusion, even though Mr. Boogaard signed the Access Agreement on behalf of ABCD Marine, the indemnitor was ABCD Marine, the partnership entity that was assuming the tort liability of the indemnitee, Northland Services. Mr. Boogaard was the third party (to Northland Services) who sustained injury at the hands of the indemnitee. Therefore, it is my opinion the Access Agreement was an “insured contract” and contractual coverage was triggered under the IMU Comprehensive Marine Liability policy.

**I DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.**

Executed this 27<sup>th</sup> day of November, 2009 at Redmond, Washington.

A handwritten signature in cursive script that reads "Robert A. Sedillo". The signature is written in black ink and is positioned above a solid horizontal line.

**Robert A. Sedillo**

# EXHIBIT A

**Robert A. Sedillo, Principal Consultant**

Bob Sedillo is the owner and principal consultant of Sedillo Risk Services, an independent risk management consulting firm located in Redmond, Washington. Bob focuses on providing unbiased consulting and innovative solutions to a diverse mix of organizations, where he helps them better manage the wide variety of risks posed by the challenges of their operations, competition, and environment. In providing these solutions, he incorporates traditional and non-traditional approaches of handling exposures, utilizing a variety of risk identification, risk control and risk financing methods, including alternative funding mechanisms. Additionally, Bob provides litigation support and expert testimony for resolution of insurance claims and disputes. He is on the faculty of the American Management Association and served on the faculty of Bellevue Community College, teaching risk management and insurance courses. Bob has over 35 years experience in risk management consulting, insurance brokerage, and underwriting.

**Education**

- Bachelor of Arts, University of Arizona

**Designations**

- Associate in Risk Management (ARM)
- Chartered Property Casualty Underwriter (CPCU)
- Associate in Underwriting (AU)
- Certified Insurance Counselor (CIC)
- Certified Employment Benefit Specialist (CEBS)

**Professional Affiliations**

- Faculty member, American Management Association and past faculty member, Bellevue Community College - risk management and insurance courses
- Member, Pacific Northwest Chapter of CPCU
- Associate member, Pacific Northwest Chapter of RIMS
- Member, Washington Chapter of PRIMA
- Past president, Phoenix Chapter, National Association of Insurance Brokers
- Past board member, Central Arizona Chapter of CPCU

# **EXHIBIT B**

Robert Sedillo <sedillorisk@msn.com>  
To: David Balint <davidjbalint@gmail.com>  
Cc: MARTIN D.FOX <martindfox@msn.com>

Fri, Nov 27, 2009 at 10:14 AM

Documents supplied consisted of a 3-ring binder sectioned off as follows:

1. A seven (7) page "Memo on Boogaard, dated May 29, 2009;
2. A group of unnumbered pages consisting of: IMU Policy #C5JH80128, for the policy period 4/3/04 - 4/3/05; copies of e-mails, memos, phone logs, and faxes between IMU and Alliance personnel; copies of certificates of insurance; a copy of the Access Agreement between Northland Services and ABCD Marine.
3. Boogaard v. IMU/Alliance Chronology, 6/25/2009;
4. Bates number pages 1 - 510: IMU resp. to Alliance RFP and Roggs first set, 4/16/2009;
5. Bates number pages AL 0001 - AL 0151;
6. Defendants' First Requests for Production and Interrogatories to Cross-Claim Defendant Alliance Insurance Corp. a/k/a Alliance Insurance, Inc.;
7. Responses by Defendant Alliance to First Requests for Production and Interrogatories Propounded to it by Other Defendants;
8. (Amended) ABCD Marine LLC, ABCD Marine Partnership and Albert Boogaard's Answer to Plaintiff's Complaint and Counterclaim and Cross Claims;

Additionally, by e-mail, I received the following:

1. IMU's Motion for Partial Summary Judgment
2. Defendants' 2nd Interrogatories & Requests for Production to Cross-Claim Defendant Alliance Insurance Corp., A/K/A Alliance Insurance, Inc.

Let me know if there is anything else you require at this time.

Sincerely,  
Bob Sedillo  
Sedillo Risk Services  
9503 218th Avenue NE  
Redmond, WA 98053-7620  
Voice: 425.836.4159

<http://mail.google.com/mail/?ui=2&ik=5f7781be2b&view=pt&search=inbox&th=12531e...> 11/27/2009

# Appendix D

FILED

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KING COUNTY  
The Honorable Susan Craighead  
Motion for Summary Judgment  
Friday, March 26, 2010 at 9:00 a.m.  
CASE NO. 08-2-13632-9 SEA

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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON  
IN AND FOR KING COUNTY

INTERNATIONAL MARINE  
UNDERWRITERS, a division of One Beacon  
America Insurance Company, a Massachusetts  
Insurance Company,

Plaintiff,

v.

ABCD MARINE, LLC a Washington LLC;  
ABCD MARINE, a Washington partnership and  
ALBERT BOOGAARD, an individual domiciled  
in Washington,

Defendants,

v.

ALLIANCE INSURANCE CORP. a/k/a  
ALLIANCE INSURANCE, INC.,

Cross-Claim Defendant

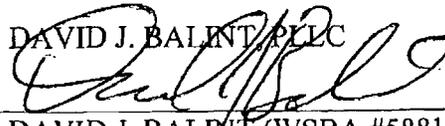
No. 08-2-13632-9

DECLARATION OF ROBERT A.  
SEDILLO IN OPPOSITION TO  
ALLIANCE SUMMARY  
JUDGMENT MOTION

Attached hereto is a signed Declaration of Robert A. Sedillo in opposition to the  
Alliance summary judgment motion

Dated this 15<sup>th</sup> day of March, 2010, in Seattle.

DAVID J. BALINT/PLLC

  
DAVID J. BALINT (WSBA #5881)  
Of Attorneys for Defendants

DAVID J. BALINT, PLLC  
2033 SIXTH AVE., #800  
SEATTLE, WA 98121-2565  
Phone: (206) 728-7799  
Fax: (206) 728-2729

DECLARATION OF ROBERT A. SEDILLO IN  
OPPOSITION TO ALLIANCE SUMMARY JUDGMENT  
MOTION  
Boogaard v. IMU 2625.01 (P-7.1)  
Page 1 of 1

## DECLARATION OF ROBERT A. SEDILLO

I, Robert A. Sedillo, under penalty of perjury, hereby declare as follows:

1. I am over the age of 18 and have personal knowledge of the facts stated in this declaration. If called as a witness, I could and would competently testify thereto.

2. I am the owner and principal consultant of an independent risk management consulting firm called Sedillo Risk Services, located in Redmond, Washington. I have over 35 years experience in risk management consulting, insurance brokerage, and underwriting. I have earned the following designations: Associate in Risk Management (ARM); Chartered Property Casualty Underwriter (CPCU); Associate in Underwriting (AU); and Certified Insurance Counselor (CIC). I hold a Bachelor of Arts from the University of Arizona and am a faculty member of the American Management Association and past faculty member of Bellevue Community College, teaching risk management and insurance courses. I have testified multiple times in the Superior Courts in the State of Washington and in other jurisdictions as an expert regarding insurance related issues. A copy of my curriculum-vitae is attached hereto as Exhibit "A."

3. I have been asked by the attorneys for ABCD Marine, a Washington partnership, to consult as an expert regarding insurance agents and brokers' standard of care. Previously, on November 27, 2009, I provided a Declaration regarding underwriting issues and specifically the meaning of the "insured contracts" clause. My testimony set forth in this declaration is based on my experience in risk management consulting, insurance brokerage, and underwriting. With over 35 years of industry experience and teaching, I have an

excellent understanding of the standard of care as respects agents and brokers.

4. Alliance Insurance, Inc, (Alliance) was ABCD Marine's insurance agent from April, 2000 through April, 2006.

5. Generally, the standard of care for an insurance agent is to carry out the insured's instructions and must act with reasonable care and diligence.

6. In 2001, ABCD Marine was doing work for the operators of Pier 115 and Mr. Boogaard was told by Mr. Ed Hiersche of Naknek Barge Lines LLC that ABCD Marine would not be allowed to continue working on the premises until the operators of Pier 115 received a certificate of insurance evidencing coverage and naming Northland Holdings, Inc. and Naknek Barge Lines LLC as additional insureds on ABCD Marine's liability insurance policy.

7. In response to Mr. Herchie's demands, ABCD Marine instructed Alliance to add Naknek Barge Lines LLC and Northland Holdings, Inc. as certificate holders and additional insureds on ABCD's liability insurance policy that was underwritten by IMU.

8. Alliance contacted IMU regarding the requirements being imposed on ABCD by the operators of Pier 115 and IMU provided Alliance with the following, specific wording for designating Northland Holdings, Inc. and Naknek Barge Lines LLC as additional insureds on the certificate of insurance:

*"Certificate holder is included as additional insured but only with respects to named insured's operations."*

9. ABCD Marine had to wait approximately 3-4 weeks from the time they contacted Alliance to the time the certificate was eventually processed on 9/17/01. During this period, ABCD Marine was not permitted to do any work for the operators of Pier 115.

10. As a rule, certificates of insurance do not amend, extend or alter the insurance policies they document. **Therefore, if a certificate of insurance**

**reflects an individual or organization as an additional insured, the policy must reflect this coverage either in the coverage form itself or by an endorsement to the policy.**

11. However, there is no evidence that an endorsement adding Northland Holdings, Inc. and Naknek Barge Lines LLC as additional insureds, was ever endorsed to the IMU marine liability policy covering the 4/3/01 – 4/3/02 policy period or any subsequent policies up to date of Mr. Boogaard's injury on 10/19/04.

12. In fact, Ms. Tammy Hausinger, Alliance's employee who contacted IMU to secure IMU's authorization to issue the certificate as well as obtain the additional insured language to be used on the certificate, testified in her deposition that she thought the additional insured language on the certificate of insurance was all that was needed to effect coverage and it was not necessary to follow-up with IMU to secure an endorsement to ABCD Marine's liability policy naming Northland Holdings, Inc. and Naknek Barge Lines LLC as additional insureds to actually effect coverage on ABCD's liability policy.

13. It is my opinion that Alliance did not meet the standard of reasonable care and diligence by failing to procure an additional insured coverage endorsement for the 4/3/01– 4/3/02 IMU policy and all subsequent policies, up to the 4/3/04 – 4/3/05 IMU policy. The accepted standard of care within the insurance industry is that a certificate should not list the holder as an additional insured unless the policy is endorsed to that effect. This lapse could have been easily avoided if Alliance had requested IMU to issue the additional insured endorsement and followed up with them in a timely manner to ensure receipt and transmittal of the additional insured endorsement to ABCD Marine. Finally, on 12/7/04 (which was after the date of Mr. Boogaard's injury) the policy was finally endorsed, listing **Northland Services** as an additional insured.

14. On September 29, 2004, Mr. Boogaard signed an Access Agreement that contained several insurance requirements, including naming **Northland Services, Inc.** as an additional insured on ABCD Marine's liability policy that was underwritten by IMU. Northland Services, Inc. (a Washington corporation) was subsidiary of Northland Holdings, Inc. (a Delaware corporation) with the same management. Mr. Boogaard signed the Access Agreement, thinking he already had the additional insured coverage, relying of the previously issued certificates of insurance and the acceptance of those certificates by the Pier 115 management which allowed ABCD Marine back on the jobsite.

15. On 11/01/04 Alliance Insurance issued a certificate of insurance naming Naknek Barge Lines LLC and **Northland Holdings, Inc.** as certificate holders in addition to showing the coverages that were in effect for the 4/3/04 – 4/3/05 IMU marine liability policy. However Alliance inexplicably omitted designating these two certificate holders as additional insureds as had been done on previous certificates. When it comes to renewing certificates of insurance contemporaneously with the renewal policy, it is the custom and practice within the industry for insurance agents and brokers to verify the certificate information with their insured, and unless instructed otherwise, issue renewal certificates, contemporaneously with the policy renewal, reflecting the renewal policy's terms and conditions. ABCD Marine never instructed Alliance to drop the certificate holders (Naknek Barge Lines and Northland Holdings, Inc.) as additional insureds for the 4/3/04 – 4/3/05 policy term, but Alliance did so without being instructed by ABCD, or notifying ABCD this had been done.

16. Alliance may argue that they should not be held responsible for Northland Services, Inc. not being added to the ABCD Marine liability policy as an additional insured prior to the 10/19/04 accident because Alliance was never notified to do so. However, if Northland Holdings, Inc. had been added as an

additional insured on the 4/3/2001 – 4/3/2002 policy, that additional insured endorsement would have been brought forward on the succeeding renewals, including the 4/3/2004 – 4/3/2005 IMU policy. As an additional insured, Northland Holdings, Inc. would have been defended by IMU, and more likely than not, IMU would also have defended Northland Services, Inc. since Northland Services, Inc. was a subsidiary of Northland Holdings, Inc. Moreover, these two companies had the same management and there is nothing that would indicate that adding both would in any way increase the risk to IMU. In fact, when Northland Services, Inc. was finally added as an additional insured, IMU's premium charge was only \$250.00, which represents more of an administrative charge the insurer makes for issuing the endorsement. Under these circumstances it would have been doubtful that IMU would have denied additional insured status for Northland Services, Inc., while defending Northland Holdings, Inc.

17. In conclusion, Mr. Boogaard mistakenly believed his liability policy already provided additional insured coverage to Northland Services, Inc. based on past certificates of insurance issued by Alliance and accepted by the operators of Pier 115 naming Northland Holdings, Inc. as an additional insured. Had Alliance, beginning with the 4/3/01 – 4/3/02 policy period, additionally procured an additional insured endorsement, as they should have done, naming Northland Holdings, Inc., it is more likely than not Northland Services would have also been afforded additional insured status when Mr. Boogaard was injured on 10/19/04 because Northland Services, Inc. was a subsidiary of Northland Holdings, Inc. and the two companies had the same management. The fact that Northland Holdings, Inc. was never shown as an additional insured on any of ABCD Marine's liability policies issued by IMU, was due to Alliance's failure to request and then to follow-up with the insurer to make sure the endorsement was

actually delivered. This lack of action and oversight began with the 4/3/01 – 4/3/02 IMU policy period and continued for each succeeding policy term, until the date of the accident on 10/19/04. Even if Mr. Boogaard had requested Tammy Hausinger, his contact person at Alliance, to add Northland Services as an additional insured after he signed the access agreement, it is more likely than not all she would have done is issue a certificate of insurance as she had done previously, because even as of the date of her deposition, she doesn't understand certificates do not modify insurance policies – only endorsements do. It wasn't until after the accident, on 12/7/04 at Mr. Boogaard's request, the policy was finally endorsed, listing **Northland Services** (without any reference to its corporate status) as an additional insured.

I DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Executed this 15<sup>th</sup> day of March, 2010 at Redmond, Washington

A handwritten signature in cursive script that reads "Robert A. Sedillo". The signature is written in black ink and is positioned above a horizontal line.

Robert A. Sedillo