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NO. 65046-7-I

COURT OF APPEALS, DIVISION 1
OF THE STATE OF WASHINGTON

AMERICAN STATES INSURANCE COMPANY, in its own right and as
assignee of JASON MUN and ALEXANDER MUN, d/b/a
PROFESSIONAL HOMEBUILDERS, a Washington partnership,

Respondent,

v.

CENTURY SURETY COMPANY, a foreign insurance company,

Appellant.

BRIEF OF APPELLANT

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I. SUMMARY

This is an action for contribution brought by American States Insurance Company ("ASIC"), a primary liability insurer, against Century Surety Company ("Century"), an excess liability insurer. ASIC issued two primary policies, each with a \$1,000,000 limit. Century's excess policy covered the period of one of the ASIC policies. ASIC's and Century's mutual insured – a building contractor – became liable on a judgment entered on an arbitration award of just under \$2,000,000. After initially refusing to pay any part of the judgment, ASIC paid \$1,922,044.68 and then sued Century for reimbursement of the portion that exceeds the \$1,000,000 limit of just one of ASIC's primary policies.

ASIC's complaint against Century presents two fundamental issues. One is whether there is coverage under both ASIC policies and, if so, whether ASIC must exhaust both policies before Century's excess policy can be required to contribute. The other issue is whether ASIC breached its duty to actively pursue settlement with the claimant and, thereby, became liable for the entire judgment, even if only one of its policies applies to the claim.

The court below resolved both issues in ASIC's favor by summary judgment. In doing so, the court erred because both issues turn on triable issues of fact.

After granting ASIC summary judgment, the court below awarded ASIC its attorney fees based on *Olympic Steamship Co. v. Centennial Ins. Co.*, 117 Wn.2d 37, 811 P.2d 673 (1991). This too was error because attorney fees are not recoverable in an insurer vs. insurer contribution action. The court also erred in its calculation of attorney fees.

II. ASSIGNMENTS OF ERROR

1. The trial court erred by granting ASIC's Motion for Partial Summary Judgment re: Century Surety's Liability Excess of 1999-2000 "Underlying Insurance." This issue is subject to *de novo* review. *Polygon Northwest Co. v. American Natl. Fire Ins. Co.*, 143 Wn. App. 753, 766, 189 P.3d 777 (2008) ("The interpretation of an insurance policy is a question of law, reviewed *de novo*"); *Security State Bank v. Burk*, 100 Wn. App. 94, 97, 995 P.2d 1272 (2000) ("When reviewing a grant of summary judgment, the appellate court engages in the same inquiry as the trial court, considering facts and reasonable inferences therefrom in the light most favorable to the nonmoving party and reviewing questions of law *de novo*").

2. The trial court erred by granting ASIC's Motion for Partial Summary Judgment Regarding [Century's] Counterclaim and Bad Faith Affirmative Defenses. This issue is subject to *de novo* review. [See above.]

3. The trial court erred by awarding ASIC its attorney fees pursuant to *Olympic Steamship Co. v. Centennial Ins. Co.*, 117 Wn.2d 37, 811 P.2d 673 (1991). This issue is subject to *de novo* review. [See above.]

4. The trial court erred in its calculation of the attorney fee award. This issue generally is subject to an abuse of discretion standard of review. *Bowers v. Transamerica Title Ins. Co.*, 100 Wn. 2d 581, 583, 675 P.2d 193 (1983). However, any legal conclusions underlying the decision are reviewed *de novo*. *Gildon v. Simon Property Group, Inc.*, 158 Wn.2d 483, 493, 145 P.3d 1196 (2006).

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

A. Issues Pertaining to Assignment of Errors Nos. 1 and 2.

1. Whether, with respect to a continuous loss claim, an excess liability policy is excess of all applicable primary liability policies, including policies in force during periods other than the period of the excess policy.

2. Whether the existence of property damage during the period of ASIC's earlier policy presents a triable issue of fact.

3. Whether ASIC's breach of its duty to actively engage the claimants against the mutual insured in settlement negotiations presents a triable issue of fact.

B. Issue Pertaining to Assignment of Error No. 3.

1. Whether the attorney fee rule adopted in *Olympic Steamship* applies in a dispute between two insurers as to which of their policies applies to a loss.

C. Issues Pertaining to Assignment of Error No. 4.

1. Whether the trial court erred, as a matter of law, in applying a multiplier to compute the award.

2. Whether the attorney fee award is manifestly unreasonable.

IV. STATEMENT OF THE CASE

A. The Parties.

Plaintiff/respondent American States Insurance Company ("ASIC") and defendant/appellant Century Surety Company ("Century") are insurance companies.

ASIC issued at least two primary liability insurance policies to Alex and Jason Mun d/b/a Professional Home Builders ("PHB"). Policy no. 01-CE-108730-3 was in force for the period 9/19/98 – 9/19/99 ("the '98-'99 ASIC Policy"). [CP 720-817.] It was renewed for another one year term through Policy no. 01-CE-108730-4 ("the '99-'00 ASIC Policy"). [CP 927 – 1087.]

Under the '98-'99 ASIC Policy and the '99-'00 ASIC Policy, ASIC provided PHB with primary general liability insurance with annual limits

of \$1,000,000 per occurrence. [CP 722; 1035-1048.] The policies' status as primary insurance is confirmed by "other insurance" clauses in both ASIC policies. The clauses read:

If other valid and collectible insurance is available to the insured for a loss we cover under Coverages A or B of this Coverage Part, our obligations are limited as follows:

- a. Primary Insurance
This insurance is primary except when b. below applies. If this insurance is primary, our obligations are not affected unless any of the other insurance is also primary
- b. Excess Insurance
This insurance is excess over:
 - (1) Any of the other insurance, whether primary, excess, contingent or on any other basis:
 - (a) That is Fire, Extended Coverage, Builder's Risk, Installation Risk or similar coverage for "your work;"
 - (b) That is Fire Insurance . . . ;
 - (c) That is insurance purchased by you to cover your liability as a tenant . . .
 - (d) If the loss arises out of the maintenance or use of aircraft, "autos" or watercraft to the extent not [excluded].
 - (2) Any other primary insurance available to you covering liability for damages arising out of the premises or operations for which you have been added as an additional insured by attachment of an endorsement. [CP 763, 1043.]

Century insured PHB under commercial excess liability policy no. CCP-182938 for the period 9/19/99 to 9/19/00 ("the Century Policy"). [CP 320-330.] Schedule A to the Century Policy identifies the '99-'00 ASIC Policy. [CP 321.]

The Century Policy obligates Century to "pay those sums that the insured becomes legally obligated to pay as damages because of . . . property damage . . . to which this insurance applies." [CP 327.] "But: (1) The amount [Century] will pay for damages is limited as described in LIMITS OF INSURANCE (SECTION III)" [*Id.*]

Section III, paragraph 4 of the Century Policy states in relevant part: "this Coverage Part is excess of an amount not less than the amount shown in the Schedule of Underlying Insurance for the applicable underlying insurance" [CP 328.]

The Century Policy is subject to the following condition: "[i]f other valid and collectible insurance is available to the insured for a loss we cover under this Coverage Part, then this insurance is excess of and not contributing with such insurance. The above does not apply to 'Underlying Insurance' nor to insurance written specifically in excess of this Coverage Part." [CP 329.]

B. The Underlying Claim.

PHB was a siding subcontractor. In December 1998, it entered into a contract ("the Subcontract") with Residential Investment Partners 1997, LLC ("RIP") to supply and install vinyl siding and siding components on 9 apartment buildings in a project known as Heritage Ridge Apartments Phase I. [CP 364, 661-673.] The Subcontract obligated

PHB to begin work on each building on two days notice and to complete its work on each building within 5 working days. [CP 672.] Separate temporary certificates of occupancy were issued for each building as it was completed. [CP 409.] PHB completed work on the first building and the temporary certificate of occupancy for that building was issued on July 22, 1999. [CP 179, 409.]

PHB negligently performed its work. [CP 364.] PHB improperly installed the weather resistive barrier and vinyl siding. It failed to fasten the vinyl siding in compliance with industry standards. It failed to utilize nails of sufficient length at shear walls. It mislapped building paper at window sills, window heads, and at the metal flashing at the "belly bands." It installed building paper with holes in it. It installed deficient "belly band" flashing and used improper components. And the vinyl siding improperly terminated at corners and other transitions. [CP 364.]

As a consequence of PHB's defective work, moisture entered the building envelope and caused damage through the completion of the siding work and thereafter. [CP 364, 365, 1656 – 1657.] Damage began before September 19, 1999. This is evident from the extent of decay discovered after September 19, 1999. "[F]or it to have reached the advanced state observable in the . . . photographs, it would have had to

have initiated during that [prior to September 19, 1999] time period."
[CP 1659 (testimony of K. Flynn).]

In January 2003, RIP sued PHB and others for construction defects in an action styled *Residential Investment Partners, 1997, LLC v. S.C. Visions, et al.*, Snohomish County Cause No. 03-2-04996-2 ("*RIP v. PHB*"). [CP 668.] Among other relief, RIP sought an order compelling the defendants, including PHB, to arbitrate the dispute. The matter ultimately was submitted to binding arbitration. [CP 362-367.]

In 2003, PHB notified ASIC of *RIP v. PHB* and requested that ASIC defend and indemnify it. [CP 368.] On July 22, 2003, ASIC responded to the tender by issuing a reservation of rights letter. [CP 368-374.] In its July 22nd letter, ASIC accepted the tender under the '99-'00 ASIC Policy and appointed counsel to defend PHB. [*Id.*; CP 523-524.] ASIC referred to the policy's insuring agreement and exclusions "k" (property damage to your product), "l" (damage to your work) and "m" (damage to impaired property or property not physically injured). ASIC's July 22, 2003 reservation of rights letter did not mention exclusion "j".¹ [CP 369-371.]

¹ According to exclusion "j(6)", there is no coverage for property damage to "[t]hat particular part of any property that must be restored, repaired or replaced because 'your work' was incorrectly performed on it." The exclusion does not apply "to 'property damage' included in the 'products-completed operations hazard.'" [CP 743.]

ASIC and PHB waited more than two years before ASIC notified Century of *RIP v. PHB* on March 30, 2005. [CP 315.] On April 21, 2005, Century acknowledged receipt of the notice and requested further notice "as soon as it appears as though the underlying limits will not be sufficient to cover the amount of the loss." [*Id.*]

A consulting firm – Exterior Research & Design, LLC – assessed RIP's damages attributable to the improper installation of the siding. In a report dated April 22, 2005 – the day after Century requested that it be informed if it appeared the claim might exceed ASIC's limits – the consulting firm opined that it would cost \$2,005,540 to repair the damage suffered by RIP due to PHB's work. [CP 377.] Neither ASIC nor PHB notified Century of their receipt of this damages estimate. [CP 313 (¶9).]

On May 10, 2005, RIP demanded \$2,738,270 in settlement from PHB. [CP 394.] Neither ASIC nor PHB notified Century of this settlement demand. [CP 313 (¶9).]

On May 27, 2005, RIP demanded \$1,000,000 in settlement from PHB. [CP 398.] Neither ASIC nor PHB notified Century of the \$1,000,000 demand. [CP 313 (¶10).]

After receiving the \$1,000,000 demand, PHB's defense counsel spoke with RIP's counsel. PHB's defense counsel (appointed by ASIC) believed that RIP would be willing to settle for \$500,000. [CP 400.]

ASIC's claim handler held the same opinion. [*Id.*] PHB's defense counsel further believed that "PHB's likely risk at arbitration was in the \$100,000 to \$500,000 range." [CP 527 (¶16).] ASIC's claim handler did not expect a defense verdict, expected only a 50-65% chance of prevailing on the major issues, and actually saw a potential for a combined award (damages and attorney fees) of \$1,000,000. [CP 1715, 1716.] However, ASIC, on PHB's behalf, never made a settlement offer in excess of \$100,000 or advised PHB of its exposure evaluations. [CP 527.]

The arbitration commenced on May 31, 2005. Defense counsel advised ASIC that the arbitrator was "swallowing" all of RIP's experts' testimony, was over-ruling defense objections, and was allowing RIP's witnesses to testify freely. [CP 1718.] ASIC's expectation of a damages award rose to \$350,000 plus attorney and expert fees and court costs. [CP 1717.] Nevertheless, ASIC made no settlement overture. RIP completed its case-in-chief on June 3rd. A week later, on June 10, 2005, RIP demanded \$1,400,000 to settle with PHB. [CP 419.] Neither ASIC nor PHB notified Century of the \$1,400,000 demand. [CP 314 (¶12).]

On June 13, 2005, after receiving the \$1,400,000 demand, ASIC provided PHB with an update of its July 22, 2003, reservation of rights. [CP 403-408.] In the June 13th letter, ASIC stated: "Our information indicates that the first building upon which you worked was completed on

July 22, 1999, triggering coverage under policy periods 9/19/1998 to 9/19/1999 and 9/19/1999 to 9/19/2000, each policy with limits of \$1,000,000 per occurrence and a \$2,000,000 aggregate limit per policy year." [CP 403.] The June 13th letter referred to the policies' insuring agreement and to exclusion "l" (damage to your work) and "m" (damage to impaired property or property not physically injured). [CP403-405.] In the June 13th supplemental reservation of rights letter, ASIC again did not mention exclusion "j". [*Id.*]

The juxtaposition of the \$1,400,000 settlement demand and the June 13th reservation of rights letter gave the impression to PHB's independent counsel that ASIC was acknowledging that the demand was within the sum of the limits of its two policies. Leslie Drake, PHB's independent counsel, monitored *RIP v. PHB*. [CP 1661-1662.] Based on ASIC's June 13, 2005, letter, Drake understood that both the '98-'99 ASIC Policy and the '99-'00 ASIC Policy, with separate \$1,000,000 limits, applied to the loss. [CP 1665.] Drake provided PHB with advice concerning settlement of *RIP v. PHB* based on the understanding that \$2,000,000 in limits were available for the claim. If Drake had known that ASIC would assert that only the '99-'00 ASIC Policy applied to the claim, Drake would have more aggressively pursued settlement with RIP on behalf of PHB. [CP 1665-1666.] According to Drake:

At a minimum I assert that [ASIC] is estopped from asserting that only one year is available to my clients given that all decisions made by them in this matter have been based on the representations of [ASIC] that both policy years are available to them. If we had been told that [ASIC] was taking the position that only one policy year was available, then our response to RIP's settlement demand of one million dollars prior to the arbitration would have been different. [CP 1739 (10/17/05 letter from Drake to ASIC).]

On July 27, 2005, the arbitrator issued his award in *RIP v. PHB* ("the Award"). [CP 362-367.] In the Award, the arbitrator found that RIP had suffered \$2,113,955 in damages for repair costs and consequential damage. [CP 366.] The arbitrator assigned 71.5% of these damages to PHB – the sum of \$1,511,478. [*Id.*] Thereafter, the arbitrator awarded RIP attorney fees of \$384,436.73 and costs of \$2,800 and \$23,329.85. [CP 396.] Accordingly, PHB's total liability to RIP was \$1,922,044.68.

Century had not been notified that the arbitration had commenced. [CP 312-314.] Indeed, Century had received no communication from ASIC or PHB since the March 30, 2005, initial notice letter. Century learned of the arbitration when it was a *fait accompli* – when Century received a July 28, 2005, letter from Drake (PHB's personal counsel) reporting on the \$1,922,044.68 Award. [CP 313 (¶10); CP 318.]

ASIC refused to pay any portion of the Award. RIP then commenced an action against ASIC to recover on the judgment and for its

attorney fees ("*RIP v. ASIC*"). [CP 206-208.] In December 2005, PHB, RIP, ASIC and PHB entered into a settlement agreement ("the Settlement Agreement"). [CP 1746-1754.] Under the terms of the Settlement Agreement, ASIC paid RIP \$1,922,044.68. In consideration for the payment, ASIC received a number of things: (i) dismissal of *RIP v. ASIC*; (ii) a release by PHB of its claims, including its claim for "bad faith," against ASIC; and (iii) an assignment of "all claims and rights, if any, they have against the Other Insurers." [CP 1749.] In the assignment provision, there was no mention of claims PHB "might have in the future." Nor was there any apportionment of the payment to the separate items of consideration given by PHB and RIP to ASIC. The settlement agreement gave ASIC the option to prosecute any coverage or extra-contractual claims in PHB's name. [*Id.*]

C. This Litigation.

After paying the arbitration award, ASIC pursued several strategies to shift the cost to other insurers. It first commenced a federal court action, under PHB's name, against First Financial Insurance Company ("First Financial") and Century. [CP 220 – 228.] Century and ASIC (in PHB's name) entered into a tolling agreement pursuant to which ASIC agreed to entry of nonsuit in favor of Century, without prejudice, and Century agreed to the tolling of the statute of limitations. [CP 229 – 231.]

The action proceeded against First Financial, which had issued a primary general liability policy for a period after the '99-'00 ASIC Policy. First Financial moved for summary judgment on the ground that PHB, in whose name ASIC had brought the action, was not the real party in interest as required by Federal Rules of Civil Procedure rule 17(A). The federal court granted First Financial's motion. [CP 233 – 239.] Thereafter, ASIC substituted in as plaintiff. ASIC and First Financial then filed cross-motions for summary judgment. [CP 241 – 251.] The federal court granted summary judgment in favor of First Financial, finding that First Financial's named insured -- "Professional Home Builders, LLC" -- which it insured for the period October 10, 2000, to October 10, 2001, was not the same legal entity as ASIC's insured (PHB – a general partnership) and was neither a party to the subcontract with RIP nor the defendant in *RIP v. PHB*. [CP 360-361.]

Having failed to obtain contribution from another primary insurer, ASIC then commenced this action against Century – an excess insurer – in July 2008. [CP 449.] In its complaint, ASIC purports to sue "in its own right and as assignee of PHB." [*Id.*] It asserts causes of action for declaratory relief and damages. The gist of its claim is that it paid more than its applicable limits and that it has the right to recover the excess from Century. [CP 454.]

Century moved for summary judgment on ASIC's complaint. [CP 289-311.] In its motion, Century argued that ASIC's claims fail for one or more of four independent reasons: (i) the *RIP v. PHB* claim was covered under both the '99-'00 ASIC Policy and the '98-'99 ASIC Policy and, therefore, the applicable primary coverage was sufficient to pay the claim; (ii) ASIC waived its right to dispute coverage under the '98-'99 ASIC Policy; (iii) ASIC should be estopped from disputing coverage under the '98-'99 ASIC Policy; and (iv) ASIC is liable for the entire *RIP v. PHB* award because of its breach of the duty to engage RIP in good faith settlement negotiations. [CP 295.]

ASIC opposed Century's summary judgment motion, arguing, among other things, that triable issues of fact existed as to whether its handling of settlement negotiations in *RIP v. PHB* was reasonable. [CP 606-631.]

By order entered on August 31, 2009, the court below denied Century's motion without explanation. [CP 2854.]

ASIC then filed two motions for partial summary judgment. In one, ASIC sought summary disposition of Century's affirmative defense of "bad faith" failure to settle. [CP 899-922.] As ASIC framed the motion, it sought "a ruling that, as a matter of law, it did not act in bad faith by not settling [*RIP v. PHB*] prior to the arbitration." [CP 900.] Century

opposed the motion, presenting substantial evidence that ASIC had breached its duty to engage RIP affirmatively in settlement negotiations. [CP 1621-1645.] In its other motion, ASIC sought a declaration that Century is obligated to pay the portion of the arbitration award that exceeds the \$1,000,000 occurrence limit of the '99-'00 ASIC Policy. [CP 875-898.] Century opposed this motion, arguing that, as a matter of law, its policy was excess of all implicated primary policies, including the '98-'99 ASIC Policy, and presenting substantial evidence of property damage during the period of the '98-'99 ASIC Policy. [CP 1600-1620.]

On January 11, 2009, the court below entered its order granting summary judgment in ASIC's favor on Century's "bad faith" affirmative defense. [CP 2026-2028.] On the same date, the court also entered its order granting ASIC summary judgment on its claim that Century was responsible for the portion of the award in excess of \$1,000,000. [CP 2029-2031.]

After addressing other issues by way of an additional motion for partial summary judgment, on January 29, 2010, the court below entered its judgment awarding ASIC the principal amount of \$922,044.60. [CP 2042- 2043.]

ASIC then moved for an award of attorney fees and other litigation expenses. [CP 2300.] ASIC premised its motion on the theory that it was

pursuing claims against Century as PHB's assignee and that it was entitled to recover its own fees pursuant to *Olympic Steamship*. Century opposed the motion, arguing, among other things, that this was a dispute between two insurers concerning which of their policies covered the claim and, therefore, the rule of *Olympic Steamship* does not apply. [CP 2379-2393.] Century also challenged the reasonableness of the fees requested. [*Id.*] The court below granted ASIC's motion *in its entirety* by simply signing ASIC's proposed order without any modification. [CP 2630-2642.] Thus, for a claim worth \$922,044.60, the court awarded ASIC attorney fees and costs of \$988,018.45. [*Id.*]

A revised final judgment, incorporating the attorney's fee award, was entered on March 5, 2010. [CP 2626 – 2629.] On March 19, 2010, the court below entered its revised findings of fact and conclusions of law. [CP 2630 – 2642.] Century timely filed its notice of appeal. [CP 2600 – 2621.]

V. ARGUMENT

A. ASIC's Burden Was to Prove the Absence of a Triable Issue as to Whether It Paid More Than It Owed.

"Indemnity in its most basic sense means reimbursement and may lie when one party discharges a liability which another should rightfully have assumed." *Central Washington Refrigeration, Inc. v. Barbee*, 133 Wn.2d 509, 513, 946 P.2d 760 (1997) (citation omitted). Accordingly, the

central issue in this case is whether ASIC was liable for the full \$1,922,044.68 award or whether Century was liable for the amount in excess of \$1,000,000.

ASIC sought to resolve this central issue by motion rather than trial. ASIC was entitled to summary judgment only "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits . . . show[ed] that there [was] no genuine issue as to any material fact and that [ASIC was] entitled to a judgment as a matter of law." *Hash v. Children's Orthopedic Hospital & Medical Center*, 110 Wn.2d 912, 915, 757 P.2d 507 (1988). "The burden of showing that there is no issue of material fact falls upon the party moving for summary judgment; all reasonable inferences must be resolved against the moving party, and the motion should be granted only if reasonable people could reach but one conclusion." *Id.*

The purpose of a summary judgment motion is not to adjudicate facts but to ascertain whether any material fact is genuinely in dispute. When reasonableness is a material fact, summary judgment is particularly difficult. This is because reasonableness is typically a question of fact to be determined by the trier of fact. *See Security State Bank v. Burk*, 100 Wn. App. 94, 101, 995 P.2d 1272 (2000). "Such traditional fact questions

should be determined as a matter of law only in the "clearest of cases.""

Id.

ASIC's theory is that it paid more than it owed. If there was coverage under both ASIC policies, then ASIC paid less than the sum of its two policy limits and its claim against Century must fail. Alternatively, if ASIC became liable for an excess-of-limits judgment due to its unreasonable failure to actively pursue settlement of RIP's claim, then, again, it merely paid what it owed – even assuming only one policy was applicable to the loss. Thus, to carry its initial burden of proving that it paid more than it owed, ASIC must show the absence of a triable issue with respect to two contentions: (i) the claim was not covered by the '98-'99 ASIC Policy; and (ii) ASIC handled settlement negotiations reasonably. ASIC proved neither.

B. ASIC Was Not Entitled to Summary Judgment Because There Is At Least a Triable Issue as to Whether the '98-'99 ASIC Policy Applies to the Claim.

The issue of Century's obligation to fund the Award is governed by two principles. One is the principle that, for continuous loss claims, coverage exists under all liability policies in force during a period when some damage resulted. The damage need not be manifest or even substantial. Even minute damage is sufficient to trigger coverage. The

other principle is that, before an excess liability policy is triggered, all primary insurance applicable to the loss must be exhausted.

1. The "Continuous Trigger" Rule Applies to Progressive Losses.

Standard "occurrence" based general liability policies obligate the insurer to pay damages for which the insured is held legally liable to pay because of property damage that results during the policy period. Under Washington law, progressive or continuing property damage implicates every policy spanning the period during which the damage progresses. *American Natl. Fire Ins. Co. v. B&L Trucking Co.*, 134 Wn.2d 413, 425, 951 P.2d 250 (1998); *Villella v. Public Employees Mut. Ins. Co.*, 106 Wn.2d 806, 814, 725 P.2d 957 (1986).

The test is whether there was any damage at all during the policy period. So long as there was tangible damage – even if minute – the insurer must pay for all damages attributable to the occurrence. See *American Natl. Fire Ins. Co. v. B&L Trucking Co.*, *supra*, 134 Wn.2d at 425 (discussing *Villella v. Public Employees Mut. Ins. Co.*, 106 Wn.2d 806, 814, 725 P.2d 957 (1986)). This is the "continuous trigger" rule. *Gruol Construction Co. v. Insurance Co. of North America*, 11 Wn. App. 632, 637-638, 524 P.2d 427 (1974) ("*Gruol*").

Gruol illustrates application of the continuous trigger rule in a context very similar to that present here. *Gruol* constructed a building which it sold to Donovan in 1964. 11 Wn. App. at 633. In 1968, Donovan sued *Gruol* for damage to the building caused by dry rot which resulted from dirt having been back-filled against the side of the building. *Gruol* tendered the claim to its insurers under policies spanning the date of sale to the date suit was filed. When none of the insurers agreed to defend, *Gruol* settled with Donovan and then sued its insurers. *Id.* Finding that the dry rot was a continuing process until its discovery, the trial court held that all of the insurers were jointly liable for the settlement amount. The court of appeals affirmed, explaining:

The question then becomes which insurer covered the damage – the insurer at the time of the defective backfilling, at the time of the discovery of the dry rot, or all insurers providing coverage during the total time period of the undiscovered condition which progressively worsened. ¶Here, the resulting damage was continuous; coverage was properly imposed under the language of the policy [on all of the insurers]. *Id.* at 635-636.

2. The "Horizontal Exhaustion" Rule Requires Exhaustion of All Primary Policies Before an Excess Policy Is Triggered.

In assessing the liability of an insurer for a continuous loss, the plain language of the policy controls. *American Natl. Ins. Co. v. B&L Trucking & Construction Co.*, *supra*, 134 Wn.2d at 427. For excess policies, one of the key policy provisions is the "other insurance" clause.

Polygon Northwest Co. v. American Natl. Fire Ins. Co., 143 Wn. App. 753, 778, 189 P.3d 777 (2008) ("*Polygon*") ("each excess insurer's liability for purposes of contribution was defined by . . . its 'other insurance' clause with respect to all triggered underlying policies . . ."). When the clause provides that the insurance is "excess over any other valid and collectible insurance available to the 'Insured,' whether or not described in the schedule of underlying policies," courts require horizontal exhaustion of all primary coverage before the excess insurer is required to contribute. *Id.*

The rule is illustrated in *Polygon*. A homeowners' association sued Polygon for construction defects. The parties settled the claims for \$7,800,000. 143 Wn. App. at 764. Polygon's primary and excess insurers funded the settlement and then sought to reallocate the payments among themselves. Noting that each of the excess policies contained an "other insurance" clause making it excess over "any other valid and collectible insurance," the court held that the excess policies applied only to that portion of the settlement that exceeded the sum of the limits of all the solvent primary policies. *Id.* at 778-779.²

² The court also held that, due to its insolvency provision, a policy in excess of an insolvent primary was entitled to a credit for the limit of that policy as well. 143 Wn. App. at 779.

The *Polygon* rule of horizontal exhaustion has been embraced by numerous courts and commentators. See, e.g., *Kajima Constr. Services Co. v. St. Paul Fire & Marine Ins. Co.*, 227 Ill.2d 102, 879 N.E.2d 305, 313 (2007) ("Recognizing vertical exhaustion would 'blur the distinction between primary and excess insurance"); *AAA Disposal Systems, Inc. v. Aetna Cas & Sur. Co.*, 355 Ill. App. 3d 275, 821 N.E.2d 1278, 1289 (2005) ("we . . . affirm the trial court's ruling that American Employer's excess policies are triggered only after the primary insurers' coverage is horizontally exhausted"); *Stonewall Ins. Co. v. City of Palos Verdes Estates*, 46 Cal. App. 4th 1810, 1850, 54 Cal. Rptr. 2d 176 (1996) ("The fact that the total amount of primary insurance covering the loss exceeds the amount contemplated in the excess policy does not subject the excess carrier to liability. Liability under a secondary [excess] policy will not attach until all primary insurance is exhausted"); Windt, *Insurance Claims & Disputes*, 5th ed. §6:45 ("assuming duplicative coverage is triggered in multiple years, any and all benefits owed under any primary policy in any year should be considered before any excess policy in any year should be obligated to pay"); Holmes' *Appleman on Insurance 2d*, Part VI, §145:3, Excess Insurance ("Horizontal exhaustion, favored by excess carriers, appears to be the dominant exhaustion theory courts apply in long-tail claims").

The rule of *Polygon* applies here. Like the excess policies in *Polygon*, the Century Policy is subject to an "other insurance" condition that states: "If other valid and collectible insurance is available to the insured for a loss we cover under this Coverage Part, then this insurance is excess of and not contributing with such insurance." [CP 338.]

3. There Is At Least a Triable Issue of Fact as to Whether the '98-'99 ASIC Policy Applies and, Therefore, as to Whether All Applicable Primary Coverage Has Been Exhausted.

As shown above, ASIC's contribution claim against Century is subject to the continuous trigger rule and the rule of horizontal exhaustion of primary coverage. Thus, to establish that it overpaid on the claim and that Century must contribute toward the amount of the Award in excess of \$1,000,000, ASIC, as the party moving for summary judgment, had the burden of proving the absence of a triable issue as to coverage under the '98-'99 ASIC Policy. It did not carry that burden.

The '98-'99 ASIC Policy is triggered by the claim so long as there was some damage, "even if minute," that continued or progressed between 9/19/98 and 9/19/99. [CP 741.] Thus, to prevail on summary judgment, ASIC had to show the absence of any substantial evidence of such damage. The record, however, includes substantial evidence – consisting of both expert testimony and party admissions – that damage began before September 19, 1999.

Kevin Flynn, a wood technologist with expertise in the performance of wood building materials and in field and laboratory evaluation of the performance and failure of wood products, opined: "for [the wood decay] to have reached the advanced state observable in the . . . photographs, it would have had to have initiated during that time period [of the '98-'99 ASIC Policy]." [CP 1651, 1659.] During deposition, ASIC's counsel sought to weaken his conviction, but Mr. Flynn stood his ground and elaborated:

Q. What are your opinions with regard to whether or not damage began at Phase I in Phase I prior to September 19, '99?

A. Again, I guess, getting back to the – the rainfall during the construction prior to that period and the indications that moisture was apparently entering the building envelope, that it likely would have started and progressed throughout the – the construction really up through the completion of the siding and beyond.

....

Q. What information or facts do you have that would lead you to conclude that damage began in Phase I prior to September 19, '99, that resulted directly from the installation of vinyl siding components?

A. I guess some of the photographs from Exterior Research & Design during that time period would show watermarks and some – let's see. Looked like there was some thickness swell in some of the OSB in one of the photographs as well.

Q. That thickness swell in the OSB could have been from water damage that occurred prior to those materials even being on-site, though, right?

A. From the staining pattern, it looked like it had occurred in place.

Q. Okay. What about the staining pattern would lead you to conclude that it occurred in place?

A. In the photograph it was at the base of a wall where there was a flat surface next to it, and it looked like it had – the bottom edge had sort of wicked the moisture up it.

....

Q. The thickness swell in the OSB due to the contact with, say, the flooring line, that could have been a result of the framing contractor applying the framing too close to a horizontal surface, correct?

A. No. It looked more like it was a moisture-induced situation.

....

Q. It could have been a result of rain on the framed buildings before the vinyl siders even arrived on-site, couldn't it?

A. The staining pattern looked like it had occurred, more, actually, after that. Because the wicking, it seemed to be coming up from the bottom. It wasn't really a uniform type of staining like you would expect. So it seemed more likely that it would have occurred after the cladding was put on.

....

Q. Isn't it true that there is a requisite saturation point that materials like oriented strand board must achieve prior to them degrading?

A. Well, it depends. You could have – thickness swell can occur at lower moisture contents. For the establishment of decay fungi specifically, you would need – the wood would have to be above the fiber saturation point. You need free moisture to be

available for the fungus to grow and to put the enzymes out that would break the material down.

But moisture exposure can cause degradation without fungi being present as well.

....

Q. What is the duration at the 25 percent saturation point we discussed earlier that would be required for the cycle of decay to begin? Is there a duration?

A. It – the fungus can go dormant once it's established, and intermittent wetting and drying can occur. The fungus again wouldn't necessarily die between those periods, so it can be a progressive phenomenon where you have a fungus that is metabolizing the material. Then it dries out and goes dormant again. Later on as moisture is reintroduced it reactivates and starts the degradation or continues the degradation process.

....

Q. Decay spores. And what facts do you have in hand that would show that the decay spores were actually degrading the framing and sheathing at Phase I of Heritage Ridge prior to September 19, 1999?

A. Again, it would be the amount of time it takes for decay to reach an advanced state. The spores — you know, it's on a microscopic level. Essentially you have a single spore that would be very small, and a hyphal strand that would grow from that. And it would penetrate the wood and not be observable to the naked eye for some period after that. [T]he fungus takes a period. You know, it starts to grow and there is what they call a lag phase, generally speaking, where the fungus is there and growing yet the breakdown of the wood is not progressing at a very rapid state yet. The fungus is kind of building mass. And then once it reaches a certain point, then it starts to affect a cross-section of the materials more in a significant and observable manner. [CP 1656-1657, 1659.]

Mr. Flynn's expert opinion – that there was damage, even if minute, during the '98-'99 ASIC Policy period – is corroborated by ASIC's own admissions. On June 13, 2005, after having controlled the *RIP v. PHB* litigation for two years, ASIC wrote to PHB, saying: "Our information indicates that the first building upon which you worked was completed on July 22, 1999, triggering coverage under policy periods 9/19/98 to 9/19/1999 and 9/19/1999 to 9/19/2000, each policy with limits of \$1,000,000 per occurrence and a \$2,000,000 aggregate limit per policy year." [CP 403.] As party admissions under ER 802(d)(2), these statements would be sufficient standing alone to create at least a triable issue of fact precluding summary judgment.

4. ASIC Cannot Rely on Exclusion "j(6)".

Although it did not do so in its own motion for partial summary judgment, ASIC may argue on appeal that exclusion "j(6)" in the '98-'99 ASIC Policy precludes coverage.³ There are two reasons why the argument fails: (i) ASIC never reserved the right to rely on exclusion

³ ASIC raised exclusion j(6) in its opposition to Century's motion for summary judgment. [CP 617.] As mentioned in footnote 1, supra, exclusion j(6) bars coverage for property damage to "[t]hat particular part of any property that must be restored, repaired or replaced because 'your work' was incorrectly performed on it." The exclusion, however, does not apply "to 'property damage' included in the 'products-completed operations hazard.'" [CP 743.]

"j(6)", so it has been waived; and (ii) even if there had been no waiver, exclusion "j(6)" would not bar coverage here.

Generally-worded reservations of rights are disapproved. *Weber v. Biddle*, 4 Wn. App. 519, 483 P.2d 155, 159 (1971) Such reservations of rights are faulted for not stating the specific policy defenses upon which the insurer intends to rely. *Id.* ¶ Under *Weber*, Specialty Surplus's reservation of "all defenses," without more, is legally insufficient as a reservation of the scope-of-employment defense. [T]he insurer [is obliged] to inform the insured of developments relevant to his or her policy coverage. This clearly includes the obligation to inform the insured when it becomes clear that a specific coverage defense may be available, and particularly when the insurer determines that it will pursue that specific coverage defense.

Specialty Surplus Ins. Co. v. Second Chance, Inc., 412 F. Supp. 2d 1152, 1167-1168 (W.D. Wash. 2006).

ASIC issued two reservation of rights letters to PHB. In its first letter, dated July 22, 2003, ASIC acknowledged a potential for coverage and, therefore, a duty to defend under the '99-'00 ASIC Policy. It noted, however, that the complaint in *RIP v. PHB* presented coverage issues under that policy's insuring agreement and exclusions "k", "l" and "m". The July 22nd letter did not mention exclusion "j(6)". [CP 368-374.]

After defending the case for nearly two years and during the middle of the arbitration hearing, on June 13, 2005, ASIC issued a supplemental reservation of rights letter. In its June 13th letter, ASIC acknowledged a potential for coverage and, therefore, a duty to defend

under the '98-'99 ASIC Policy. ASIC again mentioned coverage issues arising out of the insuring agreement and exclusions "l" and "m", but, again, ASIC made no reference to exclusion "j(6)". [CP 403-408.]

ASIC's failure to mention exclusion "j(6)" in either of its reservation of rights letters is inexplicable. From the beginning, ASIC knew that RIP's claim against PHB was based on a contention that PHB had performed its work incorrectly. By the time of the June 13, 2005, supplemental reservation of rights letter, sent while the arbitration hearing was under way, ASIC knew the details of the alleged defects in PHB's work. Indeed, RIP had completed the presentation of its case-in-chief. [CP 1768.] ASIC also knew the completion dates of the nine buildings that comprised Phase I and it knew the dates of the temporary certificates of occupancy. [CP 409.] Thus, ASIC was obliged to notify PHB that it intended to rely on exclusion j(6) to preclude coverage under the '98-'99 ASIC Policy. By failing to do so, ASIC is deemed to have waived exclusion "j(6)".

Even if ASIC were not deemed to have waived it, exclusion "j(6)" does not exonerate the '98-'99 ASIC Policy. By its own terms, exclusion "j(6)" does not apply to claims that fall within the products-completed operations hazard. According to the policy, the "products-completed operations hazard:"

includes all . . . "property damage" occurring away from premises you own or rent and arising out of "your product" or "your work" except: . . . (2) Work that has not yet been completed or abandoned. However, "your work" will be deemed completed at the earliest of the following times: . . . (b) When all of the work to be done at the job site has been completed if your contract calls for work at more than one job site. (c) When that part of the work done at a job site has been put to its intended use by any person or organization other than another contractor or subcontractor working on the same project. Work that may need service, maintenance, correction, repair or replacement, but which is otherwise complete, will be treated as completed. [CP 1046.]

Here, the subcontract between RIP and PHB called for PHB to perform work on nine separate buildings in Phase I of the development. For each building, PHB was required to start its work on 2 days notice and to complete its work within 5 working days. [CP 672.] And each building received a separate temporary certificate of occupancy. [CP 409.] Thus, each building constitutes a distinct job site. And, upon issuance of the applicable temporary certificate of occupancy, each building was put to its intended use. Thus, exclusion "j(6)" has no application to property damage that resulted to building B after it was completed on July 22, 1999, or to building A after it was completed on August 3, 1999, or to building C after it was completed on August 13, 1999, or to building H after it was completed on August 28, 1999, or to buildings D and E after

they were completed on September 13, 1999, or to building G after it was completed on September 16, 1999. [CP 409.]

The definition of the "products-completed operations hazard" also disposes of any argument that PHB's work was not "completed" while it was continuing to perform repairs or warranty work. Thus, "work that may need service, maintenance, correction, repair or replacement, but which is otherwise complete, will be treated as completed." [CP 1046.]

C. ASIC Was Not Entitled to Summary Judgment Because There is At Least a Triable Issue of Fact as to Whether ASIC Breached Its Duty to Pursue Settlement.

Implicit in a liability insurance policy is an obligation to take reasonable steps to settle the claim. The duty requires proactive conduct by an insurer. It is not sufficient for an insurer simply to react to settlement demands made by a claimant.

The rule is clearly articulated in *Hamilton v. State Farm Ins. Co.*, 83 Wn.2d 787, 523 P.2d 193 (1974). As the court there held, "[i]f investigation of the circumstances and facts surrounding an accident disclose liability on the part of the insured, it is the affirmative duty of the insurer to make a good faith attempt to effect settlement." *Id.* at 791-792. In *Truck Ins. Exch. v. Century Indem. Co.*, 76 Wn. App. 527, 534, 887 P.2d 455 (1995), the court elaborated: "the insurer has an affirmative duty to make a good faith effort to settle the case. This includes an obligation

at least to conduct good faith settlement negotiations sufficient to ascertain the most favorable terms available and make an informed evaluation of the settlement demand." Furthermore, "[w]hen a settlement offer exceeds the primary insurer's policy limits, the insurer must communicate the offer to its insured, ascertain whether the insured is willing to make the necessary contribution to the settlement amount, and must exercise good faith in deciding whether to pay its own limits." *Id.*

The duty runs to the insured *and to any excess insurer*. *First State Ins. Co. v. Kemper Natl. Ins. Co.*, 94 Wn. App. 602, 610-611, 971 P.2d 953 (1999) ("the duty a primary insurer owes an excess insurer [to pursue settlement] is identical to that owed the insured"); *see Truck Ins. Exch. v. Century Indem. Co.*, *supra*, 76 Wn. App. at 533-534. The duty sounds in both "bad faith" and "negligence". *First State Ins. Co. v. Kemper Natl. Ins. Co.*, 94 Wn. App. at 612.

An insurer's breach of its duty to make a good faith attempt to settle renders it liable for damages proximately caused by that breach. *See First State Ins. Co. v. Kemper Natl. Ins. Co.*, *supra*, 94 Wn. App. 602; *Truck Ins. Exch. v. Century Indem. Co.*, *supra*, 76 Wn. App. 527. It also precludes the primary insurer from pursuing an action for contribution. *See Sequoia Ins. Co. v. Royal Ins. Co. of America*, 971 F.2d 1385, 1391-1392 (9th Cir. 1992) ("an insurer who breaches the implied covenant of

good faith and fair dealing by failing to settle a claim may not recover contribution for that portion of the loss that exceeded its limits").

The facts in *Truck Ins. Exch. v. Century Indem. Co.* are particularly instructive. Truck provided primary general liability insurance to Wilber Ellis Company ("WEC") with a limit of \$500,000 (of which only \$166,000 remained available). Century Indemnity provided excess insurance to WEC. Truck assumed WEC's defense. Before trial, the claimant offered to settle for \$3,500,000 and defense counsel opined that a likely outcome at trial would be an award of damages in the range of \$500,000 to \$1,500,000. 76 Wn. App. at 529. Truck did not respond to the settlement demand. Shortly before trial, Century Indemnity asked if Truck would release its limits to be offered with up to \$1,000,000 of Century Indemnity's own money. Truck did not do anything. *Id.* at 530. The trial resulted in a award against WEC of \$2,800,000, which was reduced to \$2,100,000 pursuant to a settlement while post-trial motions were pending. *Id.* Truck offered only its remaining policy limit toward the settlement, so Century Indemnity funded the balance and then sued Truck for damages based on the theory that Truck had breached its duty of good faith and fair dealing in failing to attempt to settle. In reversing the trial court order granting Truck's summary judgment motion, the court of appeals explained:

There is evidence [the claimant's] attorneys would have considered an offer of less than \$1 million, and Century would have been willing to make the necessary contribution to the settlement amount. Thus, a trier of fact could find Truck breached its duty to make a good faith effort to settle the case. The evidence is sufficient to present a triable issue of fact. Dismissal of Century's second cause of action on summary judgment was error." *Id.* at 534.

The same is true here. RIP demanded very significant sums to settle with PHB. For more than 2 years, ASIC made no settlement offer at all. [CP 1762.] During discovery, RIP produced expert reports showing a cost of repair attributable to PHB's deficient work of more than \$2,000,000. [CP 1683-1691, 1763.] In response, ASIC offered a mere \$50,000. Shortly before the arbitration began, ASIC received a demand for \$1,000,000. At the time, ASIC knew there was no chance of a defense verdict and believed RIP was willing to settle for \$500,000, which was an amount within the range of what defense counsel advised was a "likely" outcome of the arbitration. [CP 400, 527, 1715.] Indeed, RIP's counsel confirmed that a settlement in the range of \$225,000 - \$450,000 would have been "attractive" to RIP before the arbitration commenced. [CP 1728.] Once the arbitration commenced, ASIC knew the case was going poorly for PHB. [CP 1717, 1718.] ASIC, however, never offered more than \$100,000. And, ASIC never informed Century of any of these settlement discussions and, therefore, never provided Century with an

opportunity to participate in settlement discussions so as to avoid or minimize liability under its excess policy. [CP 313, 314.] In summary, ASIC breached its duty to both PHB and Century, as described in *Truck Ins. Exch. v. Century Indem. Co., supra*, by: (i) failing to make an effort to "ascertain the most favorable terms available;" (ii) failing to communicate excess-of-limits demands to Century; and (iii) failing to ascertain whether Century "was willing to make the necessary contribution" to an excess-of-limits settlement.

In its motion, ASIC argued that the trial court could summarily adjudicate the bad faith claim because PHB (through its personal counsel), did not demand that ASIC accept RIP's \$1,000,000 demand. This ignores the fact that, at the time, ASIC had told PHB in writing that *both* ASIC primary policies, with a combined limit of \$2,000,000, were available to pay any judgment. In light of that, PHB had no reason to push ASIC to accept the \$1,000,000 demand or to make a sizable offer so as to test RIP's "bottom line." As PHB's counsel stated, however, "If [she] had been told that [ASIC] was taking the position that only one policy year was available, then [her] response to RIP's settlement demand of one million dollars prior to the arbitration would have been different." [CP 1739.]

ASIC also argued that it did not breach its duty because RIP "never expressed a willingness to settle for amounts as low as \$450,000 – an

amount PHB was willing to settle for." [CP 911.] This argument rests on a misperception of an insurer's duty. With respect to the duty to settle, an insurer may not play a merely passive role. As stated in *Hamilton v. State Farm, supra*, an insurer has "an affirmative duty . . . to make a good faith attempt to effect settlement." 83 Wn.2d at 792. This includes the affirmative duty "to ascertain the most favorable terms available." *Truck Ins. Exch. v. Century Indem. Co., supra*, 76 Wn. App. at 534. It is uncontroverted that, although ASIC believed RIP would accept as little as \$500,000, ASIC never offered more than \$100,000 and, therefore, never ascertained how low RIP was actually willing to go. Moreover, it is also uncontroverted that, had ASIC made a pre-arbitration offer in the range of \$225,000 to \$450,000, RIP would have found it "attractive". [CP 1728.]

The evidence shows, as a matter of law, that ASIC breached its duty with respect to settlement negotiations. For purposes of ASIC's summary judgment motion, however, the test was not whether Century is entitled to judgment as a matter of law but, rather, whether there is an absence of a triable issue of fact. An insurer's bad faith failure to settle typically presents a question of fact. *St. Paul Fire & Marine Ins. Co. v. Onvia, Inc.*, 165 Wn.2d 122, 130, 196 P.3d 664 (2008). "It is the factual situation which is significant, in light of the duty which exists, and in the ordinary case the trier of fact must make the determination of liability and

nonliability." *Hamilton v. State Farm, supra*, 83 Wn.2d at 792. At a minimum, ASIC has failed to prove the absence of a triable issue of fact concerning its handling of settlement negotiations with RIP. *See Sequoia Ins. Co. v. Royal Ins. Co. of America, supra*, 971 F.2d at 1393 (in an action for contribution brought by a primary insurer against an excess insurer, evidence of the primary insurer's breach of duty to accept reasonable policy limit demands precluded summary judgment in favor of the primary insurer).⁴

D. ASIC Has No Right to Recover Its Attorney Fees From Century.

If, as shown above, the summary judgment in favor of ASIC must be reversed, its attorney fee award will necessarily fail. However, even if ASIC were entitled to judgment, the attorney fee award must still be reversed.

In Washington, a court has no power to award attorney fees as a cost of litigation in the absence of an applicable provision of a contract, statute, or a recognized ground in equity providing for fee recovery. [Cite.] *Olympic Steamship* provides such an equitable ground: that an insured successfully suing an insurer to obtain coverage may also recover reasonable attorney fees necessarily

⁴ *Sequoia Ins. Co. v. Royal Ins. Co.* rejects ASIC's assertion that an excess insurer must first pay the claim in order to have standing to complain of the primary insurer's "bad faith": "To require an excess insurer defending a subrogation action first to pay the plaintiff primary carrier, and then institute yet another subrogation action to recover that payment from the primary carrier, would be an unjustifiable waste of judicial resources. ¶ Moreover, the law of subrogation indicates that a primary insurer's bad faith refusal to settle is properly raised defensively by an excess carrier in an action such as this." 971 F.2d at 1391.

incurred in the endeavor. [Cite.] There is no question that, under *Olympic Steamship*, "assignees of the insured may recover fees if they are compelled to sue an insurer to secure coverage." [Cite.] ¶[However,] [t]he rule of *Olympic Steamship* has never been extended to include equitable contribution claims between insurers. No such extension is warranted.

Polygon, supra, 143 Wn. App. at 795-796.

The insured in *Polygon* was a property developer that had been sued for construction defects. Several of its primary and excess insurers funded a large settlement and then sought to reapportion liability among themselves and to compel another insurer to contribute. 143 Wn. App. at 764-765. The court concluded that the primary insurer – Assurance – had paid more than its policy limit and ordered excess insurers to reimburse it. *Id.* at 789-790. Assurance then asked for an award of its attorney fees based on *Olympic Steamship*. *Id.* at 794. Finding that Assurance had brought the action as the insured's assignee, the trial court awarded Assurance its attorney fees. The court of appeals held this was error, saying:

the trial court erred by awarding *any* attorney fees related to the equitable contribution action. [A]ll of Assurance's claims in this action . . . are equitable contribution claims, *not* claims based on any assignment of rights by Polygon. ¶Assurance's claims were claims for equitable contribution against jointly liable coinsurers—claims that arise from the rights of the overpaying insurer, *not* from the rights of the insured. The "right of equitable contribution belongs to each insurer individually. It is not based on any right of

subrogation to the rights of the insured, and is not equivalent to 'standing in the shoes' of the insured." *Id.* at 794-795.

The holding in *Polygon* makes good sense. The purposes of the *Olympic Steamship* rule are to address the "disparity of bargaining power between an insurance company and its policyholder" and to honor the insured's expectation that, by purchasing insurance, he is buying "protection from expenses arising from litigation, not "vexatious, time-consuming, expensive litigation with his insurer."" *McGreevy v. Oregon Mut. Ins. Co.*, 128 Wn.2d 26, 35, 904 P.2d 731 (1995). Those purposes are not served in an action to apportion a loss between two insurers. There is no "disparity of bargaining power" between insurers, and neither bargained with the other to avoid litigation. Indeed, neither contracted with the other at all. For contribution actions, therefore, there is no reason to craft an exception to the "American Rule" that precludes the award of attorney's fees absent a contract, statute or recognized principle of equity. *Dayton v. Farmers Ins. Group*, 124 Wn.2d 277, 280, 876 P.2d 896 (1994).

The *Polygon* holding applies here. This is a dispute between two insurers of a common insured. Just as Assurance did in *Polygon*, ASIC – the primary insurer – contends that it overpaid the claim and that it is entitled to contribution from the excess insurer, Century. This is an

insurer vs. insurer contribution action rather than an insured vs. insurer breach of contract/coverage action.

It is notable that the two pivotal issues both concern ASIC rather than Century. If, after paying the judgment, ASIC had sued PHB for reimbursement and had succeeded in proving that there was no coverage under the '98-'99 ASIC Policy and that it had not mishandled settlement negotiations, ASIC clearly would have had no right to attorney fees under *Olympic Steamship*. See *McGreevy v. Oregon Mut. Ins. Co.*, 128 Wn.2d at 37-38 (the rule of *Olympic Steamship* is one-sided and does not allow a prevailing insurer to recover its attorney fees from the insured). There is no public policy reason why ASIC should be allowed to recover its attorney fees here merely because it chose to litigate issues of coverage under the '98-'99 ASIC Policy and ASIC's claim handling with Century rather than with PHB.

To support its invocation of *Olympic Steamship*, ASIC seeks to characterize this as a subrogation action. However, as was true for Assurance's claim in *Polygon*, ASIC's claim against Century exists independent of any assignment of rights from PHB. As the *Polygon* court held: "[t]he 'right of equitable contribution belongs to each insurer individually. It is not based on any right of subrogation to the rights of the insured, and is not equivalent to 'standing in the shoes' of the

insured." 143 Wn. App. at 795. ASIC's own complaint reflects this reality when it asserts that this action is brought by ASIC "in its own right and as assignee of PHB." [CP 449.] The *Polygon* court refused to allow an insurer to avoid the "American Rule" (precluding recovery of attorney's fees) by joining a subrogation claim to its contribution claim. The same result should obtain here.

McRory v. Northern Ins. Co. of New York, 138 Wn2d 550, 980 P.2d 736 (1999), does not compel a contrary result. There, the action was brought by the insured. The defendant insurer argued that, because the litigation was being funded by another insurer, the insured had no right to recover fees under *Olympic Steamship*. The court disagreed, explaining that "[a]ny reimbursement arrangement between McRory and third persons for attorney fees and other costs of litigation advanced to McRory is outside the purview of a decision to award attorney fees under *Olympic Steamship*." *Id.* at 561. Here, PHB is not the plaintiff, ASIC is.

Furthermore, although the *McRory* court acknowledged that an insurer, in theory, could recover *Olympic Steamship* attorney fees as the insured's assignee, there are at least two reasons why ASIC cannot proceed as PHB's assignee. First, PHB assigned only existing claims and, at the time the settlement agreement was executed, PHB had no *Olympic Steamship* rights against Century to assign to ASIC. As of the date of the

settlement agreement, PHB had not incurred attorney fees pursuing coverage from Century. Indeed, PHB contended that coverage for the entire arbitration award was owed *by ASIC*. [CP 1739.]

Second, because the settlement agreement does not specify what payment ASIC made as consideration for the assignment, ASIC did not and cannot carry its burden of proving what portion of the settlement is attributable to Century for which ASIC has a subrogation right. By failing to apportion its payment among the various items of consideration it received, ASIC is deemed to have waived its subrogation right against Century. *See Essex Ins. Co. v. Heck*, ___ Cal. App. 4th ___, ___ Cal. Rptr. 2d ___ (2010) (2010 Cal. App. LEXIS 1256).

In *Essex Ins. Co. v. Heck*, Essex defended Abraham in a premises liability action brought by Dompeling. Dompeling prevailed at trial, but Essex refused to pay the judgment, so Dompeling sued Essex to recover his judgment under Essex's liability policy. 2010 Cal. App. LEXIS 1256 at 6-7. Dompeling's complaint included claims for bad faith, breach of contract and fraud. Essex and Dompeling settled their dispute, with Dompeling releasing Essex of all claims and causes of action. *Id.* Essex then brought a subrogation action against a doctor whose conduct allegedly contributed to Dompeling's injuries. The trial court granted the

doctor (Heck) summary judgment, which the court of appeal affirmed. *Id.*

at 12-13. The court explained:

[I]n order to prevail on its subrogation claim, Essex must prove that it compensated its insured for the same loss for which Dr. Heck is liable. . . . Since Dompeling and Essex settled the personal injury action, however, there is no longer a judgment in that case. Instead, Essex paid Dompeling \$700,000 pursuant to the settlement agreement to settle not only the personal injury action, but also . . . the bad faith action. Thus, to prevail, Essex must prove that its settlement included payment to Dompeling for his personal injury damages on behalf of its insured . . . and the amount it paid ¶ [T]he settlement agreement encompassed more than Essex's compensation to Dompeling for his personal injuries, as it released other claims and parties. Despite this, the settlement agreement did not specify which portion of the \$700,000 settlement was paid to settle which claim Without such specifications, the agreement left unsettled into whose shoes Essex was stepping . . . and what was being paid to compensate each claim. ¶ Essex . . . asserts the record contains no evidence that it engaged in any misconduct that would have subjected it to bad faith liability. Essex admits, however, the relevant issue "is whether any value was paid to settle the claims at the time of the settlement agreement, not whether there are now valid and provable claims of bad faith against Essex" Thus, by Essex's own admission, whether it actually committed misconduct is irrelevant here. ¶ [W]e agree with the trial court that Essex has failed to preserve any claim that it may have against Dr. Heck based on equitable subrogation. *Id.* at 18-30.

The facts here are similar in all material respects. ASIC defended its insured in a liability suit. When judgment was entered, ASIC refused to pay it. The judgment creditor (RIP) brought a direct action against ASIC to recover on the judgment. Claims of "bad faith" and claims for

attorney fees were also asserted. The judgment ultimately was replaced by a settlement. Under the terms of the settlement, ASIC compromised all claims for a lump sum payment without any apportionment. It is impossible to know, therefore, how much ASIC paid toward the judgment versus how much it paid to avoid its "bad faith" exposure or liability for attorney fees or post-judgment interest. Thus, even if ASIC had succeeded in limiting its coverage to the '99-'00 ASIC Policy, ASIC did not and could not prove what portion of the settlement is attributable to Century's liability under its excess policy versus what portion was paid to avoid ASIC's extra-contractual liability. Accordingly, it did not and cannot prove the predicate – status as an assignee – to recover *Olympic Steamship* attorney fees.

E. The Attorney Fee Award Is Excessive.

The award of attorney fees involves the discretionary application of legal principles. *Bowers v. Transamerica Title Ins. Co.*, 100 Wn.2d 581, 593-601, 675 P.2d 193 (1983). Errors of law made in the course of a trial court's exercise of discretion are subject to *de novo* review. *Gildon v. Simon Property Group, Inc.*, 158 Wn.2d 483, 493, 145 P.3d 1196 (2006). Errors in the exercise of discretion are subject to review for abuse. *Id.*

"A court abuses its discretion when its decision is manifestly unreasonable, or exercised on untenable grounds or for untenable

reasons." *Gildon v. Simon Property Group, Inc., supra*, 158 Wn.2d at 494. "Abuse of discretion is found if the trial court relies on unsupported facts, takes a view that no reasonable person would take, applies the wrong legal standard, or bases its ruling on an erroneous view of the law."

Id.

In *Bowers v. Transamerica Title Ins. Co., supra*, the court reviewed an attorney fee award made pursuant to RCW 19.86.090.⁵ The dispute concerned Transamerica's liability for failing to advise plaintiffs to secure a purchase money loan with a security interest in the property they were selling. The jury concluded the value of the property was \$33,000, and they awarded plaintiffs damages in that amount. The court then awarded plaintiffs \$42,805 in attorney fees, plus costs of \$3,673. 100 Wn.2d at 585. The court of appeals reversed the fee award. Noting first the importance for trial courts to "articulate the reasons for fee awards so as to render those awards susceptible to appellate review" (*id.* at 595), the court held:

⁵ There is reason to doubt that the rules for computing statutory attorney fee awards should apply to fees awarded under *Olympic Steamship*. The purpose of the Consumer Protection Act fee provision "is to encourage deserving litigants to seek judicial relief in order to vindicate consumer rights." *Bowers v. Transamerica Title Ins. Co., supra*, 100 Wn.2d at 606 (Dimmick, J., concurring and dissenting). The purpose of the *Olympic Steamship* rule is to make the insured "whole". *McGreevy v. Oregon Mut. Ins. Co., supra*, 128 Wn.2d at 40. Because the aim is to make the insured whole, an award of fees under *Olympic Steamship* logically should never be more than the amount actually incurred by the insured.

- "[T]he contingency adjustment is designed solely to compensate for the possibility . . . that the litigation would be unsuccessful and that no fee would be obtained.' Therefore, the risk factor should apply only where there is no fee agreement that assures the attorney of fees regardless of the outcome of the case." 100 Wn.2d at 601 (citation omitted).
- In calculating the number of hours reasonably expended, it was error to disregard evidence of duplication of work. "The starting point for the calculation of the lodestar is the number of hours reasonably expended in the litigation. In calculating this figure, the court must discount any duplicated or wasted effort by the attorneys. The attorney's efficiency, his ability to produce the results in the minimum time, is a factor which will be reflected by the reasonable hourly rate. It is therefore unnecessary to consider the attorney's efficiency in determining the number of hours reasonably expended." 100 Wn.2d at 599-600.
- When "[n]othing in the record suggests that the quality of the work performed by plaintiffs' counsel was significantly better than could be expected from attorneys who commanded the hourly rates used to calculate the lodestar . . . [n]o adjustment should be made for the quality of work." 100 Wn.2d 601.

The court below granted ASIC all of the attorney fees and costs it sought without deduction. It signed the proposed order submitted by ASIC without any modification. In doing so, it abused its discretion in several ways.

First, the court improperly applied a contingency multiplier to the lodestar number. [CP 2638 (§26).] ASIC's counsel's fee agreement called for payment of a substantial hourly fee with a contingency bonus.

[CP 2631.] Thus, there was never any prospect ASIC's counsel would receive *no* compensation in this litigation. According to *Bowers v. Transamerica Title Ins. Co.*, no contingency adjustment can be made in this circumstance.

Second, the court improperly applied a "quality of work" multiplier. [CP 2638 (¶26)] The hourly rate used in the lodestar computation (\$325 for partners, \$235 and \$215 for associates and \$155 for paralegals) presumes ASIC's counsel performed according to the standards of other attorneys charging those rates. There was no showing that the quality of ASIC's counsel was significantly better than such attorneys. Accordingly, application of a multiplier based on "quality of work" is not supported by the evidence.

Third, the court failed to deduct for duplicative or excessive work. The record contains numerous examples of work included in the lodestar hours that was unreasonable: (1) Counsel "block billed" their time, so it is impossible to know how much time was spent on any particular task. However, it appears they spent 377 hours in "conferences" and "team meetings." [CP 2396.] (2) Counsel apparently billed 1,000 hours for summary judgment motions. This is the equivalent of a lawyer working full time for nearly 7 months (assuming an 1800 hour year). [CP 2395.] (3) Counsel billed 14.4 hours to "take deposition of . . . M. Hart" even

though the deposition lasted less than 5 hours. [CP 2397.] (4) Counsel billed 9 hours to "take deposition of J. Olsen" even though the deposition lasted less than 2.5 hours. [CP 2397.] (5) Paralegals billed substantial time – at \$155 an hour – for clerical work. [CP 2398.] (6) Counsel included 272 hours (\$50,776) for work related to its unsuccessful assertion of privilege to documents requested by Century. [CP 2399.] (7) Counsel included 144 hours (\$31,400) for work performed before this action was commenced. [CP 2400.]

VI. CONCLUSION

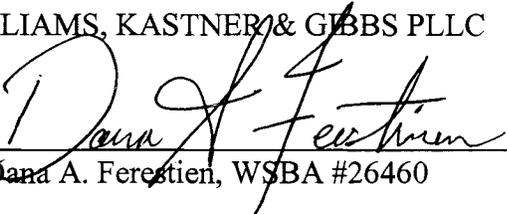
Primary insurer ASIC controlled the defense of RIP's litigation against PHB. It retained defense counsel. It decided when and if to make settlement overtures. It led PHB to believe there were two ASIC policies, with a combined limit of \$2,000,000 available to protect PHB against a judgment. It disregarded its own and defense counsel's anticipation of a substantial judgment against PHB, and offered a measley \$100,000 in settlement. After judgment was entered against PHB, ASIC did not even tender the limit of one of its policies and, instead, forced RIP to commence a collection action. Then ASIC settled contractual and extra-contractual claims against it without apportioning the sum to any particular claim. Based on this record, ASIC was not entitled to summary

judgment or an award of attorney fees. Accordingly, the judgment of the court below must be reversed.

RESPECTFULLY SUBMITTED this 11th day of August, 2010.

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