

No. 67952-0-I

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

WESTERN NATIONAL ASSURANCE COMPANY, a Washington
corporation, Respondent,

v.

MAXCARE OF WASHINGTON, INC., a Washington corporation,
Appellant.

APPELLANT'S OPENING BRIEF

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I. INTRODUCTION

Respondent Western National Assurance Company (“Western National”) brought this action seeking a judicial declaration that it has no duty to defend or indemnify its policyholder, appellant Maxcare of Washington, Inc. (“Maxcare”), in an underlying personal injury/property damage lawsuit (the “Cueva Action”) seeking damages for injury and damage allegedly resulting from Maxcare’s efforts to clean the Cueva home after a “smoke incident.” Maxcare’s counterclaim in this action seeks a judicial declaration that Western National has those duties. The core issue is whether a Total Pollution Exclusion (“TPE”) in Maxcare’s policy bars coverage for the Cueva Action.

At the trial court level, the parties filed cross-motions for summary judgment on Western National’s coverage obligations. On October 28, 2011, the trial court denied Maxcare’s motion for summary judgment, granted Western National’s motion for summary judgment, and ruled that Western National has no duty to defend or indemnify Maxcare in the Cueva Action. Maxcare appeals that ruling.

Under Washington law, the duty to defend determination is based upon the allegations made against the policyholder – that is, those set forth in the complaint against the policyholder and through other extrinsic evidence creating potential liability for the policyholder. Western

National owes Maxcare a duty to defend if there are *any* allegations against Maxcare which, if proven true, would result in liability covered under any reasonable interpretation of the Western National Policy.

As Section III.E of this brief explains, the allegations in the Cueva Action create several different types of potential liability for Maxcare:¹

- Potential liability for physical symptoms resulting from Maxcare's negligent failure to clean organic particulate matter (dust, skin flakes, clothing fiber, dog dander, insect debris, etc.) from the Cueva home after the smoke incident;
- Potential liability for physical symptoms resulting from Maxcare's negligent failure to investigate/detect/warn of formaldehyde unrelated to Maxcare's cleaning work that existed throughout the Cueva home before Maxcare even began cleaning that home;
- Potential liability for physical symptoms resulting not from any chemical cleaners used by Maxcare, but from hysterical fears caused by Maxcare's negligent disregard of Ms. Cueva's instructions concerning prior disclosure and approval of the use of cleaners in the Cueva home; and
- Potential liability for physical symptoms resulting from Maxcare's negligent use of ordinary cleaning supplies to clean the Cueva home.

Western National has a duty to defend Maxcare in the Cueva Action because it is reasonable to interpret the TPE as inapplicable one or more types of potential liability facing Maxcare in that action.

¹ Under Washington law, an insurer's duty to defend is based on the allegations against its policyholder, even if false. Thus, by identifying allegations/testimony against or potential liability facing Maxcare in the Cueva Action, Maxcare is not agreeing to the truth of such allegations or acknowledging liability to the Cuevas. To the contrary, Maxcare denies all allegations against it and expects to prevail in the Cueva Action.

Maxcare therefore requests that the trial court ruling be reversed with instructions that the trial court declare Western National has a duty to defend Maxcare in that action and grant summary judgment for Maxcare.²

II. ASSIGNMENTS OF ERROR

A. Assignments Of Error

Maxcare assigns error to the following rulings in the trial court's October 28, 2011 Order denying Maxcare's Motion For Summary Judgment On Duty To Defend and granting Western National's Motion For Summary Judgment:³

1. ORDERED, ADJUDGED AND DECREED that plaintiff Western National Assurance Company's Motion for Summary Judgment is granted;
2. FURTHER ORDERED, ADJUDGED AND DECREED that Western National Assurance Company has no duty to defend or indemnify Maxcare for allegations arising out of the lawsuit brought by Ricardo, Latisha, and Madeline Cueva, Pierce County Superior Court Cause No. 10-2-06680-8; and
3. Maxcare of Washington's cross motion for summary judgment on duty to defend is denied.

² Western National's initial coverage denial correspondence also invoked the Western National Policy's "intentional injury" exclusion. So Maxcare's summary judgment motion explained why that exclusion did not apply to bar coverage for the Cueva Action. Western National conceded the inapplicability of the "intentional injury" exclusion by not opposing that aspect of Maxcare's summary judgment motion. Thus, that exclusion is not at issue in this appeal.

³ CP 992-994.

Maxcare also assigns error to the following ruling in that same October 28, 2011 Order:

The Court finds that the TPE (exclusion) applies. Following Quadrant the TPE applies regardless of whether Maxcare's "chemicals" or "pollutants" caused the injury alleged. The question re: what actually has harmed the Cuevas go to the Cuevas [*sic*] ability to prove their claim.

B. Issues Pertaining To Assignments Of Error

In reviewing the trial court's ruling, the following insurance policy interpretation issues must be addressed and resolved:

1. The Western National Policy's TPE excludes coverage for injury or damage arising out of the "discharge, dispersal, seepage, migration, release or escape of pollutants." (Emphasis added.) The Cuevas' own physicians have testified that the Cuevas' alleged injuries might have resulted from organic particulate matter (dust, skin flakes, animal dander, etc.) that Maxcare was hired to remove from the Cueva home, but which remained in the Cueva home after Maxcare completed its cleaning work. Such testimony creates the potential that Maxcare could be adjudged liable for bodily injury or property damage resulting from its failure to clean organic material from the Cueva home. Could an average purchaser of insurance reasonably interpret the TPE as not applying to claims for bodily injury resulting from an alleged failure to clean organic particulate matter that Maxcare was hired to clean?

2. The Cuevas' own industrial hygienist has opined that the only remaining "pollutant" detected in the Cueva home was formaldehyde which pre-existed the smoke incident, and thus was not caused by Maxcare. That expert also opined that Maxcare was negligent in failing to investigate and detect heightened formaldehyde levels in the Cueva home, and in failing to warn the Cuevas about those heightened formaldehyde levels. Such testimony creates the potential that Maxcare could be adjudged liable for bodily injury or property damage resulting from its failure to investigate/detect/warn of the existence of formaldehyde in the Cueva home that Maxcare did not cause. Could an average purchaser of insurance reasonably interpret the TPE as not applying to claims that Maxcare failed to investigate/detect/warn of the existence of alleged "pollutants" that Maxcare did not discharge, disperse, or release?

3. The Western National Policy's TPE excludes coverage for injury or damage arising out of the "discharge, dispersal, seepage, migration, release or escape of 'pollutants.'" The Cuevas' own treating physician has opined that the Cuevas' alleged injuries result not from cleaning supplies used by Maxcare, but from the Cuevas' fear of chemicals in their home. Such testimony creates the potential that Maxcare could be adjudged liable for bodily injury or property damage resulting from hysterical fears caused by Maxcare's failure to abide by

Ms. Cuevas' instructions and concerns about the use of cleaning supplies in the Cueva home. Could an average purchaser of insurance reasonably interpret the TPE as not applying to claims for bodily injury or property damage resulting solely from a claimant's mere fear of chemical exposure, and not from that claimant's actual exposure to chemicals?

4. Western National knowingly insured Maxcare for liability arising out of Maxcare's janitorial and cleaning operations. The Western National Policy excludes coverage for injury or damage arising out of a "pollutant." Could an average purchaser of insurance reasonably interpret the term "pollutant" in a liability policy specifically insuring janitorial and cleaning operations as not including the ordinary cleaning supplies used in those operations?

5. Under Washington insurance law, the duty to indemnify determination is based upon the actual findings/verdict/judgment entered against the policyholder. The underlying Cueva Action is still being litigated. Is the duty to indemnify issue ripe for adjudication such that the trial court could address and resolve that issue on summary judgment?

III. STATEMENT OF THE CASE

A. Maxcare's Business/Operations

Maxcare is a Sumner, Washington-based corporation that has been in business since 2000. CP 290. Initially, Maxcare's primary business

was dust-free hardwood floor installation and finishing. Id. Around 2005, Maxcare expanded its business to include painting and janitorial/cleaning services. Id.; CP 326-343. Maxcare now focuses solely upon post-loss property cleaning and restoration on behalf of property insurers obligated to provide coverage for such loss. Id.; CP 344-367.

B. The Western National Policy

Western National has been Maxcare's property and liability insurer since October 1, 2005. CP 290. In its initial Commercial Insurance Application to Western National, Maxcare stated that it was seeking liability insurance for the following hazards: "interior carpentry," "interior finish," "interior paint," and "interior janitorial." CP 326-331.

In August 2008, before the subject Western National Policy took effect, Western National obtained a third-party survey of Maxcare's business, which described Maxcare's business as:⁴

[C]leaning and restoring customers' furnishings that have been damaged either by fire or water, usually resulting in an insurance claim. The Insured is very much the same type of business that "Service Master" performs, working with insurance companies to restore damaged furnishings and physical property to its original position prior to such loss.

This action involves general liability policy number CPP 0010416-03 that Western National issued to Maxcare for the

⁴ CP 344-367.

October 1, 2008 to October 1, 2009 period (the “Western National Policy”). CP 2, 158-287. Maxcare paid Western National a \$30,725 premium for that liability coverage. CP 164.

The Western National Policy’s “Coverage A” Insuring Agreement provides:

We will pay those sums that the insured becomes legally obligated to pay as damages because of “bodily injury” or “property damage” to which this insurance applies. We will have the right and duty to defend the insured against any “suit” seeking those damages.

The Western National Policy also contains the following Total Pollution Exclusion (“TPE”):

f. Pollution

- (1) “Bodily injury” or “property damage” which would not have occurred in whole or in part but for the actual, alleged or threatened discharge, dispersal, seepage, migration, release or escape of “pollutants” at any time.
- (2) Any loss, cost or expense arising out of any:
 - (a) Request, demand, order or statutory or other regulatory requirement that any insured or others test for, monitor, clean up, remove, contain, treat, detoxify or neutralize, or in any way respond to, or assess the effects of “pollutants;”

The Western National Policy defines “pollutants” to mean:

[A]ny solid, liquid, gaseous or thermal irritant or contaminant, including smoke, vapor, soot, fumes, acids,

alkalis, chemicals and waste. Waste includes materials to be recycled, reconditioned, or reclaimed.

C. The Smoke Incident at the Cueva Home

On February 23, 2009, a smoke incident occurred at the Cueva home located in Auburn, Washington. CP 739:7-740:11. The smoke incident occurred when a pot containing boiling chicken parts went dry, causing smoke to fill the Cueva home. Id. There were no flames involved; the incident caused only smoke damage. CP 740:7-12, 22-25.

The Cuevas submitted a claim to their property insurer, Garrison Property & Casualty Insurance Company (“USAA”). CP 415.

D. Post-Smoke Incident Clean-up of the Cueva Home

USAA hired Maxcare to clean smoke damage at the Cueva home, including contents, furnishings, and interior finishes. CP 30:12-13; 91 ¶2.13. Maxcare cleaned interior finishes/fixtures on-site, and painted a single room – the guest room. CP 742:7-743:17; 747:4-17. Maxcare used ordinary cleaning supplies including “Dawn,” “Windex,” “Degrease All,” “Double O,” “Unsmoke,” “and “D9D.” See, e.g., CP 758:11-24. Maxcare also Ozone-treated the Cueva home and some contents. CP 747:4-10.⁵

⁵ Maxcare originally removed most contents for cleaning at Maxcare’s facility. CP 742:22-23; 743:6-13. But Maxcare later returned those contents at Ms. Cueva’s request. CP 750:4-25.

After Maxcare completed its work, the Cuevas voluntarily undertook to clean most of their contents themselves.⁶ The Cuevas also painted all but one room using primer and paint they purchased. CP 747:21-749:11; 429:11-23; 430:1-433:3. Finally, the Cuevas hired a “green” carpet cleaning company. CP 753:3-4.

USAA paid the Cuevas’ carpet cleaner and paid the Cuevas \$7,538.02 to paint their interior and \$14,583.13 to clean their contents. CP 761:9-12, 764:7-11.

In late-April 2009, after completing their interior painting work but before cleaning their contents, the Cuevas moved back into their home. CP 426:20-427:2. Thereafter, the Cuevas allegedly began experiencing certain symptoms while in their home, including runny noses, congestion, coughing, respiratory problems, fatigue and headaches CP 438:10-25; 439:10-20; 440:21-25. So the Cuevas moved back out of their home in late-June 2009, and demanded testing to see what might be causing those symptoms, and additional cleaning to remove those causes. CP 427:9-19.

USAA retained industrial hygienist MDE, Inc. to investigate whether anything in the Cueva home might be contributing to the Cuevas’

⁶ For example, the Cuevas cleaned their own laundry (using standard detergent), furniture (using leather cleaner and dish soap/water), and art pieces (by “airing out” those pieces and knowingly using “chemical” sponges they obtained from Maxcare). CP 451:1-25; 754:19-755:9; 756:16-757:2; 765:9-18; 783:8-15.

alleged symptoms. CP 784-834. MDE issued a report stating that formaldehyde and Volatile Organic Compounds (“VOCs”) existed in the home at somewhat elevated levels. Id. MDE recommended a high temperature “bake-out” to eliminate those elements. Id.; CP 436:12-25.

After that “bake-out” was completed, MDE gave the Cueva home a clean bill of health. CP 459-482. The Cuevas’ own consultant Laurence Lee concluded that formaldehyde or glass fibers and particulate matter, but not VOCs, might still exist in the Cueva home. CP 483-489. Nancy Beudet, a UW hygienist also consulting the Cuevas, also reviewed the testing results and concluded it was okay for them to return to their home. CP 773:24-774:8.

The Cuevas moved back into their home in October 2009. CP 427:20-428:1. The Cuevas allegedly began to feel sick again while in their home. CP 774:11-21. That was when they consulted with Dr. Van Hee on Beudet’s recommendation. CP 774:9-775:1; 775:20-22.

Dr. Van Hee reviewed all air quality testing results concerning the Cueva home and concluded that the “numbers looked okay” and that the continuation of symptoms “was in [the Cueva parents’] heads.” CP 775:20-776:22.

The Cuevas moved out of their home for good in late-December 2009. CP 437:18-25. After that, they wore a respirator the

few times they returned. CP 445:23-447:2. Despite wearing a respirator, they continued to experience the same types of symptoms while in the home as they did before the “bake-out.” CP 448:24-449:25; 778:16-25.

E. The Cuevas’ Allegations Against Maxcare

1. Cuevas’ Complaint Allegations Against Maxcare

The Cuevas’ complaint against Maxcare is unclear about what the Cuevas’ specific allegations against Maxcare are. CP 413-422. But pursuant to Washington insurance law, that complaint provides the appropriate starting point for the duty to defend determination.

The Cueva complaint generally alleges that Maxcare “negligently, intentionally, and recklessly” used “potentially toxic chemicals” in violation of the Cuevas’ directions. CP 92 at ¶2.15. The complaint asserts claims for “negligence, breach of contract, breach of the implied duty of good faith and fair dealing” against Maxcare. *Id.* at ¶3.4. Finally, the complaint alleges that Maxcare is liable for damages for “severe and potentially permanent injuries,” “pain, suffering, loss of enjoyment and life, medical expenses, loss of earning capacity,” “stress [and] emotional distress,” and their loss of the use of their home. CP 93 at ¶4.3, 94 at ¶¶4.7, 4.8.

2. Additional Claims/Allegations Made in Written Discovery

Under Washington's settled Vanport doctrine discussed in Section IV.B.2.a below, the duty to defend determination must consider facts extrinsic to the complaint to the extent those facts support the existence of coverage. The Cuevas' written discovery responses provide some additional detail about the Cuevas' allegations against Maxcare:⁷

- “Ms. Cueva told a MAXCARE employee...that [Cueva daughter] Madeline could not be around harsh cleaning chemicals, that only mild cleaning agents could be used, and that Ms. Cueva must be advised of anything they intended to use in the house, so she could determine if the cleaning agents MAXCARE intended to use would be safe for Madeline.”
- “[Maxcare's] Robin Hamilton told Mrs. Cueva MAXCARE would comply.”
- “MAXCARE commenced cleaning the fire damage and Madeline got sick.”
- “MAXCARE promised to consider Madeline's health issues in choosing cleaning products, and agreed to provide plaintiffs with advance notice of products to be used, and agreed to not use products which were not approved by the Cuevas. We alleged that MAXCARE's failure to do so was fraudulent and negligent because in fact, MAXCARE failed to keep those promises to us. Whether intentionally or accidentally, MAXCARE used products which it knew or should have known would injure plaintiffs. This failure to do what it promised was either intentional or negligent, or both.”

⁷ CP 506, 509.

3. Additional Claims/Allegations Made Through Discovery Testimony

Ms. Cueva's deposition testimony provides details about the Cuevas' interactions with Maxcare. Ms. Cueva testified that before Maxcare began cleaning, she informed Maxcare that the Cuevas' two year-old daughter had chemical sensitivities. CP 741:11-22.⁸ She further testified that she told Maxcare "we needed to get the chemicals approved" before cleaning began, but that Maxcare began cleaning before any of Maxcare's cleaning supplies had been approved. CP 741:23-742:3, 759:11-20, 760:6-15.⁹

The Cuevas' interrogatory answers do not contain any allegations concerning (1) whether the cleaning supplies used by Maxcare caused any of the Cuevas' alleged symptoms, or (2) which particular cleaning supplies used by Maxcare caused any such symptoms. The only such allegations are found in the deposition testimony of the Cuevas, their physicians, and their consultants.

⁸ Ms. Cueva testified that the Cuevas learned about those chemical sensitivities a mere two days before the smoke incident occurred, when she had taken her daughter to the hospital emergency room because she was falling and stumbling after she was present while Ms. Cueva cleaned her vehicle's interior and family room using leather cleaner, carpet cleaner, and windex. CP 743:18-744:24; 745:4-25. Ms. Cueva testified that at the conclusion of that emergency room visit, the treating physician merely told her "[t]o try to not use cleaners around [the daughter] and ventilate." CP 746:8-11.

⁹ Maxcare notes that it particularly objects to this false allegation.

Mr. Cueva testified:

- No one had ever told him that the chemicals Maxcare used had caused his symptoms. CP 456:11-14.
- Dr. Van Hee does not believe that Mr. Cueva's symptoms are caused by any chemicals used by Maxcare. CP 456:4-10.
- The only physician who might have told him his symptoms might be related to chemical exposure – Dr. Mitchell – knew nothing about the work done at the Cueva home, the chemicals used, or the testing results. CP 441:19-442:21.
- He believes his symptoms are attributable solely to the presence of formaldehyde in his home. CP 443:21-444:10; 452:1-6; 453:15-24; 454:23-455:13.

Ms. Cueva testified:

- The Cueva daughter has never been tested for chemical sensitivity, and the only physician that ever suggested to Ms. Cueva that she was chemically sensitive was an emergency room physician at Seattle Children's Hospital. CP 745:5-15.
- UW Dr. Sheela Sathyanarayana told Ms. Cueva to keep her daughter away from household chemicals and to have her home tested, based solely upon Ms. Cueva's own statement that Dr. Vincent had determined that her daughter was sensitive to household chemicals, and without ever examining the Cueva daughter or her treatment records. CP 766:11-777:22.
- UW industrial hygienist Nancy Beaudet reviewed MDE's initial testing results and recommended a "bake-out." After that "bake-out," Beaudet concluded that it was okay for the Cuevas to move back into their home. CP 772:15-774:8.
- Ms. Cueva contacted Beaudet again around November 2009 after the Cueva family experienced symptoms upon moving back into their home after the

“bake-out.” Beaudet sent the Cuevas to Dr. Van Hee. CP 774:9-775:1.

- Dr. Van Hee reviewed all air quality testing results concerning the Cueva home and concluded that the “numbers looked okay” and “he thought it was in our heads.” CP 775:20-776:22.
- Since moving out of the Cueva home around December 2009, Ms. Cueva has continued to experience the same symptoms upon entering the Cueva home despite wearing a respirator whenever she did so. CP 778:16-25.
- She believes none of the doctors who concluded that chemicals were making the Cueva family sick knew anything about the particular chemicals used by Maxcare in the Cueva home. CP 777:1-22. Those doctors based their conclusions on the Cuevas’ own assertions that they were sick while they were in their home, but not while they were out of their home. CP 777:15-22.

Dr. Vincent (the Cueva daughter’s treating physician) testified:

- His understanding of the cause of the Cueva daughter’s symptoms was based entirely upon information provided by Ms. Cueva and records of Ms. Cueva’s statements about that cause. CP 517(21):5-12; 518(22):24-518(23):22; 525(217):7-12.
- Ms. Cueva did not tell him about similar symptoms the Cueva daughter had been experiencing before the smoke incident, which would have been relevant to his own assessment of the cause of the Cueva daughter’s symptoms. CP 519(32):3-9.
- His recommendation that the Cueva daughter “stay out of the house” was based entirely upon Ms. Cueva’s assertion that chemicals and formaldehyde in the Cueva home were causing the Cueva daughter’s symptoms. CP 519(32):10-519(33):8; 521(60):23-521(61):21.

- He had no information or opinion connecting the Cueva daughter's symptoms to any cleaning agent used by Maxcare in the Cueva home. CP 523(208):16-24; 524(211):13-17.
- He defers to the conclusions of a toxicology specialist such as Dr. Van Hee, who concluded that the levels of exposures in the Cueva home would not have toxicological effects. CP 522(151):2-8.

Dr. Van Hee (treating physician for Mr. and Mrs. Cueva) testified:

- Based on his evaluation of the Cueva parents, treatment notes from their other physicians, and his review of Laurence Lee's post-"bake-out" evaluation of the Cueva home, Ms. Cueva suffers from reactive airway disease or asthma entirely unrelated to anything she was exposed to in the Cueva home. CP 530:11-534:7; 535:10-15; 536:22-538:1.
- The Cuevas' health issues are psychologically triggered, based on a fear of odors encountered in the Cueva home, rather than chemicals or other elements present in that home. CP 539:7-541:1; 542:20-24; 543:11-15; 545-580; 581-617.
- Based on the post-"bake-out" testing results, he advised the Cuevas to return to their home and believed they could do so without problems. CP 544:6-12.

Dr. Faeder (the Cuevas' testifying industrial hygienist) testified:

- He was asked to form an opinion on whether elevated formaldehyde levels in the Cueva home would have caused the Cueva daughter's reported symptoms. The Cueva daughter's reported symptoms are caused by a sensitivity to formaldehyde in the home. CP 624(53):16-22.
- Elevated levels of formaldehyde existed in the Cueva home before the smoke incident and simply remained after the initial cleanup and bake-out. Those formaldehyde levels are therefore unrelated to the smoke incident and

subsequent cleaning activities in the Cueva home. CP 620(31):6-16; 620(35):15-22; 622(37):11-18; 623(51):4-623(52):17; 625(68):13-21; 626(70):13-14. The Cueva daughter would have had the same symptoms without the smoke incident and subsequent. CP 627(84):10-14.

- Maxcare did not do anything to create formaldehyde in the Cueva home. CP 629(100):17-22.
- In his opinion, once Maxcare was aware that the Cueva daughter had chemical sensitivity, Maxcare should have “determined what the levels of materials in the house were before. They should have done a test afterward. They should have determined that formaldehyde is high and a sensitizer to people that are chemically sensitive to different things, and they should have made a recommendation that you investigate or you do something about the level of formaldehyde to reduce it to an acceptable range for a chemically sensitive individual.” CP 624(55):11-624(56):1. That means “evaluat[ing] what was in that unit that could make somebody sick or continue their symptoms and ... [making] them aware of what that problem was, and that would involve some sort of testing.” CP 630(101):4-12; 631-660.

Finally, Laurence Lee – the Cuevas’ industrial hygienist during the cleaning process – issued a report based on post-“bake-out” testing results provided by Microlab Northwest. Mr. Lee concluded:¹⁰

Formaldehyde concentrations have increased at the Cueva home post-bake out and may be contributing to the family’s symptoms. The presence of glass fiber in surface and air samples, and the relatively high concentrations of particulate matter in the air samples may also be contributing to the family’s symptoms. The total concentrations of VOC’s decreased post-bake out and are not likely to be contributing to the family’s symptoms.

¹⁰ CP 483-489.

In short, in the Cueva Action, Maxcare faces:¹¹

- Potential liability for physical symptoms resulting from Maxcare's failure to clean organic particulate matter (dust, skin flakes, clothing fiber, dog dander, insect debris, etc.) from the Cueva home after the smoke incident;
- Potential liability for failing to investigate, detect, and warn the Cuevas of heightened levels of formaldehyde that existed in the Cueva home before and after the smoke incident, and thus were not caused by any cleaning supplies used by Maxcare in that home;
- Potential liability for physical symptoms resulting not from chemical exposure, but from hysterical fears caused by Maxcare's disregard of Ms. Cueva's concerns and instructions concerning the use of cleaning supplies in the Cueva home; and
- Potential liability for using cleaning supplies in the Cueva home that caused health issues for one or more of the Cuevas, and physically damaged the Cueva home.

F. Western National's Rejection of Maxcare's Tender of Cueva Action for Coverage

Maxcare promptly tendered the Cueva Action to Western National and requested a defense. Western National rejected that tender based upon the "intentional injury" and "total pollution" exclusions in the Western National Policy. CP 729-732. Western National then brought this action.

¹¹ As stated in footnote 1, Maxcare denies the Cuevas' allegations in full, denies that it has any liability to the Cuevas, and thus expects to prevail in the Cueva Action. But that does not change or diminish Western National's duty to defend Maxcare in that action.

IV. ARGUMENT

A. Standard of Review

A trial court's ruling on summary judgment cross-motions is reviewed de novo.¹² As such, a Court of Appeals reviewing such a ruling engages in the same inquiry as the trial court.¹³

B. Summary Judgment Standard

1. General Standards

Under Washington Civil Rule 56, summary judgment “shall be rendered forthwith if the pleadings ... together with the affidavits, if any, show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law.”

Insurance policy interpretation is a matter of law for a Court to decide.¹⁴ Summary judgment is therefore appropriate in an insurance coverage suit where, as here, there is no dispute about the relevant facts.¹⁵

¹² Telecable of Seattle, Inc. v. City of Seattle, 164 Wn.2d 35, 41, 186 P.3d 1032 (2008) (conducting de novo review of trial court's ruling on summary judgment cross motions); Avanade, Inc. v. City of Seattle, 151 Wn. App. 290, 297, 211 P.3d 476, 479 (2009) (same).

¹³ TracFone Wireless, Inc. v. Wash. Dept. of Revenue, 170 Wn.2d 273, 280-281, 242 P.3d 810 (2010); Lallas v. Skagit County, 167 Wn.2d 861, 864, 225 P.3d 910 (2009).

¹⁴ Public Util. Dist. No. 1 of Klickitat County v. Int'l Ins. Co., 124 Wn.2d 789, 797, 881 P.2d 1020 (1994) (“The interpretation of insurance policies is a question of law...”).

¹⁵ See Roller v. Stonewall Ins. Co., 119 Wn.2d 724, 730, 837 P.2d 1000 (1992).

2. Standards Applicable to Duty to Defend Determination

A legal defense against claims is one of the primary benefits of a general liability policy like the Western National Policy.¹⁶ An insurer's duty to defend "is broader than its duty to indemnify."¹⁷ A duty to defend exists when a suit against a policyholder "could, if proven, impose liability upon the insured within the policy's coverage."¹⁸

Thus, Washington law requires an insurer or court to undertake a two-part analysis in determining the existence of a duty to defend. First, the insurer or court must identify the various types of potential liability facing the insured. Second, the insurer or court must determine whether it is reasonable to interpret the subject policy as providing coverage for any of those various types of potential liability. If the answer to the second question is "yes," then a duty to defend exists.

a. Determining Maxcare's Potential Liability

The analysis of the policyholder's potential liability begins with the allegations of the complaint.¹⁹ But facts extrinsic to the complaint against a policyholder also must be considered to the extent: (1) those

¹⁶ Safeco Ins. Co. v. Butler, 118 Wn.2d 383, 392, 823 P.2d 499 (1992).

¹⁷ Truck Ins. Exch. v. Vanport Homes, Inc., 147 Wn.2d 751, 760, 58 P.3d 276 (2002).

¹⁸ Id. (quoting Unigard Ins. Co. v. Leven, 97 Wn. App. 417, 425, 983 P.2d 1155 (1999)). Conversely, an insurer's duty to indemnify its policyholder for an adverse judgment depends upon the factual and legal basis for that judgment. Id. Trial is set for August 20, 2012. Because judgment has not yet been entered in the Cueva Action, the trial court's entry of summary judgment on the duty to indemnify issue should be reversed.

¹⁹ Vanport, 147 Wn.2d at 760-61.

extrinsic facts contradict the allegations of the complaint; and/or (2) the allegations of the complaint are ambiguous or inadequate for a duty to defend determination.²⁰ Extrinsic facts should be considered only to the extent they support the existence of coverage, but not to undermine coverage.²¹ If the allegations against the policyholder remain ambiguous after considering extrinsic facts, the allegations should be “liberally construed in favor of triggering the insurer’s duty to defend.”²²

b. Interpreting the Western National Policy

Washington’s settled policy interpretation rules impose several burdens upon an insurer such as Western National in summary judgment proceedings such as these.

First, Washington law requires a policy to “be liberally construed to provide coverage whenever possible,”²³ and that “any doubts, ambiguities and uncertainties arising out of the language used in the policy must be resolved in [the policyholder’s] favor.”²⁴

Second, this pro-coverage mandate applies “with added force” to language in an insurance policy that purports to limit the scope of

²⁰ Id.

²¹ Id.

²² Id.; Prudential Prop. & Cas. v. Lawrence, 45 Wn. App. 111, 115, 724 P.2d 418, 421 (1986).

²³ Odessa Sch. Dist. v. Ins. Co. of America, 57 Wn.App. 893, 897, 791 P.2d 237 (1990).

²⁴ Phil Schroeder Inc. v. Royal Globe Ins. Co., 99 Wn.2d 65, 69, 659 P.2d 509 (1983) (underline added).

coverage.²⁵ This is because exclusions are “contrary to the fundamental protective purpose of insurance,” and the reason why exclusions must be narrowly construed.²⁶

Third, a policy must be interpreted as it would be by an average purchaser of insurance, as opposed to a skilled lawyer or technical expert.²⁷ That means a policy must be interpreted according to its plain language, in a manner that gives meaning to each policy term.²⁸

Fourth, a policy must not be “interpreted” in a way that effectively inserts new language to restrict or narrow coverage.²⁹

Fifth, a policy must not be interpreted in a way that has a nonsensical result.³⁰

If, after applying the foregoing rules, a court ultimately concludes that there is more than one reasonable interpretation of the plain language

²⁵ Shotwell v. Transamerica Title, 91 Wn.2d 161, 588 P.2d 208 (1978); accord, e.g., Dickson v. U.S.F.&G., 77 Wn.2d 785, 789, 466 P.2d 515 (1970) (provisions excluding coverage “are to be construed most strongly against the company writing the policy, and in favor of the insured”).

²⁶ Stuart v. Amer. States Ins. Co., 134 Wn.2d 814, 818, 953 P.2d 462 (1998).

²⁷ Boeing Co. v. Aetna Cas. & Sur. Co., 113 Wn.2d 869, 881, 784 P.2d 507 (1990) (rejecting insurance companies’ technical interpretation of the legal “damages” their policies covered).

²⁸ P.U.D. No. 1, 124 Wn.2d at 797 (“The interpretation of insurance policies is a question of law, and in construing the language of an insurance policy, a court must construe the entire contract together so as to give force and effect to each clause.”) (citations omitted).

²⁹ American Nat’l Fire Ins. Co. v. B&L Trucking & Const. Co., Inc., 134 Wn.2d 413, 430, 951 P.2d 250 (1998).

³⁰ PUD No. 1, 124 Wn.2d at 799 (court should not give policy language a “strained or forced construction that leads to an absurd conclusion, or that renders the policy nonsensical or ineffective.”) (citing Transcontinental Ins. Co. v. P.U.D. Util. Sys., 111 Wn.2d 452, 457, 760 P.2d 337 (1988)).

of the policy at issue, that language is “ambiguous” and the court should consider facts extrinsic to the policy itself that indicate the parties’ intentions regarding what the policy would cover.³¹

If the policy remains ambiguous – that is, subject to competing reasonable interpretations – after considering such extrinsic evidence, the policy must be construed in favor of coverage.³²

Importantly, Washington law does not permit a court to “weigh” competing reasonable interpretations, because “so long as coverage is available under any reasonable interpretation...the insurer cannot escape liability.”³³

Thus, to avoid coverage under a particular policy provision, an insurer must prove that the only reasonable way to interpret that provision is against coverage. As the remainder of this brief demonstrates, Western National cannot carry its substantial burden here of proving that the only reasonable way to interpret the TPE is as applying to each type of potential liability facing Maxcare in the Cueva Action.

³¹ Quadrant Corp. v. American States Ins. Co., 154 Wn.2d 165, 171-72, 110 P.3d 733 (2005).

³² Id.; State Farm Fire & Cas. Co. v. English Cove Ass’n, Inc., 121 Wn. App. 358, 363, 88 P.3d 986 (2004).

³³ 16 Williston on Contracts §49:15 (4th ed.) (emphasis added).

C. The Cueva Action Triggers Western National’s Duty To Defend.

1. Coverage A’s Insuring Clause Is Satisfied.

Western National has never disputed that the Cueva Action alleges “bodily injury” and “property damage” claims falling within the Coverage A Insuring Agreement.³⁴ Thus, Western National must defend Maxcare in that Action unless an exclusion clearly and unambiguously applies to bar coverage for any potential liability facing Maxcare in that action. As explained below, that is not the case.

2. The TPE Does Not Apply.

The Western National Policy’s TPE bars coverage for:³⁵

“Bodily injury” or “property damage” which would not have occurred in whole or in part but for the actual, alleged or threatened discharge, dispersal, seepage, migration, release or escape of “pollutants” at any time.

The policy further defines “pollutants” to mean:³⁶

[A]ny solid, liquid, gaseous or thermal irritant or contaminant, including smoke, vapor, soot, fumes, acids, alkalis, chemicals and waste. Waste includes materials to be recycled, reconditioned, or reclaimed.

Washington law requires a court to adopt a reasonable interpretation favoring coverage even if an alternative interpretation disfavoring coverage exists. The trial court’s summary judgment ruling

³⁴ CP 729-732.

³⁵ CP 275.

³⁶ CP 253.

should be reversed because it is at least reasonable to interpret the TPE as not barring coverage Maxcare’s potential liability in the Cueva Action.

a. Maxcare’s Potential Liability For Failure To Clean Cueva Home Triggers Western National’s Duty To Defend.

Laurence Lee, the Certified Industrial Hygienist originally retained by the Cuevas to test their home, concluded that after the “bake-out,” only organic particulate matter and formaldehyde remained in the Cueva home at levels that might affect the Cuevas physically.³⁷ Specifically, Lee concluded that the Cuevas’ symptoms might result from various types of organic “particulate matter” (dust and debris comprised of skin flakes, clothing fiber, dog dander, insect parts, etc.) remaining after Maxcare finished cleaning the Cueva home.³⁸ Maxcare’s potential liability – and Western National’s duty to defend – therefore must be analyzed with that particulate matter and formaldehyde in mind.

The Cuevas have not alleged that particulate matter remaining in their home was caused by any of Maxcare’s cleaning supplies. And the Cuevas’ testifying industrial hygienist, Dr. Faeder, has testified that any formaldehyde remaining in the Cueva home after the “bake-out”

³⁷ CP 483-489.

³⁸ Id.

pre-existed Maxcare's work in the Cueva home, and thus is unrelated to Maxcare.³⁹

In light of the foregoing, the Cuevas' appear to be alleging/claiming, among other things, that Maxcare is liable for failing to clean organic particulate matter (e.g., dust and debris such as skin flakes, clothing fiber, dog dander, shoe wear, and insect parts) from their home. Those allegations create potential liability for symptoms resulting from exposure to organic particulate matter in the Cueva home. (The trial court's summary judgment ruling appears to ignore this particular type of potential liability facing Maxcare.)

The TPE would not apply to bar coverage for Maxcare's potential liability arising out of such allegations/claims. The Western National Policy's "pollutant" definition does not include organic dust, debris, flakes, fiber, dander, etc., identified by the Cuevas' industrial hygienist. And an average purchaser of insurance would not interpret the term "pollutant" or any of the terms included in the Western National Policy's "pollutant" definition – for example, vapor, soot, fumes, acids, alkalis, or waste – to mean such organic dust, debris, flakes, fibers or dander.

Because an average purchaser of insurance could reasonably interpret the TPE as not applying to bar coverage for Maxcare's potential

³⁹ CP 618-660.

liability arising out of the Cuevas' failure to clean allegations, those allegations trigger Western National's duty to defend and entitle Maxcare, not Western National, to summary judgment.

b. Maxcare's Potential Liability For Failure To Investigate/Detect/Warn Of Pre-Existence Of Formaldehyde Throughout Cueva Home Triggers Western National's Duty To Defend.

The Cuevas' testifying industrial hygienist, Dr. Faeder, testified that the Cuevas' alleged symptoms resulted from exposure to formaldehyde in the Cueva home that pre-existed Maxcare's work, and thus was not caused by Maxcare.⁴⁰ Dr. Faeder further testified that in his opinion, given the Cueva daughter's alleged chemical sensitivity, Maxcare was negligent in failing to investigate, detect, and warn the Cuevas about the pre-existence of such formaldehyde in their home.⁴¹

In light of the foregoing, the Cuevas' appear to be alleging/claiming, among other things, that Maxcare is liable for negligently failing to investigate, detect, and warn the Cuevas about the existence of formaldehyde in their home that was not caused by Maxcare.

⁴⁰ CP 620(31):6-16; 621(35):15-22; 622(37):11-18; 623(51):4-623(52):17; 624(53):16-22; 625(68):13-21; 626(70):13-14; 629(100):17-22. Notably, none of the Cuevas' other physicians or consultants rebutted this testimony by testifying or actually concluding that the Cuevas' alleged symptoms were actually caused by cleaning supplies used by Maxcare.

⁴¹ CP 624(55):11-624(56):1; 630(101):4-12.

Those allegations create potential liability for symptoms resulting from formaldehyde exposure.

The TPE bars coverage for injury/damage arising out of an “actual, alleged or threatened discharge, dispersal, seepage, migration, release or escape of ‘pollutants.’”⁴² The Cuevas’ allegations that Maxcare negligently failed to investigate, detect, and warn of the pre-existence of formaldehyde in the Cueva home do not assert any “discharge, dispersal, seepage, migration, release or escape” of formaldehyde.

At most, the Cuevas allege that Maxcare is liable for the continued presence or existence of formaldehyde in their home. But the plain language of the TPE simply does not apply to the mere “presence” or “existence” of pollutants. And those terms cannot be interpreted into the TPE, because Washington law expressly prohibits policy interpretations that add/insert omitted language with the effect of narrowing/restricting coverage.⁴³

Moreover, even if the detected formaldehyde came to exist in the Cueva home as a result of “off-gassing” – that is, a “release” from materials originally used to construct the home – that “off-gassing” would

⁴² CP 275.

⁴³ B&L Trucking, 134 Wn.2d 413, 430, 951 P.2d 250 (1998).

not be the type of “release” to which the TPE applies, because such formaldehyde would have pre-existed that home as a habitable structure.

Although Washington courts have not addressed this particular issue, courts in other jurisdictions have held that the mere existence or presence of pollutants within their intended confined space – such as within a home comprising building materials containing formaldehyde – is not the type of “discharge, dispersal, seepage, migration, release or escape” of those pollutants that would trigger a pollution exclusion.⁴⁴

Thus, the Cuevas’ allegations concerning the existence of formaldehyde confined within the same general area of their home both before and after Maxcare performed its work do not trigger the applicability of the TPE. That means the Cuevas’ symptoms were not caused by a discharge, dispersal, or release of that formaldehyde, as the TPE requires in order to apply.

⁴⁴ See, e.g., Meridian Mut. Ins. Co. v. Kellman, 197 F.3d 1178 (6th Cir. 1999) (finding that “discharge, dispersal, seepage, migration, release or escape” was ambiguous to the extent injuries were caused by pollutants in the immediate area of their intended use, stating “the total pollution exclusion clause at bar does not shield the insurer from liability for injuries caused by toxic substances that are still confined within the general area of their intended use.”); Bosserman Aviation Equip., Inc. v. U.S. Liab. Ins. Co., 183 Ohio App.3d 29, 34, 915 N.E.2d 687 (Ohio App. 2009) (pollution exclusion did not bar coverage because “[claimant’s] alleged injury resulted from his presence in the immediate area of the fumes, in a confined space where the fuel was retained in its proper site. Thus, the Court can only conclude that the fumes were not discharged, dispersed, or released, nor did they seep or migrate to a place where they did not belong or where they were not intended to be.”).

To be sure, an average purchaser of insurance – from whose perspective Washington law requires all policy language to be interpreted – could reasonably interpret the TPE as not applying to such allegations.

Thus, the Cuevas' failure to investigate/detect/warn allegations trigger Western National's duty to defend and entitle Maxcare, not Western National, to summary judgment.

c. Maxcare's Potential Liability For Negligent Disregard Of Ms. Cueva's Concerns/Instructions Triggers Western National's Duty To Defend.

In discovery in the Cueva Action, the Cuevas alleged that before Maxcare started cleaning the Cueva home, Ms. Cueva expressed her concerns about chemical exposure and instructed Maxcare to advise her of the cleaning supplies Maxcare intended to use in her home so she could determine whether those cleaning supplies would be safe for use in the Cueva home.⁴⁵ Ms. Cueva testified that Maxcare's negligent disregard for her concerns and instructions caused her to mistrust Maxcare.⁴⁶ She also testified that her daughter's alleged chemical sensitivity made her particularly concerned about the potential and serious health consequences of Maxcare not abiding by her requests/instructions.⁴⁷

⁴⁵ CP 506, 509.

⁴⁶ CP 761:20-763:25.

⁴⁷ Id.

The Cuevas disclosed Dr. Victor Van Hee as a medical provider with personal knowledge of their alleged symptoms.⁴⁸ Dr. Van Hee testified that: (1) Ms. Cueva suffers from respiratory conditions that are not related to anything she was exposed to in the Cueva home; (2) the Cuevas' continuing physical symptoms are psychologically triggered by their fear of odors in their home, not by anything actually present in that home; and (3) it is safe for the Cuevas to return to their home.⁴⁹ Dr. Van Hee also testified that the Cuevas' fears triggering those symptoms might come from the smoke incident itself, cleaning supplies used by Ms. Cueva, a dust allergy, or other stressful life events entirely unrelated to Maxcare.⁵⁰ These conclusions are consistent with the Cuevas' testimony that they experience the same symptoms upon returning to their home even while wearing a respirator.⁵¹

Thus, in the Cueva Action, Maxcare faces potential liability for injury and damage caused solely by the fear created by the manner in which Maxcare conducted its operations.

⁴⁸ CP 502. Given the Cuevas' admitted lack of medical expertise that might enable them to identify the specific causes of their alleged symptoms, any evidence about what the Cuevas are really alleging in the Cueva Action must come from medical providers such as Dr. Van Hee.

⁴⁹ CP 530:11-534:7; 535:10-15; 536:22-538:1; 539:7-541:1; 542:20-24; 543:11-15; 544:6-12; 545-580; 581-617.

⁵⁰ CP 931:9-932:24; 933:8-934:5; 935:18-936:9; 939:24-941:11.

⁵¹ CP 778:16-25; CP 448:24-449:25.

In this latter respect, the Washington Supreme Court's decision in Kent Farms, Inc. v. Zurich Ins. Co., 140 Wn.2d 396, 998 P.2d 292 (2000), is controlling. In Kent Farms, the policyholder was sued by a delivery driver who was injured when a defect in a faulty intake valve on the policyholder's storage tank caused fuel to back-flow on to and into the driver.⁵² Because the plaintiff driver was injured by fuel, the insurer denied the policyholder's coverage claim under the pollution exclusion.⁵³

The Washington Supreme Court held that the pollution exclusion did not apply to bar coverage for the injured driver's claim.⁵⁴ Specifically, the Court analyzed the history and purpose of the pollution exclusion and concluded that such exclusions were intended to address claims for broader environmental damage, not claims for discharge of pollutants directly on and into an individual.⁵⁵ The Court also stated that even if the fuel that injured the plaintiff driver was a pollutant, the driver was not actually "polluted" by that fuel.⁵⁶ Rather, the Court concluded, the driver was injured because he was "struck" by the physical force of that fuel.⁵⁷

⁵² Id. at 397-98.

⁵³ Id.

⁵⁴ Id. at 403.

⁵⁵ Id. at 400-01. In its subsequent decision in Quadrant, 154 Wn.2d 165, 174-75, 110 P.3d 733 (2005), the Washington Supreme Court further held that extrinsic evidence such as an insurance policy's drafting history may only be considered in interpreting ambiguous policy provisions. Such consideration is appropriate here because the TPE is at least ambiguous as applied to the Cueva Action.

⁵⁶ Kent Farms, 140 Wn.2d at 400-01.

⁵⁷ Id.

The Court therefore held that an average purchaser of insurance would reasonably believe that the pollution exclusion would not apply to claims of “acute bodily injury caused by negligently maintained or operated equipment.”⁵⁸

In short, Kent Farms holds that a standard pollution exclusion does not apply to injury resulting from a “defect” in the insured’s operations, rather than the toxic character of an alleged pollutant used in those operations. The Washington Supreme Court’s subsequent Quadrant decision summarized the underlying rationale of the Kent Farms decision as “In other words, it was the defect in the shutoff valve, not the toxic character of the fuel, that was central to the injury.”⁵⁹

In the Cueva Action, Maxcare facts potential liability for physical symptoms experienced by the Cuevas not as a result of the cleaning supplies used by Maxcare, but rather as a result of the Cuevas’ fears created by the manner in which Maxcare conducted its cleanup of the Cueva home, including how it communicated with the Cuevas and complied with their requests/directives. Under Kent Farms, the TPE would not apply to bar coverage for Maxcare’s potential liability for the

⁵⁸ Id.

⁵⁹ Quadrant, 154 Wn.2d at 176.

physical consequences of psychological fears created by an insured's business operations.

Moreover, even if the TPE could be reasonably interpreted as applying to Maxcare's potential liability for the Cuevas' physical symptoms – that is, bodily injury – resulting from their hysterical fears, the TPE would not apply to bar coverage for the Cuevas' property damage claims against Maxcare. That is because the Cuevas' home itself could not be damaged by the Cuevas' own hysterical fears.

Thus, Maxcare's potential liability for bodily injury and property damage resulting from Maxcare's manner of doing business triggers Western National's duty to defend and entities Maxcare, not Western National, to summary judgment.

d. Maxcare's Potential Liability For Using Ordinary Cleaning Supplies Triggers Western National's Duty To Defend.

(1) Interpreting Cleaning Supplies as "Pollutant" is Inconsistent with History of Western National Policy and Pollution Exclusions in General.

Finally, the Cuevas allege that they were injured and their property was damaged by the cleaning supplies Maxcare used in their home.⁶⁰ It is at least reasonable to interpret the TPE as not barring coverage here given

⁶⁰ See, e.g., CP 92-3.

the underwriting history concerning the Western National Policy specifically and pollution exclusions generally.⁶¹

Specifically, Maxcare paid for general liability coverage for its cleaning and janitorial operations, which obviously would include the use of cleaning supplies.⁶² The underwriting file produced by Western National confirms that Western National accepted Maxcare's \$30,000 premium knowing that Maxcare's business was "cleaning and restoring customers' furnishings that have been damaged either by fire...."⁶³

Washington law requires that policy language be interpreted the way an average purchaser of insurance would interpret it.⁶⁴ An average purchaser of insurance would not interpret ordinary cleaning supplies to be considered banned "pollutants" under a cleaning company's general

⁶¹ Western National argues that the TPE bars coverage because it is alleged that Maxcare "contaminated" the Cueva home. CP 39:23-40:2. Western National's argument, however, confuses the definition of "pollutants" (which includes a "contaminant") with the specific "discharge, dispersal, seepage, migration, release or escape" requirement of the TPE. Stated otherwise, the TPE does not apply to alleged "contamination" with "pollutants"; it applies to the "discharge, dispersal, seepage, migration, release or escape" of "pollutants," which can include a "contaminant." In this case, however, there is no such "discharge, dispersal, seepage, migration, release or escape" because the formaldehyde identified by the Cuevas' industrial hygienist as possibly affecting the Cuevas existed throughout their home even before Maxcare began work at their home. Western National's "contamination" argument fails for this additional reason.

⁶² CP 326-331.

⁶³ CP 158-287.

⁶⁴ Lynott v. National Union Fire Ins. Co of Pittsburgh, PA, 123 Wn.2d 678, 871 P.2d 146 (1994).

liability policy. It is therefore reasonable to interpret the Western National Policy as covering claims arising out of the use of cleaning supplies.⁶⁵

In its Quadrant decision, the Washington Supreme Court recognized that such underwriting context is relevant to whether or not a pollution exclusion is ambiguous in a given case.⁶⁶ Quadrant involved a dispute over whether a pollution exclusion barred coverage for an apartment tenant's claim against her building owner for injuries that occurred when the owner's contractor allowed noxious deck sealant fumes to enter the tenant's unit. The Court acknowledged that "[a]n absolute pollution exclusion clause can be ambiguous with regard to the facts of one case but not another."⁶⁷ But the Court ultimately held that the pollution exclusion unambiguously applied under the particular context of that case, but could be "ambiguous in the context of another case involving very different factual circumstances."⁶⁸

⁶⁵ Western National has argued that Maxcare's cleaning supplies are not "ordinary" because their MSDS say they are "irritants." But the MSDS for household products as innocuous as Dawn and latex paint (both used by the Cuevas themselves in their home), dial hand soap, minty toothpaste, and even "green" cleaners like "Simple Green" say even those products are "irritants." CP 942-977.

⁶⁶ Quadrant, 154 Wn.2d at 183 n.10.

⁶⁷ Id. at 181 (citing Queen City Farms v. Central Nat'l Ins. Co. of Omaha, 126 Wn.2d 50, 81, 882 P.2d 703 (1994)).

⁶⁸ The Court concluded that its prior decision in Kent Farms did not overrule prior appellate decisions regarding the pollution exclusion. But the Court did not upset or overrule its prior Kent Farms decision, as it concluded that decision was factually distinguishable. Quadrant, 154 Wn.2d at 183. As explained above, this action is more like Kent Farms than Quadrant.

The factual context of this case is very different from the context of Quadrant, and therefore requires a different result – that is, a declaration that the TPE does not apply here:

- The duty to defend was not at issue in Quadrant as it is here.⁶⁹ This action therefore involves more liberal policy interpretation rules than Quadrant.
- Quadrant did not involve the type of ambiguous allegations that Maxcare faces here. In Quadrant, the parties knew what materials allegedly caused the tenant’s injuries, who was responsible for those materials, and what alleged injuries resulted from those materials.⁷⁰ As explained above, no such specific allegations exist here.
- The insured in Quadrant sought coverage as an additional insured under the contractor’s liability policy. Thus, that insured’s expectations about the scope of coverage to which it was entitled were much different from Maxcare’s here. The Court in Quadrant expressly acknowledged how important an insured’s expectations are to policy interpretation, stating: “The average purchaser of a comprehensive liability policy reasonably expects broad coverage for liability arising from business operations and exclusions should be strictly construed against the insurer.”⁷¹

In addition to the underlying claim’s factual context and the subject policy’s underwriting history, a policy provision’s drafting history is relevant to the interpretation of ambiguous policy provisions.⁷² As the Washington Supreme Court acknowledged in its Kent Farms decision, the

⁶⁹ Quadrant, 154 Wn.2d at 170 n.3.

⁷⁰ Id. at 180-181.

⁷¹ Id. at 177 (citing Kent Farms, 140 Wn.2d at 401-02).

⁷² Quadrant, 154 Wn.2d at 181.

drafting history of the standard pollution exclusions confirms that the purpose of such exclusions is to avoid the “yawning extent of potential liability arising from the gradual or repeated discharge of hazardous substances into the environment.”⁷³ The Court further recognized that pollution exclusions were intended to avoid liability for massive CERCLA-like cleanups.⁷⁴

The Cueva Action does not involve discharges of hazardous substances into the environment or clean-up mandated by state or federal laws. Rather, it is a private dispute over how a business went about performing its operations for a single customer. Pollution exclusions were not intended to apply to such disputes. This further confirms that the TPE does not apply here.

(2) Interpreting Cleaning Supplies as “Pollutant” Would Render Subject Policy Largely Illusory.

The TPE also cannot be interpreted as barring coverage for claims arising out Maxcare’s use of cleaning supplies in its operations, because doing so would render the Western National Policy largely illusory. As noted above, Western National knew Maxcare was seeking coverage for hazards associated with its cleaning operations, and accepted a substantial

⁷³ Kent Farms, 140 Wn.2d at 400 (quoting Waste Management of Carolinas, Inc. v. Peerless Ins. Co., 315 N.C. 688, 698, 340 S.E.2d 374 (N.C. 1986)).

⁷⁴ Id. at 401.

premium for providing that coverage. Interpreting the TPE as barring coverage for claims arising out of Maxcare’s use of cleaning supplies would essentially negate that bargained- and paid-for coverage. Such an interpretation violates settled Washington insurance law.

The Quadrant decision discussed whether interpreting the pollution exclusion as applying in that case would render the subject policy illusory as to the apartment owner, and concluded that that exclusion would not bar coverage for many of the exposures an insured apartment owner would face with respect to its property.⁷⁵ The Court specifically acknowledged that the named insured contractor would have a stronger “illusory coverage” argument than the apartment owner, but did not address that argument because the contractor was not making that argument.⁷⁶

Because interpreting the TPE as applying to the Cueva Action would render the Western National Policy largely illusory, that interpretation should be rejected here.

3. Western National Relies Upon Inapposite Case Law

Western National’s prior coverage correspondence and summary judgment briefing below cites to Washington and non-Washington cases purportedly supporting Western National’s argument that the TPE applies

⁷⁵ Quadrant, 154 Wn.2d at 185-86.

⁷⁶ Id.

to bar coverage for the Cueva Action. But as explained below, Western National's reliance upon those cases is misplaced for several reasons.

a. Inapposite Washington Cases

At the trial court level, Western National relied upon on the Washington appeals court decision in Cook v. Evanson, 3 Wn. App. 149, 920 P.2d 1223 (1996), and argued that decision is controlling here because "Cook and the present case are factually indistinguishable."⁷⁷ But Cook is distinguishable in several important respects.

To begin with, the issue in Cook was whether the insurer had a duty to indemnify its insured against an adverse judgment.⁷⁸ As explained in Section IV.B.2 above, the duty to defend involved here is much broader than the duty to indemnify involved in Cook. As such, Cook would not be predictive or persuasive – let alone controlling – of the proper result here even if it involved analogous facts.

Moreover, because Cook involved the duty to indemnify, the judgment entered against the insured eliminated any ambiguity about the facts to be considered in making the coverage determination. Specifically, the appeals court merely considered whether the pollution exclusion applied to the plaintiff's claim that the insured "negligently allowed toxic

⁷⁷ CP 40:11-13.

⁷⁸ Id. at 152.

vapors from the White Roc 10 [exterior sealant applied by the insured] to enter the HVAC system” and cause serious respiratory damage to the plaintiff.⁷⁹ Because the court knew the specific product that injured the plaintiff, knew that the insured had applied that product, and knew how the application of that product reached and injured the plaintiff, it could assess whether the language of the pollution exclusion applied to those particular facts.⁸⁰

Conversely, the Cueva Action involves various different allegations about how Maxcare allegedly injured the Cuevas and damaged their home. Thus, this court must consider whether any of those allegations, if proven, would give rise to liability to which the TPE would not apply. The Cuevas’ allegations about Maxcare causing hysterical fears of chemical exposure, or about a failure to investigate/detect/warn of formaldehyde that pre-existed Maxcare’s work, are not remotely analogous to Cook.

Indeed, even the most comparable set of Cueva Action allegations – that is, that Maxcare physically injured the Cuevas by using ordinary cleaning supplies to clean their home – merits a different result here than in Cook. That is because here, Maxcare expressly requested, paid for, and

⁷⁹ Id. at 151-52.

⁸⁰ Id. at 153-54.

thus reasonably expected coverage for its janitorial and cleaning operations, while the insured in Cook expressly acknowledged that it purchased liability insurance not to protect against certain risks/exposures, but merely to satisfy state licensing requirements.⁸¹ Given the Washington Supreme Court's emphasis – confirmed in its Quadrant decision discussed above – upon underwriting context in interpreting and applying a pollution exclusion, this factual distinction is critical and merits the opposite result from Cook here.

Finally, Cook involved injury caused when fumes from sealant being applied to the exterior of a building unintentionally entered into the interior of that building via the HVAC system because the insured failed to seal off the fresh air intake.⁸² The court concluded that the pollution exclusion unambiguously applied because there was clearly a discharge or release of sealant fumes from the building exterior where the sealant was being applied into the building interior where the plaintiff was located.

Conversely here, even the cleaning supplies used by Maxcare were contained and localized within the vicinity of their intended use, and the formaldehyde identified by the Cuevas' industrial hygienist as possibly affecting the Cuevas existed throughout their home even before Maxcare

⁸¹ Id. at 151-52.

⁸² Id. at 151.

began work at their home. As recognized in various non-Washington decisions addressing the particular issue, there simply is no “release” or “discharge” when an alleged pollutant is contained and localized within the vicinity of its intended use.⁸³ Thus, unlike Cook, here there simply was no “release” or “discharge” as required for the TPE to apply. Indeed, no Washington court has ever applied a standard pollution exclusion under the circumstances involved here.

⁸³ See, e.g., Meridian Mut. Ins. Co. v. Kellman, 197 F.3d 1178, 1183 (6th Cir. 1999) (interpreting total pollution exclusion as not barring coverage when alleged pollutant is contained and localized within the vicinity of its intended use, noting that “no reasonable person could find that the insurance policy at issue unambiguously excluded coverage for injuries suffered by an employee who was legitimately in the immediate vicinity of the chemicals, and where the injury occurred only a few feet from where the chemicals were being used. Even viewed in the light most favorable to the insurance company, the policy is ambiguous as to whether it covered injuries caused by toxic chemicals in the immediate area of their intended use.”); see also Clarendon America Ins. Co. v. Bay Inc., 10 F.Supp.2d 736, 743-4 (S.D. Tex. 1998) (finding that total pollution exclusion is ambiguous as it relates to damage/injury from pollutants that are contained within their intended location and accordingly did not bar coverage for such claims); Kerr-McGee Corp. v. Georgia Cas. & Sur. Co., 256 Ga. App. 458, 568 S.E.2d 484 (Ga. App. 2002) (finding that the total pollution was ambiguous and did not apply to pollutants in a contained environment, and further noting that “[w]here the insured did not cause or contribute to the release, the release did not occur on or originate from the insured’s property, and the indemnification claim against the insured is not for environmental contamination, the [total pollution] exclusion does not apply.”); Clendenin Brothers, Inc. v. U.S. Fire Ins. Co., 390 Md. 449, 468, 889 A.2d 387 (Md. App. 2006) (concluding that “the total pollution exclusion clause drafted by the Insured was not intended to bar coverage where Insureds’ alleged liability may be caused by non-environmental, localized workplace fumes.”); Belt Painting Corp. v. TIG Ins. Co., 100 N.Y.2d 377, 387-88, 795 N.E.2d 15 (N.Y. App. 2003) (holding that the total pollution exclusion “applies only if the underlying injury is caused by ‘discharge, dispersal, seepage, migration, release or escape’ of the [pollutant]. It cannot be said that this language unambiguously applies to [pollutants] that drifted a short distance from the area of the insured’s intended use and allegedly caused inhalation injuries to a bystander.”).

Western National also relies upon the Washington appeals court's decision in City of Bremerton v. Harbor Ins. Co., 92 Wn. App. 17, 963 P.2d 194 (1998), and the Eastern District of Washington's decision in City of Spokane v. United Nat'l Ins. Co., 190 F.Supp.2d 1209 (E.D. Wa. 2002), as supporting the applicability of the TPE here. But like Cook, both cases involved unambiguous allegations against the insured – specifically, that the insured operated a facility (a wastewater treatment plant in City of Bremerton and a compost facility in City of Spokane) that emitted noxious and offensive odors and fumes that reached and injured/damaged the plaintiffs. 92 Wn. App. at 22-3; 190 F.Supp.2d at 1212-13.⁸⁴

Both cases are inapposite because they simply do not involve the types of ambiguous, varied, and shifting allegations that Maxcare is facing in the Cueva Action. Neither involves allegations of injury/damage resulting from hysterical fears of chemical exposure, or the mere failure to warn of the pre-existence of the presence or existence of chemicals.⁸⁵

Moreover, both cases involved an obvious and undisputed “discharge” or “release” of “pollutants” from the insured's property on to

⁸⁴ The only issue in City of Bremerton was whether the pollution exclusion applied to claims of odors and gases emanating from “waste” even though the “pollutant” definition did not include “waste.” The court ultimately concluded that the pollution exclusion applied. 92 Wn. App. at 22-3.

⁸⁵ The non-Washington cases that Western National relied upon in trial court proceedings are inapposite for the same reasons, and for the additional reason that none of them applies Washington law.

the plaintiffs' properties/persons, which triggered the pollution exclusion. Conversely, the Cueva Action involves the existence of formaldehyde within the Cueva home before and after Maxcare's work, which does not constitute a "discharge" or "release" triggering the TPE. As such, neither case supports Western National's coverage denial.

Finally, Western National cites the Washington Supreme Court's decision in Quadrant as supporting application of the TPE to the Cueva Action. As explained above, the Quadrant decision is factually distinguishable. If anything, that decision supports the existence of a duty to defend Maxcare in the Cueva Action because that decision emphasized the importance of context to the interpretation of a pollution exclusion.⁸⁶

The context of this matter is an insured (Maxcare) that purchased a liability policy with the specific and declared purpose of insuring its janitorial and cleaning operations, and a duty to defend determination based upon the Cuevas' allegations about injury/damage caused by, among other things, the Cuevas' hysterical fear of chemical exposure and Maxcare's failure to investigate/detect/warn of the existence of formaldehyde within their home before Maxcare began its work.

Conversely, Quadrant involved an additional insured that was not even involved in the underwriting of the policy at issue, and a duty to

⁸⁶ Quadrant, 154 Wn.2d at 183 n.10.

indemnify determination based upon defined allegations as to the cause and source of the plaintiff's alleged injuries – specifically, a release of certain chemicals from the exterior of a building into its interior.⁸⁷

This action and Quadrant involve fundamentally distinct contexts, and merit opposite results – that is, the inapplicability of the TPE here.

b. Inapposite Non-Washington Cases

Western National also relies upon several non-Washington cases to support its position that the TPE bars coverage for the Cueva Action. Those decisions are inapposite for one of more of the following reasons:

First, those cases do not involve Washington law that undisputedly applies here.⁸⁸

Second, several of those cases do not involve an alleged failure to investigate or warn.⁸⁹ So they cannot provide any guidance regarding coverage for Maxcare's potential liability created by those allegations.

⁸⁷ Id. at 177-81.

⁸⁸ See CP 40-41 (citing American States Ins. Co. v. Nethery, 79 F.3d 473 (5th Cir. 1996) (applying Mississippi law); Brown v. American Motorist Ins. Co., 930 F.Supp. 206 (E.D. Pa. 1996) (Pennsylvania law); Madison Const. Co. v. Harleysville Mut. Ins. Co., 557 Pa. 595, 735 A.2d 100 (Pa. 1999) (Pennsylvania law); Mark I Restoration SVC v. Assurance Co. of America, 112 Fed.Appx. 153, 2004 WL 2297145 (3rd Cir. Oct. 13, 2004) (unpublished; Pennsylvania law); Bernhardt v. Hartford First Ins. Co., 102 Md. App. 45, 648 A.2d 1047 (Md. App. 1995) (Maryland law)).

⁸⁹ See, e.g., American States Ins. Co. v. Skrobis Painting & Decorating, Inc., 182 Wis.2d 445, 513 N.W.2d 695 (Wis. App. 1994) (insured was statutorily required to clean up fuel spill after insured neglected to turn off fuel tank spigot); Madison Const., 557 Pa. 595 (underlying claim for personal injuries after claimant inhaled fumes emanating from curing agent applied by insured); Northbrook Indem. Ins. v. Water Dist. Mgmt Co., 892 F.Supp. 170 (S.D. Tex. 1995) (underlying claim for personal injuries caused by exposure to pollutants from water well operated by insured); Bernhardt, 102 Md. App. 45 (underlying

Third, several of those cases involve pollution exclusions that are materially different from the TPE involved here.⁹⁰ Those cases cannot provide guidance concerning interpretation of the TPE.

Fourth, several of those cases involve specific instances of “actual, alleged or threatened discharge, dispersal, seepage, migration, release or escape” of pollutants from the insured’s property, operations, or products.⁹¹ Conversely here, Maxcare faces potential liability for failing to investigate/detect/warn about the pre-existence of formaldehyde in their

claim for injury/damages resulting the actual dispersal or escape of carbon monoxide from a heating plant operated by the insured into the claimants’ apartments.); Brown, 930 F.Supp. 206 (underlying claim for damages resulting from actual seepage or migration of chemical waterproofing sealant fumes from the exterior into the interior of the insured’s home.); Mark I, 2004 WL 2297145 (not involving allegations about insured’s failure to warn of the preexistence of pollutants); Nethery, 79 F.3d 473 (only decided whether glue constituted a “pollutant” and did not involve allegations about the insured’s failure to investigate/detect/warn of the preexistence of pollutants.).

⁹⁰ See Continental Cas. Co. v. City of Jacksonville, 654 F.Supp.2d 1338 (M.D. Fla. 2009); Continental Cas. Co. v. Terrazzo, 2005 WL 1923661 (D. Minn. Aug. 11, 2005) (unreported); League of Minn. Cities Ins. Trust v. City of Coon Rapids, 446 N.W.2d 419 (Minn. App. 1989); Skrobis Painting, 182 Wis.2d 445; Madison Const., 557 Pa. 595; Hartford v. Estate of Turks, 206 F.Supp.2d 968 (E.D. Mo. 2002); Water Dist. Mgmt Co., 892 F.Supp. 170.

⁹¹ See, e.g., City of Jacksonville, 654 F.Supp.2d 1338 (migration of toxic chemicals from insured’s property); Terrazzo, 2005 WL 1923661 (release of carbon monoxide from insured’s equipment); City of Coon Rapids, 446 N.W.2d 419 (discharge of nitrogen dioxide from insured’s facility); Garamendi v. Golden Eagle Ins. Co., 127 Cal. App. 4th 480, 25 Cal.Rptr.3d 642 (Cal. App. 2005) (dispersal of silica from insured’s products); Skrobis Painting, 182 Wis.2d 445 (escape of diesel fuel from insured’s machinery); Madison Construction, 557 Pa. 595 (dispersal of curing agent fumes from insured’s compound); Estate of Turks, 206 F.Supp.2d 968 (release of lead-based paint chips from insured’s property); Water Dist. Mgmt Co., 892 F.Supp. 170 (discharge of toxic substances from well operated by insured); Bernhardt, 102 Md.App. 45 (dispersal or escape of carbon monoxide from a heating plant operated by the insured into the claimants’ apartments.); Brown, 930 F.Supp. 206 (seepage or migration of chemical waterproofing sealant fumes from the exterior into the interior of the insured’s home).

home, and thus not based upon a “discharge, dispersal, seepage, migration, release or escape” of a pollutant.⁹²

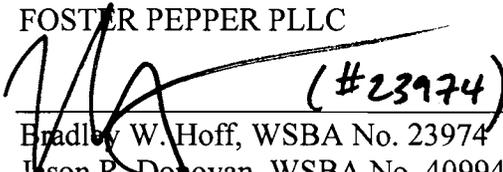
In short, none of the case law Western National cited to the trial court supports the relief requested in that motion.

V. CONCLUSION

For the foregoing reasons, this Court should reverse the trial court’s ruling with instructions that summary judgment be granted in favor of Maxcare declaring Western National has a duty to defend Maxcare in the underlying Cueva Action.

RESPECTFULLY SUBMITTED this 2nd day of March, 2012.

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⁹² As explained in footnote 44 above, courts in other jurisdictions have held that such contained presence of pollutants does not constitute a “discharge, dispersal, seepage, migration, release or escape” of those pollutants. See, e.g. Kellman, 197 F.3d at 1183; Bosserman Aviation, 183 Ohio App.3d at 34.