No. 101585-2

SUPREME COURT
OF THE STATE OF WASHINGTON

No. 82704-9-I

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

T-MOBILE USA, INC.,

Respondent,

v.

STEADFAST INSURANCE COMPANY and ZURICH AMERICAN INSURANCE COMPANY,

Petitioners.

PETITION FOR REVIEW

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A. Identity of Petitioner and Decision Below.

Petitioner Steadfast Insurance Company seeks review of the Court of Appeals November 28, 2022 opinion affirming partial summary judgment in favor of respondent T-Mobile USA, Inc., attached as the appendix to this petition.

B. Issue Presented for Review.

Steadfast and T-Mobile negotiated an indemnity policy, under which T-Mobile was responsible for managing and paying any loss for privacy breaches up to a $10 million self-insured retention ("SIR") at its own risk; the policy also excluded from the definition of "loss" any sums T-Mobile was absolved by agreement from paying. Does T-Mobile's recovery of $10.75 million from the party responsible for a privacy breach reduce its claimed $17.3 million loss to an amount within the $10 million SIR?

C. Statement of the Case.

1. T-Mobile agreed that it would bear $10 Million in privacy breach losses at its own risk before Steadfast was obligated to pay under an indemnity policy.

Steadfast and T-Mobile agreed to the terms of a Professional, Technology and Media Liability Insurance Policy providing coverage for "Privacy Breach Costs" incurred by T-Mobile up to a limit of $15 million, subject to a "Self-Insured Retention" ("SIR") of $10 million per claim. (CP 219) The SIR required T-Mobile to self-insure for the first $10 million in loss, expressly providing that Steadfast has no indemnity obligation unless and until T-Mobile's loss exceeded $10 million:

> The **Underwriter's** liability for **Loss** on account of each **Claim** or **Privacy Event** shall apply only to that part of such **Loss** in excess of the applicable Self-Insured Retention for each Insuring Agreement, as shown in item 4 of the Declarations. *The portion of the **Loss** within the Self-Insured Retention shall be borne by the **Insureds** at their own risk.* The **Underwriter** shall have no obligation for any **Loss** within such Self-Insured Retention.

(CP 236) (bold in original; italics added)

The policy defines **"Loss"** as "the total amount which the **Insureds** become legally obligated to pay," "including but not limited to damages, judgments, pre-judgment and post-judgment interest, settlements and **Defense Costs."** (CP 228) (bold in original) The policy provides that a "Loss" is measured at the time T-Mobile incurs an obligation, not at the time of the underlying data breach or "Privacy Event," and that a subsequent agreement that absolves T-Mobile of any amount owed reduces or eliminates a "Loss" by that amount, by specifically excluding from the definition of **"Loss"** "any amount for which the **Insureds** are absolved from payment by any covenant, agreement, or court order." (CP 228) (bold in original)

Under a "Conversion to Indemnity Policy Endorsement," T-Mobile had the right to (and did) control the defense of privacy breach claims. (CP 243, 280)

Although T-Mobile had the obligation not to settle any Claim for which Steadfast might have to indemnify it without obtaining Steadfast's written consent, T-Mobile had the sole and absolute right to select defense counsel, incur defense costs, or settle within the SIR without Steadfast's consent:

> The **Insureds** agree not to offer to settle or to settle any **Claim**, incur any **Defense Costs, Privacy Breach Costs** . . . or otherwise assume any contractual obligation, admit any liability or stipulate to any judgment with respect to any **Claim** without the **Underwriter's** written consent, which shall not unreasonably be withheld. . . . However, such consent shall not be required if the aggregate **Loss** is equal to or less than any applicable Self-Insured Retention.

(CP 243) (bold in original)

2. T-Mobile's credit contractor, Experian, suffered a privacy breach. T-Mobile sought indemnity from Experian, then tendered a claim to Steadfast.

T-Mobile contracted with the credit reporting company Experian to provide credit application services to

T-Mobile's customers. (CP 408-520) Experian suffered a data breach resulting in the unauthorized release of personal data for roughly 15 million customers who had applied to T-Mobile for financing services. (CP 81-82)

In September 2015, T-Mobile demanded that Experian indemnify T-Mobile from any expenses, defense costs and anticipated claims from T-Mobile customers or federal and state regulators. (CP 522-23) One month later, in October 2015, T-Mobile tendered a claim based on the same data privacy breach to Steadfast, attaching complaints in three class-action lawsuits. (CP 89-90, 269-70)

Steadfast preliminarily accepted the tender while reserving other defenses to coverage not at issue on review, reminding T-Mobile that it had agreed to self-insure and manage its own risk up to $10 million: "[T]he Policy contains a Retention Amount of $10,000,000 for Security and Privacy Liability Coverage . . . Such Retention shall be borne by the **Insureds** uninsured and at their own risk." (CP 279, 281) (bold in original) Steadfast also asked to be updated "concerning any indemnification obligations on the part of Experian or any other entity involved in this breach . . . [and] information on the scope of the indemnification provided by Experian, if any." (CP 281)

T-Mobile exercised its right to manage its own defense, pursuing its indemnity rights against Experian, but ignored Steadfast's request for updates through the remainder of 2015. T-Mobile reported its expenses to Experian in November 2015 and again in January, February, and March 2016. (CP 560-672) On March 14, 2016, T-Mobile initiated arbitration proceedings to enforce Experian's contractual indemnification obligations. (CP 1576-1603)

T-Mobile reported to Steadfast $7.8 million in claimed loss as of June 30, 2016 (CP 109-11), and $11.2 million as of January 31, 2017, from private lawsuits and regulatory proceedings related to the privacy breach. (CP 93-96) Steadfast asked for supporting documentation of T-Mobile's loss in May 2017. (CP 113) Months passed, but T-Mobile did not provide that documentation even though on August 22, 2017, T-Mobile finalized a settlement of its indemnification claims against Experian. (CP 1563-74)

Experian paid T-Mobile $10.75 million in return for a dismissal of the pending arbitration and a full release of T-Mobile's claims against Experian in connection with the data breach. (CP 1563) T-Mobile did not disclose the settlement agreement with Experian to Steadfast when it was reached, or until almost 18 months later. (CP 123) And when, on July 13, 2018, T-Mobile finally responded to Steadfast's May 2017 request for documentation of its claim, it did so by sending Steadfast invoices totaling over $16.4 million (CP 151-55)—the same invoices T-Mobile had relied upon in reaching its settlement agreement with Experian absolving it of $10.75 million in claims. (CP 160)

In finally providing documentation to support a purported loss exceeding $17 million for the privacy breach, T-Mobile still did not disclose to Steadfast that Experian had almost a year earlier paid T-Mobile $10.75 million, thereby reducing T-Mobile's out-of-pocket losses to an amount well below the $10 million SIR. T-Mobile did not advise Steadfast of the $10.75 million payment from Experian until February 14, 2019, three weeks before it sued Steadfast in the instant action. (CP 123-25)

3. T-Mobile claimed that the $10.75 million recovered from Experian did not reduce its loss subject to the SIR.

On March 4, 2019, T-Mobile began this action in King County Superior Court against Steadfast for breach of contract, declaratory judgment, insurance bad faith, and violation of the Insurance Fair Conduct Act and the Consumer Protection Act. (CP 128-30)

In its Complaint, T-Mobile claimed it had incurred $17.3 million in recoverable loss resulting from the

Experian data breach, but once again did not mention the $10.75 million it had received from Experian. (CP 1-7) In its Answer, Steadfast maintained that the amounts sought by T-Mobile "are within the self-insured retention under the insurance policy . . . and Plaintiff has not satisfied that self-insured retention." (CP 15)

4. The Court of Appeals held that T-Mobile's indemnity recovery of $10.75 million did not reduce the amount of T-Mobile's loss subject to the SIR.

King County Superior Court Judge Josephine Wiggs-Martin ("the trial court") granted T-Mobile's motion for partial summary judgment and denied Steadfast's motion for summary judgment, deciding as a matter of law that T-Mobile is entitled to seek coverage from Steadfast. (CP 396-401) The trial court then entered an order certifying its summary judgment ruling for discretionary review under RAP 2.3(b)(4) as an issue of first impression. (CP 402-05) After granting review, the Court of Appeals affirmed in a November 28, 2022 unpublished decision. (Appendix)

D. Why This Court Should Grant Review.

T-Mobile exercised its right under the parties' indemnity policy to self-insure and manage its own risk up to $10 million, which T-Mobile agreed to bear at its own risk. By enforcing its right to indemnity against Experian, T-Mobile reduced its claimed $17.3 million loss from Experian's privacy breach to an amount less than $10 million, the amount of the SIR it had agreed to retain "at its own risk." In allowing T-Mobile to nonetheless claim $7.3 million from Steadfast, despite having been absolved from paying $10.75 million by its agreement with Experian, the Court of Appeals did not give effect to the plain language of the parties' indemnity policy, requiring Experian to pay T-Mobile for a "loss" from which it was partially absolved by virtue of Experian's payment.

The Court of Appeals decision defeats both the letter and purpose of this indemnity policy, under which Steadfast stands as an excess insurer above T-Mobile's self-insured risk of $10 million. T-Mobile, which negotiated the right to manage its own risk, and controlled the timing and means of reducing its losses, all undertaken without notice to Steadfast, is not an insured under a liability policy with a small deductible and the right to be "made whole" under the equitable subrogation principles cited by the Court of Appeals are inapplicable here. The obligations of sophisticated corporations such as T-Mobile that choose to self-insure under negotiated indemnity policies by agreeing to maintain a substantial SIR presents an issue of substantial public concern that this Court should resolve. RAP 13.4(b)(4).

1. The Court of Appeals failed to give effect to the plain language or manifest intent of the indemnity policy, because T-Mobile's "loss" was reduced by Experian's payment of $10.75 million.

The plain language of the parties' indemnity policy excludes from the definition of "loss" all amounts that T-Mobile was absolved from paying by virtue of Experian's agreement. The Court of Appeals purported to apply a "plain and ordinary" definition of the policy language (Op. 5), but its view that a "loss" is not reduced by amounts Experian paid as indemnity gave an unreasonable definition to the policy language and ignored the purpose of the $10 million SIR. *See Xia v. ProBuilders Specialty Ins. Co.*, 188 Wn.2d 171, 177, ¶11, 400 P.3d 1234 (2017) (court must consider in addition to policy's plain language its underlying purpose).

The policy defined "loss" as the "total amount [T-Mobile] become[s] legally obligated to pay," excluding "any amount for which the Insureds are absolved from payment by any covenant, agreement or court order." (CP 228) Because Experian, under its settlement agreement with T-Mobile, was "solely responsible for any losses incurred by T-Mobile" (CP 1624), Experian "absolved" T-Mobile of $10.75 million from its claimed $17.3 million in losses when it fulfilled its indemnity obligation. Under the terms of the indemnity policy, T-Mobile's SIR did not include amounts it was "absolved" from paying. (CP 228)

The Court of Appeals erroneously reasoned that Experian's $10.75 million payment did not "absolve" T-Mobile of any portion of its loss because "it did not set free or release T-Mobile from its obligation to pay the costs and expense that it incurred from the data breach." (Op. 7) The Court of Appeals properly looked to dictionary definitions of "absolve" as an undefined term in the indemnity policy. But the Court of Appeals erred in adopting an overly narrow definition of the word in aid of a circular definition of the term that in effect read the SIR out of the indemnity policy. *See Seattle Tunnel Partners v. Great Lakes Reinsurance (UK) PLC*, 200 Wn.2d 315, 323-24, ¶¶15-17, 516 P.3d 796 (2022) (reviewing several dictionary definitions to interpret policy terms).

The Court of Appeals cited Webster's (Op. 7), but failed to recognize that Webster's definition of "absolve" includes freeing one not just from an *obligation,* but also from its *consequences.*[1] Where, as here, another party agrees to take responsibility for an error for which one is accused, that party's agreement absolves one of the consequences of that error.

Moreover, the Court of Appeals ignored that T-Mobile's right to indemnity from Experian directly reduced its "loss" within the meaning of the indemnity policy. Had

[1] *See* Merriam Webster Online Dictionary, available at https://bit.ly/3jBMlS4 ("Absolve" means to "to set (someone) free from an obligation or the consequences of guilt."); *see also* Collins Online Dictionary, available at https://bit.ly/3C66qq9 (absolve means "to free from guilt or blame or their consequences").

Experian accepted T-Mobile's tender of indemnity in September 2015 (CP 522-23), and taken directly the corrective action that T-Mobile demanded "at [Experian's] sole cost and expense" in early 2016 (CP 561), there would be no question that T-Mobile's "loss" would have been significantly reduced. Experian, not T-Mobile, would have paid for defense counsel, technical consultants and the other expenses for which T-Mobile sought indemnity. That T-Mobile chose to pay these expenses directly and then seek to recover them from Experian through arbitration is a distinction without a difference for purposes of determining T-Mobile's "loss" under the policy. Indeed, T-Mobile had the best of both worlds: it was able to completely control its defense, and then not only recover (*i.e.,* been absolved from) those expenses in its settlement with Experian, but rely upon them as part of its SIR in seeking indemnity from Steadfast.

Experian's fulfillment of its indemnity obligation freed ("absolved") T-Mobile from $10.75 million of financial consequences of the data privacy breach. The Court of Appeals' refusal to consider Experian's indemnity payment to T-Mobile in its calculation of "loss" did not give effect to the plain meaning of the policy.

2. The Court of Appeals' refusal to consider Experian's $10.75 indemnity payment in calculating T-Mobile's loss under the policy thwarted the parties' agreement.

The Court of Appeals' refusal to recognize that Experian's indemnity payment absolved T-Mobile of $10.75 million in consequences for the data privacy breach is wrong given the nature and purpose of this policy, in which T-Mobile agreed to "bear at its own risk" $10 million in losses before Steadfast's indemnity obligation was triggered. The Court of Appeals failed to consider the nature of a multimillion-dollar SIR that gave T-Mobile, a sophisticated insured, the negotiated right to manage its risk in exchange for the concomitant obligation to "bear at its own risk" $10 million in "loss." The insured's obligation to reduce its losses under a substantial negotiated SIR presents an issue of substantial concern to insurers, insureds, and those advising them. RAP 2.3(b)(4).

This was not a standard liability policy, in which the insurer has a duty to defend any claims at its sole expense, and then to pay damages up to its limits, less any deductible. To the contrary, Steadfast had no obligations until and unless T-Mobile incurred losses in excess of the $10 million SIR, while T-Mobile exercised absolute control over the defense and payment of losses that did not exceed the SIR. Under this indemnity policy, T-Mobile had both the right and obligation to control the defense and management of any claims, including the privacy breaches caused by Experian, within its $10 million SIR.

The purpose of an SIR is to allow the insured to retain, or self-insure, a portion of the risk in exchange for control of the claim and a reduction in premiums. Michael A. Hamilton & Michael Murphy Jr., *SIRS and Deductibles – Evolving Policies and Their Impact on Carrier Duties*, 78 Def. Couns. J. 411, 413 (2011); *see Bordeaux, Inc. v. Am. Safety Ins. Co.*, 145 Wn. App. 687, 696, ¶18, 186 P.3d 1188 (2008) ("self-insurance involves risk retention"), *rev. denied*, 165 Wn.2d 1035 (2009). T-Mobile's $10 million SIR "represents the amount of the loss that the insured is responsible for before coverage can exist." *In re Feature Realty Litigation,* 634 F. Supp.2d 1163, 1169-70 (E.D. Wash. 2007); *see Ohio Cas. Ins. Co. v. Chugach Support Servs., Inc.,* No. C10–5244 RBL, 2011 WL 4352147*,* *5 (W.D. Wash. Sept. 16, 2011) (unpublished, cited per GR 14.1) (insured bears responsibility for SIR before insurer's coverage duties are in force).

"[A]n insured with an SIR serves as its own primary insurer, i.e., it assumes the responsibility to defend itself and pay any losses that fall within the SIR." Seth Lamden, Iain A.W. Nasatir, *The Rights and Duties of Insurers and Insureds Under Self-Insured Retentions,* Brief, 44 (Fall 2020). Until the SIR is satisfied, the self-insured policyholder independently manages its own risk, investigating claims, controlling its defense, and (as T-Mobile did here) pursuing indemnity or contribution rights wholly independent of its contractual rights under an insurance policy. (*See* CP 243)

By allocating the first portion of a loss to the policyholder, the SIR should give a policyholder greater incentives to avoid or minimize a loss than under a standard third party liability policy. And by retaining the right to control the defense and settlement of smaller claims, the insured may keep those smaller claims out of its experience rating, lowering its premiums in the future, as well. Hamilton, 78 Def. Couns. J. at 413. Indeed, the existence of an SIR alone recognizes the insured's willingness and ability to absorb a portion of its loss in exchange for the right to control defense and settlement within the SIR.

The Court of Appeals decision, however, distorts these predictable incentives and encourages gamesmanship. Rather than prudently managing risk within a self-insured retention, policyholders may now be encouraged to seek indemnity from a responsible party only after it has incurred costs in excess of its retention. The Court of Appeals decision effectively transforms a policy with substantial self-insured retention into a policy with first dollar coverage, encouraging a sophisticated insured to control its defense and prosecution of claims against third parties, all without notification to its insurer, and then claim that its "loss" is calculated without regard to amounts it has been absolved from paying by its settlement with third parties.

Just as an excess insurance policy "provides coverage only after the primary coverage is exhausted," *Quellos*

Grp., LLC v. Fed. Ins. Co., 177 Wn. App. 620, 634, ¶31, 312 P.3d 734 (2013) (quoted source omitted), a primary insurer's obligations under a policy with an SIR are only triggered once the insured incurs losses that exceed the amount it agreed to retain under an SIR. Windt, 3 *Insurance Claims and Disputes* § 11:31 (6th ed.). Under the unambiguous terms of the policy here, Steadfast stands in the same position as an excess insurer does with respect to a primary policy. *Odessa Sch. Dist. No. 105 v. Ins. Co. of Am.*, 57 Wn. App 893, 903, 791 P.2d 237 ("the self-insurance retention constitutes primary coverage"), *rev. dismissed,* 115 Wn.2d 1022 (1990); *Pac. Emps. Ins. Co. v. Domino's Pizza, Inc.,* 144 F.3d 1270, 1276 (9th Cir. 1998) ("self-insurance retentions are the equivalent to primary liability insurance, and . . . policies which are subject to self-insured retentions are 'excess policies'").

In *Bordeaux,* Division One distinguished *Odessa* and *Domino's*, rejecting the excess policy analogy and equating

SIRs to deductibles in standard liability policies. But it did so only in the specific equitable context of the insurer's claimed right to be subrogated to (and repaid from) the insured's settlement with a third party. *Bordeaux*, 145 Wn. App. at 696, ¶18 ("neither [*Odessa* nor *Domino's*] examined whether the SIRS operated as insurance for the purpose of subrogation."). There is no issue of subrogation in this case. The issue instead is whether an insured that agreed to a multimillion-dollar SIR must account for its recovery of indemnity payments from a tortfeasor in calculating the amount of loss it must "bear at its own risk" before seeking to recover under an indemnity policy.

Ignoring T-Mobile's recovery of $10.75 million from Experian in calculating its "loss," as the Court of Appeals did, substantially alters the allocation of risk to which the parties agreed, undermining the very calculus for the insurance agreement: T-Mobile agreed to sustain the first $10 million in loss, at its own risk, and Steadfast agreed, *for the premium T-Mobile paid,* to undertake the risk in excess of $10 million. This Court should grant review and reverse the Court of Appeals decision that the courts should ignore T-Mobile's recovery of indemnity payments from Experian in determining the amount of the loss it agreed to bear at its own risk before looking to Steadfast for additional indemnity.

3. The Court of Appeals erred in treating T-Mobile's recovery of $10.75 million from Experian as a "setoff."

If the $10.75 million from Experian reduced T-Mobile's "loss" under the risk retained by T-Mobile under its SIR, it could not be considered a "setoff" as the Court of Appeals held. (Op. 8) The Court of Appeals' "setoff" analysis is also flawed because it is based on equitable subrogation cases and the "made whole" doctrine. This equitable doctrine does not modify the parties' express allocation of risk determining whether an insured has satisfied an SIR as a condition to the insurer's obligation under an indemnity policy.

Steadfast is not making any "claim to sums a third party has already paid the insured." (Op. 8, citing *Winters v. State Farm Mut. Auto Ins. Co.*, 144 Wn.2d 869, 876, 31 P.3d 1164 (2001)). And because its policy defined T-Mobile's losses to exclude sums it was absolved of paying by virtue of any agreement or settlement, that the policy did not expressly authorize Steadfast to "setoff" T-Mobile's recovery of indemnity payments while managing its own risk is irrelevant; T-Mobile did not suffer a "loss" in excess of the SIR to which a "setoff" could apply.

The conditions the Court of Appeals required before the "made whole" doctrine could apply—that "(1) the policy itself authorizes [a setoff] and (2) the insured is fully compensated by the relevant 'applicable measure of damages'" (Op. 8, citing *Sherry Fin. Indem. Co.*, 160 Wn.2d 611, 618-19, ¶12, 160 P.3d 31 (2007) and *Group*

Health Coop v. Coon, 193 Wn.2d 841, 852, ¶20, 447 P.3d 139 (2019))—are inapplicable here. As the cases cited by the Court of Appeals confirm, this Court imposed those conditions as a matter of equity pursuant to the "made whole" doctrine when an *insurer* attempts to exercise a right of subrogation—itself an equitable doctrine. *See Winters*, 144 Wn.2d at 875 ("'subrogation' is an equitable doctrine involving three parties, permitting one who has paid benefits to one party to collect from another."). Steadfast does not seek subrogation. Nor is T-Mobile's resort to the doctrine here equitable.

In *Winters*, the Court held that as a matter of equity a PIP insurer exercising its right of subrogation owed the insured a portion of the attorney fees incurred in recovering from a third party. *See also Sherry*, 160 Wn.2d at 619, ¶14 (PIP insurer not entitled to subrogation from UIM benefits until "the insured has made a complete recovery of the actual losses he or she suffered as a result of an automobile accident."); *Coon,* 193 Wn.2d at 855-56, ¶26 (fact issue whether insured was fully compensated for loss precluded health insurer's recovery in subrogation from insured's settlement with tortfeasor as a matter of law).

These subrogation principles do not supersede the plain language in the parties' negotiated insurance policy. They apply only when "an insurance policy is silent on the matter," *Meas v. State Farm Fire and Cas. Co.*, 130 Wn. App. 527, 538, ¶24, 123 P.3d 519 (2005), *rev. denied*, 157 Wn.2d 1018 (2006), and when there is "nothing in the language of the policy to indicate that the parties agreed that a different principle would apply." *Thiringer v. Am. Motors Ins. Co.*, 91 Wn.2d 215, 220, 588 P.2d 191 (1978).

In *Meas*, the insured argued his insurer could not be reimbursed in subrogation for property damage payments made to the insured until he had been "made whole" for his total loss—his property and personal injury damages. 130

Wn. App. at 537-38, ¶¶23-24. Division Two rejected the insured's argument, holding that the made hold doctrine could not override the plain language in the policy. Because the policy distinguished between property and personal injury damages claims, the insured's property damages were made whole when the insurer paid him. "[T]he property damage subrogation [did] not relate to the right of reimbursement for personal injuries," and the insurer was entitled to reimbursement for the property damage claim even if the insured had yet to receive any compensation for personal injury damages. *Meas*, 130 Wn. App. at 538-39, ¶¶25-26.

Just as the policy in *Meas* excluded the insured's property damages from his total loss once the insurer paid him, the policy here expressly excludes the Experian settlement from T-Mobile's loss, reducing it to an amount that does not exceed the SIR and that did not trigger Steadfast's obligation to pay. (CP 228) The Court of

Appeals' reliance on equitable principles to evade that clear policy language contravenes the parties' negotiated agreement that T-Mobile's "loss" would not include amounts T-Mobile was absolved from paying, and that T-Mobile would be responsible to manage and absorb "at its own risk" claims up to its $10 million SIR.

E. Conclusion.

This Court should grant review and hold that an insured who agreed to and relied upon a multimillion dollar SIR must account for its recovery of indemnity payments from a tortfeasor in calculating the amount of loss it must bear at its own risk before seeking recovery from the insurer under an indemnity policy.

I certify that this petition is in 14-point Georgia font and contains 4,259 words, in compliance with the Rules of Appellate Procedure. RAP 18.17(b).

Dated this 28th day of December, 2022.

ROPERS MAJESKI, P.C.

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DECLARATION OF SERVICE

The undersigned declares under penalty of perjury, under the laws of the State of Washington, that the following is true and correct:

That on December 28, 2022, I arranged for service of the foregoing Petition for Review, to the court and to the parties to this action as follows:

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DATED at Everett, Washington this 28th day of December, 2022.

/s/ Victoria K. Vigoren
Victoria K. Vigoren

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11/28/2022
Court of Appeals
Division I
State of Washington

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

T-MOBILE USA, INC., Respondent, v. STEADFAST INSURANCE COMPANY; and ZURICH AMERICAN INSURANCE COMPANY, Petitioners.	No. 82704-9-I UNPUBLISHED OPINION

BOWMAN, J. — Zurich American Insurance Company and its subsidiary Steadfast Insurance Company (collectively Steadfast) insured T-Mobile USA Inc. for loss from data privacy breaches. Under the policy, T-Mobile self-insured the first $10 million of any loss from a data privacy breach under a "Self-Insured Retention" (SIR) provision and Steadfast insured the next $15 million in loss. T-Mobile incurred about $17.3 million in loss after one of its vendors, Experian Information Solutions Inc., suffered a data privacy breach. T-Mobile later recovered $10.75 million from Experian as indemnification for its loss. Steadfast refused to pay T-Mobile's claim for $17.3 million, asserting that the policy's definition of "loss" excludes T-Mobile's recovery from Experian, so T-Mobile did not satisfy the SIR. T-Mobile sued. Now, on certified question from the trial court, we must determine the scope of coverage under T-Mobile's policy. We conclude that Steadfast must provide coverage under the policy because T-Mobile incurred $17.3 million in loss as defined by the policy, a loss exceeding its SIR obligation. We affirm and remand to the trial court for further proceedings.

FACTS

Steadfast insured T-Mobile for data privacy breach losses. The policy covered up to $15 million subject to an SIR, which required T-Mobile to self-insure the first $10 million in loss from a data breach. That is, after a data privacy breach, T-Mobile had to bear the risk of the first $10 million in loss before Steadfast would cover the next $15 million in loss.

In September 2015, Experian, a T-Mobile vendor, suffered a data privacy breach. T-Mobile notified Steadfast of the breach in October 2015 and tendered a claim for coverage. In the following months, T-Mobile faced multiple individual and class action lawsuits. T-Mobile also faced inquiries from the Federal Communications Commission, the Federal Trade Commission, and state attorneys general. In total, T-Mobile incurred $17.3 million in costs and expenses related to the data privacy breach.[1] T-Mobile sought indemnity from Experian by filing an arbitration demand to which Experian counterclaimed. Ultimately, in July 2017, Experian agreed to pay T-Mobile $10.75 million to settle.

T-Mobile provided Steadfast documentation of its losses, but Steadfast denied coverage. Steadfast acknowledged that T-Mobile submitted invoices totaling about $17.3 million, but because T-Mobile recovered $10.75 million from

[1] T-Mobile documented $17,264,498.20 in loss. We refer to that amount as $17.3 million.

Experian, Steadfast concluded T-Mobile's loss was less than the $10 million SIR "as defined in the Steadfast policy."

In March 2019, T-Mobile sued Steadfast. It sought declaratory judgment and asserted claims of breach of contract, insurance bad faith, violation of the Washington Insurance Fair Conduct Act, RCW 48.30.010 to .015, and violation of the Washington State Consumer Protection Act, chapter 19.86 RCW. Steadfast and T-Mobile cross-moved for summary judgment. Steadfast sought summary judgment in whole, arguing that T-Mobile did not satisfy the SIR because it recovered from Experian $10.75 million of the $17.3 million loss, leaving "T-Mobile's actual out of pocket losses . . . less than $10 million." T-Mobile sought partial summary judgment, arguing that the policy does not allow Steadfast to set off the Experian recovery against its payment obligation. The trial court granted T-Mobile's motion and denied Steadfast's motion.

The parties then stipulated to stay the proceedings and moved to certify the trial court's summary judgment rulings for discretionary review in this court under RAP 2.3(b)(4). The trial court granted the motion, finding that "coverage in this insurance case presents 'a controlling question of law as to which there is substantial ground for a difference of opinion,' "[2] certifying for discretionary review its summary judgment orders, and staying the proceedings pending our review. A commissioner of this court accepted the certification and granted review.

[2] RAP 2.3(b)(4).

ANALYSIS

Steadfast and T-Mobile dispute whether the entire $17.3 million in costs and expenses T-Mobile incurred from the Experian data breach amounts to a covered loss under the policy.

We review rulings on summary judgment de novo, performing the same inquiry as the trial court. Ellis v. City of Seattle, 142 Wn.2d 450, 458, 13 P.3d 1065 (2000). Summary judgment is appropriate only where "there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law." CR 56(c). By cross moving for summary judgment, the parties concede there are no material issues of fact. Hobbs v. Hankerson, 21 Wn. App. 2d 628, 632, 507 P.3d 422, review denied, 200 Wn.2d 1003, 516 P.3d 376 (2022). We will grant summary judgment only if, from all the evidence, reasonable persons could reach but one conclusion. Ellis, 142 Wn.2d at 458.

Interpretation of an insurance policy is a question of law we review de novo. Bordeaux, Inc. v. Am. Safety Ins. Co., 145 Wn. App. 687, 693, 186 P.3d 1188 (2008). Determining whether coverage exists is a two-step process. Schwindt v. Underwriters at Lloyd's of London, 81 Wn. App. 293, 298, 914 P.2d 119 (1996). The insured must first show the loss falls within the scope of the policy's coverage. Id. If the insured shows coverage, the insurer must then show specific policy language that excludes the loss. Id. We liberally construe insurance policies to provide coverage wherever possible. Bordeaux, 145 Wn. App. at 694.

We interpret insurance policy language as an average person would understand it and in a manner that gives effect to each provision.[3] McDonald v. State Farm Fire & Cas. Co., 119 Wn.2d 724, 733-34, 837 P.2d 1000 (1992). If a policy defines a term, we interpret the term " 'in accordance with that policy definition.' " Bordeaux, 145 Wn. App. at 694 (quoting Kitsap County v. Allstate Ins. Co., 136 Wn.2d 567, 576, 964 P.2d 1173 (1998)). But if a policy does not define a term, we give it its plain and ordinary meaning and may look to a standard English dictionary. Id.; Boeing Co. v. Aetna Cas. & Sur. Co., 113 Wn.2d 869, 877, 784 P.2d 507 (1990). We must give any remaining ambiguity a meaning and construction most favorable to the insured. Bordeaux, 145 Wn. App. at 694. That is because coverage exclusions " 'are contrary to the fundamental protective purpose of insurance and will not be extended beyond their clear and unequivocal meaning' "; coverage exclusions " 'should also be strictly construed against the insurer.' " Id. (quoting Stuart v. Am. States Ins. Co., 134 Wn.2d 814, 818-19, 953 P.2d 462 (1998)).

Covered Loss

T-Mobile argues that its covered loss amounts to $17.3 million. The policy defines "loss" as

> the total amount which the **Insureds** become legally obligated to pay on account of each **Claim** and for all **Claims** in each **Policy Period** . . . made against them for **Wrongful Acts** for which coverage applies, including but not limited to damages, judgments,

[3] This is true even if the parties are corporations. Boeing Co. v. Aetna Cas. & Sur. Co., 113 Wn.2d 869, 882, 784 P.2d 507 (1990).

> pre-judgment and post-judgment interest, settlements and **Defense Costs**.

“Loss” includes “punitive, exemplary, or multiple damages, or . . . civil fines, sanctions, or penalties imposed pursuant to **Privacy Regulations** or resulting from a **Regulatory Proceeding** . . . ; and . . . **Consumer Redress Funds**.” Coverage also includes reimbursement for “**Privacy Breach Costs**,” which the policy defines as “the reasonable and necessary fees, costs, charges and expenses incurred . . . for the purposes of retaining an accountant, attorney, public relations consultant or other third party” to investigate the cause, determine indemnification obligations, effect compliance with privacy regulations, notify affected individuals, manage public relations, and procure credit monitoring services.

The record shows T-Mobile incurred $17.3 million in costs and expenses because of the Experian data breach. A declaration from T-Mobile’s attorney states that those expenses included “costs tied to responding to government regulatory agencies, defending itself in numerous underlying lawsuits, defending itself against Experian, and prosecuting its indemnification claim in the Experian arbitration” after the data breach. Because those are all costs T-Mobile had to pay on account of the data breach, they are a covered loss under the policy.

<u>Exclusion from Covered Loss</u>

Steadfast argues that we should exclude the $10.75 million T-Mobile recovered from Experian from T-Mobile’s covered loss. According to Steadfast, that recovery “absolved” T-Mobile from paying $10.75 million because Experian indemnified T-Mobile for costs it incurred as a result of the breach.

The policy excludes from its definition of "loss" "any amount for which the **Insureds** are absolved from payment." The policy does not define the word "absolve." But the dictionary defines "absolve" as "to set free or release from some obligation, debt, or responsibility." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 7 (2002). But the Experian recovery did not "absolve" T-Mobile from payment because it did not set free or release T-Mobile from its obligation to pay the costs and expenses it incurred from the data breach. T-Mobile remained directly liable for those obligations and paid them in full. Experian then reimbursed T-Mobile for some of those data-breach-related costs and expenses T-Mobile already paid. We conclude that the policy does not exclude as a covered loss the $10.75 million T-Mobile recovered from Experian.[4]

<u>Allocation of the Covered Loss</u>

Under the policy, T-Mobile agreed to self-insure the first $10 million of any privacy breach claim "at their own risk."[5] So, according to the policy, Steadfast's "liability for **Loss**" on the $17.3 million claim applies to only that part of the loss

[4] Steadfast argues our interpretation renders the "absolution exception superfluous to the definition of 'loss' " because "loss" means the amount for which the insureds "become legally obligated to pay." But the exception retains independent meaning because it includes amounts an insured is obligated to pay but is later released from paying by the obligor or by court order. For example, the insured may be legally obligated to pay a judgment but then absolved of that obligation following a successful appeal.

[5] Steadfast argues that including the Experian recovery as a covered loss defeats the parties' intent that T-Mobile would incur "at their own risk" the first $10 million of loss under the SIR. But T-Mobile did bear a $10 million risk under the SIR. It incurred a total loss of $17.3 million, the first $10 million of which it is responsible for. Had T-Mobile not successfully sued Experian for indemnification, it would have suffered an out-of-pocket loss of $10 million.

greater than $10 million. As a result, the policy allocates the first $10 million of the loss to T-Mobile and the remaining $7.3 million to Steadfast.

Allocation of the Experian Settlement

We can best characterize Steadfast's effort to benefit from the $10.75 million payment to T-Mobile as seeking a "setoff." A "setoff" refers to an insurer's claim to sums a third party has already paid the insured. Winters v. State Farm Mut. Auto. Ins. Co., 144 Wn.2d 869, 876, 31 P.3d 1164 (2001). But an insurer may not set off any third-party payment to the insured unless "(1) the [policy] itself authorizes it and (2) the insured is fully compensated by the relevant 'applicable measure of damages.' "[6] Sherry v. Fin. Indem. Co., 160 Wn.2d 611, 618-19, 160 P.3d 31 (2007) (quoting Barney v. Safeco Ins. Co. of Am., 73 Wn. App. 426, 429, 869 P.2d 1093 (1994), abrogated on other grounds by Price v. Farmers Ins. Co. of Wash., 133 Wn.2d 490, 946 P.2d 388 (1997)); Grp. Health Coop. v. Coon, 193 Wn.2d 841, 852, 447 P.3d 139 (2019). Nothing in T-Mobile's policy authorized Steadfast to set off the $10.75 million Experian recovery.[7]

Because T-Mobile incurred a loss of $17.3 million and the policy does not authorize Steadfast to set off the $10.75 million recovery from Experian, the trial court properly granted partial summary judgment for T-Mobile. We affirm and

[6] The same rule applies to offsets and reimbursement. Winters, 144 Wn.2d at 876. An offset clause permits "a credit to which an insurer is entitled for payments made under one coverage against claims made under another coverage within the same policy." Id. And a reimbursement clause "permits an insurer to be reimbursed by its insured from proceeds that the insured collects directly from the party at-fault." Id. But Steadfast points to no offset or reimbursement clause in its policy.

[7] We note, however, that insureds are never entitled to double recovery. See Sherry, 160 Wn.2d at 618.

remand to the trial court for further proceedings.[8]

Bowman, J.

WE CONCUR:

Díaz, J.

[8] T-Mobile seeks appellate attorney fees. Because this is an interlocutory decision, we decline to award attorney fees and reserve the issue for the trial court after final disposition. See RAP 18.1(i).

SMITH GOODFRIEND, PS

December 28, 2022 - 12:07 PM

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SUPREME COURT
OF THE STATE OF WASHINGTON

No. 82704-9-I

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

T-MOBILE USA, INC., Respondent, v. STEADFAST INSURANCE COMPANY and ZURICH AMERICAN INSURANCE COMPANY, Petitioners.	PETITIONERS' GR 14.1 AUTHORITY

The following unpublished authority is cited in petitioners' Petition for Review, pursuant to GR 14.1:

1. *Ohio Cas. Ins. Co. v. Chugach Support Servs., Inc.,* No. C10–5244 RBL, 2011 WL 4352147 (W.D. Wash. Sept. 16, 2011) (App. A).

Dated this 28th day of December, 2022.

ROPERS MAJESKI, P.C.	SMITH GOODFRIEND, P.S.
By: */s/ Andrew Margulis* Andrew L. Margulis WSBA No. 52993	By: */s/ Howard Goodfriend* Howard M. Goodfriend WSBA No. 14355 Catherine W. Smith WSBA No. 9542

Attorneys for Petitioners

DECLARATION OF SERVICE

The undersigned declares under penalty of perjury, under the laws of the State of Washington, that the following is true and correct:

That on December 28, 2022, I arranged for service of the foregoing Petitioners' GR 14.1 Authority, to the court and to the parties to this action as follows:

Office of Clerk Court of Appeals - Division I One Union Square 600 University Street Seattle, WA 98101	____ Facsimile ____ Messenger ____ U.S. Mail _X_ E-File
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DATED at Everett, Washington this 28th day of December, 2022.

/s/ Victoria K. Vigoren
Victoria K. Vigoren

2011 WL 4352147
Only the Westlaw citation is currently available.
United States District Court, W.D. Washington,
at Tacoma.

OHIO CASAULTY INSURANCE
COMPANY, Plaintiff,
v.
CHUGACH SUPPORT SERVICES,
INC., et al., Defendants.
Shon E. Frostad, as Personal Representative of the
Estate of Bradley J. Frostad, Third–Party Plaintiff,
v.
R–Custom Excavation, et al., Third–Party Defendants.

No. C10–5244 RBL.
|
Sept. 16, 2011.

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John R. Connelly, Jr., Lincoln C. Beauregard, Connelly Law Offices, Tacoma, WA, for Third–Party Plaintiff.

ORDER GRANTING IN PART AND DENYING IN PART PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT AND GRANTING DEFENDANT CHUGACH'S MOTION FOR PARTIAL SUMMARY JUDGMENT

MARSHA J. PECHMAN, District Judge.

***1** This matter comes before the Court on Plaintiff Ohio Casualty Insurance Company's ("Ohio") motion for summary judgment and Defendant Chugach Support Services, Inc.'s ("Chugach") motion for partial summary judgment. (Dkt. Nos.77, 85.) Having reviewed the motions, the responses (Dkt.Nos.93, 99), the replies (Dkt.Nos.95, 102), Chugach's surreply (Dkt. No. 100), and all related papers, the Court GRANTS in part and DENIES is part Ohio's motion, and GRANTS Chugach's motion. Ohio's motion has prompted Chugach to dismiss its bad faith and Insurance Fair Conduct Act counterclaims. (Dkt. No. 93 at 4.) The Court DISMISSES these counterclaims.

Background

This is an insurance coverage dispute in which Ohio seeks a declaratory judgment that it owes no coverage to Chugach. Ohio provided a comprehensive general liability policy to RCustom, a company that provided construction work as a subcontractor to SRI and Chugach in a construction project in Virginia. While working on the site on March 1, 2008, Bradley Frostad was crushed by a metal plate and died shortly after. (Dkt. No. 27–1 at 2–3.) Frostad's estate sued Chugach, SRI, Ron Long, the president of SRI, and R–Custom in Pierce County Superior Court. Chugach, SRI, and Ron Long tendered defenses to Ohio. (Love Decl. Ex 1., Ex. 2.) Ohio accepted the defense of SRI and Long under reservations, and denied Chugach's tender. (*Id.;* Dkt. No. 21.) Chugach settled the Frostad estate's claims with for $950,000. (Dkt. No. 86.) Chugach paid $150,000 of the settlement, while its insurer, Evanston Insurance Company ("Evanston") covered the remainder. Chugach also incurred $128,840.98 in legal fees that it has paid without assistance from its insurer.

In its motion, Ohio argues that any coverage it owes is excess only to Chugach's primary insurance with Evanston. The Court has previously ruled that there is a dispute of fact as to whether Chugach is an additional insured on the Ohio policy. In the present motion Ohio contends that because the underlying settlement and defense costs did not exceed the Evanston policy, it owes no coverage payments to Chugach if it is an additional insured. Under the Ohio policy, the additional insured is treated as a primary insured only if R–Custom, Ohio's insured, agreed in a written contract to provide additional insurance coverage "on a primary and noncontributory basis":

> If the additional insured's [Chugach] policy has an Other Insurance provision making its policy excess, and a Named Insured [R–Custom] has agreed in a written contract or written agreement to provide the

> additional insured coverage on a primary and noncontributory basis, the policy shall be primary and we will not seek contribution from the additional insured's policy for damages we cover.

(Dkt. No. 24–2 at 8.) In the absence of primary coverage, the Ohio policy is only excess: “any coverage provided hereunder shall be excess over any other valid and collectible insurance available to the additional insured whether primary, excess, contingent or on any other basis.” (*Id.*)

***2** The Evanston policy converts to excess coverage from primary coverage where the insured, Chugach, has been named an additional insured covering the same loss. The Evanston policy contains an “Other Insurance” provision that states it is “excess over ... [a]ny other valid and collectible insurance available to you covering liability for damages arising out of the ... operations for which you have been added as an additional insured by an endorsement, or by definition via a contract or agreement, or by combination thereof.” (Dkt. No. 79 at 15.) The parties dispute whether Ohio and Evanston are thus competing excess carriers or whether Ohio's excess clause is a “super-escape” clause, making its excess coverage secondary to Evanston's.

Both policies have similar language as to the method of contribution when the insurers are both excess carriers:

> If all of the other insurance permits contribution by equal shares, we will follow this method also. Under this approach each party contributes equal amounts until it has paid its applicable limit of insurance or none of the loss remains, whichever comes first.

(Dkt. No. 79 at 15; Dkt. No. 9–5 at 20–21.) The policies also have a provision stating “[w]hen this insurance is excess, we will have no duty under Coverage A or B to defend any claim or ‘suit’ under that any other insurer has a duty to defend.” (*Id.*) This envisions a scenario where there is one primary carrier and one or more excess carriers. In the case where there is no primary carrier, both policies provide that “[i]f no other insurer defends, we will undertake to do so, but we will be entitled to the insured' rights against all those other insurers.” (*Id.*)

At issue in both motions is the Self–Insured Retention (“SIR”) endorsement in the Evanston policy. The Evanston SIR requires Chugach to cover the first $250,000 of any occurrence under the policy before Evanston has a duty of coverage. (Dkt. No. 79 at 23.) The policy states “[i]n the event that there is any other insurance, whether or not collectible, applicable to an occurrence, claim, suit, or pollution condition within the Self–Insured Retention, the Insured must make actual payment for the full Self–Insured Retention before the limits of insurance under this policy apply. (Dkt. No. 94 at 12; Dkt. No. 9–6 at 15.)

Chugach's separate motion for summary judgment focuses on the reasonableness of its settlement of the Frostad action and the attorneys' fees Chugach incurred. It seeks an order establishing these costs as the indemnity and defense damages at issue in this litigation. The motion raises the question of whether Chugach withdrew its tender. The Court thus lays out dates relevant to this issue. On February 22, 2010, the Frostad estate filed suit against Chugach and others, and on March 10, 2010, Chugach tendered its request for indemnity and defense coverage for the Frostad suit to Ohio. (Dkt. No. 21 at 1–2.) Ohio denied coverage on April 1, 2010, and filed this declaratory judgment action on April 4, 2010. (*Id.* at 2.) On June 18, 2010, a reasonableness hearing was held in the underlying Frostad action for the proposed settlement agreement. (Allen Decl. ¶ 5.) Ohio filed no objections. On June 18, 2010 the superior court approved the settlement, which was finalized on July 22, 2010. (Allen Decl. Ex. 1.) The superior court found the $950,000 settlement reasonable, but did not opine as to the attorneys' fees Chugach incurred. On July 26, 2010, Chugach withdrew its tender by email, and then sent a letter reconfirming its withdrawal of tender on September 7, 2010. (Dkt. No. 21 at 2.) This Court has earlier ruled that a case and controversy exists because Chugach still seeks indemnity and defense coverage despite its withdrawal of the tender. (Dkt. No. 37 at 4.) Chugach then retendered its request for indemnity and defense on November 22, 2010.

Analysis

A. *Standard*

***3** Although the interpretation of an insurance policy is a question of law, the Court cannot grant summary judgment when genuine issues of material fact remain in dispute.

Allstate Ins. Co. v. Peasley, 131 Wash.2d 420, 423–24, 932 P.2d 1244 (1997). When reviewing the motion, the Court must view the policy in its entirety, *see* *Hess v. North Pac. Ins. Co.,* 122 Wash.2d 180, 186, 859 P.2d 586 (1993), and give effect to each provision in the policy, *Kish v. Ins. Co. of N. Am.,* 125 Wash.2d 164, 170, 883 P.2d 308 (1994). Undefined terms in an insurance contract must be given their "plain, ordinary, and popular" meaning. *Boeing Co. v. Aetna Cas. and Sur. Co.,* 113 Wash.2d 869, 877, 784 P.2d 507 (1990) (citation omitted). The Court should "determine the ordinary meaning of an undefined term" by using "standard English language dictionaries." *Id.*

When policy terms are ambiguous, the Court is to construe them in favor of the insured. *Kish,* 125 Wash.2d at 170, 883 P.2d 308. A policy term is ambiguous "only if the language on its face is fairly susceptible to two different but reasonable interpretations." *Allstate,* 131 Wash.2d at 424, 932 P.2d 1244 (internal citation and quotation omitted). "When analyzing an insurance policy and questioning whether an ambiguity exists, we look at the language according to the way it would be read by the average insurance purchaser." *Id.*

B. *Ohio's Motion*

Ohio's motion asks the Court to determine whether Ohio has to provide primary coverage, and if not, whether it owes excess coverage co-equal to Evanston's coverage or whether it owes coverage only after the exhaustion of Evanston's policy limits. The Court finds Ohio's coverage, if any is proven at trial, is co-extensive to Evanston's.

1. *Ohio's Coverage is Excess*

In order for Chugach to be a primary insured on the Ohio policy, it must show a "written contract or written agreement to provide the additional insured [Chugach] coverage on a primary and noncontributory basis." (Dkt. No. 24–at 8.) In ruling on Ohio's first motion for summary judgment, the Court held that there was ambiguity in the additional insured clause. The clause presently before the Court is quite different and not ambiguous. On the face of the policy, it is clear there must be a written contract or written agreement with an express provision that Chugach is to receive coverage on a primary and non-contributory basis. The term cannot be taken from an oral agreement. Chugach argues that this provision is ambiguous. The Court agrees only insofar as the term "written agreement or written contract" does not require a fullyintegrated contract. Even if the contract is not fully integrated, there must be a writing naming Chugach as an additional insured on a primary and non-contributory basis.

Chugach has failed to point to any facts showing a written agreement or written document naming it as an additional insured on a primary and non-contributory basis. At best, it has pointed to a declaration from Ron Long, principal of SRI, stating that he intended to ensure that Chugach was named as an additional insured because SRI did not have insurance. Chugach argues that "because SRI had no coverage whatsoever, the intent of the parties necessarily had to be that the Ohio policy would be primary and noncontributory." (Dkt. No. 93 at 15.) This is purely conjectural. More importantly, it does not show a *written* document naming Chugach as an additional insured on a primary and noncontributory basis. The Court GRANTS Ohio's motion and finds that Chugach cannot be an additional insured on a primary and noncontributory basis. Rather, Ohio only potentially owes excess coverage.

2. *Ohio's Coverage of Chugach is Co–Excess to Evanston's Coverage*

***4** Ohio incorrectly argues that its policy can only be excess to Evanston's primary coverage. Ohio also incorrectly argues that its policy has a super-escape clause that renders its obligations secondary to Evanston's. The parties are to share coverage equally.

When two insurance policies provide excess coverage to the same party they are generally considered to be mutually repugnant. *Polygon NW Co. v. Am. Nat'l Fire Ins. Co.,* 143 Wash.App. 753, 777, 189 P.3d 777 (2008). They essentially negate each other, as there can be no excess policy without a primary policy. Whether two excess policies are mutually repugnant depends on the language of the policies. Here, the policies are virtually identical. Ohio's policy states that "any coverage provided hereunder shall be excess over any other valid and collectible insurance available to the additional insured whether primary, excess, contingent or on any other basis." (Dtk. No. 24–2 at 8.) Through similar language, Evanston's policy states that Chugach's coverage becomes excess when it has additional insured coverage: "[t]his insurance is excess over ... [a]ny other valid and collectible insurance available to you covering liability for damages arising out of the ... operations for which you have been added as an additional insured ...." (Dkt. No. 94 at 12.)

These are both excess coverage clause that negate each other, and are mutually repugnant.

Given that the both insurers are excess carriers, Ohio's and Evanston's policies require the insurers share the insurance responsibilities equally. Both Ohio and Evanston share the same methodology of contribution. Both agree to pay defense and indemnity up to the limits of the covered loss if it "exceeds the sum of ... [t]he total of all deductible and self-insured amounts under all that insurance." (*See* Dkt. No. 94 at 12.) Thus to the extent that Evanston owes a duty to Chugach, Ohio owes the same duty to Chugach.

Ohio argues incorrectly that its clause is a "super-escape" clause and that its coverage is only excess to any coverage, excess or primary, that Evanston offers. The Ohio policy contains only an excess, not a super-excess clause. The case Ohio relies on illustrates the difference. In *New Hampshire Indem. Co., Inc. v. Budget Rent–A–Car Sys., Inc.,* 148 Wash.2d 929, 64 P.3d 1239 (2003), the Court explained two competing policies were not mutually repugnant because one had a super escape clause. The super-escape policy stated: "Budget's liability protection does not apply until after exhaustion of all automobile liability insurance ... whether primary, excess or contingent ....“ *Id.* at 934, 64 P.3d 1239. The Court explained that a super-escape clause will expressly state it does not apply until the other coverage is exhausted. *Id.* at 933 n. 12, 64 P.3d 1239. Here, however, Ohio's policy only states that it is an excess policy to any other policy. It does not say it "does not apply until after exhaustion of all" other policies. The Ohio policy has only an excess, not an escape or super escape clause.

3. *SIR Not Subject to Cost Sharing*

***5** The parties dispute whether Ohio has any liability to cover the SIR amount that Chugach was required to pay under the Evanston policy. Ohio argues that its liability is only excess to the SIR, while Chugach argues that Ohio must indemnify it for the SIR because the SIR is not insurance at all. Ohio is correct.

In general, an SIR is the equivalent of a deductible on a medical insurance policy. *See* *Bordeaux, Inc. v. Am. Safety Ins. Co.,* 145 Wash.App. 687, 695, 186 P.3d 1188 (2008). The SIR is not considered a separate insurance policy, but it is simply the risk retained by the insured under a policy. *Id.* at 696, 186 P.3d 1188. Under the Evanston policy, Chugach bears the responsibility to cover the first $250,000 of each occurrence before Evanston's coverage duties are in force. Chugach made such a payment and there is no dispute here that SIR was satisfied. The only question is whether either insurer bears the responsibility to reimburse Chugach for the SIR. The Court finds that neither one does. Both policies explain that their excess coverage only includes the amounts due beyond any applicable SIR amounts. (Dkt. No. 94 at 12; Dkt. No. 9–6 at 15.) This excludes the SIR limit in force in the Evanston policy. This is only logically, given that the SIR is the liability that Chugach chose to retain. Ohio has no duty to provide coverage for the SIR amount.

4. *Chugach's Motion to Strike*

Chugach filed a surreply brief in which it complains that Ohio inappropriately raised a legal argument in its reply for the first time. Chugach's motion itself is overlength by four pages and it was not preceded by notice, as required by the Local Rules. Local Rule CR 7(g). This alone is reason not to consider the surreply. Even considering the merits, the Court finds no basis to strike the responsive arguments. As to this argument, the Court DENIES the motion. The Court finds the request to strike two declarations MOOT, as it has not considered them in reaching its decision.

C. *Chugach's Motion for Partial Summary Judgment*

Chugach's motion for summary judgment primarily asks the Court to find as a matter of law that the settlement amount and attorneys' fees Chugach incurred in the underlying litigation are the proper measure of indemnity and defense damages at issue in this litigation. Ohio presents no opposition to determining whether the settlement amount is the proper, and presents no factual challenge to the reasonableness of the attorneys' fees. Ohio instead focuses its brief on an erroneous argument that Chugach waived its rights to defense because it withdrew its tender.

1. *Waiver*

Ohio argues incorrectly that Chugach withdrew its tender for defense, and that Ohio owes no duty of coverage.

As a factual matter, the only period when the tender was withdrawn was *after* the settlement of the underlying liability suit. Thus, Chugach had a live tender and request for defense coverage throughout the pendency of the underlying lawsuit. *See* *Grifin v. Allstate Ins. Co.,* 108 Wash.App. 133, 140, 29 P.3d 777 (2001) (holding that an insured must affirmatively inform the insurer that its participation is desired for there be a duty to defend when owed). The tender was only withdrawn after the settlement was entered. The duty to defend was thus in force throughout the pendency of the underlying litigation. Moreover, the withdrawal of the tender in July 2010 was temporary and not a clear, knowing, or intentional waiver of coverage. As the Court has already ruled, Chugach has made its request for coverage in this case, in spite of any temporary withdrawal. (Dkt. No. 37 at 4.) The Court rejects Ohio's waiver argument.

***6** The "late tender" rule also resolves any potential issue of waiver in Chugach's favor. The "late tender" rule states that an insurer is relieved of its duties under the policy where the insured fails to provide notice in a timely manner, and where the insurer suffers actual and substantial prejudice. *Mutual of Enumclaw Ins. Co. v. USF Ins. Co.,* 164 Wash.2d 411, 422, 191 P.3d 866 (2008). Here, the withdrawal and retender did not cause Ohio to suffer any prejudice. The tender was live throughout the underlying lawsuit up and through the settlement, when Ohio could have objected to settlement amount. It cannot claim to be prejudiced now. This is yet another basis on which the Court finds the tender was not waived.

Ohio lastly argues that Chugach was not permitted to settle the case without its participation as required by the Ohio policy. This argument has no merit. At the time of settlement, Ohio had denied coverage in spite of the tender. It would be nonsensical for the Court to require Chugach to have comply to with Ohio's policy provisions as a condition precedent to settling the case when Ohio denied coverage and refused to get involved in the settlement itself. Ohio made its decision with regard to coverage, and it must abide by that decision.

2. *The Reasonableness of Fees*

In response to Chugach's request to establish the amount of defense costs damages, Ohio argues only that the reasonableness of the fees incurred by Chugach cannot be determined on summary judgment. The only case Ohio cites that is on point involved a case from this district where the parties raised a genuine issue of material fact as to the reasonableness of the fees. *Arch Ins. Co. v. Scottsdale Ins. Co.,* No. C09–602RSM, 2010 WL 4365817, at *5 (W.D.Wash. Oct.27, 2010). Here, Ohio presents no attack to the fees themselves or any argument that there are facts in dispute on this issue. As such, *Arch* is inapposite and the issue is properly before the Court.

Although Ohio has failed to present any contrary facts, the Court has independently reviewed the fees incurred in the underlying suit and finds them a reasonable measure of the damages at issue in this coverage case. Chugach has provided a full accounting of all of the billings, which show that a reasonable number of hours were expended on the case, and that the hourly rates were reasonable. The fees charged for related services as part of the litigation also appear neither excessive nor unreasonable. On the undisputed record before it, the Court finds the attorneys' fees and costs in the amount of $128,840.98 the proper measure of defense coverage damages in this case. The Court GRANTS the motion on this issue.

3. *The Settlement Amount is a Proper Measure of Damages*

With no valid opposition on point, Chugach has correctly argued that the settlement amount is the proper measure of damages for the indemnity owed. Where the insurer has an opportunity to be involved in the settlement and the settlement is judged to be reasonable, it is presumed to be the proper measure of the insured's indemnity coverage damages. *Mutual of Enumclaw Ins. Co. v. T & G Constr., Inc.,* 165 Wash.2d 255, 266–67, 199 P.3d 376 (2008) (holding that a good faith settlement which has been reviewed and found reasonable by a judge establishes the insured's presumptive damages even if the insurer does not decline coverage in bad faith). Here, Ohio had the opportunity to oppose the settlement amount and it did not. The superior court found the settlement to be reasonable. Thus, the amount of the settlement is the proper measure of damages to be awarded for indemnity costs. However, as explained above, Ohio's liability is only for half of the sum after the SIR is deducted. The total, less the SIR, is $700,000. The Court notes that the SIR applies equally to the defense costs, but for the ease of calculation, the Court applies it to the settlement amount.

***7** The Court GRANTS Chugach's motion. The Court finds the total damages for indemnity and defense costs are $828,840.98. The Court notes that Ohio is responsible for only half of this amount ($414,420.49).

Conclusion

The Court DENIES in part and GRANTS in part Ohio's motion for summary judgment. If Chugach establishes that it is an additional insured on the Ohio policy, Ohio will share the duty to indemnify and defend with Evanston equally. This does not include coverage of the SIR amount. The Court GRANTS Chugach's motion and holds that the total indemnity damages are $700,000 and the total defense costs damages are $128,840.98. The Court finds the total damages for indemnity and defense costs are $828,840.98, although Ohio is responsible for only half of this amount.

The clerk is ordered to provide copies of this order to all counsel.

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SMITH GOODFRIEND, PS

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