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NO. 64337-1-I

IN THE COURT OF APPEALS  
OF THE STATE OF WASHINGTON  
DIVISION I

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CERTAIN UNDERWRITERS AT LLOYD'S, LONDON,

Respondent,

vs.

THE TRAVELERS PROPERTY CASUALTY COMPANY OF AMERICA,

Appellant,

and

EVERGREEN HEALTHCARE; and LONG-CENTER ASSOCIATES, LP,

Defendants.

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APPEAL FROM KING COUNTY SUPERIOR COURT  
Honorable Julie Spector, Judge

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BRIEF OF APPELLANT

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FILED  
COURT OF APPEALS  
STATE OF WASHINGTON  
2018 APR -  
AM 10:30

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## **I. NATURE OF THE CASE**

This is a dispute between two insurance carriers. Lloyd's specifically wrote its policy to be excess over Travelers' **\$1,000,000** coverage for flood loss. But Lloyd's now claims its coverage does not become available unless and until Travelers pays **\$11,000,000**. The trial court agreed with Lloyd's and certified its decision as final under CR 54(b).

## **II. ASSIGNMENTS OF ERROR**

The trial court erred in—

- A. Granting Lloyd's motion for partial summary judgment (CP 787);
- B. Denying Traveler's motion for partial summary judgment (CP 787).

## **III. ISSUES PRESENTED**

- A. Is the Lloyd's policy triggered once Travelers pays or admits liability for \$1,000,000?
- B. Is Travelers' coverage for Evergreen's claim limited to \$1,000,000?

#### IV. STATEMENT OF THE CASE

##### A. STATEMENT OF RELEVANT FACTS.

Defendant Evergreen Washington Healthcare Centralia, LLC, leased from defendant Long-Cent Associates, LP, a skilled nursing facility in Centralia, Washington. (CP 17, 197-98) The lease required Evergreen to maintain property insurance to insure both Evergreen and Long-Cent. (CP 198)

##### 1. The Insurance Procurement.

In 2006 Evergreen's insurance agent sought insurance for Evergreen's facilities, including its 18,000 square foot Centralia nursing home. (CP 19, 701) Because the Centralia facility and two properties in California were in Flood Zone A<sup>1</sup>, the agent procured a \$500,000 primary flood policy through the National Flood Insurance Program (NFIP).<sup>2</sup> (CP 233-321, 701) The agent also obtained an all-risk property policy<sup>3</sup> with appellant Travelers Property Casualty Co. of America. (CP 565-677)

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<sup>1</sup> Flood Zone A is at high risk for flood. <http://msc.fema.gov/webapp/wcs/stores/servlet/info?storeId=10001&catalogId=10001&langId=-1&content=floodZones&title=FEMA%20Flood%20Zone%20Designations>.

<sup>2</sup> The National Flood Insurance Program was established by Congress to provide insurance for flood, a peril rarely covered under private insurance policies. See 42 U.S.C. § 4001(b).

<sup>3</sup> "All risk" property policies generally insure against all risks of loss except as excluded. See *Eide v. State Farm Fire & Cas. Co.*, 79 Wn. App. 346, 348, 901 P.2d 1090 (1995).

That policy provides \$277,120,000 in blanket coverage<sup>4</sup> for buildings and \$36,488,000 blanket coverage business personal property. (CP 672) In addition, the policy provides separate sublimits for—

- certain types of Covered Property (for example, electronic data processing equipment, accounts receivable, and valuable papers and records),
- certain types of Covered Costs and Expenses (for example, debris removal and ordinance or law), and
- certain types of perils (such as earth movement). (CP 672-75)

The main policy form excludes flood. (CP 575) However, an endorsement to the policy adds flood coverage subject to a \$1,000,000 sublimit for properties like the Chehalis facility that are located in Flood Zone A.<sup>5</sup> (CP 597-98, 674, 701)

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<sup>4</sup> “Blanket” coverage is one that insures property collectively, without providing for a distribution of insurance to each item. *Abraxas Group, Inc. v. Guaranty Nat’l Ins. Co.*, 648 F. Supp. 304, 305 (W.D. Pa. 1986). In contrast, “specific” insurance provides a specific amount of insurance for each item or each property. *See Insurance Co. of N. Am. v. Fireman’s Fund Ins. Co.*, 471 S.W.2d 878, 882 (Tex. Civ. App. 1971).

<sup>5</sup> Courts have recognized that sublimits are generally valid. *See, e.g., American Home Assur. Co. v. Cohen*, 124 Wn.2d 865, 873, 881 P.2d 1001 (1994); *McConaghy v. RLI Ins. Co.*, 882 F. Supp. 540 (E.D. Va. 1995).

Needing to obtain an additional \$10,000,000 in flood coverage, over and above the \$500,000 NFIP and \$1,000,000 Travelers coverages, Evergreen's agent contacted a US broker. (CP 701) The US broker sent an e-mail to a British broker that said (CP 712):

Simon, please find submission for 3 locations that need excess flood. The U/L is \$500,000 on Building and Contents with the NFIP and \$1MM included in the property quote with Travelers. I have attached the flood wording for the Travelers policy. Let me know if you need anything else in order to quote.

....

Attached to the e-mail was, among other things, (1) a National Flood Insurance policy endorsement showing \$500,000 building and \$500,000 contents coverage for flood for the Centralia location (CP 716); and (2) a page from the Travelers policy that said (CP 717):

17. Flood – aggregate in any one policy year, for all losses covered under this policy, commencing with the inception date of this policy:

\$1,000,000

- a. Occurring at Insured Premises within Flood Zones prefixed A as classified under the National Flood Insurance Program:

....

Seeking additional confirmation that the Travelers policy would provide an underlying flood coverage of \$1,000,000 in excess of the National Flood Insurance Program's \$500,000 primary coverage, the British broker asked the US broker, "As these three properties are located in Flood Zone A will we still have an underlying \$1[M] limit excess of the NFIP?" (CP 720)

Ultimately, respondent Certain Underwriters at Lloyd's was willing to write a \$10,000,000 flood policy over the \$1,000,000 in flood coverage provided by the Travelers policy, which was excess to the \$500,000 primary national flood policy. The agent e-mailed her client (CP 702):

. . . The quote is for \$10,000,000 agg over NFIP and Travelers Flood Zone A \$1,000,000 agg.

Evergreen approved the quote and authorized the agent to obtain the Lloyd's insurance. (CP 702) Consequently, the US broker e-mailed the British broker (CP 719):

Simon, please bind coverage effective 6/1/06 per your indication. . . I have attached copies of the NFIP policies on the 3 locations as well as the quote page from Travelers showing the \$1MM limit applying to the locations in the NFIP only.

Lloyd's then issued a certificate of insurance to which was attached an endorsement that provided, among other things, that the "Total

Limit of Liability for all Underlying Excess Insurer(s)” was Travelers’  
“USD 1,000,000.” (CP 722)

All policies were renewed the following year. In the course of the  
renewal process, Evergreen’s agent e-mailed the US broker the following  
information to give to the British broker (CP 703):

Travelers Ins. Co. KTJCMB4508483-07 \$1,000,000 flood  
zone A

....

Natl Flood Ins. Prog – 2027267182 – Centralia location  
\$500,000 bldg

Lloyd’s issued a renewal certificate for coverage effective June 1,  
2007. The certificate described the sums insured as follows (CP 725):

USD10,000,000 any one occurrence and in the aggregate

EXCESS OF

USD 1,000,000 any one occurrence and in the aggregate

WHICH IN TURN IS EXCESS OF

USD 500,000 any one occurrence, per Building in respect  
of Buildings

## **2. The Flood.**

In December 2007, a flood caused extensive damage to  
Evergreen’s Centralia facility. (CP 19) Evergreen’s flood-related claim  
includes, among other things, costs for repair of the physical damage as

well as costs necessary to comply with applicable building codes. (CP 735)

The NFIP policy paid its \$500,000 limits. (CP 735) Travelers made an early advance payment in excess of what it owed on an actual cash value basis for the building. (CP 459) Travelers also acknowledged (CP 462):

Travelers' [sic] has a 100% obligation to the insured up to the maximum available flood limit of \$1,000,000, subject to the terms and conditions of its policy.

Lloyd's, whose policy was a "following form" policy<sup>6</sup>, first took the position that its policy followed the NFIP policy form, not Travelers'. (CP 699, 707-08) Evergreen strenuously objected, pointing out (CP 707-08):

....

It was intended that the Lloyd's policy apply excess and follow-form of Travelers excess and DIC of FEMA as underlying insurers.

It makes no sense to construe the Lloyd's policy as being solely follow-form of FEMA. The FEMA policy provides no business interruption, insures building and contents on

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<sup>6</sup> A "following form" policy is an excess policy that insures the same risks as, but in excess to, the coverage provided by a lower level policy. *See Hartford Acc. & Indem. Co. v. Chicago Housing Auth.*, 12 F.3d 92, 95 (7<sup>th</sup> Cir. 1993). "Following form" coverage follows the same terms and conditions as the underlying policy. *Acadia Ins. Co. v. American Crushing & Recycling, LLC*, 475 F. Supp. 2d 168, 174 (D. Conn. 2007).

an ACV basis and provides very limited ordinance coverage for only flood plain code.

....

A year after the flood, Lloyd's changed its position, claiming that it owed nothing unless and until Travelers paid not only its \$1,000,000 sublimit for flood loss but also its \$10,000,000 sublimit for ordinance or law coverage.<sup>7</sup> (CP 465-66)

In contrast, Travelers asserted that the most it owed for all flood loss was its \$1,000,000 flood sublimit. Evergreen's insurance agent also took the position that Travelers owed only its \$1,000,000 flood sublimit. (CP 461, 735)

**B. STATEMENT OF PROCEDURE.**

Lloyd's brought a declaratory judgment action against Travelers, Evergreen, and Long-Cent to determine what Travelers had to pay before Lloyd's had any obligation to Evergreen. (CP 1-12) Evergreen and Long-Cent each counterclaimed against Lloyd's and cross-claimed against Travelers. (CP 13-374)

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<sup>7</sup> In general, the ordinance or law coverage pays, under certain circumstances, for (a) loss to undamaged property caused by enforcement of an ordinance or law regulating the construction or repair of buildings, (b) the cost to demolish and clear the site of undamaged parts of buildings caused by enforcement of building, zoning, or land use ordinances or laws, and (c) the increased cost to repair, rebuild, or construct caused by enforcement of such ordinances or laws. (CP 573)

The two insurers filed cross-motions for summary judgment. (CP 424-45, 542-59) Lloyd's sought a declaration that Travelers provided \$11,000,000 total in coverage and that Travelers had to pay that amount before the Lloyd's policy attached. (CP 444) Travelers sought a declaration that its maximum liability was \$1,000,000 and that the Lloyd's policy was liable for anything in excess of Travelers' \$1,000,000 limit. (CP 561)

The trial court granted Lloyd's motion and denied Travelers', ruling (CP 826):

Travelers Insurance Policy Number KT-J-CMB-545D848-3-07 provides coverage for Evergreen's claim with limits of \$1,000,000 for damage to covered Property caused by Flood and, in addition, with limits of \$10,000,000 for "Covered Costs and Expenses" for "Ordinance or Law." Further, Certain Underwriters at Lloyd's Policy Number B066447256A07 does not attach until after Travelers exhausts its \$11,000,000 policy limits.

Travelers filed a notice for discretionary review. (CP 822-27) The trial court then certified its summary judgment orders as final under CR 54(b) and entered final judgment. (CP 828-39) Travelers filed an amended notice of appeal to reflect that it now had an appeal as a matter of right. (CP 840-57) On December 11, 2009, a commissioner of this court ordered that the appellate proceeding could proceed as a matter of right. Travelers, Evergreen, and Long-Cent thereafter stipulated to a

dismissal of the claims between them. (CP 858-59) Evergreen and Long-Cent are thus not parties to this appeal.

## V. ARGUMENT

This is an appeal from summary judgment orders. The issue requires construction of insurance policies. This court will therefore review *de novo*. *Campbell v. Ticor Title Insurance Co.*, 166 Wn.2d 466, 470, 209 P.3d 859 (2009); *Tyrrell v. Farmers Insurance Co.*, 140 Wn.2d 129, 132-33, 994 P.2d 833 (2000).

Furthermore, Lloyd's was entitled to summary judgment only if its position was the only conclusion a reasonable person could reach after resolving all reasonable inferences from the evidence against it. See *Musso-Escude v. Edwards*, 101 Wn. App. 560, 563, 4 P.3d 151 (2000). As will be discussed, the only conclusion a reasonable person could reach is that Travelers obligation for the flood loss is limited to \$1,000,000 and that Lloyd's agreed it would pay excess of that \$1,000,000.

### A. RULES OF INSURANCE POLICY CONSTRUCTION.

Insurance policies are construed as contracts. *Findlay v. United Pacific Insurance Co.*, 129 Wn.2d 368, 378, 917 P.2d 116 (1996). The goal in construing an insurance policy is to give effect to the apparent clear intention of the parties. *Id.* at 379. This court's duty is to ascertain the intent of the parties at the time of contracting. *Koop v. Safeway Stores*,

*Inc.*, 66 Wn. App. 149, 155, 831 P.2d 777 (1992), *rev. denied*, 120 Wn.2d 1022 (1993).

Insurance policies must be given a reasonable and sensible construction. *S&K Motors, Inc. v. Harco National Insurance Co.*, 151 Wn. App. 633, 639, 213 P.3d 630 (2009). Courts should avoid a construction that contradicts the insurance policy's general purpose or results in absurdity. *Campbell v. Ticor Title Insurance Co.*, 166 Wn.2d 466, 472, 209 P.3d 859 (2009).

In construing a policy, a court may not rule out language that the parties have put into it. *Sowa v. National Indemnity Co.*, 102 Wn.2d 571, 576, 688 P.2d 865 (1984). But individual clauses in an insurance policy must be read in light of the whole, so as to effect the parties' intent. *Nautilus, Inc. v. Transamerica Title Insurance Co.*, 13 Wn. App. 345, 349, 534 P.2d 1388 (1975).

Clear and unambiguous language must be enforced as written. *Washington Public Utilities Districts' Utility System v. Public Utility District No. 1*, 112 Wn.2d 1, 10, 771 P.2d 701 (1989). Courts are not at liberty to write a new contract or revise the contract's language under the guise of construing it. *Wagner v. Wagner*, 95 Wn.2d 94, 101, 621 P.2d 1279 (1980); *see also Armstrong v. Safeco Insurance Co.*, 111 Wn.2d 784, 792, 765 P.2d 276 (1988); *Holthe v. Iskowitz*, 31 Wn.2d 533, 542,

197 P.2d 999 (1948). A policy may not be interpreted in a way that is at variance with the clearly disclosed intent of the parties. *Davis v. North American Accident Insurance Co.*, 42 Wn.2d 291, 296-97, 254 P.2d 772 (1953). If there are two policies, the court will preserve the integrity of each if they can be read together without conflict. *Mission Insurance Co. v. Guarantee Insurance Co.*, 37 Wn. App. 695, 701, 683 P.2d 215 (1984).

That a policy is long and the pertinent language is not contained in a single page does not, by itself, create ambiguity. *See State Farm General Insurance Co. v. Emerson*, 102 Wn.2d 477, 484, 687 P.2d 1139 (1984). Thus, complexity or the need to interrelate policy provisions is insufficient to find a policy ambiguous. *Wetmore v. Unigard Insurance Co.*, 125 Wn. App. 938, 950, 107 P.3d 123 (2005). A policy may be confusing, yet not be ambiguous. *McDonald v. State Farm Fire & Casualty Co.*, 119 Wn.2d 724, 734, 837 P.2d 1000 (1992).

Even if an insurance policy is ambiguous, that is not the end of the inquiry. Extrinsic evidence of the intent of the parties is relevant to resolve ambiguity. *American National Fire Insurance Co. v. B&L Trucking & Const. Co.*, 134 Wn.2d 413, 428, 951 P.2d 250 (1998). Consequently, a court construes ambiguous language by viewing the contract as a whole, examining its purpose, objective, subject matter, the circumstances of its making, the subsequent conduct of the parties, and the

reasonableness of their interpretations. *Washington Public Utility Districts' Utility System v. Public Utility District No. 1*, 112 Wn.2d 1, 11, 771 P.2d 701 (1989); see also *Denny's Restaurants, Inc. v. Security Union Title Insurance Co.*, 71 Wn. App. 194, 209, 859 P.2d 619 (1993).

**B. LLOYD'S AGREED TO PAY AFTER TRAVELERS ADMITTED LIABILITY FOR \$1,000,000.**

To determine what Lloyd's obligations are, this court must look at the Lloyd's policy. As will be shown, all of the pertinent provisions in the Lloyd's policy confirm that the parties intended that the Lloyd's policy would be excess over the \$500,000 NFIP policy and \$1,000,000 Travelers policy.

The insuring agreement of the Lloyd's policy provides (CP 699):

Subject to the limitations, terms and conditions contained in this Policy or added hereto, the Underwriters agree to indemnify the Assured named in the Schedule herein in respect of Direct Physical loss or damage . . . caused by any such perils as are set forth in Item 4 of the Schedule . . .

Item 4 of the schedule states (CP 696):

4. Perils Insured:

Flood

In short, Lloyd's agreed to cover flood.

The Lloyd's policy also defines when Lloyd's obligations begin (CP 699):

Provided always that *liability attaches to the Underwriters only after the Primary and Underlying Excess Insurer(s) have paid or have admitted liability for the full amount of their respective Ultimate Net Loss liability as set forth in Item 9 of the Schedule and designated “Primary and Underlying Excess Limit(s)” and then the limits of Underwriters Liability shall be those set forth in Item 10 of the Schedule under the designation “Excess Limit(s)”* and the Underwriters shall be liable to pay the ultimate net loss up to the full amount of such “Excess Limit(s)”.

(Emphases added.) Item 9 of the schedule states (CP 697):

9. Primary and Underlying Excess Limit(s)

USD1,000,000 Ultimate net loss per occurrence  
subject to an aggregate limit of

USD1,000,000 any one Policy year

Which in turn is excess of

USD500,000 per occurrence per Building in respect  
of Buildings

Item 10 provides (CP 697):

10. Excess Limit(s):

USD10,000,000 Ultimate net loss per occurrence  
subject to an aggregate limit of

USD10,000,000 any one Policy year.

Thus, the Lloyd’s policy in essence provides:

Provided always that *liability attaches to the Underwriters only after the Primary and Underlying Excess Insurer(s) have paid or have*

***admitted liability for [\$1,000,000 Ultimate net loss per occurrence which in turn is excess of \$500,000 per occurrence per Building] and then the limits of Underwriters Liability shall be [\$10,000,000] and the Underwriters shall be liable to pay the ultimate net loss up to the full amount of such “Excess Limit(s).”***

Furthermore, to emphasize that the Lloyd’s policy is liable to pay once the limits set forth in Item 9 are met, section 5 of the Lloyd’s policy provides:

***Notwithstanding any of the terms of the Policy that might be construed otherwise, the insurance provided by this Policy shall always be excess over the maximum monetary limits set forth in Item 9 of the Schedule . . . .***

(CP 699) (emphases added).

In other words, Lloyd’s agreed its \$10,000,000 would be available to pay “***after the Primary and Underlying Excess Insurer(s) [NFIP & Travelers] have paid or have admitted liability for [\$1,000,000 Ultimate net loss per occurrence which in turn is excess of \$500,000 per occurrence per Building]***” and that its \$10,000,000 “***shall always be excess over [\$1,000,000 in excess of \$500,000]***.” (CP 697, 699)

Travelers has admitted liability for \$1,000,000. (CP 461-62, 543)  
The underlying NFIP policy has paid its \$500,000 limit. (CP 735) Thus, Lloyd’s \$10,000,000 is available to Evergreen.

Nonetheless, once Evergreen sustained its flood loss, Lloyd’s did a complete U-turn on what it had agreed to previously. Now its position is

that it does not have to pay a dime towards Evergreen's loss until Travelers pays \$11,000,000, not \$1,000,000. (CP 465)

But Lloyd's has not pointed to a single provision in *its* policy that said its policy would be excess over \$11,000,000 or words to that effect. In fact, Lloyd's has consistently sought to deflect attention from its own policy by focusing almost exclusively on the language of the *Travelers* policy. (CP 424-55, 754-69, 778-85) This is indeed odd since the Lloyd's policy was specifically designed to be excess of the Travelers policy. Indeed, Lloyd's agreed to "follow form". (CP 699) Under these circumstances, it was up to Lloyd's to set forth clearly in *its* policy when *its* coverage became available.

Nevertheless, the *only* part of *its own policy* Lloyd's mentioned during the summary judgment proceedings in the trial court was this:

"3. LIMIT

Provided always that liability attaches to the Underwriters only **after** the Primary and Underlying Excess Insurer(s) have paid or have admitted liability for the full amount of their respective Ultimate Net Loss . . ."

(CP 443) (quoting CP 699) (emphasis added by Lloyd's). But Lloyd's neglected to tell the trial court that crucial language follows the term "Ultimate Net Loss" in the foregoing provision. The language after "Ultimate Net Loss" that Lloyd's omitted is:

. . . liability *as set forth in Item 9 of the Schedule and designated “Primary and Underlying Excess Limit(s)”* and then the limits of Underwriters Liability shall be those set forth in Item 10 of the Schedule under the designation “Excess Limit(s)” and the Underwriters shall be liable to pay the ultimate net loss up to the full amount of such “Excess Limit(s).”

(CP 699) (emphases added). As discussed *supra*, Item 9 of the Schedule sets forth the \$500,000 NFIP as primary limits and the \$1,000,000 Travelers flood sublimit as the underlying excess limit. (CP 697)

The language of the Lloyd’s policy could not be clearer: Lloyd’s has undertaken to pay once Travelers has paid or acknowledged liability for \$1,000,000. Travelers had acknowledged its liability for its \$1,000,000 flood sublimit. (CP 461-62, 543) Hence, Lloyd’s policy has been triggered. That is exactly what the parties to the Lloyd’s insurance contract negotiated. The trial court erred in granting summary judgment that Lloyd’s liability does not attach until Travelers had paid or acknowledged liability for \$11,000,000.

**C. TRAVELERS’ LIABILITY IS LIMITED TO \$1,000,000.**

Not only has Lloyd’s obligation been triggered because Travelers has admitted its liability for its \$1,000,000 flood sublimit, Travelers’ liability in this case, including for ordinance or law coverage, is limited to that \$1,000,000 flood sublimit.

**1. “All” Means All.**

The insuring agreement in the main form in the Travelers policy provides:

The Company will pay for direct physical loss or damage to Covered Property . . . . caused by or resulting from a Covered Cause of Loss. Covered Cause of Loss means risk of direct physical loss *unless the loss is excluded in Section D. Exclusions; limited in section E., Limitations; or excluded or limited in the Supplemental Coverage Declarations or by endorsements.*

(CP 568) (emphasis added). Section D. Exclusions *remove coverage* for “loss or damage caused directly or indirectly by” flood. (CP 575) This is not unusual. Most property policies exclude flood:

Insurers are discouraged from issuing flood insurance because of the difficulty of predicting floods, the frequency of flooding in some areas, and the extent of potential liability.

11 L. Russ & T. Segalla, COUCH ON INSURANCE § 153:51, at 153-70 (3d ed. 2006). Thus, the main policy form expressly does not provide coverage for flood.

The flood endorsement was added to the policy to make flood a Covered Cause of Loss. The flood coverage provided, however, is limited in *amount*:

The most the Company will pay for the total of *all loss or damage caused by Flood* in any one policy year is the single Highest Annual Aggregate Limit of Insurance *specified for Flood shown in the Supplemental Coverage*

*Declarations.* This limit is part of, and does not increase, the Limits of Insurance that apply under this policy.

Subject to the single highest Annual Aggregate Limit of Insurance:

1. Any individual Annual Aggregate Limit of Insurance *shown in the Supplemental Coverage Declarations* for Flood is the most the Company will pay in any one policy year for ***all loss or damage*** to which that Limit of Insurance applies.

....

(CP 598) (emphases added).

The Supplemental Declarations referred to in the preceding provision provides the following limits:

Flood – aggregate in any one policy year, for ***all losses covered under this policy***, commencing with the inception date of this policy:

- a. Occurring at Insured Premises within Flood Zones prefixed A as classified under the National Flood Insurance Program:

\$1,000,000

- b. Occurring at all other Insured Premises, except this policy does not cover Flood loss occurring in Zone V as classified under the National Flood Insurance Program:

\$10,000,000

If more than one Annual Aggregate Limit applies in any one occurrence, the most the Company will pay is the highest involved Aggregate Limit. The most the Company will pay during each annual period is the largest of the Annual Aggregate Limits shown.

(CP 674) (emphases added).

It is undisputed that the Chehalis facility is in Flood Zone A. (CP 701) Thus, under its flood endorsement, the most Travelers agreed to pay in any one policy year for “*all* losses covered under this policy” for Flood Zone A is \$1,000,000. (CP 674) (emphasis added).

The dictionary defines “all” to mean “: the whole amount, quantity, or extent of”. <http://www.merriam-webster.com/dictionary/all>. Washington law is in accord. See *S.S. Mullen, Inc. v. Marshland Flood Control District*, 67 Wn.2d 461, 464, 407 P.2d 990 (1965) (“all applicable . . . taxes’ encompass[es] every conceivable tax . . .”) (emphasis omitted); *Perkins Coie v. Williams*, 84 Wn. App. 733, 737, 929 P.2d 1215 (1997) (“plain and ordinary meaning of [“all”] is ‘[b]eing or representing the entire or total number, amount, or quantity’), *rev. denied*, 132 Wn.2d 1013 (1997).

“All loss” does not mean all loss except for loss under the ordinance or law coverage. Nor, for that matter, does “all loss” mean all loss except for loss under the business income, extra expense, or any of the other available coverages of the policy. In short, “all” really means all.

**2. The Ordinance or Law Coverage Pays for “Losses Covered Under This Policy.”**

Travelers’ flood sublimit applies to “*all losses* covered under this policy”. Not only does “all” mean all, but the ordinance or law coverage pays for “loss,” as that term is used in the policy.

The policy does not define “loss”. Nonetheless, a review of how the policy utilizes that term mandates the conclusion that the ordinance or law coverage pays for “loss.”

For example, paragraph 1 of Section O. in the policy’s General Conditions provides (CP 622):

The most the Company will pay for *loss* or damage in any one occurrence is the applicable specified Limit(s) of Insurance shown in the *Supplemental Coverage Declarations*, Schedules, Coverage Form(s) or endorsement(s).

(Emphases added.)

The introduction to Section B of the referenced Supplemental Coverage Declarations provides (CP 672):

**LIMITS OF INSURANCE**—For application of Limits of Insurance refer to Section O. Limits of Insurance in the General Conditions.

Included under the numerous sublimits listed in Section B is the sublimit for ordinance or law coverage. (CP 673) Since paragraph 1 of Section O. says these sublimits (as well as the other sublimits under Section B) are the most the company will pay for “loss” in any one

occurrence (CP 622), the ordinance or law coverage provides coverage for a certain type of “loss”. Hence, that loss must be a “loss” included in “*all losses* covered under this policy” within the meaning of the flood endorsement.

Courts elsewhere have recognized that when a covered cause of loss causes physical damage to a building and an ordinance or law requires changes in the reconstruction, “loss” has occurred due to the ordinance or law. *See, e.g., Regents of Mercersburg College v. Republic Franklin Insurance Co.*, 458 F.3d 159 (3d Cir. 2006). Similarly, when an ordinance or law prohibits repair of a damaged building, the “loss” to that building is total. *See, e.g., A.H. Jacobson Co. v. Commercial Union Assur. Co.*, 83 F. Supp. 674 (D.Minn. 1949); *Netherlands Insurance Co. v. Fowler*, 181 So.2d 692 (Fla. Dist. App. 1966).

Thus, the ordinance or law coverage pays for “loss” within the meaning of the phrase “all losses covered by this policy.”

### **3. The Ordinance or Law Coverage Falls Within “All Losses Covered Under This Policy.”**

The Supplemental Declarations provide for a \$1,000,000 aggregate limit for Flood Zone A “in any one policy year, for **all losses covered under this policy.**” (CP 674) (emphases added). By referring to all losses covered “under this policy”, the Supplemental Declarations again

demonstrate that the flood sublimit applies not only to physical damage caused by flood, but also to any other coverages *under the policy* triggered by flood. This would, of course, include the ordinance or law coverage.

Significantly, the Travelers policy refers to “all losses covered under this policy” only twice: once for its flood coverage and once for its earthquake, volcanic eruption, landslide, and mine subsidences coverage. (CP 674) These coverages are available only through endorsements since the main policy form excludes both flood and earth movement. (CP 595-98) Flood and earth movement such as earthquake, volcanic eruption, landslide, and mine subsidence, are the types of catastrophic perils that most first-party property policies simply do not cover. 42 U.S.C. § 4001(b)(1) (“many factors have made it uneconomic for the private insurance industry alone to make flood insurance available . . . on reasonable terms and conditions”); 1 INSURING REAL PROPERTY § 2.04[5] (S. Cozen ed. 2009); 2 INSURING REAL PROPERTY § 12.01[1], at 12-2 (S. Cozen ed. 2009).

Travelers, however, made coverage for these two types of catastrophic perils available to Evergreen by endorsement, but with sublimits. (CP 595-98, 674) These sublimits are *significantly less* than the policy’s blanket limits generally available for buildings. If, for example, Evergreen’s facility had been completely destroyed in a fire, the

Travelers policy would have provided up to \$277,120,000 in coverage. (CP 672) In contrast, if Evergreen's facility had been completely destroyed by earthquake, the Travelers policy would have provided up to only \$10,000,000 in coverage. (CP 634, 674)

Under Lloyd's theory, even though the amount of Travelers' earthquake coverage is less than 4 percent of the amount of the blanket coverage for buildings, Travelers granted 100 percent of the amount of all the other incidental coverages triggered by earthquake (*e.g.*, ordinance or law, business income, etc.)

The absurdity of this theory is even more pronounced for flood coverage for Flood Zone A. Under Lloyd's theory, even though the amount of such flood coverage is *less than 1 percent* of the amount of the blanket coverage for buildings, Travelers nevertheless granted 100 percent of the amount of all the other incidental coverages triggered by flood..

An insurance "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." *Public Utility District No. 1 v. International Insurance Co.*, 124 Wn.2d 789, 799, 881 P.2d 1020 (1994). Absurdity will be the result under Lloyd's theory.

**4. The Flood Sublimit Is Not a “Covered Property Limit.”**

Lloyd’s cites the following paragraph of the Travelers policy’s General Conditions, Section O, for its argument that for flood, the Travelers policy includes a separate \$10,000,000 for ordinance or law coverage in addition to the \$1,000,000 flood coverage (CP 622):

2. Under the Property Coverage Form, unless otherwise stated in the Supplemental Coverage Declarations, or by endorsement:
  - a. Payments under the following Covered Costs and Expenses will not increase the applicable Covered Property Limit(s) of Insurance:  
  
...
  - b. The Limits of Insurance that are specified for the remaining Covered Costs and Expenses are in addition to the Covered Property Limit(s) of Insurance.

The ordinance or law coverage is not listed in subparagraph 2.a. Lloyd’s therefore argues that that coverage’s \$10,000,000 limits are governed by subparagraph 2.b., *i.e.*, are “in addition to the Covered Property Limit(s) of Insurance”. Lloyd’s then claims the Travelers \$1,000,000 flood sublimit is a “Covered Property Limit.” (CP 437-42, 758-62, 781) Wrong.

To fall within subparagraph 2.b, the \$1,000,000 flood sublimit must, by the terms of subparagraph 2.b, qualify as a “Covered Property

Limit of Insurance.” (CP 622) But, as will be discussed, the \$1,000,000 flood sublimit is not a “Covered Property Limit.”

It is true that the Travelers policy does not explicitly define “Covered Property Limit.” However, the average purchaser of insurance would understand “Covered Property Limit” to refer to a limit specifically applicable to certain Covered Property. In contrast, the flood sublimit is a limit specifically applicable to a certain Covered Cause of Loss—flood.

The Washington Supreme Court has recognized “the importance of both the language and the structure of an all-risk insurance policy.” *Findlay v. United Pacific Insurance Co.*, 129 Wn.2d 368, 377, 917 P.2d 116 (1996). The structure of the policy here is illuminating.

The policy’s main form is the Property Coverage Form. (CP 568-81) That form has sections for—

- the insuring agreement (CP 568),
- coverage (CP 568-74),
- property and costs not covered (CP 574-75),
- exclusions (CP 575-79),
- limitations (CP 579),
- deductibles (CP 579), and
- definitions (CP 579-81).

The coverage section states, among other things (CP 568):

Coverage is provided for Covered Property and Covered Costs and Expenses, as described in Sections B.1. and B.2. for which the insured has an insurable interest, unless excluded . . . . Coverage applies only when a Limit of Insurance is shown in the Supplemental Coverage Declarations for the specific type of Covered Property or Covered Costs and Expenses . . . .

The Section B.1 referred to sets forth various types of Covered Property. (CP 568-71) Section B.2 sets forth various types of Covered Costs and Expenses. (CP 572-74) Ordinance or law coverage is listed under Section B.2. as a Covered Cost and Expense. (CP 573)

In contrast, section B.1. for Covered Property lists coverages for twelve different specific types of Covered Property—for example, Buildings, Business Personal Property, Electronic Data Processing Equipment and Electronic Data Processing Data and Media, Accounts Receivable, Valuable Papers, Fine Arts, etc. (CP 568-71) All but two of these specific types of Covered Property have sublimits listed on the Supplemental Coverage Declarations.<sup>8</sup> These sublimits are “Covered Property Limits”—they apply to sublimits for coverage for damage to certain types of *property*.

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<sup>8</sup> Evergreen did not purchase the two coverages without sublimits, Covered Property at Undescribed Premises and Covered Property Overseas. (CP 570-71, 672-75) The Property Coverage Form’s coverage section provides that “[c]overage applies only when a Limit of Insurance is shown in the Supplemental Coverage Declarations for the specific type of Covered Property or Covered Costs and Expenses.” (CP 568)

The flood sublimit, on the other hand, applies to loss caused by a specific *peril*—flood. In fact, the flood endorsement expressly makes flood a Covered Cause of Loss, not Covered Property. (CP 597) In addition, with respect to the deductibles, the policy refers to the flood coverage as “a cause of loss.” (CP 619)

The flood sublimit is thus not a Covered Property Limit because it is not identified in the policy as applying to a particular type of Covered Property. Therefore, General Condition 2.b, providing that the ordinance or law sublimit, among others, is in addition to Covered Property Limits, does not apply to the flood sublimit. (CP 622) For General Condition 2.b to apply to the flood sublimit, General Condition 2.b would instead have had to have said:

- b. The Limits of Insurance that are specified for the remaining Covered Costs and Expenses are in addition to the Covered Property Limit(s) of Insurance or Covered Causes Limit(s) of Insurance.

Even if the \$1,000,000 flood sublimit did qualify as a Covered Property Limit, that would not help Lloyd’s. This is because General Condition 2.b. is subject to an exception for “unless otherwise stated in the Supplemental Coverage Declarations, or by endorsement.” (CP 622) As discussed *supra*, the Supplemental Coverage Declarations and the flood

endorsement both limit “all losses” under the flood coverage—including loss due to ordinance or law requirements—to \$1,000,000.

**D. EVEN IF THE TRAVELERS POLICY IS AMBIGUOUS, EXTRINSIC EVIDENCE RESOLVES THAT AMBIGUITY IN TRAVELERS’ FAVOR.**

Even if any part of the Travelers policy were deemed ambiguous, reversal would still be required. Extrinsic evidence of the intent of the parties is used to resolve ambiguity. *American National Fire Insurance Co. v. B&L Trucking & Const. Co.*, 134 Wn.2d 413, 428, 951 P.2d 250 (1998). Only if ambiguities remain after examining extrinsic evidence are those ambiguities resolved against the drafter. *See Weyerhaeuser Co. v. Commercial Union Insurance Co.*, 142 Wn.2d 654, 666, 15 P.3d 115 (2000).

The extrinsic evidence here is unanimous that *all parties*—Travelers, Evergreen (both directly and through its insurance agent and broker), and Lloyd’s—expected and intended that Travelers would provide a maximum of \$1,000,000 of coverage for all flood loss, no more, no less. For example, when the US broker, acting on behalf of Evergreen, was looking for additional coverage, she told the British broker (CP 712):

Simon, please find submission for 3 locations that need excess flood. The U/L is \$500,000 on Building and Contents with the NFIP and \$1MM included in the property quote with Travelers. . . .

Seeking confirmation that the Travelers policy would pay \$1,000,000, the British broker asked (CP 720):

As these three properties are located in Flood Zone A will we still have an underlying \$1m limit excess of the NFIP?

When Evergreen's agent contacted Evergreen with a premium quote for the Lloyd's policy, the agent advised (CP 702):

The quote is for \$10,000,000 agg over NFIP and Travelers Flood zone A \$1,000,000 agg.

Evergreen approved the purchase of the Lloyd's policy after the US broker told it that Lloyd's was providing "\$10,000,00 agg over NFIP and Travelers Flood zone A \$1,000,000 agg." (CP 702) The US broker asked the British broker to bind coverage (CP 719):

Simon, please bind coverage effective 6/1/06 per your indication. No terrorism. I have attached copies of the NFIP policies on the 3 locations as well as the quote page from Travelers showing the \$1MM limit applying to the locations in the NFIP only.

And when Evergreen sought to renew the policies, Evergreen's agent e-mailed the US broker the following information to send to the British broker (CP 705):

Travelers Ins. Co. KTJCM4508483-07 \$1,000,000 flood zone A

...

Natl Flood Ins. Prog—2027267182—Centralia location \$500,000 building

Indeed, the whole purpose of obtaining the Lloyd's policy was to get \$10,000,000 in flood coverage over and above Travelers' \$1,000,000 and NFIP's \$500,000. And even after the loss, Evergreen's insurance agent was taking the position that Travelers owed only its \$1,000,000 flood sublimit (CP 735):

We have all agreed from the beginning that Travelers had a \$1,000,000 sub limit that applied to this location and flood zone in Centralia, Washington. Also, FEMA has paid out their entire limit of \$500,000 to Evergreen Centralia . . . . It is now Travelers time and turn to pay Evergreen the \$1,000,000 for the damages and value of the building with the proceeds provided by our insurance contract. . . .

. . . FEMA has settled their building claim, then with Travelers settling the next building coverage layer, it will allow for settlement of the excess Lloyd's protection.

Nowhere in the record is there a single shred of evidence that anyone—Evergreen, Travelers, or Lloyd's—thought any differently. It was not until the lawyers got involved, post-loss, that Lloyd's decided to take its current position that Travelers owes more than \$1,000,000 for flood loss for Evergreen's Chehalis facility.

Consequently, the extrinsic evidence clears up any ambiguity: the parties intended that Lloyd's pay once Travelers paid or admitted liability for \$1,000,000. *Nothing* in the extrinsic evidence suggests otherwise.

## VI. CONCLUSION

Lloyd's agreed to provide \$10,000,000 in flood coverage once the two underlying insurers—Travelers and NFIP—paid \$1,000,000, and \$500,000 respectively. Now Lloyd's is trying to avoid the very obligation for which it contracted.

The trial court erred in granting Lloyd's summary judgment and denying Travelers summary judgment. This court should reverse and remand for entry of summary judgment in favor of Travelers that Lloyd's is excess over Travelers' \$1,000,000 and NFIP's \$500,000 and that Travelers' obligation for the subject loss is no more than \$1,000,000.

DATED this 31<sup>st</sup> day of March, 2010.

**REED McCLURE**

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DATED this 31<sup>st</sup> day of March, 2010.

  
\_\_\_\_\_  
Cathi Key

SIGNED AND SWORN to (or affirmed) before me on March 31,  
2010 by Cathi Key.

  
\_\_\_\_\_  
Print Name: Leone Powers  
Notary Public Residing at Sno. Co., WA  
My appointment expires: 8/11/2010

