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Supreme Court
No. 80199-1

Court of Appeals
No. 57866-9-1

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

MUTUAL OF ENUMCLAW INSURANCE COMPANY
and
COMMERCIAL UNDERWRITERS INSURANCE COMPANY,

Respondent,

v.

USF INSURANCE COMPANY,

Petitioner.

USF INSURANCE COMPANY'S
PETITION FOR REVIEW

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ORIGINAL

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A. IDENTITY OF PETITIONER

Defendant USF Insurance Company ("USFIC") petitions this Court to accept review of part of the decision designated in Part B of this motion.

B. COURT OF APPEALS' DECISION

This petition pertains to the Opinion of Division I of the Court of Appeals in this case, *Mutual Of Enumclaw Insurance Company and Commercial Underwriters Insurance Company v. USF Insurance Company*, No. 57866-9-1, 137 Wn. App. 352, 153 P.3d 877 (2007), filed February 26, 2007. That Court subsequently denied USFIC's motion for reconsideration, by an order entered April 23, 2007.

The Opinion reversed the trial court's grant of defendant USFIC's motion for summary judgment and dismissal of Mutual of Enumclaw Insurance Company ("MOE") and Commercial Underwriters Insurance Company's ("CUIC") contribution claims. A copy of the Opinion is in the Appendix, pages 1 through 11. A copy of the Order Denying Reconsideration is at Appendix, page 12.

USFIC does not seek review of the portion of the Opinion denying MOE and CUIC's motion for summary judgment addressing USFIC's defense of a known loss under the policy.

C. ISSUES PRESENTED FOR REVIEW

1. The insured, Dally Homes, Inc. ("Dally Homes"), on the advice of its counsel, waived its right to policy benefits from its insurer, USFIC, for a lawsuit relating to construction defect claims, *Windsong Arbor Homeowners Association v. Dally Homes, Inc., et al.*, King County Superior Court No. 00-2-19309-2. Are Dally Homes' assignees, MOE and CUIC, therefore precluded from seeking contribution from USFIC, by virtue of black letter law that an assignee of a claim takes no other or greater rights than the original assignor?

2. The issue of selective tender is a matter of first impression in Washington. Does the doctrine of selective tender apply in Washington when the issue implicates public policy?

3. Whether the Court of Appeals failure to preclude MOE and CUIC's contribution claims in the face of prejudice to USFIC caused by its loss of an opportunity to investigate, defend, participate in settlements, monitor the underlying claims, or mount its own claim in the prior contribution action, is in conflict with *NW Prosthetic v. Centennial Ins.*, 100 Wn. App. 546, 550, 997 P.2d 972, 974 (2000).

D. STATEMENT OF THE CASE

MOE and CUIC, the Plaintiffs in the trial court and Respondents

herein, brought claims for contribution and subrogation against USFIC towards the amount of USFIC's alleged share of defense and indemnity costs paid by MOE and CUIC in settlement of *Windsong Arbor Homeowners Association v. Dally Homes, Inc., et al.*, King County Superior Court No. 00-2-19309-2.

USFIC bound coverage on Commercial General Liability ("CGL") Policy No. MS 02474 ("Policy") for Dally Homes on January 18, 2000. **CP 44-87.** Windsong Arbor is a condominium development near Kent, Washington. Dally Homes was the developer and, affiliated entity Windsong Arbor Limited Partnership ("Partnership") was the declarant for Windsong Arbor. **CP 350.**

Dally Homes, acting on the advice of its attorney, chose not to tender the Windsong Arbor Homeowners Association's ("HOA's") claim to USFIC, although the claim was tendered to all of Dally Homes' other insurers. None of Dally Homes' other insurers informed USFIC of the HOA's claims. **CP 397-402; CP 559-62; CP 564-66.**

On January 30, 2002, Dally Homes, the Partnership, MOE and CUIC, entered into an Agreement for funding the settlement in the HOA's suit against Dally Homes and the Partnership. Dally Homes and the Partnership assigned to MOE and CUIC their rights to

recovery in four specifically identified policies of insurance under which coverage for the HOA settlement was claimed. USFIC received no notice of this settlement, just as it had received no notice of the underlying suit. USFIC was not named in the assignment, which specifically listed several of Dally Homes' insurers. The Agreement did include an assignment of rights to recover defense costs from "all liable insurers." **CP 443-54.**

MOE and CUIC gave no notice to USFIC of their claims until February, 2004, after they had settled the HOA suit against Dally Homes and after they had recovered a settlement in a contribution suit against the other insurers of Dally Homes and its sub-contractors, *Mutual of Enumclaw Insurance Company, et al., v American States Insurance Company, et al.* **CP 397-99; CP 401-02; CP 506.** USFIC had no opportunity to participate in the defense, investigation, settlement or allocation of settlement proceeds concerning either the HOA suit or the insurer contribution lawsuit.

In 2004, MOE and CUIC filed this action against USFIC for subrogation and for contribution. **CP 1-5.** On January 31, 2006, the trial court below granted USFIC's motion for summary judgment, dismissing all MOE and CUIC's claims with prejudice. **CP 377-378; CP 576-79; CP 586-88.** The Court of Appeals reversed and

remanded, holding in relevant part that the insured's assignment of claims to MOE and CUIC meant "that MOE and CUIC may maintain an action against USFIC for contribution to the Windsong settlement", subject to "the late tender rule." *Mut. of Enumclaw Ins. Co. v. USF Ins. Co.*, 137 Wn. App. 352, 354, 153 P.3d 877 (2007).

E. ARGUMENTS WHY REVIEW SHOULD BE ACCEPTED

1. MOE and CUIC Took an Assignment Against "All Liable Insurers" Subject To Any Defenses Available Against the Assignor, Including the Defense of the Insured's Waiver of Policy Benefits.

The Court of Appeals determined:

Dally Homes assigned all of its rights against all nonparticipating primary and additional insurers to MOE and CUIC. This assignment included rights it would have had under the USFIC policy. Because MOE and CUIC thus became Dally Homes for the purpose of asserting its rights, they could tender late and receive the benefits of the late tender rule described in *Unigard. Casualty*, the Montana case on which the trial court relied, did not concern the rights of an assignee and cannot control here.

Mut. of Enumclaw Ins. Co. v. USF Ins. Co., 137 Wn. App. 352, 361, 153 P.3d 877 (2007).

The Court did not examine the specific facts of the assignment and failed to analyze the assignee's waiver of policy rights. The Court also overlooked black letter law determining what rights are actually given with an assignment. This is particularly critical here,

when the assignor had previously decided not to exercise the rights purportedly assigned.

The decision of the Court of Appeals is in conflict with decisions of this Court governing the rights of assignors and assignees. RAP 13.4(b)(1). The Court of Appeals correctly observed that as assignees, "MOE and CUIIC became Dally Homes for the purpose of asserting its rights." *Mut. of Enumclaw Ins. Co. v. USF Ins. Co.*, 137 Wn. App. 352, 361, 153 P.3d 877 (2007). However the Court's analysis did not go far enough, because it failed to account for USFIC's defense of waiver, and did not otherwise apply established Washington precedent.

"[A]n assignee takes subject to defenses assertible against the assignor." *Lonsdale v. Chesterfield*, 99 Wn.2d 353, 359, 662 P.2d 385, 389 (1983), *citations omitted*; and an assignee's rights under an assigned insured policy are not unlimited. "The assignee's rights are coextensive with those of the assignor at the time of the assignment"; when an assignment involves a policy of insurance, the assignee obtains only "the rights owed by the insurer to the insured." See, *Besel v. Viking Ins. Co.*, 105 Wn. App. 463, 472, 21

P.3d 293, 297 (2001), citation omitted.¹ Here of course, Dally Homes waived its rights under the USFIC policy. The policy was not triggered. USFIC's policy obligations therefore had not arisen at the time of the assignment.

The Court of Appeals recognized that "[I]n an insurance contribution action, the issue is whether a nonparticipating coinsurer has a legal obligation to provide a defense or indemnity for a claim or action arising before the date of settlement" *Mut. of Enumclaw Ins. Co. v. USF Ins. Co.*, 137 Wn. App. 352, 360, 153 P.3d 877 (2007) (citing *Safeco Ins. Co. of Am. v. Superior Court*, 140 Cal. App. 4th 874, 44 Cal.Rptr. 3d 841, *review denied*, 2006 Cal. LEXIS 10468 (2006)); but the Court failed to apprehend that because the USFIC policy was not triggered, it had no obligation to defend or to indemnify the insured in the matter settled. *Casualty Indem. Exch. Ins. Co. v. Liberty Nat'l Fire Ins. Co.*, 902 F. Supp. 1235, 1239 (D. Mont. 1995). Notice was not given before settlement, so the policy was not triggered. This is a policy defense USFIC may assert against MOE and CUIC as assignees of the

¹ An assignment of an insurance policy to a stranger in interest operates only as an equitable appropriation...the assignee cannot recover unless the assignor has an insurable interest when the purchase occurs. 5A-153 *APPLEMAN ON INSURANCE* § 3456, n. 93, citation omitted.

policy. *Key Tronic v. St. Paul Fire & Marine*, 134 Wn. App. 303, 309, 139 P.3d 383 (2006).

MOE and CUIC took the assignment subject to any defenses that could have been asserted against the assignor. *Pacific N.W. Life Ins. Co. v. Turnbull*, 51 Wn. App. 692, 700, 754 P.2d 1262, 1267, *review denied*, 111 Wn.2d 1014 (1988). They could only take an assignment of the USFIC policy subject to the defense of waiver. Dally Homes waived its contractual rights to coverage when it chose, upon advice of its insurance counsel, not to provide notice of or to tender the HOA's claim to USFIC. MOE and CUIC can only recover under the USFIC policy if the policy provided coverage for the Windsong Arbor claim. See, *State ex rel. Lumbermens Mut. Cas. Co. v. Stubbs*, 471 S.W.2d 268, 269, 1971 Mo. LEXIS 934 (Mo. 1971) (*en banc*) (if there can be no recovery on the part of the insured, there can be no recovery on the part of his assignee, who would stand in the insured's shoes); *Stone v. Farm Bureau Town & Country Ins. Co.*, 203 S.W.3d 736, 744, 2006 Mo. App. LEXIS 1511 (2006), same.

"The right of the assignee is subject to any defense or claim of the obligor which accrues before the obligor receives notification of the assignment, but not to defenses or claims which accrue

thereafter..." This is fundamental contract law. *Restatement (Second) of Contracts*, § 336(2). Further, "the assignee takes what the assignor had 'warts and all' for an assignment does not deprive the obligor of any defenses or claims arising out of the agreement that the could have asserted against the assignor absent assignment. The obligor may assert these defenses and claims against the assignee..." 3 E.A. Farnsworth, *Farnsworth On Contracts* § 11.8, at 106 (2d ed. 1998).

MOE and CUIC, as Dally Homes' assignees, are bound by Dally Homes' voluntary and intentional relinquishment of its known contract rights under the USFIC policy. See, *Grant v. Morris*, 7 Wn. App. 134, 137, 498 P.2d 336 (1972). *Kane v. Magna Mixer Co.*, 71 F.3d 555, 563 (6th Cir. 1995). It is "axiomatic"..."[t]hat the rights of an assignee to recover upon choses in action and nonnegotiable contracts is coextensive with that of the party from whom he takes, but no greater. *Ass'n Collectors v. Hardman*, 2 Wn.2d 414, 416, 98 P.2d 318, 319 (1940), citation omitted.

2. The Insured's Right To Choose What Insurance Policies Must Respond To A Claim Should Be Recognized and Respected.

a. Public Policy Favors Washington Adopting the Doctrine of "Selective Tender".

This case is one of first impression in Washington, and presents an opportunity for the Court to recognize and to protect the insured's important right to control its insurance coverage and to decide which of its insurance contracts the insured wants to trigger when faced with a claim. RAP 13.4(b)(4).

Looking to *Casualty Indem. Exch. Ins. Co. v. Liberty Nat'l Fire Ins. Co.*, 902 F. Supp. 1235, 1239 (D. Mont. 1995), the trial court found that "where the insured has failed to tender the defense of an action to its insurer, the latter is excused from its duty to perform under its policy or to contribute to a settlement procured by a coinsurer". **CP 579** The Court of Appeals rejected this reasoning, concluding:

Casualty ... did not concern the rights of an assignee and cannot control here. Under these facts, the Casualty rule is inconsistent with Washington's late tender rule. We hold that MOE and CUIC may maintain an action against USFIC for contribution to the Windsong settlement.

Mut. of Enumclaw Ins. Co. v. USF Ins. Co., 137 Wn. App. 352, 361, 153 P.3d 877 (2007). But the holding overlooks or misapprehends the specific facts of this case, as well as the important, basic principles of insurance law expressed in *Casualty* and the cases

underlying that decision.²

USFIC's insured made a knowing, informed decision not to trigger the USFIC policy when the HOA's suit arose. The insured did not give a specific assignment in the USFIC policy when the HOA's suit was settled.

On these facts, a vague assignment against "all liable insurers", but not naming USFIC, should not be permitted to preempt the insured's valuable and important right to forgo particular insurance coverage. *Cincinnati Cos. v. W. Am. Ins. Co.*, 183 Ill. 2d 317, 324-327, 701 NE 2d 499, 503-504 (Ill. 1998). Neither equity nor the "late tender rule" relied upon by the Court of Appeals³, allow contribution to MOE and to CUIC on the facts before the Court.

The insured's right to enforce or not to enforce a particular policy essentially implicates the insured and the insurer's freedom to contract. "Insurance is a contract whereby one undertakes to

² When an insured has knowingly chosen to forego an insurer's assistance by instructing the insurer not to involve itself in the litigation, the insurer is relieved of its obligation to the insured with regard to that claim. *Am. Nat'l Fire Ins. Co. v. Nat'l Union Fire Ins. Co. of Pittsburgh*, 343 Ill. App. 3d 93, 99, 796 N.E.2d 1133, 1138, (2003). The targeted insurer, then, has the sole responsibility to defend and indemnify the insured. *Chicago Hospital Risk Pooling Program v. Illinois State Medical Inter-Insurance Exchange*, 325 Ill. App. 3d 970, 976, 758 N.E.2d 353, 357, 259 (2001)... That insurer may not seek equitable contribution from the other insurers that were not designated by the insured. *Legion Ins. Co. v. Empire Fire & Marine Ins. Co.*, 354 Ill. App. 3d 699, 704, 822 N.E.2d 1 (2004), citation omitted.

³ *Unigard Ins. Co. v. Leven*, 97 Wn. App. 417, 983 P.2d 1155 (1999).

indemnify another or pay a specified amount upon determinable contingencies." RCW 48.01.040; and the relation between an insurer and an insured is purely a contractual one. *Richards v. Metropolitan Life Ins. Co.*, 184 Wash. 595, 601, 55 P.2d 1067 (1935). It therefore follows that the insured must have the right to enforce or not to enforce a particular contract of insurance, as the insured chooses, when more than one carrier's policy covers the loss. "[A]n insured's ability to forgo that assistance should be protected." *Cincinnati Cos. supra*, at 701 NE 2d 499, 503 (1998) (*citation omitted*). This is the underlying reasoning of *Casualty Indem. Exch. Ins. Co. v. Liberty Nat'l Fire Ins. Co.*, 902 F. Supp. 1235 (D. Mont. 1995), the case looked to by the trial court.

Casualty Indemnity involved contribution claims between two insurers who had issued liability policies to a motel. After an injured guest sued, the insured tendered the claim to Casualty Indemnity but not to its other insurer, Liberty National. This failure to tender was inadvertent.

After Casualty Indemnity paid the claim, it filed a contribution action against Liberty Mutual. The Court granted summary judgment dismissing Casualty Indemnity's contribution claim, holding: "[W]here the insured has failed to tender the defense of an

action to its insurer, the latter is excused from its duty to perform under its policy or to contribute to a settlement procured by a co-insurer." *Casualty Indem. Exch. Ins. Co.*, 902 F. Supp. at 1239, *citation omitted*.

This holding is in line with *Cincinnati Cos. v. West Am. Ins. Co.*, *supra*, where the insurer actually had notice of the suit because one defendant had tendered to the insurer, but their insured co-defendant had not. After learning of the potential coverage, a co-insurer sued for equitable contribution. In denying contribution, the *Cincinnati Cos.* Court specifically noted that when an insured "knowingly" does not tender to all insurers:

[T]he duty to defend falls solely on the selected insurer. That insurer may not in turn seek equitable contribution from the other insurers who were not designated by the insured. This rule is intended to protect the insured's right to knowingly forgo an insurer's involvement.

Id., 183 Ill. 2d 317, 324, 701 N.E.2d 499, 503 (1998) (*citation omitted*).

In a similar case, when an insured tendered a claim solely to one of two insurers, the named insurer was foreclosed from seeking equitable contribution. *John Burns Constr. Co. v. Indiana Ins. Co.*, 189 Ill. 2d 570, 578, 727 N.E.2d 211, 217 (2000). See also, *Bituminous Casualty Corp. v. Royal Insurance Co. of America*,

301 Ill. App. 3d 720, 726, 704 N.E.2d 74, 79 (1998):

[It] is only when an insurer's policy is triggered that the insurer becomes liable for the defense and indemnity costs of a claim and it becomes necessary to allocate the loss among co-insurers. The loss will be allocated according to the terms of the 'other insurance' clauses, if any, in the policies that have been triggered.

There are several reasons an insured might choose not to trigger a particular policy of insurance. One is to protect its relationship with its current insurer, which USFIC was for Dally Homes at that time. An insured might also choose not to tender to a particular carrier in order to protect aggregate limits of coverage, or to avoid cancellation or a premium increase. This is common with automobile liability policies, where an insured may choose to pay insignificant property damages out-of-pocket rather than tender a small claim to his insurer.

Selective tender, or "targeted tender", as it is also known, may be used by an insured who carries both a primary policy and is an additional named insured on another's policy. A general contractor who does not want to deplete its own insurance to defend claims, may prefer to involve the carrier to whom it is not paying a premium when a claim arises, such as the insurer of a subcontractor. If a selective tender or targeted tender is allowed, the general

contractor is assured that its insurance company will not be brought into the suit. The subcontractor's insurer is then precluded from suing the general contractor's insurer for contribution towards funds paid out on the general contractor's behalf. See, *John Burns Constr. Co. v. Indiana Ins. Co.*, 189 Ill. 2d 570, 578, 727 N.E.2d 211, 217 (2000) and *Am. Nat'l Fire Ins. Co. v. Nat'l Union Fire Ins. Co.*, 343 Ill. App. 3d 93, 796 N.E.2d 1133 (2003), The general contractor will thus not be responsible for paying any deductible, nor will its premiums increase or its policy be cancelled, as its insurer will not be involved in paying any losses.

In addition to its attorney's concern over tendering a "known loss" to USFIC, Dally Homes may have been seeking to protect its policy limits so that the limits were available to pay other claims. At the time of the Windsong Arbor claim, Dally Homes already had several other projects under construction. Two of the projects in fact resulted in construction defect claims, which Dally Homes tendered to USFIC.⁴ Selective tender allows the insured to manage and to control its insurance coverage. Selective tender similarly

⁴ *Corta Madera Homeowners Association vs. Factoria 30 Condominiums, LLC, et al.*, King County Superior Court No. 03-2-29692-92SEA; *Steeple Chase Hill Homeowners Association vs. Steeple Chase Hill LLC, et al.*, King County Superior Court No. 03-2-07432-2KNT.

recognizes the insured's right to enforce or not to enforce a contract of insurance between itself and a particular insurance carrier.

The selective tender rule is in total harmony with Washington law. *Unigard Ins. Co. v. Leven*, 97 Wn. App. 417, 983 P.2d 1155 (1999), looked specifically to *Time Oil Company v. Cigna Property & Casualty Insurance*, 743 F. Supp. 1400, 1420-1421 (W.D. Wash. 1990), for the proposition that "an insurer's duty to defend does not arise unless the insured specifically asks the insurer to undertake the defense of the action." Absent such notice, a policy is not triggered and therefore has no further obligation to respond to a claim.

Thus the trial court was absolutely correct in relying upon the reasoning and the holding of *Casualty Indem. Exch. Ins. Co. v. Liberty Nat'l Fire Ins. Co.*, 902 F. Supp. 1235, 1239 (D. Mont. 1995), in dismissing MOE and CUIC's claims. This Court should adopt a similar rule, as it is in the best interests of insureds, and recognizes the contract rights running between insurers and insureds:

[A]n insurer is not allowed to seek equitable contribution from a coinsurer for a claim never tendered by the insured to the latter carrier. The right of an insurer to contribution from a coinsurer exists when both insurers are liable for the loss; a situation which can only arise when the obligations

of both insurers under their respective policies are "triggered". Otherwise, if the doctrine of equitable contribution were applied to a coinsurer for a claim never tendered by the insured to that coinsurer, "the insurance policy becomes, in effect, a third-party beneficiary contract entered into by the insured for the direct benefit of other carriers."

Id., citation omitted.

b. The Insured's Selective Tender of a Claim Forecloses Contribution from the Policy not Triggered.

MOE and CUIC asserted contribution rights against USFIC in respect of their funding the settlement of claims against Dally Homes. However the right of an insurer to contribution from a coinsurer exists only when both insurers are liable for the loss; i.e., when the obligations of both insurers under their respective policies are "triggered". See, *Sound Built Homes v. Windermere Real Estate/South, Inc.*, 118 Wn. App. 617, 633-35, 72 P.3d 788, 797 (2003); see also *Fireman's Fund Ins. Co. v. Md. Casualty Co.*, 65 Cal. App. 4th 1279, 1293, 77 Cal. Rptr. 2d 296, 303-304 (1998).

When its policy is not triggered by notice, an insurer has no obligation to respond to a claim and thus cannot be liable for a loss. In an insurance contribution action, "the inquiry is whether the nonparticipating coinsurer 'had a legal obligation ... to provide [a] defense [or] indemnity coverage for the ... claim or action prior to

[the date of settlement],’ and the burden is on the party claiming coverage to show that a coverage obligation arose or existed under the coinsurer’s policy.” *Safeco Ins. Co. of Am. v. Superior Court*, 140 Cal. App. 4th 874, 879, 44 Cal. Rptr.3d 841, 844-45 (2006) (*citations omitted*). Here, USFIC was not legally obligated to defend or to indemnify prior to settlement of the HOA’s suit, because the insured chose not to tender the claim and therefore chose to not trigger the USFIC policy.

Allowing contribution from a policy that was not triggered creates coverage where there otherwise is none, and undermines the insured’s contract rights, its ability to manage its insurance coverage, and to maintain per occurrence or aggregate limits. Allowing contribution from the policy the insured chose not to invoke defeats the insured’s rights, particularly if the right of selection was exercised in order to preserve policy limits or aggregate limits. *See, Legion Ins. Co. v. Empire Fire & Marine Ins. Co.*, 354 Ill. App. 3d 699, 704, 822 N.E.2d 1, 5 (2004), and cases cited therein. The Court of Appeals not only failed to recognize that a policy that is not triggered by notice is not liable for contribution, it allowed contribution to MOE and CUIC in spite of the unequivocal decision of the insured not to involve the USFIC policy in the HOA’s

suit.

3. The Court of Appeals failure to preclude MOE and CUIC's contribution claims in the face of prejudice to USFIC caused by its loss of an opportunity to investigate, defend, participate in settlements, monitor the underlying claims, or mount its own claim in the prior contribution action, is in conflict with decisions of the Court of Appeals and of this Court.

a. USFIC was Prejudiced as a Matter of Law.

This case is not a matter of an insured's breach of an insurance contract provision through late notice of a claim. *Unigard Ins. Co. v. Leven*, 97 Wn. App. 417, 423, 983 P.2d 1155 (1999). Nor is this case one involving late notice of a claim followed by a denial of coverage, as in *Carron v. Federal Ins. Co.*, 82 Wn. App. 480, 486, 918 P.2d 937 (1996), review denied, 131 Wn.2d 1002, 932 P.2d 643 (1997). Here there was no notice of the claim to USFIC. The insured did not want USFIC to cover the claim. USFIC had no knowledge of the HOA's suit, or its settlement, or the later contribution recoveries by MOE and CUIC until those matters were long concluded. Prejudice to USFIC must be examined in the context of Washington cases finding prejudice to an insurer as a matter of law, and the equities to be weighed when deciding the propriety of a claim for equitable contribution. RAP 13.4(b)(1).

MOE and CUIC waited four years after settlement of the HOA

suit and their recovery in an earlier contribution suit against the other insurers of Dally Homes and its sub-contractors, before asking USFIC for contribution. **CP 397-99; CP 401-02; CP 506.** MOE and CUIC admitted below that USFIC had no opportunity to participate in the defense, investigation, settlement or allocation of settlement proceeds that occurred in either the HOA lawsuit concerning Windsong Arbor (King County Superior Court No. 00-2-19309-2), or the insurer contribution lawsuit (King County Superior Court No. 01-2-27606-9). **CP 506.** The Court of Appeals, applying Washington precedent, should have found that USFIC was prejudiced as a matter of law. Despite the undisputed facts before it, the Court held:

When an insured makes a late tender, the insurer must demonstrate actual prejudice before it will be relieved from its duties to its insured. In *Unigard* we held that even when an insured breaches an insurance contract, the insurer's duty to defend remains unless it proves actual and substantial prejudice. "[P]rejudice is an issue of fact and will seldom be established as a matter of law."

Mut. of Enumclaw Ins. Co. v. USF Ins. Co., 137 Wn. App. 352, 361, 153 P.3d 877 (2007), *citations omitted*.

The Court of Appeals' should have examined whether or not prejudice to the insurer is even to be considered when the insured knowingly elects not to trigger a policy; and if so, whether notice

given by a carrier suing in contribution, years after a claim is fully compromised, constitutes prejudice as a matter of law. The Court of Appeals misread or overlooked the history of the Windsong Arbor claim and the subsequent litigation that preceded MOE and CUIC's contribution suit, for the Court of Appeals engaged in no assessment of actual prejudice to USFIC under Washington law.

The facts here constitute prejudice to USFIC as a matter of law under *NW Prosthetic v. Centennial Ins.*, 100 Wn. App. 546, 550, 997 P.2d 972, 974 (2000), (noting that prejudice to the insurer may be found as a matter of law when an insurer is prevented from "conducting a meaningful investigation of a claim or presenting a viable defense to a claim.") The *NW Prosthetic* Court relied in part upon *Sears, Roebuck & Co. v. Hartford Accident & Indem. Co.*, 50 Wn.2d 443, 454, 313 P.2d 347, 353 (1957), for the proposition that an insurer deprived of "the right to investigate, prepare and defend through its own counsel" may be found to have been prejudiced as a matter of law. The Court of Appeals decision, as applied to the facts here, is in conflict with both of these holdings.⁵

⁵ The Court of Appeals' holding may also conflict with its subsequent decision in *Maclean Townhomes, L.L.C. v. Charter Oak Fire Ins. Co.*, 156 P.3d 278, 2007 Wash. App. LEXIS 788 (2007), finding prejudice as a matter of law when an insured was denied an opportunity to fully investigate and to fully litigate claims.

What the Court of Appeals holding means, in this case, is that even when it is undisputed that an insured chose not to trigger a particular policy, so the insurer could not participate in the investigation, analysis, defense and settlement of a claim; and the insurer thereafter had no notice of or opportunity to defend and participate in contribution and subrogation actions brought against carriers for the insured and its subcontractors, prejudice will not be found as a matter of law when a claim is allowed to proceed years later. In effect, the Court of Appeals determined that prejudice to an insurer can never be found as a matter of law. This is antithetical to the clear holding that:

The loss of a meaningful opportunity to investigate a debatable claim before it is settled is, by itself, a sufficiently concrete detriment to establish actual prejudice. As *Sears* demonstrates, an insurer's obligation to prove actual prejudice does not include conducting a postsettlement investigation or offering proof that the insurer would have achieved a better result.

NW Prosthetic v. Centennial Ins., 100 Wn. App. 546, 554, 997 P.2d 972, 976 (2000).

b. It Is Not Equitable to Allow Contribution from USFIC.

The Court of Appeals did not consider whether or not MOE and CUIC were entitled to the equitable relief they sought. USFIC was asked to contribute to the settlement of a claim its insured did not

want USFIC to cover, and of which USFIC had no notice. When MOE and CUIC brought suit, they had not only handled the defense and settlement of the Windsong matter, they had recovered a portion of their expenses from other insurers in an action of which USFIC had no notice and in which it had no voice. "Absent compelling equitable considerations to the contrary, it is unfair and inequitable to saddle insurers on the risk with contribution *sans* notice of potential liability for contribution." *American Internat. Specialty Lines Ins. Co. v. Continental Casualty Ins. Co.*, 142 Cal. App. 4th 1342, 1368, 49 Cal. Rptr. 3d 1, 20 (Cal. Ct. App. 2006).

Contribution is rooted in general principles of equity. See, *Couch On Insurance* §§ 61:20, 62:151 (2d ed. 1983). "He who seeks equity must do equity." *Retail Clerks Health & Welfare Trust Funds v. Shopland Supermarket*, 96 Wn.2d 939, 949, 640 P.2d 1051, 1057 (1982). The right to equitable contribution depends on an analysis of several factors, including "a test of reasonableness. In determining this issue a court may consider ... the presence or absence of notice to other carriers..." *State Farm Mutual Auto. Ins. Co. v. MFA Mutual Ins. Co.*, 671 S.W.2d 276, 279, 1984 Mo. LEXIS 252 (Mo. 1984) (*en banc*) (*emphasis added*). "It is unfair to ask co-insurers to contribute to a completed settlement when these

carriers have been given absolutely no prior opportunity to participate in or simply monitor the lawsuit or the settlement proceedings, regardless of the participation of counsel for or agents of the settling insurer." *United Nat'l Ins. Co. v. Admiral Ins. Co.*, 1992 U.S. Dist. LEXIS 12336 (D. Pa. 1992).

It is similarly inequitable to charge an insurer with expenses about which it knew nothing, particularly when the insurer had not been notified of any potential for contribution. *Truck Ins. Exchange v. Unigard Ins. Co.*, 79 Cal. App. 4th 966, 979, 94 Cal. Rptr.2d 516, 525 (2000). The Court of Appeals did not weigh the equities of MOE and CUIC's contribution claims, and declined or failed to address whether or not MOE and CUIC should be permitted to "subject [USFIC] to a significant financial burden even though it did not enjoy any of the concomitant benefits, e.g., the right to participate in and control the defense." *Id.*

F. CONCLUSION

The Court of Appeals erred in its decision to apply the late tender rule, when it failed to recognize and analyze the issue of the assignor's waiver of its claim for coverage. As a result, the Court of Appeals' decision is in conflict with historic Washington case law that an assignee of a claim takes no other or greater rights than the

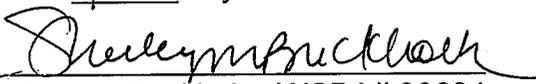
original assignor.

USFIC asks this Court to recognize the important interest of an insured in exercising its rights in policies of insurance in a manner that recognizes the insured's freedom of contract and allows the insured to control what policies must respond to a claim. USFIC further asks this Court to adopt the doctrine of selective tender: when an insured has chosen not to tender the defense of an action to a particular insurer, that insurer is excused from its duty to perform under its policy or to contribute to a settlement procured by a coinsurer.

This Court should also review and reverse the Court of Appeals' decision because the decision, that delinquent notice of MOE and CUIIC's contribution claims was not prejudicial to USFIC as a matter of law, on the facts here, fails to recognize or is in conflict with other decisions of the Court of Appeals and of this Court.

USFIC respectfully asks this Court accept review for the reasons stated herein, and after review, to reverse the Court of Appeals and reinstate the King County Superior Court's order.

RESPECTFULLY SUBMITTED this 19th day of June 2007.


John E. Lenker, WSBA #10367 
Shelley Buckholtz, WSBA# 30694
Mikkelborg Broz Wells & Fryer, PLLC - Counsel for Petitioner USFIC

APPENDIX

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MIKKELBORG, BROZ
WELLS & FRYER, PLLC

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

MUTUAL OF ENUMCLAW)
INSURANCE COMPANY and)
COMMERCIAL UNDERWRITERS)
INSURANCE COMPANY,)
)
Appellants,)
)
v.)
)
USF INSURANCE COMPANY,)
)
Respondent.)
_____)

No. 57866-9-I

DIVISION ONE

PUBLISHED OPINION

FILED: February 26, 2007

AGID, J. -- This is an insurance contribution case brought by two settling insurers against a non-participating insurer to which the insured did not tender claims arising from construction defects litigation. We hold that when the insured assigns its rights against other potentially-liable entities to the settling insurers, they stand in the shoes of the insured and may pursue a claim against the non-participating insurer under the late tender rule adopted in Unigard Insurance Co. v. Leven.¹

Mutual of Enumclaw Insurance Company (MOE) and Commercial Underwriters Insurance Company (CUIC) settled construction defect litigation brought against their insured, Dally Homes. As part of the settlement, Dally Homes assigned all of its rights

¹ 97 Wn. App. 417, 938 P.2d 1155 (1999), review denied, 140 Wn.2d 1009 (2000).

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under this claim to MOE and CUIC. USF Insurance Company (USFIC) also insured Dally Homes, but Dally did not tender a claim to USFIC. Two years later, MOE and CUIC brought a claim for contribution against USFIC. MOE and CUIC brought a motion for partial summary judgment to prevent USFIC from asserting a known loss defense, but the trial court denied the motion because there were genuine issues of material fact concerning what Dally knew about the claim. The trial court later dismissed all claims against USFIC on summary judgment, ruling that USFIC was excused from any duty of contribution because Dally Homes selectively chose not to tender a claim under this policy.

The trial court properly denied MOE's and CUIC's partial motion for summary judgment because Dally Homes' subjective knowledge of the construction defect claim is a material issue of fact. But dismissing the claims against USFIC was an error of law because late tender does not relieve an insurer of its obligations to its insured absent actual prejudice. The late tender rule applies here because, as assignees, MOE and CUIC stood in Dally Homes shoes and were entitled to choose whether to tender the claim and to have the benefit of the late tender rule.

FACTS

In the mid 1990's, Dally Homes Inc. built Windsong Arbor, a condominium complex located near Kent, Washington.² The final certificates of occupancy were issued from 1996 through 1998. In December 1999, the Board of Directors (Board) of the Windsong Homeowners Association (HOA) hired Mark Jobe, a construction expert,

² Dally Homes was the developer and affiliated entity; Windsong Arbor, LLP (Partnership) was the declarant for Windsong Arbor. Both the Partnership and Dally Homes are controlled by Don Dally.

to inspect the building for construction defects. James Skeen, the HOA Board President, also began to interview attorneys about a potential lawsuit against Dally Homes. Jobe presented his conclusions to the Board on January 20, 2000.

In November or December 1999, Richard Beal, an insurance attorney representing Don Dally on general insurance matters and some development projects, received a call from Cheryl Dittamore, a property manager with Suhrco Property Management with whom Beal and Don Dally had worked on previous occasions. Dittamore told him that the four year statute of limitations was about to run on one of her projects and that Skeen might call him about the matter. Soon after, Skeen called Beal to discuss his representing the HOA against Dally Homes. Beal told him that he could not represent the HOA because he represented Dally Homes. Skeen gave Beal permission to tell Don Dally about the HOA's concerns. In his deposition, Beal could not remember when he spoke with Dally concerning the information he received about the potential Windsong Arbor claim. He said he called Dally before January 18, but the call may have simply been a voicemail asking Dally to return his call. At the time of his telephone conversation with Skeen, Beal testified that he had an ongoing attorney-client relationship with Dally. He advised Dally about insurance matters, acted as his representative, and kept an "ear to the ground" about potential problems with Dally's development projects. Around the same time, Don Dally contacted Parker Smith & Feek (PS&F), an insurance broker, and obtained a USFIC general liability policy for Dally Homes that became effective on January 18, 2000.

In mid-January 2000, Barbara Hammermeister, a PS&F broker, spoke with Beal about the Windsong Arbor HOA claims. Beal instructed her not to tender to USFIC because he believed

it would not be appropriate to tender to USF

. . . .
... I would have regarded it as a violation of the good faith statute for me to have tendered to USF. . . .

. . . [T]here is zero question in my mind but that, as a representative of Dally Homes, I knew about this claim before January 18 and I was not about to tender what I knew was a known loss, and I knew from my experience as a lawyer what would have been, I would say, a grossly improper tender. . . .

. . . .
... I would have regarded it as a fraud.

Hammermeister notified MOE, CUIC, and two other insurers who wrote coverage for Dally Homes. She did not tender a claim to USFIC.

Two years later, on January 30, 2002, Dally Homes, the Windsong Partnership, MOE, and CUIC entered into a settlement agreement with the HOA for \$3,899,095 plus the costs incurred by Dally Homes to investigate and defend against the claims. As part of the settlement, Dally and the Windsong Partnership assigned their rights and claims against other entities to MOE and CUIC.³ The agreement did not mention the USFIC policy. MOE and CUIC later brought a contribution suit against other insurers of Dally

³ Section 6 of the settlement agreement between Dally Homes, MOE and CUIC states:

Dally also claims to be insured under policies issued by Assurance Company of America ("ACOA"), American States Insurance Company ("American States"), and/or Safeco Insurance Company of America ("Safeco"). Dally also claims to have rights against Meier Insurance Agency, Inc. ("Meier") in connection with its issuance of a Certificate of Insurance. Dally may also have rights under other policies of insurance. Pursuant to WAC 284-30-330(6), Settling Insurers herein are agreeable to advance *funding* for the settlement of the claims for Windsong Arbor Homeowners Association pursuant to the December 13, 2001 agreement in return for an assignment of Dally's rights against non-participating primary or Additional Insured insurers, Meier, and any excess or umbrella insurers who may be responsible for a portion of the settlement of the claims of the Homeowners Association.

(Emphasis omitted.)

Homes and their subcontractors. They did not include USFIC in this suit. USFIC did not participate in the defense, investigation, or the settlement of the HOA lawsuit or participate in the contribution suit that followed the 2002 settlement.

After the contribution and subrogation actions were completed, MOE and CUIC discovered the USFIC policy and its potential coverage for the Windsong construction defect case. In 2004, MOE and CUIC filed a subrogation and contribution claim against USFIC arising out of the Windsong HOA claim. MOE and CUIC brought a motion for partial summary judgment against USFIC to prevent it from raising a known loss defense at trial. On November 10, 2005, the court denied the motion, finding that there were material issues of fact concerning Dally Homes' knowledge of the claims before binding the USFIC policy.

On January 31, 2006, the trial court granted USFIC's motion for summary judgment, dismissing all of MOE's and CUIC's claims with prejudice. Citing a Montana case, Casualty Indem. Exch. Ins. Co. v. Liberty Nat'l Fire Ins. Co., the trial court concluded that USFIC was "excused from its duty to perform under its policy or to contribute to a settlement procured by a coinsurer" because Dally Homes affirmatively decided not to tender the claim.⁴ On February 10, 2006, the court denied MOE's and CUIC's motion for reconsideration. MOE and CUIC appeal both orders.

DISCUSSION

Summary judgment orders are reviewed de novo and are proper if, after reviewing all the documents on file, there is no genuine issue as to any material fact and

⁴ 902 F. Supp. 1235, 1239 (D. Mont. 1995).

the moving party is entitled to a judgment as a matter of law.⁵ All facts and inferences are viewed in a light most favorable to the nonmoving party.⁶ Summary judgment is proper when reasonable persons could only reach the conclusion that the nonmoving party is unable to establish any facts that would support an essential element of its claim.⁷

Late Tender

On January 31, 2006, the trial court granted USFIC's motion for summary judgment, dismissing all of MOE's and CUIC's claims with prejudice. The trial court rejected the late tender rule discussed in Unigard Ins. Co. v. Leven and Griffin v. Allstate Ins. Co.,⁸ reasoning that those cases applied to the duty of an insurer to its insured. Finding that Dally Homes affirmatively decided not to tender a defense to USFIC, the trial court found that "where the insured has failed to tender the defense of an action to its insurer, the latter is excused from its duty to perform under its policy or to contribute to a settlement procured by a coinsurer."⁹

Contribution is an insurer's right to recover from a co-obligor its proportionate share in the same liability.¹⁰ Generally, when fewer than all of the insurers on a risk pay more than their equitable share of the obligation, insurers seek compensation from co-

⁵ CR 56(c); Lybbert v. Grant County, 141 Wn.2d 29, 34, 1 P.3d 1124 (2000).

⁶ Reid v. Pierce County, 136 Wn.2d 195, 201, 961 P.2d 333 (1998).

⁷ Young v. Key Pharms., 112 Wn.2d 216, 225, 770 P.2d 182 (1989) (citing Celotex Corp. v. Catrett, 477 U.S. 317, 322, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986)).

⁸ 108 Wn. App. 133, 141-42, 29 P.3d 777 (2001) (citing Pub. Util. Dist. No. 1 v. Int'l Ins. Co., 124 Wn.2d 789, 804, 881 P.2d 1020 (1994)), review denied, 146 Wn.2d 1005 (2002).

⁹ Casualty, 902 F. Supp. at 1239.

¹⁰ Fireman's Fund Ins. Co. v. Maryland Cas. Co., 65 Cal. App. 4th 1279, 1293, 77 Cal. Rptr. 2d 296 (1998).

insurers who did not pay their respective share.¹¹ In an insurance contribution action, the issue is whether a non-participating coinsurer has a legal obligation to provide a defense or indemnity for a claim or action arising before the date of settlement.¹² MOE and CUIC argue that they shared a common liability with USFIC to defend and indemnify Dally Homes and are entitled to contribution from USFIC for its proportional share of that common obligation. They argue the trial court improperly dismissed their claim by not applying the late tender rule of Griffin and Unigard. They acknowledge that insurers are generally not required to defend an insured until a defense is requested, but assert the late tender rule prevents USFIC from avoiding coverage unless it demonstrates actual prejudice.

USFIC contends it is not trying to avoid coverage. Rather, it asserts that the late tender rule does not apply because Dally Homes elected not to tender a claim. But USFIC does not cite to any Washington cases that stand for the proposition that an insured's unilateral decision not to tender a claim to one of its insurers alleviates the insurer's obligation to co-insurers.¹³ Further, its arguments concerning an insured's right to decide whether to tender a claim do not apply on these facts because Dally Homes assigned its rights to MOE and CUIC, who thereafter stood in Dally Homes' shoes as its assignees.

¹¹ See Sound Built Homes v. Windermere Real Estate/South, Inc., 118 Wn. App. 617, 633-35, 72 P.3d 788 (2003); see also Fireman's Fund, 65 Cal. App. 4th at 1293.

¹² Safeco Ins. Co. of Am. v. Superior Court, 140 Cal. App. 4th 874, 44 Cal. Rptr. 3d 841, review denied, 2006 Cal. LEXIS 10468 (2006).

¹³ According to Couch on Insurance, where double coverage is involved, an insurer must inquire of its insured whether other insurance exists in order to assure that other insurers have an opportunity to protect their rights. Couch on Insurance § 218.20 (citing Brown v. Selective Ins. Co., 311 N.J. Super. 210, 709 A.2d 812 (1998)). But an insurer may be relieved of this duty to inquire and expect contribution, despite a co-insurer's ignorance of incident, when an insured deliberately chooses to inform one insurer but not the other. Id. (citing Am. Star Ins. Co. v. Allstate Ins. Co., 12 Or. App. 553, 508 P.2d 244 (1973)).

In Washington, an insurer's duty to defend arises when a complaint against the insured, construed liberally, alleges facts which could, if proven, impose liability on the insured that is within the policy's coverage.¹⁴ An insured must affirmatively inform an insurer that its participation is desired because an insurer cannot be expected to anticipate when or if an insured will make a claim for coverage.¹⁵ When an insured makes a late tender, the insurer must demonstrate actual prejudice before it will be relieved from its duties to its insured.¹⁶ In Unigard we held that even when an insured breaches an insurance contract, the insurer's duty to defend remains unless it proves actual and substantial prejudice.¹⁷ "[P]rejudice is an issue of fact and will seldom be established as a matter of law."¹⁸ Likewise, in Griffin we applied the late tender rule and held an insurer could be liable for pre-tender fees and costs even though the insured did not tender the claim until after they lost one lawsuit and a second suit had been filed.¹⁹

Here, Dally Homes assigned all of its rights against all non-participating primary and additional insureds to MOE and CUIC. This assignment included rights it would have had under the USFIC policy. Because MOE and CUIC thus became Dally Homes for the purpose of asserting its rights, they could tender late and receive the benefits of the late tender rule described in Unigard. Casualty, the Montana case on which the trial court relied, did not concern the rights of an assignee and cannot control here. Under these facts, the Casualty rule is inconsistent with Washington's late tender rule. We

¹⁴ Griffin, 108 Wn. App. at 140 (citing Unigard, 97 Wn. App. at 425).

¹⁵ Id. (citing Unigard, 97 Wn. App. at 427).

¹⁶ Id.

¹⁷ Unigard, 97 Wn. App. at 427.

¹⁸ Tran v. State Farm Fire & Cas. Co., 136 Wn.2d 214, 228, 961 P.2d 358 (1998) (citing Cannon, Inc. v. Federal Ins. Co., 82 Wn. App. 480, 491, 918 P.2d 937 (1996), review denied, 131 Wn.2d 1002 (1997)).

¹⁹ Griffin, 108 Wn. App. at 136.

hold that MOE and CUIIC may maintain an action against USFIC for contribution to the Windsong settlement. We of course express no opinion about the merits of their claims.

Known Loss Defense

As a preliminary matter, USFIC argues an order denying partial summary judgment cannot be reviewed under RAP 2.2 and is not a proper subject for discretionary review under RAP 2.3. We have the authority to accept review of this matter pursuant to RAP 2.3(b) and apply the ordinary de novo standard of review for summary judgments to this motion.²⁰

The known loss doctrine, as recognized in Public Utility District No. 1 v. International Insurance Company, prevents an insured from collecting on an insurance policy for losses that he or she subjectively knew would occur at the time the insurance policy was purchased.²¹ To prevail on the defense, the court must find the insured expected a specific occurrence before it obtained insurance coverage.²² This is ordinarily a question of fact,²³ and summary judgment is improper when the scope of the insured's knowledge is unresolved.²⁴

MOE and CUIIC argue that they were entitled to judgment as a matter of law because, without proof of Dally's subjective knowledge of the Windsong HOA claim prior to January 18, USFIC could not prove it was a known loss. They base this assertion on a number of statements Beal made during his deposition, particularly his

²⁰ See Kershaw Sunnyside v. Interurban Lines, 156 Wn.2d 253, 261, 126 P.3d 16 (2006); see also Am. States Ins. Co. v. Symes of Silverdale, Inc., 150 Wn.2d 462, 78 P.3d 1266 (2003).

²¹ 124 Wn.2d 789, 805, 881 P.2d 1020 (1994).

²² Hillhaven Props. Ltd. v. Sellen Constr. Co., 133 Wn.2d 751, 758, 948 P.2d 796 (1997) (citing Pub. Util. Dist. No. 1, 124 Wn.2d at 806).

²³ Id.

²⁴ Hillhaven, 133 Wn.2d at 762 (citing Inland Waters Pollution Control, Inc. v. Nat'l Union Fire Ins. Co., 997 F.2d 172, 176 (6th Cir. 1993)).

limited memory of the substance of his conversations with Dittamore and Skeen and the timing of his call to Dally. They argue that Beal was neither Dally's nor Dally Homes' lawyer when he received these phone calls, so his knowledge cannot be imputed to Dally. They also contend that USFIC presented no evidence that Dally knew of the claim and USFIC cannot prove knowledge because the HOA Board did not learn of the defects until Jobe presented his findings on January 20, 2000, two days after the USFIC policy was bound. Alternatively, if Beal's knowledge can be imputed to Dally, they argue that Beal's mere conclusions about the possibility of a suit are insufficient to raise a genuine issue of fact.

USFIC argues genuine issues of material fact remained. It asserts Dally knew the construction defect suit was imminent because Beal, as Dally Homes' attorney, received a call from Windsong HOA President Skeen in December 1999 about the pending claim. And it contends Loren Kenkman notified Dally that the HOA was preparing to bring suit a week and a half or two weeks before the January 20, 2000 HOA meeting.

We agree with USFIC that Dally's subjective knowledge and the agency relationship between Beal, Dally and Dally Homes were disputed issues of fact below. MOE's and CUIC's reliance on Beal's testimony underscores those disputes. The trial court properly denied their motion because Dally's subjective knowledge of the claim, the timing of that knowledge and the agency relationship with Dally are factual questions which could not have been resolved on summary judgment.²⁵

²⁵ See Hillhaven, 133 Wn.2d at 762; O'Brien v. Hafer, 122 Wn. App. 279, 93 P.3d 930 (2004), review denied, 153 Wn.2d 1022 (2005).

CONCLUSION

We reverse the trial court's order dismissing MOE's and CUIC's claims against USFIC and affirm its order denying partial summary judgment on the issue of USFIC's known loss defense. We remand the case to the trial court for further proceedings.

Ajda, J.

WE CONCUR:

Becker, J.

Baker, J.

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

MUTUAL OF ENUMCLAW
INSURANCE COMPANY and
COMMERCIAL UNDERWRITERS
INSURANCE COMPANY,

Appellants,

v.

USF INSURANCE COMPANY,

Respondent.

No. 57866-9-1

ORDER DENYING MOTION
FOR RECONSIDERATION

CLERK

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SUPREME COURT
STATE OF WASHINGTON
2001 JUN 20 P 2:46
BY RONALD R. CARPENTER

Respondent, USF Insurance Company, having filed a motion for reconsideration of the opinion filed February 26, 2007, and the court having determined that said motion should be denied; Now, therefore, it is hereby

ORDERED that the motion for reconsideration is denied.

DATED this 17th day of April 2007.

FOR THE COURT:

Azid, J.
Judge

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