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No. 69569-0-I

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

GULL INDUSTRIES, INC.,

Plaintiff/Appellant/Cross-Respondent,

vs.

ALLIANZ UNDERWRITERS INSURANCE COMPANY; AMERICAN
ECONOMY INSURANCE COMPANY; AMERICAN STATES
INSURANCE CO. (successor to WESTERN CASUALTY and SURETY
COMPANY); CHICAGO INSURANCE COMPANY; COLUMBIA
CASUALTY COMPANY; FEDERAL INSURANCE COMPANY;
FIREMAN'S FUND INSURANCE COMPANY; GENERAL
INSURANCE COMPANY OF AMERICA; GRANITE STATE
INSURANCE COMPANY; INDIANA INSURANCE COMPANY;
NATIONAL UNION FIRE INSURANCE COMPANY OF
PITTSBURGH, PA; NORTH PACIFIC INSURANCE COMPANY;
OHIO CASUALTY INSURANCE COMPANY; PACIFIC INDEMNITY
COMPANY; SAFECO INSURANCE COMPANY OF AMERICA;
STATE FARM FIRE AND CASUALTY COMPANY; TIG
INSURANCE COMPANY; UNITED STATES FIDELITY &
GUARANTY COMPANY; WESTPORT INSURANCE
CORPORATION; and ZURICH-AMERICAN INSURANCE COMPANY

Defendants/Respondents.

**GULL'S REPLY AND RESPONSE TO CROSS-
APPELLANTS/RESPONDENTS STATE FARM AND TIG**

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I. GULL’S REPLY TO STATE FARM AND TIG: THE TRIGGER OF THE INSURERS’ DUTY TO DEFEND IN THE CONTEXT OF MTCA LIABILITY

A. Insurance Policies are Construed According to the Expectations of Reasonable Purchasers, and Ambiguities are Interpreted in Favor of the Insured.

State Farm and TIG distort and overstate Gull’s position, in effect arguing that Gull denies that one definition of “suit” is a civil action filed in court. To the contrary, that is undoubtedly one meaning of the term. The questions raised by this appeal, instead, are whether the reasoning in *Weyerhaeuser Co. v. Aetna Cas. & Sur. Co.*, 123 Wn.2d 891, 874 P.2d 142 (1994), applies in this case, and whether the word “suit” is ambiguous—reasonably susceptible to more than one meaning—in the context of MTCA’s strict, retroactive, joint-and-several liability regime, which the Washington Department of Ecology (DOE) has chosen to enforce largely outside of our civil litigation system.

The Washington appellate courts have admonished, time and again, that insurance policy language “should be given a fair, reasonable, and sensible construction as would be given to the contract *by the average person purchasing insurance.*” *Queen City Farms, Inc. v. Cent. Nat. Ins. Co. of Omaha*, 126 Wn.2d 50, 65, 882 P.2d 703 (1994) (emphasis added). The average purchaser, faced with unavoidable, strict liability under MTCA, would expect its insurer to defend against that liability without

having to wait for (or instigate through aggressive or intransigent behavior with DOE) the filing of a formal legal proceeding.

B. The Dictionary Definitions Support Gull.

The American Heritage Dictionary definition, “the attempt to gain an end by legal process,” cited by State Farm, is fully consistent with Gull’s position. To the average person purchasing insurance, MTCA is an attempt to gain an end through “legal process,” one that happens not to involve a complaint filed in court. The variety of dictionary definitions, alone is dispositive evidence that the term “suit” is reasonably susceptible to multiple meanings. *A.Y. McDonald Indus., Inc. v. Ins. Co. of N. Am.*, 475 N.W.2d 607, 628 (Iowa 1991) (finding ambiguity and adopting “any attempt to gain an end by legal process” definition); *C.D. Spangler Const. Co. v. Indus. Crankshaft & Eng’g Co., Inc.*, 326 N.C. 133, 154, 388 S.E.2d 557 (1990) (same). Where, as here, one of those meanings results in coverage, the Court is bound to apply that meaning. *Am. Nat. Fire Ins. Co. v. B & L Trucking & Const. Co., Inc.*, 134 Wn. 2d 413, 428, 951 P.2d 250 (1998).

C. This Court May Consider TIG’s Conduct Because Washington Follows the “Context Rule.”

TIG’s argument that this Court cannot consider TIG’s own conduct misstates Washington law. Washington courts apply the “context rule” of contract interpretation, which allows a court to consider extrinsic

evidence, including the subsequent conduct of the parties, when interpreting contracts. *Roats v. Blakely Island Maint. Comm'n, Inc.*, 169 Wn. App. 263, 274, 279 P.3d 943 (2012). The rule applies to the interpretation of insurance policies, and the court does not need to conclude a term is ambiguous before it considers the evidence. *Safeco Ins. Co. of Illinois v. Auto. Club Ins. Co.*, 108 Wn. App. 468, 478, 31 P.3d 52 (2001); *Roats*, 169 Wn. App. at 274. Once a court determines a provision is ambiguous, it may also consider extrinsic evidence to resolve the ambiguity. *Quadrant Corp. v. Am. States Ins. Co.*, 154 Wn.2d 165, 172, 110 P.3d 733 (2005). Any ambiguity remaining after examination of the applicable extrinsic evidence is resolved in favor of the insured. *Id.*

Here, the Court may, and should, consider TIG's opportunistic about-face—which occurred only after State Farm filed its motion for summary judgment on the duty to defend—for both purposes: further evidence that the term “suit” is ambiguous in the context of MTCA liability, and to resolve the ambiguity. Gull's letters tendering to TIG its liability at the other, functionally identical sites never asserted Gull was subject to a formal DOE enforcement action or had received DOE notices. *E.g.*, CP 1135 – 1142 (tender and follow-up for Spokane site). They asserted exactly what Gull asserts here: its actual and potential MTCA liability entitle it to defense and indemnity coverage. *Id.* In response, TIG

agreed “to defend Gull against the referenced claim....” *E.g.*, CP 1249 (TIG’s response to Gull’s tender of Spokane site). TIG’s agreement to defend was subject only to “a review of Gull’s defense costs incurred to date[.]” *Id.* Under the same facts as exist at Sedro-Woolley, TIG obviously believed the policy required it to defend Gull.

Now that TIG has decided it is not willing to defend, it relies on a stock, catch-all “reservation of rights” and its answer filed in litigation to raise the “suit” issue after-the-fact. When TIG responded to the tenders for the functionally identical sites, it spent three single-spaced pages explaining the bases on which it could deny coverage, yet never once mentioned the word “suit.” CP 1266-68. If TIG’s current interpretation of the word was so self-evident, it certainly would have raised that interpretation specifically at the time.

D. Gull Does Not Read the Word “Claim” Out of The Policy.

Gull’s position does not render the word “claim” meaningless in the context of the policy. State Farm ignores the common-sense explanation for why the policies use two different terms: the State Farm and TIG policies date from 1977-1978 and 1981-1985, respectively, well before the enactment of MTCA in 1989. The “claim” provision was written at a time when liabilities not the subject of a filed complaint often

could be investigated and settled by non-lawyer adjusters who were employees of the insurer. In such cases, the claim would not require a traditional “defense” involving outside counsel, expert witnesses, and the like. Under that traditional, court-based liability regime, the drafters of the policy language plainly assumed that only a “suit” in court—one reasonable interpretation of the term—would require a defense effort, as distinct from adjustment and settlement. *A.Y. McDonald Indus., Inc.*, 475 N.W.2d at 628 (distinguishing between conventional demand letter based on a personal injury claim and a demand letter from the Environmental Protection Agency).

Today, MTCA’s strict liability and its associated administrative regime, combined with the technical complexities of environmental remediation, require an insured to begin defending itself—with counsel and technical experts—well before a complaint is filed in court or DOE begins a formal enforcement action. *Id.* at 628-29. The insured who fails to procure an early defense faces the increased liability and costs of a DOE investigation and remediation, followed by a DOE cost recovery action. *Id.*; Appellant’s Brief at 7. In these circumstances, interpreting the term “suit” to include all legal processes that impose liability for past property damage is the only course consistent with the meaning that a reasonable, lay purchaser of insurance would assign to the term if he or

she were faced with MTCA liability. Insurance adjusters retain their ability to investigate and settle “claims” where no assistance of counsel or experts is necessary. Accordingly, Gull’s position is fully consistent with the policies’ use of the terms “claim” and “suit”.

E. *Unigard v. Leven* is Inapposite.

Unigard Ins. Co. v. Leven, 97 Wn. App. 417, 983 P.2d 1155 (1999), is inapposite. That case addressed only whether a filed lawsuit was “against the insured.” 97 Wn. App. at 425. The *Leven* court was not asked to interpret the word “suit.” *Id.*

F. The Potential for Liability Comes From MTCA, Not the Vagaries of DOE Action.

TIG’s argument that Gull has not received any demands or letters from DOE, so there is nothing to defend, misses the point. If overt action by DOE is required, an insured’s defense coverage would not depend on the legal liability the insured faces under MTCA, but rather on the vagaries of the State of Washington’s choices regarding the method of enforcement of that liability. Neither the policy language nor common sense supports the notion that the insured’s right to defense coverage is dependent on such vagaries of procedure and allocation of governmental resources.

Conditioning a defense on action by DOE puts the cart before the horse. Consider a hypothetical of two insured gas station owners. Both,

because of their strict liability under MTCA, undertake to remediate their property and incur the costs of doing so. Both find equal amounts of contaminated groundwater on the property. Both, as required by MTCA, report the results of their investigations. One insured's gas station, however, is at the entrance to a marina and close to Puget Sound. Because of its location, that insured attracts DOE's attention, and DOE sends numerous letters and threatens fines and administrative proceedings. The other insured, because of its inland location, hears nothing. Both insureds faced the same MTCA liability, and both insureds incurred the same costs to minimize that liability, but if overt DOE action is required, the first one gets defense coverage and the second does not.

An insured faces liability because of the strict-liability statutory regime, not because it happens to fall within the small percentage of property owners or operators targeted by DOE. To decide otherwise could penalize insureds who proactively address their statutory liability and implement thorough, responsible remediation plans.

G. This Appeal Addresses Whether the Duty to Defend Has Been Triggered, Not How Costs Are Characterized.

Similarly, State Farm and TIG's argument that Gull has not incurred attorney fees so, therefore, there is nothing to defend, is irrelevant. Gull's acknowledgment that it has not yet incurred any defense

costs at the Sedro-Woolley site is not an “admission.” Rather, it is a simple recognition of the nature of the costs incurred so far: payments to environmental consultants for site investigation that is part and parcel of carrying out the required remedy, where there is no doubt as to Gull’s liability and no dispute with DOE regarding the nature or cost of the remedy. The current posture of the Sedro-Woolley site does not mean defense costs will not be incurred in the future; to the contrary, Gull may incur such costs at Sedro-Woolley, and certainly will incur such costs at many of its other sites.

Tellingly, while State Farm acknowledges the costs described in the opening brief are cost of indemnity and not defense, TIG conspicuously avoids agreeing with that position. Should the insurers prevail on the “suit” issue, TIG and other defendants undoubtedly will argue those costs are those of defense, and yet not covered due to the lack of a civil proceeding in court. This Court should not permit this attempt by the insurers to “strand” those costs. CP 409-11.

H. Explaining How *Weyerhaeuser* Applies is Not Arguing Public Policy Overrides the Insurance Contract.

Gull is not arguing this Court should apply public policy to trump the insurance policy language. *See* State Farm Resp. Brief at 24-25. Rather, Gull is arguing that the same rationale underpinning the

Weyerhaeuser court's interpretation of the insurance contract exists here: (1) the administrative liability regime established by the Legislature, which is the source of the policyholder's liability, should inform the construction of the policy; (2) the insurers' interpretation would result in perverse incentives; and (3) DOE, as the agency charged with enforcing MTCA, understands how courts' rulings on MTCA-related issues affect behavior and enforcement. This Court most certainly may, and should, look to *Weyerhaeuser*—and likewise to DOE's views as to the effects of insurance-driven incentives on the conduct of liable parties—when considering the scope of the duty to defend in environmental property damage cases.

Gull is not importing federal public policy to interpretation of the State Farm and TIG policies. Gull cites CERCLA and *United States v. Atlantic Research Corp.*, 551 U.S. 128, 127 S. Ct. 2331, 168 L. Ed. 2d 28 (2007), to explain the perverse incentives created by a system requiring people to sue each other for no reason. Because MTCA was heavily patterned after CERLCA, CERCLA-related considerations such as these are relevant. *Bird-Johnson v. Dana Corp.*, 119 Wn.2d 423, 427, 833 P.2d 375 (1992).

Finally, whether or not Congress (or, in this case, the Washington legislature) contemplated funding of environmental cleanups through

insurance money is not the question. The issue is whether this Court should consider the nature of the source of the insured's liability when it interprets the insurance policy. Under *Weyerhaeuser*, it should.

I. This Court May, and Should, Consider Mr. Pendowski's Declaration.

The failure to list Mr. Pendowski's declaration as an item considered in the order granting summary judgment was clerical error. The trial court considered State Farm's objections to the declaration, then exercised its discretion and considered it. RP 30:12-31:8; 44:11-22. *Id.* This Court should do the same. *Southwick v. Seattle Police Officer John Doe #s 1-5*, 145 Wn. App. 292, 301, 186 P.3d 1089 (2008) (the "trial court has discretion whether to accept or reject an untimely declaration").

Just as Gull is not arguing public policy should trump the insurance policy, Gull is not offering Mr. Pendowski's declaration to establish a public policy. Mr. Pendowski, as the program manager of DOE's Toxic's Cleanup Program, is the best-situated DOE employee to explain the bad effects that will occur because of insurance-driven behavior. His declaration confirms what is self-evident: the perverse incentives that were likely in *Atlantic Research Corp.* under CERCLA are just as likely and just as harmful under MTCA. Nothing in the statute cited by State Farm, RCW 43.21A.050, prohibits high-level DOE

managers from speaking on behalf of or testifying about the programs they manage, or from explaining the practical effects of a court's ruling on MTCA enforcement.

Gull does not dispute that this Court should not consider legal opinions or conclusions offered by witnesses. Mr. Pendowski does not make the type of statements prohibited by *King County Fire Protection Dist. No. 16 v. Housing Authority of King County*, 123 Wn.2d 819, 826, 872 P.2d 516 (1994), and the other cases cited by State Farm. Mr. Pendowski testified, in relevant part, that the Toxics Cleanup Program “continues to support the arguments raised by the State in its amicus curiae brief” in *Atlantic Research*, and that the practical effects of a decision disfavoring coverage will be the same under MTCA as under CERCLA. The first statement explains that the Toxics Cleanup Program's position has not changed since 2007, and the second explains the likely effect of a possible legal ruling. Neither is an opinion on an ultimate legal issue or legal opinion.

**II. GULL'S RESPONSE TO TIG'S CROSS-APPEAL: CR 54(B)
CERTIFICATION**

**A. Additional Facts Related to CR 54(b) Certification and
the Dale Nebeker Note.**

**1. The Court Reached a Final Decision Only on the
Policy Interpretation Issue: State Farm's Duty
to Defend.**

State Farm's summary judgment motion sought a ruling on three issues: (1) whether Gull has evidence of additional liability policies issued to the Johnsons after the second policy, number 98-60-0439, was cancelled; (2) whether the two conceded policies are comprised of the terms and forms submitted by State Farm with the motion; and (3) whether, under the two conceded policies, State Farm has a duty to defend Gull at the Sedro-Woolley Site. CP 25 – 39. The court granted summary judgment on only the third issue: whether State Farm had a duty to defend. CP 793-95. It determined genuine issues of material fact remained on the other two. *Id.* TIG's joinder and the trial court's order granting TIG partial summary judgment were limited to the duty to defend. CP 796-97.

**2. Dale Nebeker's Note Created a Genuine Issue of
Material Fact as to the First Issue: The
Existence of Additional Policies.**

In response to the first issue, Gull offered a note written by Gull's former corporate secretary, Mr. Dale Nebeker. CP 431. As Gull's

corporate Secretary, Mr. Nebeker's regular job duties included handling and resolving issues related to the insurance obligations of Gull's station operators. CP 428. When Gull received notification of a problem with an operator's insurance, Mr. Nebeker would contact the appropriate station representative, who would then follow up with the station operator in question. *Id.* Station representatives such as Mr. Taylor operated as liaisons between Gull and its station operators. *Id.* This chain of communication continued until the operator was brought into compliance with the insurance requirements of his or her lease and insurance coverage was secured. *Id.* Mr. Nebeker believes he followed that protocol with respect to the Johnson's Cancellation Request. CP 428-29.

Based on the Nebeker note, the Court determined Gull had created a genuine issue of material fact as to the existence of additional policies. RP 47:4-13. The Court also concluded that genuine issues of material fact existed in the remaining issue—the terms and conditions of the State Farm policies. CP 794-95. No party appeals that part of the Court's ruling.¹

¹ The parties agree the language that is the subject of Gull's appeal, "right and duty to defend any suit," is part of the known State Farm and TIG policies and that the discovery of additional terms and policies will not affect construction of that phrase.

3. Gull Moved for CR 54(b) Certification on the Policy Interpretation Issue Because the Court's Order Entering Summary Judgment was Final.

Relying on CR 54(b), Gull moved for entry of final judgment on only the policy-interpretation ruling, that is, whether State Farm's duty to defend had been triggered. CP 804-10. State Farm took no position on whether the ruling should be certified. CP 909. However, it requested, without providing any supporting argument, that if the court certified the policy interpretation ruling, it also certify the issue of whether Dale Nebeker's note was admissible. CP 910. *Id.* TIG opposed certification in its entirety. CP 915-23. The trial court's order entering final judgment did not certify the denial of State Farm's motion to strike the note or the denial of summary judgment on the policy-existence issue. CP 941-46.

B. Argument

1. CR 54(b) Permits Immediate Appeals in Multicclaim, Multiparty Litigation.

In an action with "more than one claim for relief," or "when multiple parties are involved," CR 54(b) authorizes the trial court to "direct entry of a final judgment as to one or more but fewer than all of the claims or parties" as long as certain criteria are met. The rule's purpose is to avoid the possible injustice of a delay by making an immediate appeal available on a claim that is distinctly separate or affects fewer than all of the parties. *Doerflinger v. New York Life Ins. Co.*, 88 Wn.2d 878, 880,

567 P.2d 230 (1977). “The rule attempts to strike a balance between the undesirability of more than one appeal in a single action and the need for making review available in multiple-party or multiple-claim situations at a time that best serves the needs of the litigants.” *Id.*; *see also* RAP 2.2(d).

2. Standard of Review

When reviewing a trial court order granting CR 54(b) certification, this Court must conduct two analyses: (1) determine that the trial court “properly reached a final decision as to any of the claims or parties”; and (2) review the trial court’s determination that there was no just reason for delay for abuse of discretion. *Nelbro Packing Co. v. Baypack Fisheries, L.L.C.*, 101 Wn. App. 517, 523, 525, 6 P.3d 22 (2000). A court abuses its discretion if the decision was manifestly unreasonable, or the discretion was exercised on untenable grounds or for untenable reasons. *Id.* “*Substantial deference* is given to the trial court’s judgment” about whether there is no just cause for delay. *Id.* (emphasis added).

3. The Trial Court Reached a Final Decision on a Separate Claim in a Multiclaime Case.

a. Gull Has Asserted Multiple Claims Against Multiple Parties.

If claims factually are separate and independent, then multiple claims are present. *Doerflinger v. New York Life Ins. Co.*, 88 Wn.2d 878, 882, 567 P.2d 230 (1977); *see also* 10 Charles Alan Wright, Arthur R.

Miller & Mary Kay Kane, Federal Practice and Procedure § 2657 (7th ed. 2011) (“Wright & Miller”); *Sears, Roebuck & Company v. Mackey*, 351 U.S. 427, 437 n.9 (1956) (count involving a separate business was “clearly independent” of other counts involving different businesses”).² A plaintiff also has multiple claims if the facts “give rise to more than one legal right or cause of action, or there is more than one possible form of recovery and they are not mutually exclusive.” *Nelbro Packing Co.* 101 Wn. App. at 524. For example, if a defendant may be held liable under both antitrust statutes and common law simultaneously, a plaintiff has two claims for relief because its recoveries are not mutually exclusive. Wright & Miller at § 2657 (relying on *Sears*, 351 U.S. at 437 n.9).

A plaintiff has a single claim when it “presents a number of legal theories, but will be permitted to recover only on one of them.” *Id.*; see also *Doerflinger*, 88 Wn.2d at 881. This Court gives some deference to a trial court’s conclusion that a plaintiff has asserted multiple claims and that the trial court has reached a final decision with respect to at least one of them. *Nelbro Packing Co.*, 101 Wn. App. at 523.

In this case, each service station presents a separate and independent set of facts. Consequently, each service station is itself a

² Fed. R. Civ. Proc. 54(b) is the same as CR 54(b), and federal interpretations of the rule are persuasive authority for Washington courts.

separate claim. *Doerflinger*, 88 Wn.2d. at 882. State Farm’s motion for partial summary judgment and TIG’s joinder were limited to a single service station, Sedro-Woolley. Although the argument made in those motions—State Farm and TIG do not have a duty to defend Gull with respect to environmental liabilities at the Sedro Woolley Station based on the word “suit” in the policies—may apply to other stations and other insurers, that characteristic does not destroy the separate nature of the claim.³

As to the Sedro-Woolley station, Gull has asserted more than one legal right and cause of action and multiple recoveries that are not mutually exclusive. CP, Sub. No. 1A.⁴ The remaining claims against State Farm, TIG, and the other insurers arising out of Sedro-Woolley assert different legal rights. *Id.* The breach of contract claim is separate from the common law tort of bad faith, and both are separate from the statutory protections established in the Washington Consumer Protection Act (CPA). If Gull recovers on its breach of contract claim, it can still recover on its bad faith and CPA claims. *E.g., Coventry Assoc. v. Am.*

³ Gull originally filed a separate complaint in Skagit County Superior Court asserting claims related just to the Sedro-Woolley Station—another fact demonstrating the separate nature of the claims. *See* Appellant’s Opening Brief at 9-10.

⁴ Gull has supplemented the clerk’s papers with a copy of the Sedro-Woolley complaint originally filed in Skagit County Superior Court. *See* Index to Clerk’s Papers, Sub No. 1A. A courtesy copy is attached as Appendix A.

States Ins. Co., 136 Wn. 2d 269, 279-81, 961 P.2d 933 (1998) (insured may recover on bad faith and CPA claims whether or not it recovers on breach of contract claim); *Woo v. Fireman's Fund Ins. Co.*, 150 Wn. App. 158, 171-72, 208 P.3d 557 (2009) (awarding damages for breach of contract, bad faith, and CPA violations).

Within its breach of contract claim, Gull has two independent legal rights: a right to a defense and a right to indemnification, and Gull can recover under both. A ruling that Gull is entitled to defense does not preclude it from indemnity and *vice versa*. *Weyerhaeuser*, 123 Wn.2d at 902 (duty to defend and the duty to indemnify are different duties under a CGL policy). Judge Trickey, who has been presiding in this case for the past year since the Skagit County and King County actions were consolidated, reached the same conclusion. He determined that “the Court’s Orders Denying State Farm’s and TIG’s Duty to Defend represent an adjudication of a single issue at a single site, namely, State Farm’s and TIG’s defense obligation to Gull at the Highway 20 site located in Sedro-Woolley, Washington.” CP 943.

As Judge Trickey recognized, the insurer’s duty to defend its insured is a separate, self-contained issue within this case and within insurance-coverage law generally. *E.g.*, *Hayden v. Mut. of Enumclaw Ins. Co.*, 141 Wn.2d 55, 64, 1 P.3d 1167 (2000); *Holland Am. Ins. Co. v. Nat’l*

Indem. Co., 75 Wn.2d 909, 911, 454 P.2d 383 (1969) (explaining rationale for distinction). Based on this defining characteristic, other courts have held the duty to defend is separable from a policyholder's other claims against an insurer and affirmed CR 54(b) certification of orders granting summary judgment on that issue. *Cont'l Ins. Co. v. Del Astra Indus., Inc.*, 811 F. Supp. 1410, 1411 (N.D. Cal. 1993) *rev'd on other grounds*, 35 F.3d 570 (9th Cir. 1994) (duty to defend was separable from duty to indemnify and bad faith); *Avondale Indus., Inc. v. Travelers Indem. Co.*, 887 F.2d 1200, 1203 (2d Cir. 1989) (affirming CR 54(b) certification because "it is well settled that the duty to defend and the duty to indemnify are separate and distinct questions of fact and law"). In *Avondale*, the exact same issue was before the court as in this case: whether a "suit" had arisen related to environmental property damage and whether, as a result, the insurer had a duty to defend. 887 F.2d at 1206.

b. *Doerflinger* is a Multiple-Theory, Not Multiple Claims, Case.

Doerflinger, relied upon by TIG, is inapposite. In that case, the court concluded the plaintiff's claims for breach of fiduciary duty and negligent and intentional infliction of emotional distress were subsumed within his claim for outrage. 88 Wn.2d at 881. As a result, the bases for recovery were multiple theories for relief rather than separate claims. *Id.*

Since *Doerflinger*, this Court has clarified that one of the tests used to determine if a plaintiff is alleging a single or multiple claims for relief is whether (1) the facts give a plaintiff more than one legal right or cause of action, or (2) a plaintiff may recover on one basis without its ability to recover on another basis being affected. *Nelbro Packing Co.*, 101 Wn. App. at 524. Gull's claims meet both those criteria.

c. The Court Reached a Final Decision Regarding State Farm and TIG's Duty to Defend at Sedro-Woolley.

When the court granted summary judgment to State Farm, it reached a final, complete decision on Gull's claim it was entitled a defense. All three parties, State Farm, TIG, and Gull, sought to have adjudicated whether an entire category of costs is recoverable based on the language of the policy. A final decision on that legal right does not require a determination of whether the costs incurred to date should be categorized as defense or indemnity. CP 26, 793-96. The ruling is not any less final because the parties or the court have not yet parsed individual invoices to determine how specific costs should be categorized. *See Avondale*, 887 F.2d at 1203-04 (Second Circuit affirmed CR 54(b) certification on whether the duty to defend arose without the issue of characterization of specific expenses being before the court).

4. The Court Did Not Abuse Its Discretion When It Determined There Was No Just Cause for Delay

In considering whether there is no just reason for delay, the trial court “should consider judicial administrative interests, as well as equity.” *Nelbro Packing Co.* 101 Wn. App. at 525. The factors relevant to the determination include:

(1) The relationship between the adjudicated and the unadjudicated claims, (2) whether questions which would be reviewed on appeal are still before the trial court for determination in the unadjudicated portion of the case, (3) whether it is likely that the need for review may be mooted by future developments in the trial court, (4) whether an immediate appeal will delay the trial of the unadjudicated matters without gaining any offsetting advantage in terms of the simplification and facilitation of that trial, and (5) the practical effects of allowing an immediate appeal.

Id.

As the trial court recognized, these factors weigh in favor of Gull. The duty to defend is a discrete issue within this case and insurance-coverage law generally. *E.g., Hayden* 141 Wn.2d at 55; *Holland Am. Ins. Co.*, 75 Wn.2d at 911. The remaining claims for coverage against all defendants—including State Farm and TIG—are unaffected by the trial court’s summary judgment orders, and immediate appeal will not delay their trial. Gull has not sought to stay the litigation. CP 943.

The issue to be reviewed on appeal is not still before the trial court in the unadjudicated portion of the case. The meaning of the word “suit” is not part of any Gull’s remaining legal claims at Sedro-Woolley.

The need for review will not become mooted by future case developments. To the contrary, immediate review will promote judicial economy. The trial court expressly found an appellate court should review the ruling “to avoid a lengthy and costly second trial if an appellate court concludes that the court’s ruling should be reversed.” CP 944.

An immediate appeal also will have overwhelmingly positive practical effects. First, Gull has voluntarily incurred defense costs at many of the 220 stations at issue in this case. The recoverability of those costs against insurers that have issued a policy containing the same language as the State Farm and TIG’s policies applies to many of those sites. The inability to recover those costs is a material hardship and injustice to Gull that an immediate appeal would alleviate. A decision from this Court will also give the parties much needed certainty about the duties and costs related to the other sites going forward. In these circumstances, the undesirability of piecemeal review is outweighed by the need to make review available “at a time that best serves the litigants.” *Doerflinger*, 88 Wn.2d at 880. Second, this issue is of state-wide significance. *Weyerhaeuser* addressed insurers’ duty to indemnify with

respect to environmental property damage, but the meaning of the word “suit” in the context of MTCA and an insurer’s duty to defend has not yet been addressed in this state. The issue affects many parties and sites throughout Washington because the majority of environmental cleanups conducted pursuant to the MTCA are voluntary, and the trial court’s order will significantly chill these efforts. CP 676-77; *see also* Appellant’s Opening Brief at 25-26. Without appellate input, many private parties and their insurers and DOE face years more of uncertainty.

In sum, the dispute over whether Gull has the right to a defense at a single site under the policies issued by two insurers is both factually and legally a single claim. The court’s order granting summary judgment represents a final determination of the entire claim. The court did not abuse its discretion when it determined there was no just cause for delay and entered final judgment. This Court should affirm the trial court’s order entering final judgment as to State Farm and TIG’s duty to defend.

III. GULL’S RESPONSE TO STATE FARM: THE ADMISSIBILITY OF THE NEBEKER NOTE

A. The Trial Court Did Not Certify Its Ruling on the Note.

State Farm raises two issues with respect to the note offered by Gull: (1) whether it was properly authenticated as an ancient document; and (2) whether the note’s contents are admissible. Preliminarily, this Court should examine the court’s evidentiary ruling under CR 54(b) and

determine it does not meet the criteria for immediate appeal. Although Gull did not raise this argument below, this Court may consider it *sua sponte*. *Spiegel v. Trustees of Tufts Coll.*, 843 F.2d 38, 43 (1st Cir. 1988).

The trial court never certified and entered final judgment on its denial of State Farm's motion to strike. CP 941-944. State Farm has no basis to immediately appeal this issue. Most likely, the trial court understood that its order admitting the note does not meet any of the requirements for CR 54(b) certification. The issue before the trial court when Gull offered the note was whether genuine issues of material fact remained related to the existence of particular State Farm policies. CP 412-16. The admissibility of the note is an evidentiary issue within that larger issue, not a single claim. Although the court ruled on the evidentiary issue, it did not reach a final determination of the existence of particular State Farm policies. It did quite the opposite—it concluded genuine issues of material fact remained and denied summary judgment. CP 793-95. A denial of summary judgment is not appealable. *In re Estate of Jones*, 170 Wn. App. 594, 605, 287 P.3d 610 (2012); *see also Matter of Fischel*, 557 F.2d 209, 213 (9th Cir. 1977) (“denial of a motion to strike evidence is not a final decision of the district court”). Finally, the trial court did not consider whether there was no just reason for delay or make any findings to support such a determination. CP 793-95.

B. Standard of Review

If this Court reaches the merits of the note issue, review is *de novo*. *Ross v. Bennett*, 148 Wn. App. 40, 45, 203 P.3d 383 (2008), *rev. denied*, 166 Wn.2d 1012 (2009).

C. The Note Was Properly Authenticated.

The ancient documents exception to hearsay provides that documents more than 20 years old are not excluded by the hearsay rule as long as the document is authenticated:

(a) Specific Exceptions. The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

(16) *Statements in Ancient Documents.* Statements in a document in existence 20 years or more whose authenticity is established.

ER 803(16). Evidence Rule 901(b)(8) establishes three requirements for authenticating documents that are more than 20 years old:

(8) *Ancient Documents or Data Compilation.* Evidence that a document or data compilation, in any form, (i) is in such condition as to create no suspicion concerning its authenticity, (ii) was in a place where it, if authentic, would likely be, and (iii) has been in existence 20 years or more at the time it is offered.

ER 901; *see also Allen v. Asbestos Corp., Ltd.*, 138 Wn. App. 564, 576, 157 P.3d 406 (2007) (quoting rule). The party offering the evidence does not have to present incontrovertible evidence of authenticity. The evidence must only be “*sufficient to support a finding* that the document is what its proponent claims it to be.” *Allen*, 138 Wn. App. at 576 (emphasis added).

1. The Note Is More Than Twenty Years Old and Was in a Likely Place.

As review is *de novo*, this Court is in the same position as the trial court. *Ross*, 148 Wn. App. at 45. It must determine whether the evidence is “sufficient to support a finding that the document is” what Gull claims it to be. *Allen*, 138 Wn. App. at 576. The evidence here is more than sufficient to support a finding that the document is authentic. First, State Farm does not contest the note is more than 20 years old. Second, the note was exactly where it would be expected—in the Johnson’s “station lease file.” CP 179. Station lease files were folders created by Gull. *Id.* They contain historic lease and insurance documents specific to each station, such as Gull’s lease(s) with the station operator and certificates of insurance Gull received as an additional insured on its lessees’ primary insurance policies. *Id.* This note was found in the folder pertaining specifically to the Johnson’s station. *Id.* It was with four other State Farm

insurance documents, whose authenticity and admissibility State Farm does not contest. *Id.* That Gull or its attorneys, not Mr. Nebeker, found the note does not matter. *Allen*, 138 Wn. App. at 576 (declaration from plaintiff's attorney testifying he obtained copies of ancient documents concerning defendant's use of asbestos at a shipyard directly from the shipyard was sufficient for ancient document authentication; testimony from a shipyard employee with personal, firsthand knowledge about the creation of the documents was not required).

2. The Note's Author Testified the Note Is Genuine.

Third, the note's condition does not create suspicion. Gull offered perhaps the strongest evidence of genuineness possible—a sworn declaration from the note's author testifying he wrote it and that he was responsible for ensuring station operators complied with lease terms requiring insurance. CP 428-29.⁵ Considering this testimony plus (1) the note's location, (2) its express reference to “insurance,” (3) its 8/24/1978 date, (4) the note's contents its that “they [the Johnsons] are renewing with present agent,” and (5) State Farm's admission that it insured the Johnsons until at least three weeks earlier and Gull until three days earlier, August

⁵ The note is signed by “DN” and dated “8/24/78.” CP 431. Dale Nebeker, Gull's corporate secretary in August 1978, testified he wrote the note. CP 429. He also testified he was responsible for ensuring station operators complied with their lease terms, including those related to insurance, and that he “would have kept on top of problems with an operator's insurance until the operator was again in compliance with his/her lease terms.” CP 428.

21, 1978, the evidence is more than sufficient to support a conclusion that the note is what Gull claims it to be—a note related to the Johnson’s insurance coverage with State Farm.

State Farm has not presented any evidence disputing Mr. Nebeker’s or Mr. Jones’s testimony. Its arguments, in addition to overstating Ms. Johnson’s (now McGunnigle’s) testimony, all go to the weight of the evidence, not the authenticity of the note.⁶ They also assume a party cannot use circumstantial evidence to authenticate a document, but circumstantial evidence and direct evidence carry equal weight. *State v. Goodman*, 150 Wn.2d 774, 781, 83 P.3d 410 (2004). State Farm may be entitled to present these arguments to the finder-of-fact to suggest Gull has not met its burden to prove coverage, but, as the superior court recognized, these arguments are not a basis for this Court to find the note was not sufficiently authenticated. Gull’s evidence meets the standard under *Allen*—sufficient to support a finding that the document is what its proponent claims it to be. 138 Wn. App. at 576.

In re Connick, 144 Wn.2d 442, 28 P.3d 729 (2001), *overruled in part on other grounds by In re Goodwin*, 147 Wn.2d 861, 876, 50 P.3d 618 (2002), relied on by State Farm, is inapposite. In that case the court

⁶ Mary Johnson did not unequivocally testify “we cancelled this [State Farm] and used another insurance company.”

criticized both the appellant and respondent in dicta for relying on uncertified and unauthenticated photocopies of out-of-state court records, but considered the documents in its decision regardless, without deciding the issue of whether they were admissible. 144 Wn.2d at 457-58. Not only did *Connick* not involve ancient documents, but also the evidence of authentication here—testimony by Gull’s attorney detailing where he found the note and testimony by the note’s author that he wrote it—is much stronger.

D. The Note’s Contents Do Not Require an Additional Hearsay Exception.

1. The Rule Plainly Includes “Statements in the Document.”

As an authenticated ancient document, the note *and* its contents are admissible. ER 803(16) states in plain language the entire document is admissible, and this interpretation of the rule better conforms to the rule’s underlying purposes. Numerous courts around the country have adopted this approach, and this Court should do the same.

The rules of statutory interpretation apply to determine the meaning of the rules of evidence. *City of Bellevue v. Hellenthal*, 144 Wn.2d 425, 431, 28 P.3d 744 (2001). The Court must give effect to the rule’s plain language and meaning when the text is clear on its face. *Id.*

The language of ER 803(16) could not be plainer. It expressly states, “Statements in a document in existence 20 years or more whose authenticity is established” are “not excluded by the hearsay rule.” The rule explicitly applies to “*statements*” that are “*in*” a document without qualification. It does not apply any limitations to the word “statements.” State Farm is asking this Court to add a requirement that does not appear in the plain language of the rule.

2. The Drafters Knew How to Restrict Hearsay Exceptions to Only One Level of Hearsay and Require Personal Knowledge.

Other ER 803 hearsay exceptions support Gull’s plain-meaning interpretation. Comparing ER 803(16) to ER 803(5), the exception for recorded recollection, shows the drafters of the evidence rules knew how to restrict hearsay exceptions to only one level of hearsay and insert personal knowledge requirements. In ER 803(5), a “memorandum or record concerning a matter” is not hearsay only if the matter is something about which the “witness once had knowledge” and the memorandum or record was “made or adopted by the witness.” Thus, the rule requires personal knowledge and excepts just one level of hearsay. These requirements are missing from ER 803(16), and this Court should not insert them.

Other exceptions, such as ER 803(13) (family records) and (15) (statements in documents affecting an interest in property) are like ER 803(16). They do not limit the number of levels of hearsay that are excepted, and statements that fall under these exceptions routinely involve multiple levels of hearsay. Family genealogies, for example, which fall under the ER 803(13) exception, could have as many levels of hearsay as there are generations in the chart. *E.g., Compton v. Davis Oil Co.*, 607 F. Supp. 1221, 1228-29 (D. Wyo. 1985) (explaining rationale for ER 803(15) and (16) and admitting documents with multiple levels of hearsay).

3. Gull's Interpretation Does Not Make ER 805 Superfluous.

The plain language of ER 803(16) makes ER 805 inapplicable, not superfluous. The unlimited “statements in” language of ER 803(16) means all statements within ancient documents are not hearsay, no matter how many levels of hearsay they would present under a different exception. Those statements are no longer “hearsay within hearsay,” and, as a result, ER 805 does not apply.

4. If the Rules Conflict, the More Specific—ER 803(16)—Prevails.

To the extent there is any conflict between the two rules, ER 803(16) supersedes ER 805 under the “general-specific rule” of statutory construction. *In re Estate of Kerr*, 134 Wn.2d 328, 343, 949 P.2d 810

(1998) (a more specific statute supersedes a general statute when the two statutes pertain to the same subject matter and conflict to the extent they cannot be harmonized”). ER 803(16) addresses a small subset of hearsay evidence—ancient documents, while ER 805 is a rule of general applicability.

5. *Hicks* Ignores the Plain Language of the Rule and Its Purpose and Rationale.

Hicks v. Charles Pfizer & Co., 466 F. Supp. 2d 799 (E.D. Tex. 2005), the case relied upon by State Farm, ignores the plain language, purpose, and rationale of ER 903(16):

Hicks is incorrect. The text, underlying purpose, and rationale of Rule 803(16) each supports a broad interpretation. Rule 803(16) simply says, “statements in a document,” not “statements in a document made on personal knowledge of the documents creator.” Thus, a newspaper article over twenty years old reporting any event is admissible even if the article states that information was received from third parties, i.e., the context of the article is not solely within the personal knowledge of the creator or creators of the document. Realistically, any requirement that the proponent of the ancient document must establish the personal knowledge of the creator of the document as to all matters contained therein would effectively emasculate Rule 803(16)’s utility as it did in *Hicks*. *Hicks* is thus incorrect both as a textual matter and a matter of policy and should not be followed.

30 C Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 7057 (7th ed. 2011) (interpreting materially identical federal version of ER 803(16)).

6. Courts in Other Jurisdictions Agree with Gull.

Numerous courts in other jurisdictions agree with Gull that hearsay statements within ancient documents are admissible under ER 803(16). In *Compton*, the court admitted hearsay statements within a death certificate and two warranty deeds because such statements, made closer to the time of the events in question and before litigation, had less risk of error. 607 F. Supp. at 1229. In *Columbus-America Discovery Group, Inc. v. Sailing Vessel*, the Eastern District of Virginia held ancient documents are generally admissible and questions about the statements within the documents go to the weight of the evidence:

Even if there be restrictions on the use of newspaper articles that are admitted in evidence, where they deal with such an event as the sinking of the Central America, they are admissible as an ancient document. The weight to be given the articles is to be determined from all of the facts and circumstances in the case, giving consideration to what is sought to be proven by the articles. That is, where the articles meet the ancient document rule, they are generally admissible and any further question usually goes to the weight of the evidence.

742 F. Supp. 1327, 1343 (E.D. Va. 1990), *rev'd on other grounds*, 974 F.2d 446 (4th Cir. 1992). The same is true here. State Farm's arguments go to the weight to be given the note, not its admissibility. The United States District Court for the Eastern District of Pennsylvania recently rejected *Hicks* and succinctly explained why hearsay statements within ancient documents are admissible:

The ancient document hearsay exception recognizes the difficulty in finding witnesses that made statements more than 20 years prior, and that even an imperfect but relatively contemporaneous recollection by the document's author of the second-party statement would likely be more accurate than a 20-year-old memory. Moreover, although not always the case (as is true with every rule application), the second-party is as unlikely as the ancient document's author to have spoken with an eye toward litigation 20 years in the future, a consistently cited rationale for the existence of the ancient document rule. The arguments made in favor of requiring a different hearsay exception for all but the document itself—primarily focused on the danger of reading Rule 805's multiple-hearsay rule out of existence—miss the mark. Rule 803(16) provides a broad hearsay exception that applies to any level of hearsay within an ancient document. That is, even following Rule 805's mandate that a court examine each level of hearsay independently, Rule 803(16) supplies the grounds by which each level within an ancient document becomes admissible.

Langbord v. U.S. Dep't of Treasury, CIV.A. 06-5315, 2011 WL 2623315 (E.D. Pa. July 5, 2011). Finally, the United States District Court for the Middle District of Alabama admitted quotes in a newspaper article more than 20 years old because “any statements contained [in the articles]” were subject to the ancient documents exception. *Murray v. Sevier*, 50 F.Supp.2d 1257, 1265 n.6 (M.D.Ala.1999), *vacated on other grounds*, *Murray v. Scott*, 253 F.3d 1308 (11th Cir.2001). *See also Gonzales v. North Twp. of Lake County*, 800 F. Supp. 676, 681 (N.D. Ind. 1992), *rev'd on other grounds*, 4 F.3d 1412 (7th Cir.1993) (admitting and considering statements in a compilation of newspaper articles that were more than 20 years old); *Ammons v. Dade City*, 594 F. Supp. 1274, 1280 n. 8 (M.D.Fla.1984), *aff'd*, 783 F.2d 982 (11th Cir.1986) (admitting ancient newspaper articles to prove the existence of a street paving program in 1925); *Fulmer v. Connors*, 665 F. Supp. 1472, 1490 (N.D. Ala. 1987) (admitting ancient time and payroll books to establish earnings).

7. *Bowers v. Fibreboard Corp.* Supports Gull's Interpretation

In *Bowers v. Fibreboard Corp.*, 66 Wn. App. 454 (1992), the leading Washington case considering ER 803(16), the Court of Appeals set forth the purpose and rationale underlying the rule:

The requirement that an “ancient document” be at least twenty years old when offered enhances the probability that it will be trustworthy. First, the lengthy time period between preparation of the document and litigation provides assurance that the work was not fabricated in anticipation of litigation....

Necessity is the second policy reason for admitting certain hearsay evidence. As living witnesses to historical events are difficult to find, the trier of fact likely will lose the benefit of such evidence entirely if not admissible under an exception to the hearsay rule. Furthermore, we recognize that the difficulty of assembling the pieces necessary to tell the entire story about an incident that occurred more than twenty years ago may be so great that the evidence is practically, though perhaps not technically, unavailable.

66 Wn. App. at (internal citations omitted). These arguments apply with equal persuasiveness to statements within the ancient documents. Eyewitness accounts of events occurring a long time ago are likely to be less reliable than contemporaneous statements recorded in ancient documents. In addition, the statements were recorded when there was no anticipation of litigation. These characteristics make the statements in the document more likely to be trustworthy, not less. The lapse of time between the document’s creation and trial reduces the preference for live testimony otherwise implicit in the hearsay rule. The need for the

evidence is also greater as the passage of time will most likely have made the declarant unavailable. *See also Lunsford v. Saberhagen Holdings, Inc.*, 139 Wn. App. 334, 348, 160 P.3d 1089 (2007), *aff'd* 166 Wn.2d 264, 208 P.3d 1092 (2009) (relying on *Bowers* to admit American Law Institute reports that recorded proceedings and most likely contained multiple levels of hearsay under the ancient documents exception).

Requiring statements in the document to meet separate hearsay exceptions would be subjecting the statements to a more stringent admissibility standard than the document itself. This approach, which would eviscerate the exception, makes no sense. It contradicts the plain language of the rule and the rule's purpose and rationale. If this Court reaches the issue of admissibility it should affirm the trial court's ruling.

IV. CONCLUSION

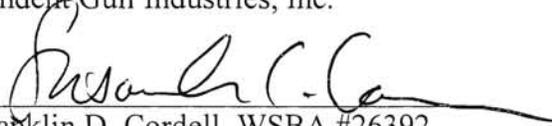
Gull requests this Court: (1) affirm the trial court's order granting CR 54(b) certification of the order determining Gull has no legal right to a defense at the Sedro-Woolley site; (2) reverse the court's order entering summary judgment on that issue; and (3) determine State Farm has no right to immediately appeal the trial court's denial of its motion to strike. However, if this Court reaches the merits of the trial court's decision to admit Dale Nebeker's note, it should affirm.

RESPECTFULLY SUBMITTED this 10th day of July, 2013.

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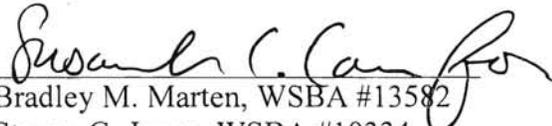
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2013 JUL 10 PM 4:24
STATE OF WASHINGTON
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DECLARATION OF SERVICE

The undersigned hereby declares under penalty of perjury under the laws of the State of Washington that a copy of the foregoing document was served at the following addresses on July 10, 2013 via the method described below:

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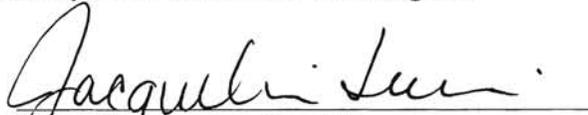
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APPENDIX A

2011 FEB -9 AM 9:05

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6 Attorneys for Plaintiff Gull Industries, Inc.

7 **SUPERIOR COURT OF WASHINGTON FOR SKAGIT COUNTY**

8 GULL INDUSTRIES, INC.,

9 Plaintiff,

10 vs.

11 SAFECO INSURANCE COMPANY OF
12 AMERICA (as successor-in-interest to
13 WESTERN CASUALTY AND SURETY
14 COMPANY), and STATE FARM FIRE
15 CASUALTY COMPANY, TRANSAMERICA
16 INSURANCE GROUP, ALLIANZ
17 UNDERWRITERS INSURANCE
18 COMPANY; SWISS REINSURANCE
19 AMERICA CORPORATION (as successor-in-
interest to PURITAN INSURANCE
COMPANY), and AMERICAN
INTERNATIONAL GROUP, INC. (as
successor-in-interest to GRANITE STATE
INSURANCE COMPANY),

20 Defendants.

NO. 10-2-01537-2

**SECOND AMENDED
COMPLAINT FOR
DECLARATORY JUDGMENT,
BREACH OF CONTRACT,
BREACH OF FIDUCIARY DUTY
AND BAD FAITH**

RECEIVED
COURT OF APPEALS
DIVISION ONE
JUL 10 2013

21 GULL INDUSTRIES, INC.,

22 Plaintiff,

23 vs.

24 UNIGARD INSURANCE COMPANY,

25 Defendant.

NO. 10-2-01537-2

CONFORMED COPY

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1. NATURE OF THE CASE

1.1 Plaintiff Gull Industries, Inc. ("Gull") brings this civil action for declaratory judgment, breach of contract, breach of fiduciary duty and bad faith conduct against Transamerica Insurance Company ("TIG"). TIG was Gull's primary insurer for the years 1981 through 1985.

1.2 Gull has also named its excess insurers, Allianz Underwriters Insurance Company ("Allianz"), Swiss Reinsurance America Corporation (as successor-in-interest to Puritan Insurance Company) ("Puritan") and American International Group, Inc. (as successor-in-interest to Granite State Insurance Company) ("Granite State") (collectively the "Excess Carriers") as defendants. Gull has named its Excess Carriers as defendants based on the fact that, under the terms and conditions of the Excess Carriers' Policies, the Excess Carriers have a contractual obligation to defend and indemnify Gull for claims arising from releases of hazardous substances at the Highway 20 Site to the extent that Gull's primary coverage is either insufficient to cover those claims or has been exhausted. As a result, the Excess Carriers are necessary parties without whom Gull's claims cannot be fully resolved.

1.3 Gull is also asserting claims for declaratory judgment, breach of contract, and breach of fiduciary duty against Safeco Insurance Company of America (as successor-in-interest to Western Casualty and Surety Company) ("Safeco"), State Farm Fire and Casualty Company ("State Farm") and Unigard Insurance Company ("Unigard"). Gull was named as an additional insured on policies of insurance issued by Safeco, State Farm and Unigard (collectively the "AI Carriers") and Gull's claims against the AI Carriers arise from the AI Carriers' refusals to honor their obligations to defend and indemnify Gull as insured or additional insured under contracts of insurance issued by the AI Carriers.

1.4 Gull has tendered claims to TIG, its Excess Carriers and the AI Carriers under their respective insurance policies arising out of the release of hazardous substances at a former Gull service station located at 21481 Highway 20, Sedro Woolley, Washington, 98284 (the "Highway 20 Site").

1 1.5 In connection with the tender of these claims, Gull provided TIG, the Excess Carriers
2 and the AI Carriers (collectively, the “Defendants”) with evidence of coverage under their respective
3 insurance policies and information demonstrating that Gull was entitled to both defense and
4 indemnity under those insurance policies. Gull also provided the Defendants with information
5 demonstrating the release of hazardous substances during the periods of coverage under the policies
6 and showing that Gull has paid hundreds of thousands of dollars in defense and indemnity costs as a
7 direct result of the release of hazardous substances.

8 1.6 Despite their receipt of this information, each of the Defendants has failed to honor
9 their coverage obligations under their respective insurance policies to provide Gull with a defense for
10 its claims and/or to indemnify Gull for both its past response costs and future responses costs, as
11 required under their respective insurance policies.

12 1.7 Based on TIG and the AI Carriers’ refusals to honor their obligations under their
13 respective insurance policies, Gull seeks a declaratory judgment from this Court that TIG and the AI
14 Carriers have an obligation under their respective insurance policies to provide Gull with a defense
15 against the claims arising from the releases of hazardous substances and also seeks a declaratory
16 judgment that all of the Defendants have an obligation to indemnify Gull for both its past response
17 costs arising from or relating to the release of hazardous substances at the Highway 20 Site and for
18 any future response costs arising from or relating to the release of hazardous substances at the
19 Highway 20 Site.

20 1.8 Gull also seeks a declaratory judgment that, to the extent provided under the terms
21 and conditions of the Excess Carriers’ policies, the Excess Carriers have a contractual obligation to
22 defend Gull for all sums incurred by Gull in connection with the investigation of the release of
23 hazardous substances at the Highway 20 Site, in the event that Gull’s primary insurance coverage is
24 insufficient to cover those sums or is exhausted.

25 1.9 Gull also seeks a declaration that it is entitled to an award of prejudgment interest on
26 all liquidated amounts tendered by Gull to the Defendants for reimbursement pursuant to
27 Washington law.

1 1986, under TIG Policy # 19341478. These policies are collectively referred to hereafter as the
2 "TIG Policies."

3 4.5 On information and belief, Allianz provided Gull with excess insurance coverage
4 pursuant to one contract of insurance. Gull obtained coverage from Allianz from October 1, 1979
5 through October 1, 1980 under Allianz Policy # AU 5003116. This policy is referred to hereafter
6 as the "Allianz Policy."

7 4.6 On information and belief, Puritan provided Gull with excess insurance coverage
8 pursuant to two contracts of insurance. Gull obtained coverage from Puritan from October 1, 1979
9 through October 1, 1980 under Puritan Policy # ML 650527 and under Puritan Policy # UL
10 672802. These policies are collectively referred to hereafter as the "Puritan Policies."

11 4.7 On information and belief, Granite State provided Gull with excess insurance
12 coverage pursuant to three contracts of insurance. Gull obtained coverage from Granite State from
13 October 1, 1980 through October 1, 1981 under Granite State Policy # 6380-7811. Gull also
14 obtained coverage from October 1, 1981 through October 1, 1982 under Granite State Policy
15 # 6381-8416, and from October 1, 1982 through October 1, 1983 under Granite State Policy
16 # 6382-9777. These policies are collectively referred to hereafter as the "Granite State Policies."

17 4.8 At a majority of Gull's stations, including the Highway 20 Site, Gull leased its
18 service stations to station operators on a commission basis. Under the terms of Gull's station
19 leases, the station operator was required to obtain liability insurance to cover the service station's
20 operations. The lease terms also required the station operators to obtain insurance coverage naming
21 Gull as an additional insured and to transmit proof of coverage to Gull in the form of a certificate of
22 insurance.

23 4.9 Hayes Johnson and Mary Johnson (n/k/a Mary McGunnigle) (collectively, the
24 "Johnsons") operated the Highway 20 Site under a lease agreement with Gull between 1972 and
25 1982. The Johnsons entered into the lease agreement with Gull on September 16, 1972. The lease
26 term was for one year and renewed automatically until either party gave written notice of
27 termination. The Johnsons terminated the lease in writing on September 9, 1982.

1 4.10 The Johnsons' lease with Gull required them to obtain liability insurance coverage
2 naming Gull as an additional insured and protecting Gull from property damages arising out of the
3 Highway 20 Site station's operations. The lease also required the Johnsons to transmit proof of
4 coverage to Gull in the form of certificates of insurance.

5 4.11 On information and belief, the Johnsons obtained coverage from State Farm for their
6 Highway 20 Site operations for the period July 28, 1977, through July 28, 1978, under State Farm
7 Policy # 98-59-34-77. The Johnsons renewed coverage for the period from July 28, 1978, through
8 July 28, 1981, under State Farm Policy # 98-60-04-39. These Policies are collectively referred to
9 hereafter as the "State Farm Policies."

10 4.12 The Johnsons transmitted proof of the existence of the State Farm Policies to Gull in
11 the form of certificates of insurance. Gull is currently in possession of two certificates for the State
12 Farm Policies. The certificates of insurance list the primary insured's address as "1945 Hwy 20,
13 Sedro Woolley, WA 98284." On information and belief, this is the same physical location as the
14 present Highway 20 site address, 21481 Highway 20, Sedro Woolley, Washington, 98284, and
15 reflects a renumbering of addresses on Highway 20 that occurred after the certificates were issued.
16 The State Farm Policies were valid at the time they were sold and remain in full force and effect.

17 4.13 The certificates of insurance in Gull's possession show that the State Farm Policies
18 provided liability coverage for combined single limits for bodily injury and property damage in the
19 amounts of \$300,000 for each occurrence and \$300,000 in the aggregate. On information and
20 belief, the State Farm Policies provided these limits for each year that the State Farm Policies were
21 in force.

22 4.14 On information and belief, the Johnsons also obtained coverage for their Highway 20
23 Site operations from Unigard for the period December 15, 1979, through December 15, 1980, under
24 Unigard Policy # GL33-4967. The Johnsons renewed coverage for December 15, 1980, through
25 December 15, 1981, under Unigard Policy # GL33-4967 and for December 15, 1981, through
26 December 15, 1982, under Unigard Policy # GL33-4967. These Policies are collectively referred to
27 hereafter as the "Unigard Policies."

1 4.15 The Johnsons transmitted proof of the existence of the Unigard Policies to Gull in the
2 form of certificates of insurance. Gull is currently in possession of certificates for two of the Policies
3 (1980-1981 and 1981-1982). These certificates listed Gull as an additional insured on both of the
4 Unigard Policies.

5 4.16 Gull provided copies of these certificates to Unigard. After reviewing its files,
6 Unigard confirmed the existence of the 1980/81 and 1981/82 Policies and acknowledged the
7 existence of the 1979/80 Policy. The Unigard Policies were valid at the time they were sold and
8 remain in full force and effect.

9 4.17 The relevant certificates of insurance for the Unigard Policies list the insured's
10 address as "1945 Hwy 20, Sedro Woolley, WA 98284." Upon information and belief, this is the
11 same physical location as the present Highway 20 site address, 21481 Highway 20, Sedro Woolley,
12 Washington, 98284, and reflects a renumbering of addresses on Highway 20 that occurred after the
13 certificates were issued. The Unigard Policies were valid at the time they were sold and remain in
14 full force and effect.

15 4.18 The certificates of insurance in Gull's possession show that the Unigard Policies for
16 which Gull has certificates of insurance each provided liability coverage for property damage in the
17 amounts of \$100,000 for each occurrence and \$100,000 in the aggregate. On information and
18 belief, the 1979/80 Policy that Unigard has acknowledged provided those same levels of coverage.

19 4.19 Verland Nolta operated the Highway 20 Site under a lease agreement with Gull
20 between 1982 and 1983. Mr. Nolta entered into the lease agreement with Gull on October 12,
21 1982. The lease term was for one year and renewed automatically until either party gave written
22 notice of termination. Mr. Nolta terminated the lease in writing on March 15, 1983.

23 4.20 Mr. Nolta's lease agreement with Gull required him to obtain liability insurance
24 coverage naming Gull as an additional insured and protecting Gull from property damages arising
25 out of the Highway 20 Site station's operations. The lease also required Mr. Nolta to transmit
26 proof of coverage to Gull in the form of a certificate of insurance.

27

1 4.21 On information and belief, Mr. Nolta obtained coverage from Western for the period
2 October 11, 1982 through October 11, 1983, under Western Policy # SSP 34-83-98. This policy
3 will be referred to hereafter as the "Nolta Western Policy".

4 4.22 Mr. Nolta transmitted proof of the existence of the Nolta Western Policy to Gull in
5 the form of certificates of insurance. Gull is currently in possession of two certificates for the Nolta
6 Western Policy. The first certificate in Gull's possession shows that Gull is listed as additional
7 insured under the Nolta Western Policy. Both certificates list the primary insured's address as
8 "1945 Hwy 20, Sedro Woolley, WA 98284." On information and belief, this is the same physical
9 location as the present Highway 20 site address, 21481 Highway 20, Sedro Woolley, Washington,
10 98284, and reflects a renumbering of addresses on Highway 20 that occurred after the certificates
11 were issued. The Nolta Western Policy was valid at the time it was sold and remains in full force
12 and effect.

13 4.23 The certificates of insurance in Gull's possession show that the Nolta Western Policy
14 provided liability coverage for property damage in the amounts of \$300,000 for each occurrence
15 and \$300,000 in the aggregate.

16 4.24 Lois Danielson (n/k/a Lois Blankenship) and Gerald C. Danielson (a/k/a Jerry
17 Danielson) (collectively, the "Danielsons") operated the Highway 20 Site under a lease agreement
18 with Gull between 1983 and 1985. The Danielsons entered into the lease agreement with Gull on
19 April 1, 1983. The lease term was for one year and renewed automatically until either party gave
20 written notice of termination. The Danielsons terminated the lease in writing effective May 31,
21 1985.

22 4.25 The Danielsons' lease agreement with Gull required them to obtain liability
23 insurance coverage naming Gull as an additional insured and protecting Gull from property
24 damages arising out of the Highway 20 Site station's operations. The lease also required the
25 Danielsons to transmit proof of coverage to Gull in the form of a certificate of insurance.

26 4.26 On information and belief, the Danielsons obtained coverage from Western from
27 October 11, 1983 through October 11, 1985, based on the dates of the Danielson's lease with Gull

1 and also based on the fact that coverage was provided by Western under Policy # SSP 34-83-98,
2 which is the same policy number under which coverage was provided to Verland Nolta. These
3 policies will be referred to hereafter as the Danielson Western Policies.

4 4.27 The Danielsons transmitted proof of the existence of the Danielson Western Policies
5 to Gull in the form of a certificate of insurance. Gull is currently in possession of one certificate for
6 the Danielson Western Policies. The certificate lists the primary insured's address as "1945 Hwy
7 20, Sedro Woolley, WA 98284." On information and belief, this is the same physical location as
8 the present Highway 20 site address, 21481 Highway 20, Sedro Woolley, Washington, 98284, and
9 reflects a renumbering of addresses on Highway 20 that occurred after the certificate was issued.
10 The Danielson Western Policies were valid at the time they were sold and remain in full force and
11 effect.

12 4.28 The certificate of insurance in Gull's possession shows that the Danielson Western
13 Policies provided liability coverage for property damage in the amounts of \$300,000 for each
14 occurrence and \$300,000 in the aggregate. On information and belief, the Danielson Western
15 Policies provided these policy limits for each year that the Danielson Western Policies were in
16 force.

17 4.29 The State Farm Policies, Unigard Policies, Nolta Western Policy, and the Danielson
18 Western Policies will be collectively referred to hereafter as the "AI Policies."

19 **Defendants' Failure to Honor Their Obligations to Defend and Indemnify Gull for Property**
20 **Damage**

21 4.30 Gull is in possession of copies of the TIG Policies, the Allianz Policy, the Puritan
22 Policies and two of the three Granite State Policies. Gull is not, however, in possession of the AI
23 Policies, because the AI Carriers issued these Policies directly to the Johnsons, Danielsons and/or
24 Mr. Nolta (collectively, the "Station Operators") and not to Gull.

25 4.31 Gull has requested copies of the AI Policies from the AI Carriers or, in the event the
26 Policies cannot be found, Gull has requested reconstruction of the AI Policies pursuant to
27 Washington Administrative Code 284-30-920. State Farm and Safeco have not provided Gull with

1 copies of their policies, but have responded with a reconstruction of the relevant policies' language.
2 Despite Gull's request, Unigard has neither provided Gull with copies of the Unigard Policies nor
3 reconstructed the Unigard Policies' language.

4 4.32 According to the language in the TIG Policies, the reconstructed policy language
5 provided by State Farm and Safeco, and on information and belief grounded on the forms in use
6 during the period of time covered by the Unigard Policies, both TIG and the AI Carriers were
7 required to defend any suit against the insured or any additional insured(s) seeking damages on
8 account of property damage to which the insurance applied, even if the allegations of the suit are
9 groundless, false or fraudulent. As excess carriers, Allianz, Puritan and Granite State undertook an
10 indemnity obligation to the extent that Gull's damages on account of property damage exceed the
11 limits of Gull's primary insurance coverage. In addition, to the extent that Gull's underlying
12 coverage was exhausted or otherwise unavailable, the Excess Carriers also undertook a defense
13 obligation for claims to which the insurance applied.

14 4.33 This same policy language required the TIG and the AI Carriers to indemnify the
15 insured or any additional insured(s) for all sums that the insured or additional insured(s) became
16 legally obligated to pay as damages because of property damage to which the insurance applies,
17 caused by an "occurrence," as that term was defined by the Policies. With respect to the Excess
18 Carriers, they undertook an obligation to provide coverage to Gull for all sums that the insured or
19 additional insured(s) became legally obligated to pay as damages because of property damage to
20 which the insurance applies, caused by an "occurrence," to the extent that the resources of Gull's
21 primary/underlying insurance was not sufficient to cover those damages. The contamination at the
22 Highway 20 Site constitutes property damage to which the insurance applies, caused by an
23 "occurrence," as that term is used under the TIG Policies, the AI Policies and the Excess Policies.

24 4.34 During the periods covered by the TIG Policies, the AI Policies and the Excess
25 Policies, gasoline and other hydrocarbons were released into the environment at the Highway 20
26 Site. Evidence of these releases is provided by a contemporaneous investigation undertaken by
27 Gull's environmental consultant, Norton Corrosion, Inc. ("Norton Corrosion").

1 4.35 In May 1984, Gull contracted with Norton Corrosion to perform analysis of leakage
2 of USTs located at a number of Gull's service stations and to document its findings in a report that
3 would allow Gull to prioritize the replacement and/or installation of leak protection in those USTs.

4 4.36 Norton Corrosion evaluated Gull's service stations between September and
5 December 1984. At the Highway 20 Site, Norton Corrosion installed borings adjacent to each UST
6 at the Site in order to: (1) determine the susceptibility of the USTs to corrosion; and, (2) determine
7 the presence of hydrocarbons adjacent to each UST that was evaluated.

8 4.37 Norton Corrosion's analysis of the soil borings at the Highway 20 Site showed the
9 presence of hydrocarbons in the soil adjacent to the USTs located at the Highway 20 Site. A
10 summary of the evidence of releases of hydrocarbons at the Highway 20 Site during the period that
11 the Station Operators operated the service station is provided by a March 1985 report prepared by
12 Norton Corrosion (the "Norton Corrosion Report").

13 4.38 The Norton Corrosion Report provides conclusive evidence that hydrocarbons were
14 present in the soil at the Highway 20 Site in December 1984. The nature and extent of the
15 hydrocarbons present in the soil at the Highway 20 Site in December 1984 indicate that a
16 continuous release was occurring during the period that the Station Operators operated the service
17 station.

18 4.39 The hydrocarbon releases documented in the Norton Corrosion Report impacted soil
19 and groundwater at the Highway 20 Site and on adjacent properties. As a result of these
20 hydrocarbon releases, Gull undertook voluntary remediation of the hazardous substances released
21 at the Site, including investigation and clean up of the soil and groundwater at the Highway 20 Site.

22 4.40 As part of its cleanup of the Highway 20 Site, Gull installed dual-purpose soil-vapor
23 and groundwater extraction wells and a treatment system to remediate the contamination.

24 4.41 To date, Gull has incurred more than \$381,000 in investigation and remedial action
25 costs at the Highway 20 Site. Based on an evaluation by Gull's consultants, Gull anticipates
26 incurring additional investigation and remediation costs of in excess of three million dollars to
27 complete remediation of on- and off-site contamination at the Highway 20 Site.

1 4.42 Gull tendered its claims regarding the Highway 20 Site under the TIG Policies by
2 letter on October 23, 2009. TIG has failed to accept Gull's request for defense and indemnification
3 in connection with Gull's damages at the Highway 20 Site. As such, TIG has failed to honor its
4 obligations under the TIG Policies.

5 4.43 Gull tendered its claims as additional insured under the Johnsons' State Farm
6 Policies by letter on March 15, 2010. State Farm replied by letter on June 17, 2010; however, State
7 Farm has failed to accept Gull's request for defense and indemnification in connection with Gull's
8 damages at the Highway 20 Site. As such, State Farm has failed to honor its obligations under the
9 State Farm Policies.

10 4.44 Gull tendered its claims as additional insured under the Johnsons' Unigard Policies
11 to Unigard by letter on October 28, 2009. Unigard has failed to accept Gull's request for defense
12 and indemnification in connection with Gull's damages at the Highway 20 Site. As such, Unigard
13 has failed to honor its obligations under the Unigard Policies.

14 4.45 Gull tendered its claims as additional insured under the Nolta Western Policy to
15 Safeco by letter on November 19, 2009. After failing to respond to several requests for a coverage
16 decision, Safeco finally denied Gull's claims by letter on April 14, 2010. Safeco's stated basis for
17 denying coverage was due to the fact that it was unable to locate a copy of the Policy. As such,
18 Safeco has failed to honor its obligations under the Nolta Western Policy.

19 4.46 Gull tendered its claims as additional insured under the Danielson Western Policies
20 to Safeco by letter on April 16, 2010. Safeco has failed to accept Gull's request for defense and
21 indemnification in connection with Gull's damages. As such, Safeco has failed to honor its
22 obligations under the Danielson Western Policies.

23 4.47 Gull tendered its claims under the Allianz Policy to Allianz by letter on October 23,
24 2009. Allianz has not agreed to accept coverage for Gull's claims.

25 4.48 Gull tendered its claims under the Puritan Policies to Puritan by letter on October 23,
26 2009. Puritan has not agreed to accept coverage for Gull's claims.

1 4.49 Gull tendered its claims under the Granite State Policies to Granite State by letter on
2 October 23, 2009. Granite State has not agreed to accept coverage for Gull's claims.

3 **TIG's Bad Faith and Violation of Washington's Consumer Protection Act**

4 4.50 In 1992, the Jenova Land Company sued Gull, seeking reimbursement of property
5 damages arising from contamination at a Gull gasoline station in Eugene, Oregon.

6 4.51 In 1994, Gull tendered a claim to TIG for defense of that suit and for reimbursement
7 of Gull's indemnity costs under TIG Policy Nos. 18493020, U 19341478 and XLX 1288119. Gull
8 eventually settled the lawsuit.

9 4.52 In 1995, Max Birnbach sued Gull, seeking reimbursement of property damages
10 arising from contamination at one of Gull's gasoline stations in Portland, Oregon.

11 4.53 In 1995, Gull tendered a claim to TIG in 1995 for defense of that suit and for
12 reimbursement of Gull's indemnity costs under TIG Policy Nos. 18493020, XLX 1288119 and U
13 19341478. Gull eventually settled the lawsuit with Max Birnbach.

14 4.54 In two letters dated February 13, 1994 and April 19, 1996, TIG denied Gull's claims
15 with respect to the Jenova Land Company lawsuit. TIG stated as its basis for denial of Gull's claim
16 that it had "not been able to locate a copy of the policy listed in [Gull's claim letter] (#18493020) at
17 this time" and asked Gull to forward a copy of the policy to TIG. With respect Policy Nos. XLX
18 1288119 and U 19341478, TIG denied coverage for Gull's claims based on alleged pollution
19 exclusions contained in those policies.

20 4.55 In addition to failing to locate Policy No. 18493020, TIG also responded that "[w]e
21 have been unable to locate any earlier policy which was allegedly issued by TIG." In other words,
22 TIG failed to acknowledge or identify any additional policies under which it had provided
23 insurance coverage to Gull.

24 4.56 In two letters dated May 16, 1996 and April 19, 1996, TIG denied Gull's claim
25 relative to the Max Birnbach lawsuit, claiming that the suit was "outside the scope of coverage
26 provided by the policies."
27

1 4.57 TIG also responded that “[w]e have been unable to locate any earlier policy which
2 was allegedly was issued by TIG.” In other words, TIG failed to acknowledge or identify any
3 additional policies under which it had provided insurance coverage to Gull.

4 4.58 Based on TIG’s denial of the Jenova Land Company claim and the Max Birnbach
5 claim and in detrimental reliance on the fact that TIG had identified no other policies under which
6 it had issued coverage to Gull, Gull has incurred costs to remediate environmental contamination at
7 its stations since 1995 and 1996, without tendering those claims to TIG.

8 4.59 In 2009, Gull once again tendered a number of claims arising from property damage
9 at the Sedro Woolley Station and at other stations and properties owned by Gull to TIG.

10 4.60 In response to those claims, TIG acknowledged, for the first time, that it had
11 provided coverage to Gull under TIG Policy # 18493010, TIG Policy # 18882389, TIG Policy
12 # 19119847, TIG Policy # 19188986 and TIG Policy # 19341478.

13 4.61 Having acknowledged issuance of those policies for the first time, TIG went on to
14 accept defense of at least some of the claims tendered by Gull, thereby confirming that Gull had
15 valid insurance coverage under at least some of TIG’s policies.

16 4.62 From 1995 until 2009, Gull has incurred millions of dollars of damages in the form
17 of both defense and remediation costs from property damage arising from contamination at many of
18 its stations – including the Highway 20 Site. Based on TIG’s failure to acknowledge its issuance of
19 insurance policies and its wrongful denial of Gull’s claims in 1995 and 1996, along with Gull’s
20 detrimental reliance on TIG’s failure to acknowledge the existence of any other policies of
21 insurance and TIG’s wrongful denial of Gull’s claims, Gull has incurred those damages itself,
22 rather than tendering claims for defense and indemnity of those costs to TIG. In addition to
23 constituting bad faith, TIG’s actions also violate Washington’s Consumer Protection Act, Chapter
24 19.86 RCW, by engaging in unfair and deceptive practices in the conduct of its business which are
25 capable of being replicated and thereby damaging the public.

1 a construction of TIG's primary policies will have a bearing on when the Excess Carrier's
2 obligations arise, the Excess Carriers are necessary parties to this litigation, without whom Gull
3 cannot obtain a full adjudication of its rights under the terms of both the Excess Policies and the
4 TIG Policies.

5 5.8 The rights, status, and other legal relations between Gull and the Defendants are
6 uncertain and insecure, and the entry of a declaratory judgment by this Court is necessary to
7 terminate the uncertainty and controversy giving rise to this proceeding. Pursuant to Chapter 7.24
8 RCW, Gull requests that this Court issue a declaration of the rights and duties of the parties under
9 the Policies with respect to Gull's defense and indemnity costs incurred in connection with the
10 Highway 20 Site, as well as Gull's future defense and indemnity costs at that Site.

11 SECOND CLAIM FOR RELIEF – BREACH OF CONTRACT

12 5.9 Gull repeats and incorporates by reference all previous allegations.

13 5.10 The insurance policies identified above are written contracts obligating TIG, the AI
14 Carriers and the Excess Carriers to defend any suit against Gull seeking damages on account of
15 property damage to which the insurance applies, even if the allegations of the suit are groundless,
16 false or fraudulent. The Policies also require the Defendants to indemnify Gull for all sums Gull
17 shall become legally obligated to pay as damages because of property damage to which the
18 insurance applies, caused by an occurrence.

19 5.11 Washington's Model Toxics Control Act, Chapter 70.105D RCW ("MTCA"), is a
20 strict liability statute that imposes liability on owners and operators of a facility where a release has
21 occurred. Under Washington law, liability insurance coverage is triggered when an insured
22 conducts a cleanup of hazardous substances for which it is strictly liable pursuant to MTCA, even if
23 the cleanup is voluntary. Therefore, the contamination at the Highway 20 Site constitutes property
24 damage to which the TIG Policies, AI Policies and Excess Policies apply, caused by an occurrence.

25 5.12 By failing to accept Gull's request to provide a defense and indemnification in
26 connection with the costs incurred by Gull at the Highway 20 Site, TIG and the AI Carriers have
27 breached and are continuing to breach the terms and conditions of the TIG Policies and the AI

1 Policies, which under applicable law require those Defendants to defend and indemnify Gull for all
2 sums incurred in connection with the property damage covered under those policies, along with
3 Gull's future defense and indemnity costs incurred at the Highway 20 Site.

4 5.13 As a result of TIG's and the AI Carriers' breaches of contract, Gull has sustained
5 damages in an amount to be determined at trial.

6 5.14 With respect to the Excess Carriers, because the Excess Carriers' obligations to
7 defend and indemnify Gull arise at the point where Gull's primary insurers' policy limits are
8 exhausted, by failing to accept Gull's request to provide a defense and indemnification in
9 connection with the costs incurred by Gull at the Highway 20 Site, where Gull's primary insurance
10 has been exhausted or is insufficient to cover potential claims, the Excess Carriers have breached
11 and are continuing to breach the terms and conditions of the Excess Policies, which under
12 applicable law require the those Defendants to defend and indemnify Gull for all sums incurred in
13 connection with the property damage covered under those policies, along with Gull's future defense
14 and indemnity costs incurred at the Highway 20 Site.

15 5.15 Finally, because a construction of TIG's primary policies will have a bearing on the
16 extent of the Excess Carrier's contract obligations, the Excess Carriers are necessary parties to this
17 litigation, without whom Gull cannot obtain a full adjudication of its contract rights under the terms
18 of both the Excess Policies and the TIG Policies.

19 THIRD CLAIM FOR RELIEF – BREACH OF FIDUCIARY DUTY

20 5.16 Gull repeats and incorporates by reference all previous allegations.

21 5.17 Under the common law of Washington and pursuant to RCW 48.01.030, as Gull's
22 insurers, the Defendants have a fiduciary relationship with Gull under which they owe heightened
23 duties to Gull. The fiduciary relationship is based both on the policies identified above and on the
24 relationship of trust and reliance underlying Gull's dependence on its insurers.

25 5.18 The Defendants have breached their fiduciary duties to Gull by the actions described
26 in the previous allegations in this Complaint.

1 5.19 As a result of those Defendants' breaches of their fiduciary duties, Gull has been
2 damaged in an amount to be determined at trial.

3 FOURTH CLAIM FOR RELIEF – BAD FAITH AND VIOLATION OF WASHINGTON'S
4 CONSUMER PROTECTION ACT AGAINST TIG

5 5.20 As a result of TIG's wrongful denial of coverage and failure to identify and
6 acknowledge the existence of additional policies of insurance under which it had undertaken to
7 provide defense and indemnity of claims asserted against Gull, which were not affected by any
8 pollution exclusion, Gull has incurred damages for claims which were properly the obligation of
9 TIG to defend and indemnify.

10 5.21 TIG's failure to identify and acknowledge the existence of additional policies under
11 which Gull was insured and its denial of coverage for property damage claims based on an
12 assertion that such claims were subject to a pollution exclusion was the result of either TIG's
13 willful failure to investigate its own policy records or negligence on the part of TIG.

14 5.22 In either case, TIG's actions constitute bad faith conduct relative to Gull under
15 Washington common law and under Chapter 43.30 RCW and Chapter 284-30 WAC.

16 5.23 As a result of TIG's bad faith, Gull has been damaged in an amount to be proven at
17 trial.

18 5.24 In addition to these damages, Gull is entitled to recover damages above the policy
19 limits set in TIG's policies as a result of TIG's bad faith.

20 5.25 In addition to these damages, Gull is also entitled to recover damages and its
21 attorney's fees as provided under Washington's Consumer Protection Act, Chapter 19.86 RCW.

22 **6. PRAYER FOR RELIEF**

23 Gull respectfully requests that this Court enter judgment in Gull's favor and against the
24 Insurance Defendants as follows:

- 25 1. For a declaration by the Court that Gull has the right to insurance coverage under the
26 policies and to payment by TIG and the AI Carriers of all of Gull's defense and
27 indemnification costs associated with the investigation and clean up of the
hazardous substances released at the Highway 20 Site, along with future defense and
indemnity costs associated with the Highway 20 Site;

