

64063-1

64063-1

NO. 64063-1-I

COURT OF APPEALS, DIVISION I  
OF THE STATE OF WASHINGTON

MUTUAL OF ENUMCLAW INSURANCE COMPANY

Respondent,  
v.

ONEBEACON INSURANCE COMPANY

Appellant.

MUTUAL OF ENUMCLAW'S  
RESPONSE BRIEF

FILED  
COURT OF APPEALS  
STATE OF WASHINGTON  
2010 MAR -4 PM 3:58

James M. Beecher, WSBA #468  
Attorney for Mutual of Enumclaw Insurance Company

HACKETT, BEECHER & HART  
1601 Fifth Avenue, Suite 2200  
Seattle, WA 98101-1651

Telephone: (206) 624-2200  
Facsimile: (206) 624-1767

## TABLE OF CONTENTS

I.	Issues . . . . .	1
II.	Statement of the Case . . . . .	1
III.	Argument . . . . .	4
	A. Abuse of discretion standard of review . . . . .	4
	B. The trial court had broad discretion to fashion an equitable allocation . . . . .	5
	C. Various recognized pro rata allocation methodologies are applied in insurance allocation disputes . . . . .	8
	D. OneBeacon did not present evidence Necessary to enforce its claimed policy exclusions . . . . .	11
	E. Fees on appeal . . . . .	11
IV.	Conclusion . . . . .	12

## TABLE OF AUTHORITIES

### Washington Cases

<i>Black v. National Merit Ins. Co.</i> , Wn. App. Div. 1 (March 1, 2010) . . . . .	11
<i>Carstens Packing Co. v. Cox</i> , 47 Wn.2d 346, 287 P.2d 486 (1955) . . . . .	5
<i>Coy v. Raabe</i> , 77 Wn.2d, 322, 326-327 (1997) . . . . .	5
<i>Diamaco v. Aenta Casualty</i> , 997 Wn. App. 335, 337, 983 P.2d 707 (1999) . . . . .	11
<i>Hanna v. Haynes</i> , 42 Wash. 284, 84 P. 861 (1906) . . . . .	5
<i>Mission Ins. Co. v. Allendale Mut. Ins. Co.</i> , 95 Wash. 2d 464, 626 P.2d 505 (1981) . . . . .	10
<i>Northwest Steel Rolling Mills Liquidating Trust v. Fireman's Fund Ins. Co.</i> , 1991 WL 639662 (W.D. Wash. July 15, 1991) . . . . .	10
<i>Thorndike v. Hesperian Orchards</i> , 54 Wn.2d 575, (1959) . . . . .	7
<i>Ward v. Buckley</i> , 1 Wash. Terr. 279, 282 (1870) . . . . .	5

### Foreign Cases

<i>Argonaut Ins. Co. v. Transport Indem. Co.</i> , 6 Cal. 3d 496, 99 Cal. Rptr. 617, 492 P.2d 673 (1972) . . . . .	8
<i>Energy-North Natural Gas, Inc., v Certain Underwriters Underwriters at Lloyd's</i> , 2007 WL 3033932 (N.H. 2007) . . . . .	10
<i>Ins. Co. of Tex. v. Employers Liability Assur. Corp.</i> , 163 F. Supp. 143 (S.D. Cal. 1958) . . . . .	9

<i>Missouri Pacific R. Co. v. International Ins. Co.</i> , 288 Ill. App. 3d. 69, 223 Ill. Dec. 350, 679 N.E.2d 801 (2d Dist. 1997) . . . . .	8
<i>Nationwide Mut. Ins. Co. v. Hall</i> , 643 So. 2d 551, 561 (Ala. 1994) . . . . .	9
<i>Reliance Ins. Co. v. St. Paul Surplus Lines Ins. Co.</i> , 753 F.2d 1288 (4th Cir. 1985) . . . . .	9
<i>Stonewall Ins. Co. v. Asbestos Claims Management Corp.</i> , 73 F.3d 1178 (2d Cir. 1995) opinion modified on denial of reh'g 85 3d. 49 (2nd Cir 1996) . . . . .	9

**Other Citations**

Seaman and Schultz, <i>Allocation of Losses in Complex Insurance Coverage Claims</i> , 2nd Ed., 2007 § 4.3 . . . . .	8
--	---

## **I. ISSUES**

- A. Did the trial court abuse its discretion when it crafted an equitable allocation of indemnity costs between two insurance companies jointly responsible for a \$536,500 obligation?
- B. Is plaintiff/respondent entitled to recover reasonable attorneys fees on review before the Court of Appeals?

## **II. STATEMENT OF THE CASE**

The factual scenario recited in the trial court's Memorandum Opinion is unchallenged by appellant and contains the following neutral statement of the operative facts:

The issue before the court is apportionment of liability between two insurance carriers after settlement of claims with their mutual insured. The policies at issue covered consecutive periods; each carrier was the primary insurer during the period of its coverage. No carriers issued contingent or excess coverage for the periods in question. The predecessor in interest of BeaconOne ["Beacon"] issued a policy effective 9/16/1999 to 9/16/2000. Mutual of Enumclaw issued a policy effective 9/16/2000 to 9/16/2002.

The insured contracted with an apartment owner to convert rental property to condominium units. According to the contract, work commenced on January 1, 2000. To the best of the knowledge of all parties remaining, the insured completed work at the project in September 2001. The condos leaked; the unit owners sued; the parties negotiated; insurers paid. The insurers agreed to a final settlement of \$800,000, which MOE paid to the insured. MOE then recovered \$263,500 from the insured's subcontractors. The amount currently at issue is the balance of the \$800,000 settlement, \$536,500. Throughout the litigation, the insurers shared litigation expenses equally. Both carriers now ask this court to determine an appropriate contribution amount from Beacon to MOE. Both carriers support their respective positions by reference to contract construction and by resort to equitable principles.

Neither insurance carrier has any information about the critical path of construction work. The court has no evidence of when, and in what sequence, the building

owner made improvements to common areas, exterior sheathing, roofing, or building infrastructure and systems.

The insured might or might not have completed work on other units, might or might not have completed common area upgrades, might or might not have “completed” work that ultimately proved to be defective and leaky.<sup>1</sup>

(CP 366-367)

Before this suit was filed, OneBeacon tendered \$36,738.01 (CP 31) “for what it determined was its appropriate share of indemnification obligations.” (CP 358) Next, at summary judgment, OneBeacon argued that its share of the joint obligation *as a matter of law* was “10/36ths of 33%” of the amount paid (CP 29), which was \$49,179.17. Finally in its Motion to Reconsider, OneBeacon argued that the law actually required its share to be set at 9/33, or \$146,318.18. (CP 372) The trial court continued to believe that “it is fair and equitable that Beacon share in the settlement to the extent of 9/21 of the \$536,500” (CP 367) and denied OneBeacon’s motion. (CP 373)

---

<sup>1</sup> Though not separately captioned as such, this section of the Memorandum Opinion contains the equivalent of unchallenged Findings of Fact.

When it moved for entry of judgment including pre-judgment interest, Mutual of Enumclaw stated:

On the *condition* that final judgment is entered pursuant to this motion, Mutual of Enumclaw will withdraw its unresolved claims for bad faith and *Olympic Steamship* fees.

(CP 376)

The final Judgment was entered without objection (CP 381) so *Olympic Steamship* fees were not requested at the trial court. However, Mutual of Enumclaw seeks *Olympic Steamship* fees on appeal because appeal fees were not an “unresolved claim” when the above waiver was made.

### III. ARGUMENT

#### A. Abuse of Discretion Standard of Review.

Though judgment was entered following cross-motions for summary judgment, both parties were content to allow the trial court to weigh the evidence and determine an equitable allocation, if it had a sufficient factual basis to do so. Therefore, abuse of discretion is the proper standard of review.

**B. The Trial Court had Broad Discretion to Fashion an Equitable Allocation.**

The Complaint sought recovery under the doctrines of subrogation and equitable contribution. (CP 3) Wide discretion is recognized in fashioning equitable relief as follows:

We have noted continuously in this case that subrogation is an equitable doctrine. In any equitable proceedings, the trial court has certain inherent discretion which can be exercised.

This principle was enunciated in one of the earliest decision of this court. After reviewing the equitable considerations prompting the particular division of property interests by the trial court, the Territorial Supreme Court noted “[i]t is true the judge who tried this suit in the Court below did not state the legal basis on which the order was formed as fully as he might, but that cannot affect the correctness of the degree, nor render the order erroneous.” *Ward v. Buckley*, 1 Wash. Terr. 279, 282 (1870). See also *Carstens Packing Co. v. Cox*, 47 Wn.2d 346, 287 P.2d 486 (1955), for an example of the deference which this court accords to determination of the trial courts of complex account questions in equitable proceedings.

As long as there is some basis for the court's determination, the trial court is not limited in its consideration to what one accountant or another says is property accounting procedure. In weighing and balancing the equities of the parties, the application of generally accepted accounting procedures is only one factor which should be considered by the court in making its final determination.

We do not think the amount found by the court was unreasonable under the testimony. *Hanna v. Haynes*, 42 Wash. 284, 84 P. 861 (1906).

*Coy v. Raabe*, 77 Wn.2d, 322, 326-327 (1997)

OneBeacon takes no exception to the comments in the trial court's Memorandum Opinion that "neither insurance carrier has any information about the critical path of construction work" or that "the court has no evidence of when, and in what sequence, the building owner made improvements to common areas, exterior sheathing, roofing or building infra structure and systems." Nor has OneBeacon challenged the comment in the Memorandum Opinion that during OneBeacon's policy period "the Insured might or might not have completed work on other units, might or might not have completed common area upgrades, might or might not have 'completed' work that ultimately proved to be defective and leaky." (CP 367)

OneBeacon insured Saltaire during 9 of the 21 months that Saltaire was making major exterior and interior renovations to the 75 unit Queen Anne Square apartment building which was being converted to condominiums. (CP 367) Less than six months after Saltaire's work was completed the Condominium Owners Association brought suit against the developers/owners. (CP 56) OneBeacon provided no evidence of when covered property damage occurred nor what construction activities were "completed" during either of the insurers' policies.

Presenting sale dates for certain units does not indicate when work on the leaking building envelope was completed. Under the meager evidence produced by OneBeacon, most of the water intrusion damage could well have commenced following exterior work completed during OneBeacon's policy period and before renovations to the interior of the units was completed for prospective buyers. Evidence simply wasn't presented to the court.

Further, the Condominium Owners Association suit against the developers was settled for \$3 million, but the action against Saltaire was settled for a net cost to the insurers of \$536,500. (CP 30-32) It is not possible to match those settlement funds to any particular property damage or to know when the damage actually occurred.

If we were of the opinion that the trial court should have resolved the factual dispute the other way, the constitution does not authorize this court to substitute its findings for that of the trial court.

*Thorndike v. Hesperian Orchards*, 54 Wn.2d, 575, (1959).

Based on the circumstances and the limited information presented, the trial judge reasonably weighted the facts and arguments and fashioned an equitable remedy well within her discretion.

**C. Various Recognized Pro Rata Allocation Methodologies are Applied in Insurance Allocation Disputes.**

Contrary to OneBeacon's assertion that it presented the only reasonable method of allocation, there are a number of recognized equitable methods applied by trial judges with the approval of appellate courts. A number of these are discussed in Seaman and Schultze, *Allocation of Losses in Complex Insurance Coverage Claims*, 2nd Ed., 2007 at § 4.3. These include:

- **“Fact – Based” Allocation.** If possible, “. . . to determine precisely what injury or damage took place during each contract period.”

*Missouri Pacific R. Co. v. International Ins. Co.*, 288 Ill. App. 3d 69, 223 Ill. Dec. 350, 679 N.E.2d 801 (2d Dist. 1997).

- **The “Policy Limits” Method.** “Apportionment based upon the relative limits of each insurance contract . . . pursuant to [some] ‘other insurance’ causes.”

*Argonaut Ins. Co. v. Transport Indem. Co.*, 6 Cal. 3d 496, 99 Cal. Rptr. 617, 492 P.2d 673 (1972)

- **The “Time on the Risk” Method.** “Apportionment based on the relative duration of each insurance

contract as compared with the overall period during which damages or injuries took place. . .”

*Stonewall Ins. Co. v. Asbestos Claims Management Corp.*, 73 F.3d 1178 (2d Cir. 1995) opinion modified on denial of reh'g 85 3d. 49 (2nd Cir 1996)

- **The “Time and Limits” Method.** “. . . proration based upon contract limits multiplied by years of coverage.”

*Nationwide Mut. Ins. Co. v. Hall*, 643 So. 2d 551, 561 (Ala. 1994)

- **The “Premium” Method.** “. . . apportionment is based upon the amount of premiums paid for the insurance contracts.”

*Ins. Co. of Tex. v. Employers Liability Assur. Corp.*, 163 F. Supp. 143 (S.D. Cal. 1958)

- **The “Equal Shares” Method.** “Equal apportionment among insurers regardless of time on the risk, limits, or premiums. . .”

*Reliance Ins. Co. v. St. Paul Surplus Lines Ins. Co.*, 753 F.2d 1288 (4th Cir. 1985)

- **The “Maximum Loss” Method.** “. . . apportionment is made among each insurer in equal shares up to the contract limits of the insurance contracts. . .”

*Mission Ins. Co. v. Allendale Mut. Ins. Co.*,  
95 Wash. 2d 464,626 P.2d 505 (1981)

- **The “Volumetric” Method.** “Apportionment based upon . . . degree of property damage attributable to that contract period. . .”

*Northwest Steel Rolling Mills Liquidating Trust v. Fireman’s Fund Ins. Co.*, 1991 WL 639662 (W.D. Wash. July 15, 1991)

- **The Owens - Illinois/Carter - Wallace Weighted Method.** “. . . essentially involves a two-step allocation process” including damages per year and total limits per year followed by allocation for gaps in coverage.

*Energy-North Natural Gas, Inc., v Certain Underwriters at Lloyd’s*, 2007 WL 3033932 (N.H. 2007)

Importantly, no case in Washington (or any other jurisdiction) has held that the trial court is limited solely to the allocation method urged here by OneBeacon. To achieve equity, the allocation should be shaped to fit the facts available to the trial court. There is no “one size fits all” formula to be applied.

**D. OneBeacon did not Present Evidence Necessary to Enforce its Claimed Policy Exclusions.**

OneBeacon complains that the trial court failed to apply its policy exclusions in its equitable analysis.<sup>2</sup> Though OneBeacon recites various policy exclusions, it was not able to present facts necessary to enforce the exclusions.

The burden of proof to support the enforcement of a policy exclusion rests with the insurance company that sold the policy.

*Diamaco, Inc. v. Aetna Casualty*, 997 Wn. App. 335, 337, 983 P.2d 707 (1999) is frequently cited for this proposition as follows:

The proper framework for our analysis begins with the basic proposition that the determination of coverage is a two-step process. The insured must first establish that the loss falls within the “scope of the policy’s insured losses.” Then, to avoid responsibility for the loss, the insurer must show that the loss is excluded by specific language in the policy.

(Emphasis Added)

The most recent application of this principle appears in *Black v. National Merit Ins. Co.*, Wn. App. Div. 1 (March 1, 2010).

**E. Fees on Appeal.**

Mutual of Enumclaw withdrew its existing “unresolved claims” for fees that had been made at the trial court. There was

---

<sup>2</sup> OneBeacon does not claim that its CGL coverage was narrower than Mutual of Enumclaw’s coverage or that it was entitled to enforce exclusions that were not also available to Mutual of Enumclaw.

no claim for fees on appeal when the waiver was made at the trial court. The narrow waiver of “unresolved claims” should not be broadened to include a claim that only arose later upon appeal.

#### **IV. CONCLUSION**

The trial court did not exceed its broad discretion in fashioning an equitable allocation on the facts presented. The judgment should be upheld and *Olympic Steamship* fees should be limited to work on this appeal.

Respectfully submitted this 4th day of March, 2010.

HACKET, BEECHER & HART

  
James M. Beecher, WSBA #468  
Attorney for Respondent

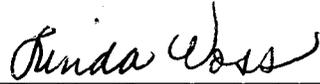
#### **CERTIFICATE OF SERVICE**

I certify and declare under penalty of perjury of the laws of the State of Washington, that on the date noted below, I caused to be delivered a true and correct copy of: Respondent Mutual of Enumclaw’s Response Brief by ABC Legal Messengers, Inc. to:

Clerk, Court of Appeals, Division I  
One Union Square, 600 University Street  
Seattle, WA 98101

Joanne T. Blackburn  
Gordon Thomas Honeywell  
600 University St. #2100  
Seattle, WA 98101

Signed in Seattle, Washington this 4th day of March, 2010.

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

---

Linda Voss  
Hackett, Beecher & Hart