

No. 63692-8-I

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

CERTAIN UNDERWRITERS AT LLOYD'S LONDON,
subscribing to Policy Nos. A02BF387 and CJ352084,

Appellant,

v.

VALIANT INSURANCE COMPANY and
NORTHERN INSURANCE COMPANY OF NEW YORK,

Respondents.

BRIEF OF RESPONDENTS

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I. Introduction

Underwriters' contention that the anti-stacking provision in the Valiant and Northern policies does not apply is not supported by the policies' plain terms, by Washington law, nor by cases decided elsewhere involving similar provisions. There also is no material factual dispute that requires reversing summary judgment. In Washington, policies having external anti-stacking clauses, which bar the use of multiple policies to pay for one occurrence, are unambiguous, valid and enforceable. Though most of the Washington cases in this area concern auto liability and therefore occurrences that involve instantaneous injury or damage, their analysis is not limited to such situations. And, courts elsewhere have enforced similar anti-stacking provisions in commercial, continuing loss cases, fulfilling the goal of these provisions: to limit a carrier's obligation to pay for damages caused by one continuous occurrence to a single limit — just as losses that happen all at once are treated. Underwriters' objection to the application of Northern's Continuous or Progressively Deteriorating Damage endorsement is also unmerited. Respondents ask this Court to affirm the judgment below.

II. Identity of Respondents

Respondents Valiant Insurance Company ("Valiant") and Northern Insurance Company of New York ("Northern"), hereinafter generally referred to as "Zurich," submit this brief pursuant to RAP 10.1.

III. Assignments of Error

Zurich makes no assignments of error. It has not cross-appealed.

IV. Counter-Statement of the Case

Appellant Certain Underwriters at Lloyd's London ("Underwriters") filed this action against Zurich affiliates, Valiant and Northern,¹ asserting claims of equitable contribution and equitable subrogation for settlement payments in an underlying construction defect action against a mutual insured, "Stratford."²

A. The Underlying Actions

The Underlying Actions (consolidated)³ involved the construction of Chateau Pacific, a retirement facility in Lynnwood, Washington, owned by GCG Associates, LP ("GCG").⁴ Chateau Pacific is a "four story wood frame building of approximately 122,900 square feet," for which Stratford was the general contractor, agreeing "to perform all the

¹ When the Zurich policies were issued, Valiant and Northern were affiliated companies under the Zurich American Insurance Company group of companies. Early in the litigation below, Underwriters appeared to question their association, but Underwriters abandoned their challenge in the trial court, and also do not, on appeal, contest the fact that Valiant and Northern are affiliates. *See* CP 16-17 (Motion for Summary Judgment); CP 38-116 (declaration of Zurich company representative and attached policies); and CP 120 (Opposition to Motion for Summary Judgment, listing reasons why the motion should be denied, which do not include a challenge to Valiant's and Northern's affiliated status).

² CP 4 (Complaint). *See also* Brief of Appellant ("App. Br.") at 10.

³ App. Br. at 4.

⁴ CP 3, ¶ 9; App. Br. at 3.

Work required by the Contract Documents.”⁵ Construction of the building began in 1998 and was substantially complete in 2000, during Valiant’s policy period.⁶ Although there was evidence that residents did not begin reporting leaks until January 2004, *i.e.*, after the second Northern policy expired, an investigation discovered substantial property damage resulting from water intrusion that appeared to have started soon after construction was complete and continued thereafter.⁷

Underwriters point out that multiple construction defects were documented and that water entered the building in many locations, and thereby contend there may have been as many “occurrences.” But, there is no genuine dispute that Chateau Pacific was a single building for which Stratford’s responsibility was that of general contractor, responsible for the entire project. The record also reveals — to borrow from the policies’ Insuring Agreements — that Stratford’s legal obligation

⁵ CP 170 ¶¶ 7, 8; CP 174 ¶¶ 7, 8. *See also* CP 148, GCG’s expert report attached to the declaration of Underwriters’ claim administrator, describing the “building” as “a 4 story, multi-faceted, wood framed structure supported by concrete footings. ... the building envelope consists of sloped ... and flat .. areas It was designed and permitted under the 1994 UBC. During the first five years of operation the building owner experienced a normal level of ... leaks, consistent with a building of its size and use.” CP 147 is a picture of the building.

⁶ CP 118, ¶ 2; App. Br. at 3.

⁷ CP 118; 147-150; App. Br. 3-4. Of course, if property damage for which Stratford was legally obligated to pay damages did not start before 2004, then neither Valiant nor Northern would have an obligation to pay.

to pay damages because of property damage⁸ resulted from “substantial and material construction deficiencies [in the exterior envelope] that have allowed water to intrude ... causing significant property damage.”⁹ As argued below, based on the policies’ definition of the term, Zurich submits this describes one “occurrence.”

B. Insurance

Zurich issued three successive, primary policies: Valiant underwrote the first policy, Northern underwrote the next two.¹⁰ Underwriters then insured Stratford for the next two policy years at the primary level.¹¹ Great American provided excess coverage over the Zurich policies only.¹² Zurich and Underwriters jointly defended Stratford against the underlying construction defect claims.¹³

Zurich American Insurance Company (on behalf of Valiant) paid Valiant’s full \$1 million “per occurrence” limit.¹⁴ Accordingly, no

⁸ See Valiant’s and Northern’s Insuring Agreement, quoted in App. Br. at 5: “We will pay those sums the insured becomes legally obligated to pay as damages because of ... ‘property damage’”

⁹ CP 170 ¶¶ 9, 10; CP 174 ¶¶ 9, 10 (underlying complaints); and CP 176 (“The Chateau Pacific suffers from construction defects in the exterior envelope that have allowed water to penetrate the envelope and cause damage to the sheathing and possibly the framing behind the sheathing.”).

¹⁰ CP 39, ¶ 3; CP 42–64. Valiant’s policy was renewed in June 2000 and June 2001, with Northern as the issuing carrier. CP 39, ¶¶ 4–5; CP 66–89, 91–116.

¹¹ CP 2, ¶ 5; App. Br. at 10.

¹² CP 2–3, ¶ 8; App. Br. at 6, 10.

¹³ App. Br. at 4.

¹⁴ CP 118; App. Br. at 4.

claim for equitable relief can lie against Valiant at all — unless Underwriters are correct that there were multiple occurrences. If so, then each carrier pays only for that property damage caused by an occurrence during its policy period, and Valiant, the first carrier on the risk, probably overpaid.¹⁵ Underwriters paid \$1,741,300, and Great American, the excess carrier over Valiant, paid the remainder.¹⁶

The Northern policy did not contribute. Northern relied on the “anti-stacking” clauses in each of its policies, which like that in Valiant’s policy, limits the payment obligation of affiliated companies to the highest available policy limit when the claim involves “the same ‘occurrence.’”¹⁷ Northern also relied on an endorsement in its second policy entitled “Prior Claims or Continuous or Progressively Deteriorating Injury or Damage” (“Continuous Damage Endorsement”).¹⁸

The anti-stacking clause applies when more than one policy issued by an affiliated company “app[lies] to the same ‘occurrence’.”¹⁹

¹⁵ See CP 148: “The wet winter of 2004/2005 revealed an unusual amount of window leaks.”

¹⁶ The insurers’ respective payments are set forth in Underwriters’ complaint, CP 3, and in App. Br. at 4–5.

¹⁷ CP 60, 85, 110 (citations to the anti-stacking provisions in the policies); App. Br. at 8; CP 182–85 (letter from Zurich to Stratford).

¹⁸ CP 116; App. Br. at 9. Underwriters quote the endorsement’s first part unnecessarily. It applies only if, before the policy’s effective date, an actual claim is brought or is first asserted against the insured. That is not the issue here.

¹⁹ CP 60, 85, 110.

“Occurrence” in the policies “means an accident, including continuous or repeated exposure to substantially the same general harmful conditions.”²⁰ Here, Stratford’s legal obligation to pay damages arose from its contract to build a single structure that, over time, was exposed to the general harmful conditions of a defectively constructed building envelope and weather, which allowed water to enter through the envelope, causing property damage.

The Continuous Damage Endorsement in the second Northern policy applies to:

... any injury or damage, including continuous or progressively deteriorating injury or damage, that first occurs prior to the effective date of this policy, or ... that first occurs prior to the effective date of this policy, continues through the policy term and ends after the expiration date of this policy, or ... that first occurs after the expiration date of this policy (which would be in Underwriters’ policy period).

By arguing that all Zurich policies must pay,²¹ and having paid under its own policies, Underwriters necessarily admit that this case involves “continuous or progressively deteriorating injury or damage, that first occurred” before the effective date of Northern’s second policy, continued through its term, and ended sometime after its expiration.

²⁰ CP 62, 87, 112.

²¹ App. Br. at 5: “Underwriters ... brought this suit against Valiant and Northern to recover the settlement amounts overpaid by Underwriters”

C. Proceedings Below

In their “Statement of the Case,” Underwriters describe “the proceedings below” in a way that merits direct response here.

Underwriters state: “Underwriters and its assignee Great American [overpaid] due to Valiant and Northern’s failure to pay their equitable share of the settlement”²² If Underwriters assigned its claims to Great American, then Underwriters have no right to bring this action. Further, Underwriters did not overpay, for they issued two policies to Stratford, each with limits of \$1 million,²³ and paid only \$1,741,300. (There is no anti-stacking provision in Underwriters’ policies.) Moreover, Underwriters contend that they and the Zurich insurers are jointly and severally liable for the entire loss. That can be true only if the loss is the same for each of them, *i.e.*, one occurrence.

Great American also did not overpay. It provided excess coverage over the Valiant and Northern policies. When Valiant exhausted its limit, Great American properly paid \$494,200.

Finally, having contributed its maximum limit of \$1 million, Valiant could not have “fail[ed] to pay [its] equitable share.”

²² App. Br. at 5, 10.

²³ CP 203.

V. Argument

A. Summary Judgment Standard

This Court may affirm the trial court's summary judgment ruling on any grounds supported by the record.²⁴ The Court's review is *de novo* and it conducts the same inquiry as the trial court.²⁵

The standard principles applicable to summary judgment motions are well known. In responding to a summary judgment motion, the non-moving plaintiff, "by affidavits or as otherwise provided in this rule [CR 56], must set forth specific facts showing that there is a genuine issue for trial."²⁶ To defeat summary judgment, a plaintiff must establish specific and material facts to support each element of his or her case.²⁷ A dispute over non-material facts does not justify denying the motion. If the plaintiff will bear the burden of proof at trial as to an element essential to its case, as Underwriters do here with respect to Zurich's policies, and that party fails to make a showing sufficient to establish a genuine dispute of material fact as to that element, then summary

²⁴ *Mountain Park Homeowners Ass'n, Inc. v. Tydings*, 125 Wn.2d 337, 344, 883 P.2d 1383 (1994).

²⁵ *Degel v. Majestic Mobile Manor, Inc.*, 129 Wn.2d 43, 48, 914 P.2d 728 (1996).

²⁶ *Young v. Key Pharmaceuticals, Inc.*, 112 Wn.2d 216, 225-26, 770 P.2d 182 (1989).

²⁷ *Marquis v. City of Spokane*, 130 Wn.2d 97, 105, 922 P.2d 43 (1996).

judgment is appropriate.²⁸ Underwriters also do not argue they had no contractual obligation to pay the underlying settlement. “Underwriters filed suit against Valiant and Northern for equitable contribution and equitable subrogation”²⁹ But this Court “review[s] equitable remedies fashioned by the trial court for abuse of discretion.”³⁰

Here it is undisputed that Chateau Pacific was a single structure for which Stratford was the general contractor, responsible for the entire project. Stratford’s legal obligation was to pay damages because of property damage that resulted from the building’s defective construction and exposure to rain.³¹ The property damage at issue happened because water intruded through the building envelope.³² Defects alone are not damage.³³ The “facts” that different defects existed in the building’s

²⁸ *Time Oil Co. v. Cigna Property & Cas. Ins. Co.*, 743 F. Supp. 1400, 1406 (W.D. Wash. 1990).

²⁹ App. Br. at 10.

³⁰ *Polygon Northwest Co. v. American Nat’l Fire Ins. Co.*, 143 Wn. App. 753, 767, 189 P.3d 777 (2008).

³¹ CP 118, ¶ 2; CP 176; App. Br. at 3.

³² CP 170 ¶ 9, 174 ¶ 9.

³³ *See, e.g. Alejandre v. Bull*, 159 Wn.2d 674, 685, 153 P.3d 864 (2007) (“And, as in other circumstances, where defects in construction of residences and other buildings are concerned, economic losses are generally distinguished from physical harm or property damage to property other than the defective product or property. The distinction is drawn based on the nature of the defect and the manner in which damage occurred.”), and *Yakima Cement Prods. Co. v. Great Am. Ins. Co.*, 93 Wn.2d 210, 218, 608 P.2d 254 (1980) (“We must conclude, on the record before us, that no property damage to the operations building occurred at the time the defective concrete panels were incorporated into the operations building.”).

envelope, and that water may have entered the structure at different times and locations, are not material. Summary judgment was appropriate.

B. Principles of Insurance Policy Construction

The interpretation of an insurance policy is a question of law, properly resolved on a motion for summary judgment,³⁴ and is also reviewed *de novo*.³⁵ In construing an insurance policy, the court must read the entire contract together “so as to give force and effect to each clause.”³⁶ “Courts view insurance contracts in their entirety and do not interpret phrases in isolation.”³⁷ In construing insurance contracts, the court must “examin[e] the contract as a whole,”³⁸ and “repair to the fundamental rule that all parties to a contract are held to language of the contract — and insurance contracts are no exception.”³⁹ While the court is to apply a sensible construction that would be understood by the average person, “[a]t the same time, we do not allow an insured’s

³⁴ See *Transcontinental Ins. Co. v. WPUDUS*, 111 Wn.2d 452, 456, 760 P.2d 337 (1988).

³⁵ *Alaska Nat’l Ins. Co. v. Bryan*, 125 Wn. App. 24, 30, 104 P.3d 1 (2004).

³⁶ *Transcontinental Ins. Co.*, 111 Wn.2d at 456.

³⁷ *Allstate Ins. Co. v. Bauer*, 96 Wn. App. 11, 14, 977 P.2d 617 (1999).

³⁸ *National Merit Ins. Co. v. Yost*, 101 Wn. App. 236, 239, 3 P.3d 203 (2000).

³⁹ *Greengo v. Public Employees Mut. Ins. Co.*, 135 Wn.2d 799, 811, 959 P.2d 657 (1998).

expectations to override the plain language of the contract.”⁴⁰

Ambiguity exists “only ‘if the *language on its face* is fairly susceptible to two different but reasonable interpretations.’”⁴¹ Courts will not construe language to create an ambiguity to resolve policy terms against the insurer when it is clear from contextual analysis that no coverage was intended.⁴² “[W]here the language in an insurance policy is clear, the court must enforce it as written and cannot modify the contract or create ambiguity where none exists.”⁴³

C. There Was One “Occurrence” At Chateau Pacific, Thus Triggering Zurich’s Anti-Stacking Clause.⁴⁴

Zurich’s anti-stacking clause applies if more than one affiliate’s policies apply to the “same occurrence.”⁴⁵ The Zurich policies define

⁴⁰ *Cle Elum Bowl, Inc. v. North Pac. Ins. Co.*, 96 Wn. App. 698, 702–03, 981 P.2d 872 (1999). “The contract will be given a practical and reasonable interpretation that fulfills the object and purpose of the contract rather than a strained or forced construction that leads to an absurd conclusion, or that renders the contract nonsensical or ineffective.” *WPUDUS v. Public Util. Dist. No. 1*, 112 Wn.2d 1, 11, 771 P.2d 701 (1989). Underwriters frequently cite non-Washington cases that apply the “reasonable expectations” doctrine, but Washington applies the “average purchaser of insurance” rule instead. *See, e.g., Kish v. Insurance Co. of N. Am.*, 125 Wn.2d 164, 170, 883 P.2d 308 (1994): “To decide this question, we turn to principles of interpretation for insurance contracts. Courts interpret insurance contracts as an average insurance purchaser would understand them”

⁴¹ *Yost*, 101 Wn. App. at 239, quoting *Kish, supra*, at 125 Wn.2d at 171 (emphasis in original); *Transcontinental*, 111 Wn.2d at 456.

⁴² *West Am. Ins. Co. v. State Farm Mut. Auto Ins. Co.*, 80 Wn.2d 38, 44, 491 P.2d 641 (1971).

⁴³ *Allstate Ins. Co. v. Bauer*, 96 Wn. App. 11, 14, 977 P.2d 617 (1999).

⁴⁴ This section addresses both Assignment of Error Nos. 1 and 2 and the corresponding sections in the Brief of Appellant, including No. 6, to the extent each contains arguments regarding whether there was one or more “occurrence.”

⁴⁵ CP 60, 85, 110.

“Occurrence” to mean “an accident, *including continuous or repeated exposure to substantially the same general harmful conditions.*”⁴⁶ Here, the “substantially the same general harmful conditions” were construction defects and rain. Chateau Pacific sustained property damage over time, caused by this occurrence, and sued GCG for repair costs.

Underwriters do not contest that Valiant and Northern are affiliates.⁴⁷ Rather, Underwriters’ primary argument is one of multiple occurrences, contending in some places that “a separate occurrence takes place in each year of [the] successive CGL policies” issued to Stratford,⁴⁸ for which there is no basis in fact, in law, or policy definition; at another that “there can be separate occurrences of water intrusion in different locations at different times which trigger ... different policy years;”⁴⁹ and at another that “each defect and instance of property damage” may be a separate occurrence.⁵⁰

Underwriters’ effort to multiply occurrences at Chateau Pacific is misguided for at least two overarching reasons: 1) it ignores the definition of “occurrence” in the Zurich policies, the terms of their insuring

⁴⁶ CP 62, 87, 112.

⁴⁷ *See, supra*, note 1.

⁴⁸ App. Br. at 14. *See also id.* at 18, 23.

⁴⁹ App. Br. at 14. *See also id.* at 18.

⁵⁰ *Id.* at 16, 18, 19.

agreements, and the nature of what happened at Chateau Pacific; and 2) it ignores Washington law, particularly the cases of *Gruol Constr. Co. v. Insurance Co. of N. Am.*⁵¹ and *Am. Nat'l Fire Ins. Co. v. B&L Trucking & Constr. Co.*,⁵² which instruct that continuing damage to property that progressively worsens over time is one occurrence for which insurers are jointly and severally liable — subject to any clear limitations in their policies.⁵³ Each of these reasons is discussed in greater detail below.

There is also a third, perhaps more subtle, reason why the Court must not accept Underwriters' invitation to initiate a fundamental shift in Washington law, and find — in leaky building envelope cases — that each defect and instance of water intrusion is a separate occurrence.

Under Washington law, the insured has the burden to prove each element of a policy's insuring agreement.⁵⁴ An insurer is liable only if

⁵¹ 11 Wn. App. 632, 634–36, 524 P.2d 427 (1974).

⁵² 134 Wn.2d 413, 951 P.2d 250 (1998).

⁵³ *Id.* at 427: If an insurer intended to control the allocation of liability, including allocation of liability to the insured, “it could have included that language in its policy.” *See also Polygon, supra*, 143 Wn. App. at 783: “Washington law does not, in fact, force insurers to pay for losses that they have not contracted to insure. Rather, **the contours of an insurer's coverage obligations are defined by the specific language of the insurance contract interacting with the type of loss suffered by the insured.**” (emphasis added)

⁵⁴ “In order to establish an entitlement to coverage, an insured must establish that (1) she has been legally required to pay damages because of ... ‘property damage’ suffered by a third party claimant, (2) those damages are the result of an ‘occurrence,’ and (3) the occurrence [or property damage] happened during the policy period.” WASHINGTON INSURANCE LAW, 2nd Ed., Harris, T., @ 21-3 (2006), *citing Queen City Farms, Inc. v. Central Nat'l Ins. Co.*, 126 Wn.2d 50, 882 P.2d 703 (1994); “The

“‘property damage’ occurs during the policy period” and is caused by an occurrence.⁵⁵ If an occurrence causing property damage has not happened yet, then an insurer is not liable for it. If an occurrence and property damage happened before the policy began and did not progress, then an insurer is not liable for it — because the damage did not “occur” during the policy period.

To get an insurer to pay damages on its behalf, the insured must prove that “an accident, including continuous or repeated exposure to substantially the same general harmful conditions,” caused property damage to occur “during the policy period,” for which the insured has a legal obligation to pay damages.⁵⁶ If each leak through a different defect in the envelope of a single building is a separate occurrence, then it becomes very expensive, if not impossible, for the insured to prove what leaked when, what got wet when, what property damage resulted, what it

claim against E-Z Loader would have been covered by Travelers’ policy only if plaintiffs had (a) sustained bodily injury, (b) an accident caused such bodily injury, and (c) the accident (including continuous or repeated exposure to conditions) resulted in bodily injury neither expected nor intended by the insured. The insured was required to prove the existence of each of these three elements to recover under the policy,” *E-Z Loader Boat Trailers, Inc. v. Travelers Indem. Co.*, 106 Wn.2d 901, 906, 726 P.2d 439 (1986); “Determining whether coverage exists is a 2-step process.” *McDonald v. State Farm Fire & Cas. Co.*, 119 Wn.2d 724, 731, 837 P.2d 1000 (1992). The burden first falls on the insured to show its loss is within the scope of the policy’s insured losses. *Overton v. Consolidated Ins. Co.*, 145 Wn.2d 417, 431, 38 P.2d 322 (2002).

⁵⁵ App. Br. at 7, quoting Zurich’s insuring agreement.

⁵⁶ See *supra*, note 8, and Zurich’s insuring agreement at CP 48, 73, 98.

will cost to fix it, and thus what is the insurer's duty to pay. Furthermore, if policies require the insured to pay a per occurrence deductible, as they often do, then the insured will have more to pay.⁵⁷

The "property damage" at Chateau Pacific allegedly began soon after the first incidence of water intrusion into the completed project and continued for a period of years.⁵⁸ The record, in documents Underwriters submitted to the trial court for its "judicial notice," describe "substantial and material construction deficiencies that have allowed water to intrude beyond the building envelope causing significant property damage."⁵⁹ By definition this describes one occurrence, *i.e.*, "continuous or repeated exposure to substantially the same general harmful conditions."

The court in *Gruol, supra*, recognized that a single occurrence can cause property damage that first occurs during one policy period, but continues to occur — and worsen — over successive policy periods.

⁵⁷ By Underwriters' count, that is at least 10 occurrences a year for five years. *See App. Br.* at 33–34. They might as well argue that there was a different "occurrence" each time it rained or each time a different window leaked or water leaked through a different location in the roof or siding, which would equate to potentially hundreds of "occurrences" and triggered deductibles.

⁵⁸ CP 118, 122–123, 148, 170, 174.

⁵⁹ CP 170 ¶¶ 9, 10, CP 174 ¶¶ 9, 10 (underlying complaints against Stratford) and CP 176 (letter from counsel for the owner to Stratford: "The Chateau Pacific suffers from construction defects in the exterior envelope that have allowed water to penetrate the envelope and cause damage to the sheathing and possibly the framing behind the sheathing"), collectively submitted by Underwriters for the trial court's "judicial notice" (CP 166).

The court there found that dry-rot damage to an apartment building caused by the insured's defective back-filling to be "a continuing condition or process,"⁶⁰ and an "undiscovered condition which progressively worsened. ... The damage, though continuing over a period of time, constituted a single injury."⁶¹

In *B&L Trucking*, the majority said: "The occurrence in this case is the continuing damage caused by the leaching, and the trial court determined which policies were triggered under the occurrence clause. ... Under the terms of the relevant policies, an occurrence includes 'continuous or repeated exposure to conditions.'"⁶² The majority rejected the dissent's argument — like Underwriters' argument here about leaks — and refused to parse the damage associated with each instance of

⁶⁰ *Gruol, supra*, 11 Wn. App. at 634–36.

⁶¹ *Id.* at 635, 637–38.

⁶² 134 Wn.2d at 426, 427. Discussing *Gruol*, the *B&L Trucking* court said:

In *Gruol*, the Court of Appeals addressed a similar, although not identical, issue. An insured brought an action against an insurer for failure to defend against a contractor. Damage was caused to an apartment building by dry rot, which resulted from improper backfilling during construction. The court held the dry rot, as the resulting damage from the improper backfilling, was the "occurrence" for purposes of the insurance policy. Because the dry rot was continuous, coverage was proper against insurers whose policies covered the "occurrence," even though the initial negligent act of improper backfilling took place within the period of another insurance company's coverage.

B&L Trucking, 134 Wn.2d at 423–24 (citing *Gruol*, 11 Wn. App. at 635).

dumping into the insured's landfill, or with each release of contaminants out of it. The majority declined to find a new occurrence each time pollutants were dumped where, as posed by the dissent, "there may be innumerable polluting events causing property damage through many policy periods ... [r]ather than a single worsening injury" ⁶³ Consider also *Lee Builders, Inc. v. Farm Bureau Mut. Ins. Co.* ⁶⁴ and *Radenbaugh v. Farm Bur. Gen. Ins. Co.* ⁶⁵

Finally, *Bordeaux, Inc. v. American Safety Ins. Co.*, a Washington construction defect coverage action, concerned whether an insured had to pay more than one self-insured retention ("SIR"). The court treated this as a deductible, where the policy provided the SIR was owed on a "per

⁶³ *Id.* at 434 (Madsen, J., dissenting). See also *Montrose Chem. Corp. v. Admiral Ins. Co.*, 913 P.2d 878, 889-90 (Cal. 1995); *Chemstar, Inc. v. Liberty Mut. Ins. Co.*, 797 F. Supp. 1541, 1546 (C.D. Cal. 1992), *affirmed*, 41 F.3d 429 (9th Cir. 1994) ("A majority of courts determines the number of occurrences based on the underlying cause of the property damage"); *Endicott Johnson Corporation v. Liberty Mutual Ins. Co.*, 928 F. Supp. 176 (N.D.N.Y. 1996) (finding that repeated dumping of hazardous waste substances at two separate waste disposal sites to be two single occurrences, *not* a new occurrence every time new material was delivered); and *Hiraldo ex rel. Hiraldo v. Allstate Ins. Co.*, 840 N.E.2d 563, 564 (N.Y. Ct. App. 2005) (finding bodily injury caused by repeated exposure to lead paint to be the result of "continuous or repeated exposure to the same general conditions" and, thus, "one loss").

⁶⁴ 104 P.3d 997, 1000, 1003 (Kan. Ct. App. 2005), *affirmed*, 137 P.3d 486 (Kan. 2006) (finding water intrusion from faulty window and siding installation to constitute a single "occurrence" under an identical definition: "The faulty materials and workmanship, especially those provided by Builders' subcontractors, caused a continuous exposure of the substructure of the Steinberger home to the general harmful conditions inherently imposed by moisture from the elements ...").

⁶⁵ 610 N.W.2d 272, 277 (Mich. Ct. App. 2000) (finding an "occurrence" under an identical definition and a duty to indemnify the insured for a settlement where multiple construction defects left home "nearly uninhabitable").

occurrence” basis.⁶⁶ Under a definition of “occurrence” identical to that in Zurich’s policies, the court found the insured owed only one SIR, even though the claims against it involved “extensive construction defects and property damage related to the project’s exterior cladding, building envelope, underlying components, roof design, site drainage, and mechanical systems.”⁶⁷

Chateau Pacific is a single structure and the work of the general contractor, Stratford. A single certificate of occupancy was issued for the building.⁶⁸ All of the asserted construction defects were within the building envelope, and together with rain, constituted “substantially the same general harmful conditions,” *i.e.*, the same “occurrence,” throughout the insurers’ policy periods, that caused the property damage for which Stratford was legally obligated to pay damages.

Neither Underwriters nor Stratford ever argued before settlement that “property damage” at Chateau Pacific resulted from anything but a single “occurrence.” This is not surprising given the Washington cases of

⁶⁶ 145 Wn. App. 687, 691, 186 P.3d 1188 (2008).

⁶⁷ *Id.* at 690. *Accord, Polygon Northwest*, 143 Wn. App. at 776, a leaky-building case involving the allocation of damages among insurers for what this Court implicitly recognized was the same occurrence over four policy years: “[W]here several insurance policies covering several different periods are triggered by a claim involving continuous harm ... each insurer is generally jointly and severally liable for all covered damages up to the amount of its policy limits without allocation to the insured.”

⁶⁸ CP 148.

Gruol, *B&L Trucking* and *Bordeaux*, discussed above, as well as *Polygon*.⁶⁹ While the underlying action here was pending, Underwriters' coverage counsel wrote to Stratford, stating that "GCG's claims against Stratford seek to recover for Stratford's liability for 'property damage' caused by *an* 'occurrence,' as those terms are defined in [Underwriters'] policies."⁷⁰ Similarly, Stratford's counsel stated: "It is undisputed that the allegations against Stratford in the GCG litigation involve *a* loss that continued through each of Zurich's three primary policy periods," and referred to the claims as a "continuous loss."⁷¹

Transcontinental,⁷² cited by Underwriters, does not change the "same 'occurrence'" analysis here. *Transcontinental* involved a \$2.25-

⁶⁹ See notes 30, 53 and 67, *supra*.

⁷⁰ CP 203–204 (emphasis added). Underwriters' coverage counsel further implies the acknowledgement of a single occurrence by stating that "because ... the limits afforded by the Stratford policies are \$1 million per occurrence, Stratford is exposed to a substantial risk of liability that will not be indemnified by Underwriters." CP 206. And, he contested coverage based on the existence of an "ongoing" or "continuing loss" that predated the inception of Lloyd's policies in 2002. CP 179, ¶ 5; CP 202–207.

These two communications were attached as exhibits to the Supplemental Beatty Declaration, filed in support of Zurich's reply brief below, and which the trial court declined to strike per Underwriters' motion below (and exception here). While Underwriters' Assignment of Error on this point is addressed *infra*, it is worth noting here that these communications by Underwriters' coverage counsel to Stratford, and by Stratford's counsel to Zurich, were made before the underlying case settled and contradict Underwriters' claim — in opposition to Zurich's motion below and on appeal — that Chateau Pacific involved multiple occurrences.

⁷¹ CP 209, 211 (emphasis added).

⁷² *Transcontinental Ins. Co. v. WPUDUS*, 111 Wn.2d 452.

billion bond default, and 13 separate suits against public utility districts, their officers, directors and employees for breaches of various state and federal securities laws, fraud, negligent misrepresentation and breach of contract. Two policies were at issue and the essential question was whether they provided coverage for claims against the insured's directors and officers separate from general liability coverage for the insured PUD entity. The court answered that question "yes," and also determined that the endorsements providing such coverage were not subject to the policies' definition of "occurrence," but had their own: "coverage is triggered by a good faith act by an officer [or] director ... in the scope of his duty that results, during the policy period, in that officer's ... liability to another."⁷³

The court there also found that the allegations against the insured directors and officers involved "several types of injuries flowing from multiple, distinct events" or causes, such as "the PUD's entrance into the Participants' Agreement ... [,] reliance on bond counsels' opinions that accompanied each bond issue, ... or participants' failure to file a declaratory action ... prior to the sale of the bonds."⁷⁴ Based upon these

⁷³ 111 Wn.2d at 465.

⁷⁴ *Id.* at 466. Additional causes or events are described at p. 468 of the court's opinion. *See also Valley Furniture & Interiors, Inc. v. Transportation Ins. Co.*, 107 Wn. App. 104, 105, 109, 26 P.3d 952 (2001) (finding series of thefts by

multiple, distinct events, the court concluded that Transcontinental's per occurrence limits of both policies — neither of which had an anti-stacking clause — were triggered.

Underwriters also cite cases decided in states such as California, which do not have decisions imposing joint and several liability for continuous loss claims. For example, *Chu v. Canadian Indem. Co.*,⁷⁵ is a California case. To Zurich's knowledge, there is no California case similar to *B&L Trucking* and *Gruol*. *Chu* also does not apply here as it *did not* construe a definition of "occurrence," particularly one "including continuous or repeated exposure to substantially the same general harmful conditions." Rather, *Chu* examined whether damage was intended or expected, and *did* involve claims of substantially *different* construction defects that caused distinct problems.

Similarly, *Gary Day Constr. Co. v. Clarendon Am. Ins. Co.*,⁷⁶ even if otherwise well-reasoned, does not apply because it involved multiple homes, not a single building. Yet it is worth noting that, under

three employees over several years to be "related acts," thus, one "occurrence" involving one limit — not three occurrences and limits as urged by the insured. "Occurrence" was defined as "all loss or damage ... involving a single act or series of related acts." The court found the policy language "unambiguous" and rejected the insured's several theories about why there were multiple occurrences, such as three people benefited and different reasons for failing to report payroll deductions).

⁷⁵ 224 Cal. App. 3d 86, 97-98 (1990).

⁷⁶ 459 F. Supp. 2d 1039 (D. Nev. 2006).

a similar “occurrence” definition, the *Gary Day* court found that “the only act giving rise to the possibility of coverage under the Policy is water intrusion,” *i.e.*, the operative “occurrence” with respect to each home.⁷⁷

IDC Constr., LLC v. Admiral Ins. Co.,⁷⁸ likewise is inapplicable.

The summary judgment motion at issue there was the *insured’s* and another of its insurers, which sought an affirmative determination of Admiral’s duty to pay. The question before the court was whether damage from water intrusion alleged in the underlying complaint occurred before or during Admiral’s policy period. If before, Admiral’s “Continuing Loss Exclusion” might apply. The underlying action was still pending and the complaint did not “specify the exact date when the damages first occurred.”⁷⁹ The court noted that it could “assess the duty to indemnify ... only if it was clear that the allegations in the Underlying Complaint could, under no circumstances, trigger the duty to indemnify,” but it could not “resolve questions of fact on a motion for summary judgment.”⁸⁰ Thus, the court denied the *insured’s* motion seeking a ruling that Admiral must indemnify. Nevertheless, while the question was not whether there was one “occurrence,” the court seemed

⁷⁷ *Id.* at 1047.

⁷⁸ 339 F. Supp. 2d 1342 (S.D. Fla. 2004).

⁷⁹ *Id.* at 1350.

⁸⁰ *Id.* at 1351.

prepared to find that whenever damages began, they were a single “occurrence.”⁸¹

Underwriters disregard facts, Washington law, and the definition of “occurrence” in Zurich’s policies, and their theory does not benefit insureds. If each defect or leak is a separate occurrence, then for each defective window, door, flashing, joint, sealant, stucco installation, weather-resistive barrier, etc., in Chateau Pacific’s building envelope that allowed water in, the resulting property damage and cost of repair must be separately determined, and a separate deductible would be due. Further, there would be no joint and several liability at all among the triggered insurers for the underlying settlement as a whole. Valiant, for example, would be liable only for repairs to those discrete locations that leaked and caused property damage during its 1999–2000 policy year. Underwriters rely on decisions from elsewhere that involve dissimilar circumstances and different policy language. Their multiple-occurrence theory, first posed after the underlying case settled, must be rejected.

⁸¹ *Id.* *City of Idaho Falls v. The Home Indem. Co.*, 888 P.2d 383 (Idaho 1995), merits little discussion. The case concerned whether the claims against the plaintiff arose out of “the same or related wrongful acts,” not whether there were one or more occurrences under an “occurrence” definition such as that in the Zurich policies. Relying in part on *Transcontinental*, the court found that there were multiple acts alleged. 888 P.2d at 388. “We need not, and have not, made a factual finding that all alleged wrongful acts are unrelated.” *Id.*

D. Zurich's Anti-Stacking Provision is Not Ambiguous Nor Against Public Policy.

1. Ambiguity

Underwriters make the incongruous assertion that this Court should rely on non-Washington cases construing different policy language to conclude there were multiple occurrences at Chateau Pacific and that Zurich's anti-stacking clause is ambiguous and contrary to public policy, but that Washington cases discussing anti-stacking clauses similar to Zurich's should not be considered because they involve uninsured/underinsured motorist ("UIM") coverage.

Despite obvious factual differences between UIM and construction defect cases (instantaneous occurrences versus ones that occur over time), the question here is one of insurance policy construction, and the decisions in the UIM cases to enforce anti-stacking limitations are informative. In *National Merit Ins. Co. v. Yost*, the comparative anti-external stacking clause provided:

If this policy and any other policy providing similar insurance apply to the same accident, the maximum limit of liability under all the policies shall be the highest applicable limit of liability under any one policy.⁸²

⁸² 101 Wn. App. at 238.

This Court held this language was reasonably susceptible to only one interpretation, the insurer’s — and, therefore, unambiguous.

Zurich Provision⁸³	<i>National Merit Ins. Co. v. Yost</i>
If this Coverage Form and any other Coverage Form or policy issued to you by us or any company affiliated with us apply to the same “occurrence,” the maximum limit of insurance under all the Coverage Forms or policies shall not exceed the highest applicable Limit of Insurance under any one Coverage Form or policy.	If this policy and any other policy providing similar insurance apply to the same <i>accident</i> , the maximum limit of liability under all the policies shall be the highest applicable limit of liability under any one policy.

National Merit contended that the language limited the insured’s total recovery under *all* applicable policies to the highest limit of any one policy. Yost argued there was a second reasonable interpretation: “the insured is entitled to recover up to that highest limit from *each* policy,”⁸⁴ an argument this Court found to be unreasonable, holding:

Under the [insured’s] interpretation, an insured could collect under every applicable insurance policy. The clause, then, would not serve as an additional limit on liability; it would merely limit National Merit’s liability to the amount stated in the policy. In other words, this interpretation renders the clause redundant and meaningless within the context of the entire policy.

[National Merit’s] interpretation recognizes the intent of the clause as an anti-external stacking

⁸³ Zurich’s clause actually is narrower than that in *Yost* because its application is limited to policies issued by affiliated companies.

⁸⁴ *Id.* at 239–40.

limitation on an insurer's liability where there is another insurer who is also liable for coverage. The second interpretation renders the clause meaningless and is unreasonable. Therefore, no ambiguity exists and, consequently, we must enforce the clear language of the policy as written.⁸⁵

This Court's interpretation in *Yost* recognizes that the intent of an anti-stacking clause like Zurich's is a limitation on the insurer's liability when another policy provides coverage for the same "occurrence." In such a situation, "the maximum limit of insurance ... shall not exceed the highest applicable Limit of Insurance under any one Coverage Form or policy."⁸⁶ Here, since the highest limit available under any one Zurich policy is \$1 million, that is the most Valiant and Northern, collectively, are obligated to pay. Any other interpretation "renders the clause meaningless and is unreasonable. Thus, no ambiguity exists, and consequently, the court must enforce the policy language as written."⁸⁷

In *Parker v. United Services Auto. Assocs.*,⁸⁸ the court found the same language to be unambiguous, reversing summary judgment for the

⁸⁵ *Id.* at 240. See also *Federated Am. Ins. Co. v. Erickson*, 67 Wn. App. 670, 673-74, 838 P.2d 693 (1992) (cited and quoted in *Yost*, 101 Wn. App. at 240) (construing an "other insurance" clause and holding that it was "unambiguous in limiting the underinsured motorist coverage to the highest applicable policy amount").

⁸⁶ CP 60, 85, 110.

⁸⁷ *Yost*, 101 Wn. App. at 240. As noted, National Merit did not limit its clause to multiple policies issued by it or affiliates. See note 83, *supra*.

⁸⁸ 97 Wn. App. 528, 530, 984 P.2d 458 (1999).

insured. The court noted that the provision did not include the convoluted structure and confusing phrases found in some other cases and agreed with USAA's position that "stacking of *any* policy" was prohibited.⁸⁹

[T]he average purchaser of insurance would understand the anti-stacking provision to apply to any other policy providing similar insurance, *including policies issued by USAA*. The provision differentiates between this insurance policy and any other policy[,] and limits recovery to the higher applicable limit under any one policy.⁹⁰

Zurich's anti-stacking clause is likewise unambiguous. There is no substantive difference between the language of its anti-stacking provision and the language validated by the courts in *Yost*, *Parker* and *Greengo*, and it should be construed consistent with those decisions.

While the application of anti-stacking provisions for occurrences involving "continuous or repeated exposure to substantially the same general harmful conditions" under commercial (non-auto) liability policies presents a new question in Washington, courts elsewhere have construed similar provisions in non-auto cases, and have found them

⁸⁹ *Id.* at 531, 533 (emphasis in original).

⁹⁰ *Id.* at 533 (emphasis added). *See also Greengo, supra*, 135 Wn.2d at 804, 806-08 (construing a nearly identical provision); *Progressive Preferred Ins. Co. v. Seppala*, 2007 U.S. App. LEXIS 19955 at *4, 245 Fed. Appx. 629, 631 (9th Cir., Aug. 17, 2007) (unpublished) (holding anti-stacking clause stating "that the amount of benefits recoverable 'from all sources by an insured person shall not exceed the amount provided by the one policy with the highest limit of liability'" to "unambiguously" limit insureds to "recover the maximum benefits available under *one policy*") (emphasis in original).

unambiguous and enforceable. *See, e.g., Progressive Premier Ins. Co. v. Cannon*,⁹¹ finding an internal anti-stacking clause in a watercraft policy to be unambiguous and stating: “[T]he policy language in the UIM and UM antistacking cases and in the policy ... here are similar.”

In the general commercial liability context, where the applicable policy and “any other policy issued to you by us or any company affiliated with us apply to the same ‘occurrence,’” and “occurrence” is defined to include “continuous or repeated exposure to substantially the same general harmful conditions,” the Zurich policies are like Allstate’s policies in *Hiraldo ex rel. Hiraldo v. Allstate Ins. Co.*⁹²

In *Hiraldo*, Allstate had three policies with the plaintiff, each for \$300,000, each containing a “non-cumulation” clause, and each covering a child’s exposure to lead-based paint.⁹³ The insureds contended that

⁹¹ 889 N.E.2d 790, 794 (Ill. App. Ct. 2008).

⁹² 840 N.E.2d 563 (N.Y. Ct. App. 2005).

⁹³ Allstate’s non-cumulation clause provided:

Regardless of the number of insured persons, injured persons, claims, claimants or *policies* involved, our total liability under Business Liability Protection coverage for damages resulting from one loss will not exceed the limit of liability for Coverage X shown on the declarations page. All bodily injury, personal injury and property damage resulting from one accident or from continuous or repeated exposure to the same general conditions is considered the result of one loss.

840 N.E.2d at 564 (emphasis in original). This provision’s reference to “continuous or repeated exposure to the same general conditions” as constituting “one loss” equates to the reference to “occurrence” in the Zurich anti-stacking clause and its definition in

since the loss occurred over each of the three policy periods, and that each policy applied to losses which occurred during the policy period, Allstate was liable up to its limits on each policy. The court disagreed.

But for the noncumulation clause in the policies, this would be a difficult case. ...

... The noncumulation clause says that “[r]egardless of the number of ... policies involved, [Allstate’s] total liability under Business Liability Protection coverage for damages resulting from one loss will not exceed the limit of liability ... shown on the declarations page.” That limit is \$300,000, and thus Allstate is liable for no more[.]⁹⁴

Similarly, in *Endicott Johnson Corp. v. Liberty Mutual Ins. Co.*,⁹⁵ the court found that repeated dumping of hazardous waste substances at two separate waste disposal sites were two occurrences, *not* a new occurrence every time new material was delivered, relying on the same definition of “occurrence” that exists in the Zurich policies.

the Insuring Agreements of Zurich’s policies. *See also Greenidge v. Allstate Ins. Co.*, 312 F. Supp. 2d 430, 432 (S.D.N.Y. 2004).

⁹⁴ 840 N.E.2d. at 564–65 (citing *Bahar v. Allstate Ins. Co.*, 2004 U.S. Dist. LEXIS 15612 (S.D.N.Y., Aug. 9, 2004); *Greene v. Allstate Ins. Co.*, 2004 U.S. Dist. LEXIS 10860 (S.D.N.Y., June 15, 2004); *Greenidge v. Allstate Ins. Co.*, 312 F. Supp. 2d 430 (S.D.N.Y. 2004)).

The court in *Greenidge*, also a lead-poisoning case, held that Allstate was not in bad faith when it refused to settle a claim against its insureds for \$600,000 (the combined limits of two policies) where the “plain language of the anti-stacking provision [at issue] admits of only one construction. ... [I]t is clear that even though two policies may have been triggered, the policy limit remained \$300,000. Allstate’s interpretation of the policies was not only reasonable, it was correct.” 312 F. Supp. 2d at 440.

⁹⁵ 928 F. Supp. 176 (N.D.N.Y. 1996).

This result is consistent with the majority's decision in *B&L Trucking*, which rejected the dissent's argument that there was a new occurrence with each instance of dumping or leaching.⁹⁶

The policies at issue in *Endicott Johnson* included a non-cumulation (a.k.a. "anti-stacking) of limits provision that stated:

if the *same occurrence* gives rise to ... property damage that occurs partly before and partly within the policy period, then each occurrence limit and the applicable aggregate limit ... of this policy shall be reduced by the amount of each payment made by the company with respect to such occurrence under a previous policy or policies of which this policy is a replacement.⁹⁷

Coupled with the "occurrence" definition, Liberty asserted the clause prevented its insured from stacking policy limits. The court agreed, finding the clause was unambiguous, quoting as follows from an unpublished U.S. District Court case from New Jersey, *O-I Brockway Glass Container, Inc. v. Liberty Mut. Ins. Co.*, which had construed an identical clause:

The Non-Cumulation clause in both content and title clearly states that the insured shall not recover more than the per occurrence limit by invoking coverage under several policies for the same occurrence. ... If one asked a reasonable person whether the Non-Cumulation clause would allow an insured to recover

⁹⁶ *B&L Trucking*, 134 Wn.2d at 426.

⁹⁷ 928 F. Supp. at 179-80 (emphasis in original).

the \$[100,000] limit under all of the ... policies *for the same occurrence*, the answer would most certainly be “no.” ... An insured would have the reasonable expectation that the Non-Cumulation clause prohibits the recovery of more than the per occurrence limit for each occurrence[.]⁹⁸

When evaluating the applicability of anti-stacking / non-cumulation clauses in construction defect claims, environmental claims like those at issue in *Endicott* provide an excellent analogy. Both involve damage that accumulates over time as a result of a property’s continuing exposure to substantially the same general harmful conditions: a leaky building + water; a leaky landfill + water.

In *Hartford Ins. Co. v. Bellsouth Telecomm., Inc.*⁹⁹ the court — relying on one case involving affiliated insurers with separate policies and another case involving the same insurer with multiple policies¹⁰⁰ — found a virtually identical provision to be unambiguous. It stated:

Hartford contends that the antistacking clause in the Auto Part unambiguously applies to the CGL Part, limiting liability coverage to \$1 million per accident or occurrence. We agree.

* * * *

Consistent with the decisions in *Sweeden* and *Lonergan*, the antistacking clause in this case is

⁹⁸ *Id.* at 182 (emphasis in original).

⁹⁹ 824 So. 2d 234 (Fla. Ct. App. 2002).

¹⁰⁰ *Sweeden v. Farmers Insurance Group*, 71 Ark. App. 381, 30 S.W.3d 783 (Ark. App. 2000), and *Lonergan v. Nationwide Mutual Insurance Co.*, 663 A.2d 480 (Del. Super. Ct. 1995).

unambiguous, limiting coverage provided by affiliated insurance carriers for the same accident to \$1 million.¹⁰¹

Likewise, the anti-stacking clause in the Zurich policies unambiguously limits coverage for the same occurrence to \$1 million and, thus bars Underwriters from recovery.

2. Public Policy

Underwriters contend that Zurich's anti-stacking clause violates "a recognized public policy in Washington regarding full compensation for insureds."¹⁰² Preliminarily, commercial liability insurance is not about compensating insureds. It is about "protect[ing] the insured against loss and injury to others for which the insured might be liable[.]"¹⁰³ There is no question here that Stratford was fully protected. Stratford's settlement with GCG was fully funded by its insurers, including Zurich.

¹⁰¹ 824 So. 2d at 237, 238. Another series of cases involves employee theft provisions that typically define an "occurrence" as "all loss caused by, or involving, one or more 'employees,' whether the result of a single act or series of acts." See *Madison Materials Co. v. St. Paul Fire & Marine Ins. Co.*, 523 F.3d 541, 543, 545-46 (5th Cir. 2008); *Reliance Ins. Co. v. Treasure Coast Travel Agency, Inc.*, 660 So. 2d 1136, 1137-39 (Fla. Ct. App. 1995); *Shared-Interest Mgmt., Inc. v. CNA Financial Ins. Group*, 725 N.Y.S.2d 469, 472 (N.Y. App. Div. 2001); *Landico, Inc. v. American Family Mut. Ins. Co.*, 559 N.W.2d 438, 441-42 (Minn. Ct. App. 1997). The New York court in *Shared Interest Mgmt.*, for example, found two general conditions, that when read together are similar to the provisions discussed above, to be "very effective 'antistacking' provisions" and "unambiguous," reflecting a "clear overall intent to preclude a stacking of coverage from year to year or period to period." 725 N.Y.S.2d at 472.

¹⁰² App. Br. at 27.

¹⁰³ *Frontier Ford, Inc. v. Carabba*, 50 Wn. App. 210, 213, 747 P.2d 1099 (1987).

Underwriters cite *B&L Trucking* (134 Wn.2d at 429) as authority for their statement of public policy. There is no statement there or anywhere else in the decision saying that public policy demands “full compensation for insureds.” Rather, *B&L* supports a different premise: “[B]ecause insurance policies are considered contracts, the policy language, and not public policy, controls.”¹⁰⁴ In fact, it could be argued that *B&L* invited insurers to include limiting language in their policies where they might otherwise be jointly and severally liable for a continuous loss *up to policy limits*: “If the insurer wished to limit its liability through a pro rata allocation of damages once a policy is triggered, the insurer could have included that language in the policy.”¹⁰⁵ Such is the purpose of Zurich’s anti-stacking provision.

About *B&L Trucking*, this Court recently said:

We thus draw two conclusions from *B&L*. First, that where several insurance policies covering several different periods are triggered by a claim involving continuous harm to the insured,¹⁰⁶ each insurer is generally jointly and severally liable for all covered damages up to the amount of its policy limits without allocation to the insured. **Second, a jointly and severally liable insurer may control the allocation of liability, including allocation of**

¹⁰⁴ 134 Wn.2d at 430.

¹⁰⁵ *Id.* at 428.

¹⁰⁶ “[H]arm to the insured” is probably a misstatement. Harm is sustained by the third party, for which the insured may be legally liable.

liability to the insured, by writing into its policy provisions specifically aimed at doing so.¹⁰⁷

This statement and the analysis here also rebut Underwriters' Assignment of Error No. 5.¹⁰⁸

Thiringer v. American Motors Ins. Co.,¹⁰⁹ *Bordeaux, Inc. v. American Safety Ins. Co.*,¹¹⁰ and *Mahler v. Szucs*,¹¹¹ which Underwriters also cite, apply only in the subrogation context where insurers seek recovery from third parties. Those cases say the insured must be "made whole" before the insurer can replenish its coffers. Other cases Underwriters cite (App. Br. at 29) are not Washington cases nor do they even articulate a public policy of their own jurisdictions.

In *Fluke Corp. v. Hartford Acc. & Indem. Co.*, the Supreme Court noted, "Washington courts rarely invoke public policy to *override* express terms of an insurance policy. ... In those Washington cases in which public policy has served to enhance coverage by overriding policy exclusions, the courts have relied on a public policy 'convincingly

¹⁰⁷ *Polygon*, 143 Wn. App. at 776 (emphasis added).

¹⁰⁸ "Whether the anti-stacking provision is contrary to Washington law that insurers are jointly and severally liable" App. Br. at 3, 29 *et seq.*

¹⁰⁹ 91 Wn.2d 215, 588 P.2d 191 (1978).

¹¹⁰ 145 Wn. App. 687, 696-97, 186 P.3d 1188 (2008).

¹¹¹ 135 Wn.2d 398, 418-26, 957 P.2d 632 (1998).

expressed' in state statutes.”¹¹² The *Fluke* court emphasized that the “paramount public policy here is the commitment to upholding the plain language of contracts.”¹¹³ Underwriters have pointed to no statute or judicial decision suggesting that Washington’s public policy prohibits anti-stacking provisions in commercial liability policies. Indeed, enforcing policy provisions that preclude or limit coverage is not against any public policy of the state. As this Court has stated:

Generally, a contract which is not prohibited by statute, condemned by judicial decision, or contrary to the public morals contravenes no principle of public policy. ...

* * * *

... Not all insurance exclusions or limitations violate the state’s public policy, and the fact that the injured party is not fully compensated for his injuries does not necessitate the conclusion that the application of a policy exclusion or limitation violates public policy¹¹⁴

Finally, Underwriters assert that because RCW § 48.22.030 expressly allows insurers to include anti-stacking clauses in their UIM policies, *Yost* and related cases are inapplicable because there is no

¹¹² 145 Wn.2d 137, 144, 34 P.3d 809 (2001) (quoting *Am. Home Ass. Co. v. Cohen*, 124 Wn.2d 865, 873, 874, 881 P.2d 1001 (1994)) (emphasis in original).

¹¹³ *Id.* at 147.

¹¹⁴ *Bates v. State Farm Mut. Auto. Ins. Co.*, 43 Wn. App. 720, 725, 726, 719 P.2d 171 (1986). See also *Parker v. USAA*, 97 Wn. App. at 530 (“Generally, anti-stacking clauses do not violate public policy.”) (citing *Greengo*, 135 Wn.2d at 811).

similar statute allowing such clauses in commercial liability policies. The statute, of course, was passed in direct response to court decisions finding such provisions to be in violation of public policy.¹¹⁵ Absent case law to the contrary, a statute is not required to allow insurers to include certain restrictive provisions in their policies. As the Supreme Court said in *Brown v. Snohomish County Physicians Corp.*, absent contrary public policy, “insurers are permitted to limit their contractual liability.”¹¹⁶ In short, “*B&L* expressly does *not* stand for the proposition that an insurer may be held liable for damages that it has not contracted to insure.”¹¹⁷

E. The Anti-Stacking Clause Does Not Conflict with the Limits of Insurance Provision.

Courts are to read the entire insurance contract as a whole, “so as to give force and effect to *each* clause.”¹¹⁸ Underwriters’ interpretation of the anti-stacking provision in conjunction with the Limits of Insurance provision impermissibly renders the former meaningless.

The Limits of Insurance provision and the anti-stacking clause are easily reconciled. The Limits provision states that the limits of each

¹¹⁵ *Bates*, 43 Wn. App. at 725–26.

¹¹⁶ 120 Wn.2d 747, 753, 845 P.2d 334 (1993).

¹¹⁷ *Polygon*, 143 Wn. App. at 776 (emphasis in original).

¹¹⁸ *Transcontinental*, 111 Wn.2d at 456 (emphasis added).

policy “apply separately to each consecutive annual period,” unless the policy is extended after issuance for additional period of less than 12 months. “In that case, the additional period will be deemed part of the last preceding period for purposes of determining the Limits”¹¹⁹

The intent of this provision is to inform insureds that if no loss or only small losses occur during one year, but a large loss occurs in the next year, the insured cannot use the prior year’s limits for the later year’s large loss even though the policy was renewed. As Stratford did here by buying insurance from Great American, excess insurance can be purchased for the large loss contingency.

The Limits of Liability section also informs the insured that if the policy is extended for less than 12 months, no new limit applies. The clause says nothing about “occurrences” or anything else that negates applying the anti-stacking clause. The result is that where a single loss or occurrence is continuous or instantaneous, only one limit is available. This does not render coverage “illusory.” Limits remain available to cover other losses during other policy years.

The “per occurrence” limit of each Zurich policy is \$1 million.¹²⁰ The anti-stacking clause states that if more than one Zurich policy

¹¹⁹ CP 58.

¹²⁰ CP 161.

“appl[ies] to the same ‘occurrence’,” then the “maximum Limit of Insurance,” which is a direct reference to the Section III, Limits of Insurance provision, “shall not exceed the highest applicable Limit of Insurance under any one Coverage Form or policy”¹²¹ — in this case, \$1 million. Payment of one limit under one policy does not preclude payment of another occurrence limit under another policy (or under the same policy if it happens to provide more than one per occurrence limit in a single year, which some do). Thus, the occurrence limits “apply separately to each consecutive annual period,” but do not accrue to provide more than one limit to the “same ‘occurrence.’”¹²²

The above premise is illustrated in *General Refractories Co. v. Insurance Co. of N. Am.*¹²³ In this case, General Refractories argued that a one-month extension of its policy entitled it to an additional \$5-million limit based on an assertion that an additional policy period had been created. The Pennsylvania court agreed with the trial court’s finding that “the one month Extension must be read as simply an elongation of the Policy period and nothing more,” and refused to

¹²¹ CP 60, 85, 110.

¹²² *Id.*

¹²³ 906 A.2d 610 (Pa. Super. Ct. 2006).

“increase the amount available to recompense (the insured’s) liability.”¹²⁴

The cases cited by Underwriters do not apply. For example, in *Cincinnati Ins. Co. v. Sherman & Hemstreet, Inc.*,¹²⁵ the policy at issue did not include any anti-external stacking language restricting indemnity to the limits of a single policy when multiple policies were triggered by the same occurrence. Hence, *Cincinnati* did not conclude that anti-stacking clauses conflict with a limits of insurance clause. The insurer in *Cincinnati* argued that a “Non-Cumulation of Limit of Insurance” clause providing that “Regardless of the number of years this insurance remains in force or the number of premiums paid, no Limit of Insurance accumulated from year to year ...,” by itself limited the carrier’s total payment to the annual limit of \$50,000 when, over a three-year period, an employee stole more than that amount each year.¹²⁶ (“Occurrence” in that case was defined as “all loss caused by ... one or more employees, whether the result of a single act or series of acts.”) The court disagreed with the insurer, holding:

Although (the clause) could be fairly understood to mean that the insurer’s liability is limited to a

¹²⁴ *Id.* at 612, 613. See also *Idaho Falls*, 888 P.2d at 385–86 (discussing a similar limits provision and stating that the policy “limit applied separately to each annual period of coverage”).

¹²⁵ 581 S.E.2d 613 (Ga. Ct. App. 2003).

¹²⁶ *Id.* at 615.

maximum aggregate amount of \$50,000, as argued by Cincinnati, it could also mean that the limit of liability in one policy period cannot be carried over and added to the limit of liability in the succeeding policy period — although for each policy period, the insured could receive up to \$50,000.¹²⁷

The latter interpretation of Cincinnati’s non-cumulation clause — that unspent limits cannot accrue from year to year — is *exactly* the effect of the Limits of Insurance clause in the Zurich policies. However, unlike the instant case, Cincinnati’s policy lacked the anti-stacking piece, relied on by Zurich here to restrict payment for the same occurrence to a single policy limit.

This is the distinction recognized by the court in *Reliance Ins. Co. v. Treasure Coast Travel Agency, Inc.*¹²⁸ In *Treasure Coast Travel*, Reliance’s policy contained the same “Non-Cumulation of Limit of Insurance” provision (General Condition No. 10) and the same definition of occurrence as in the policy at issue in the *Cincinnati* case.¹²⁹ However, Reliance’s policy also contained the following provision (General Condition No. 9), similar to Zurich’s anti-stacking clause:

If any loss is covered ... [p]artly by this insurance;
and ... [p]artly by any prior cancelled or

¹²⁷ *Id.*

¹²⁸ 660 So. 2d 1136 (Fla. Ct. App. 1995).

¹²⁹ *Id.* at 1137.

terminated insurance that *we* or any affiliate had issued to *you* or any predecessor in interest; [t]he most we will pay is the larger of the amount recoverable under this insurance or the prior insurance.¹³⁰

The *Treasure Coast* court found that there was one “occurrence” with respect to multiple employee embezzlements over a four-year period and that two policies applied to the loss.¹³¹ But it also found that just one limit was owed.

[W]hile some courts in other jurisdictions have held that a non-cumulative clause like condition no. 10 is insufficient to restrict coverage to one policy, the policies in those cases apparently did not include general condition no. 9.¹³² ...

If [Reliance’s] policies only contained condition no. 10, and not condition no. 9, we might well be inclined to follow the courts which have held it insufficient to restrict coverage to one of the policies. In light of general condition no. 9, however, we think that this insurer has accomplished what insurers with non-cumulative provisions alone apparently intended, but failed to state with sufficient clarity to be given effect by the majority of the courts which have construed it.¹³³

¹³⁰ *Id.*

¹³¹ *Id.*

¹³² Citing, *e.g.*, *Columbia Heights Motors, Inc. v. Allstate Ins. Co.*, 275 N.W.2d 32 (Minn. 1979), upon which Lloyd’s principally relies. See App. Br. at 21. The *Cincinnati* case, discussed *supra*, would be another example.

¹³³ 660 So. 2d at 1137–38. See also *Shared-Interest Mgmt., Inc. v. CNA Financial Ins. Group*, 725 N.Y.S.2d 469, 472 (N.Y. App. Div. 2001) (“[E]ven if the policy ... were to be treated as two entirely separate policies, the unambiguous antistacking provisions ... would still preclude the double recovery sought by

*A.B.S. Clothing, Inc. v. Home Ins. Co.*¹³⁴ is similarly unpersuasive on the issues before this Court. In *A.B.S.*, the court concerned itself solely with whether a non-cumulation clause and an anti-stacking clause, like those in *Treasure Coast Travel*, meant there was a single policy with a three-year term, or three separate policies, each with a one-year term.¹³⁵ The “occurrence” definition was also not like that in the Zurich policies: “*all loss ... whether the result of a single act or series of acts.*”¹³⁶ Even then, the insurer, Home, apparently did not argue that the serial embezzlement by two employees over a period of four years was one “occurrence.” Rather, Home simply argued (but lost) that the definition of “occurrence” supported its position that its policy was one contract “under which its liability was limited to a total of \$100,000 for *all loss* during the life of the insurance.”¹³⁷

*Karen Kane, Inc. v. Reliance Ins. Co.*¹³⁸ relies on *A.B.S. Clothing* as articulating the applicable rule of California law central to the *Kane* case, which involved a serial fraud and identical language in a

plaintiff.”); *Landico, Inc. v. American Family Mut. Ins. Co.*, 559 N.W.2d 438, 440–42 (Minn. Ct. App. 1997) (expressly distinguishing *Columbia Heights Motors* as involving “an ‘aggregate’ insurance policy”).

¹³⁴ 41 Cal. Rptr. 2d 166 (Cal. Ct. App. 1995).

¹³⁵ *Id.* at 170–72.

¹³⁶ *Id.* at 174 (emphasis in original).

¹³⁷ *Id.* (emphasis in original).

¹³⁸ 202 F.3d 1180 (9th Cir. 2000).

“fidelity,” *i.e.*, employee theft, policy.¹³⁹ Therein, the Court of Appeals found that *A.B.S. Clothing* described “[a] general rule of California law ... that an insurer which issues three separate policies for employee dishonesty is ‘liable up to its limit of liability for each policy period.’”¹⁴⁰

However, again relying on *A.B.S.*, the court also deemed the policies’ definition of occurrence to be temporally ambiguous, agreeing with the insured that the “ongoing fraudulent scheme would be recoverable as a separate ‘occurrence’ within each period.”¹⁴¹ As noted above, the policies’ definition of occurrence in *Karen Kane* was: “all loss caused by, or involving, one or more ‘employees,’ whether the result of a single act or series of acts.”¹⁴² Discussing this definition and the effect of other policy provisions, the *Kane* court held:

As explained by the *A.B.S.* court, “these provisions create an ambiguity as to the extent of Home’s liability, because while defining ‘occurrence’ as ‘all loss’ suggests that there can be only one occurrence during the life of the insurance, the provision restricting liability ‘for any one occurrence’ suggests there could be more than one occurrence.” Thus, the policy is silent as to whether the term “occurrence” refers to “a single act or series of acts” within a single policy period

¹³⁹ This, of course, is not the language of the Zurich policies.

¹⁴⁰ 202 F.3d at 1188. To the extent the Ninth Circuit panel relied on *A.B.S. Clothing*, it did so because, as a federal court sitting in diversity, it was bound to follow what it perceived California law to be. *Id.* at 1183.

¹⁴¹ *Id.* at 1186–87.

¹⁴² *Id.* at 1187.

or across multiple periods. If “occurrence” is construed as limited by policy period, then Dantzler’s approximately 150 individual acts of theft, spanning over three years, constitute three separate “series of acts,” one for each of the three policy periods and recoverable within each period as such.¹⁴³

This line of reasoning simply does not apply to the materially different language of the Zurich policies, but may explain why Underwriters say at various places in their brief, albeit without explanation or support, that “a separate occurrence takes place each year in successive CGL policies.”¹⁴⁴ The *A.B.S. / Kane* reasoning certainly does not bear on Underwriters’ contention that there is a conflict between the anti-stacking clause and the Limits of Insurance provision in Zurich’s policies that renders the anti-stacking clause unenforceable. Moreover, the notion that there is a new occurrence in continuing loss cases simply because a new policy comes into effect, is not supported by the occurrence definition itself, nor does it comport with Washington law.¹⁴⁵

¹⁴³ *Id.* (internal citations omitted). In *Glaser v. Hartford Cas. Ins. Co.*, 364 F. Supp. 2d 529 (D. Md. 2005), the court found that a three-year series of embezzlements constituted one occurrence, but like the court in *A.B.S.* found the definition of “occurrence” ambiguous in that it “did not ‘affirmatively indicate whether a series of acts included acts occurring outside the policy term.’” *Id.* at 538.

¹⁴⁴ App. Br. at 14. *See also id.* at 18, 23.

¹⁴⁵ *See, e.g., B&L Trucking*, 134 Wn.2d at 426–29 (discussing the nature of a continuous occurrence that spans multiple policies, and determining that all policies triggered for that occurrence are jointly and severally liable, absent limiting language).

F. The “Continuous Damage Endorsement” Precludes Coverage Under Northern’s Second Policy.

Given that there was one occurrence here, it is evident that the Continuous Damage Endorsement in Northern’s second policy bars coverage under that policy. A single “occurrence” — or “continuous or progressively deteriorating injury or damage” as set forth in the Continuous Damage Endorsement — had to have begun prior to the third policy’s effective date of June 1, 2001. Underwriters acknowledge that water intrusion began in 2000, during the first Zurich policy period.¹⁴⁶

Underwriters’ only argument against the endorsement’s application is their assertion of multiple occurrences, including some during the 2001–02 period of Northern’s second policy. Underwriters do not argue the endorsement is ambiguous or against public policy. They do not argue that if there is only one “occurrence” beginning before the second Northern policy, the endorsement does not apply.

Even then, however, Underwriters misinterpret the endorsement. They assert that for the endorsement to operate, Northern must establish “that *all* of the claimed property damage first occurred prior to” its second policy period.¹⁴⁷ However, their assertion is directly contrary to

¹⁴⁶ App. Br. at 3–4, 33.

¹⁴⁷ App. Br. at 32 (emphasis added). *See also Id.* at 34 (“The fact that some property damage may have first occurred prior to (the) June 1, 2001 to June 1, 2002

the actual terms of the endorsement, which bar coverage for:

1. any injury or damage, including continuous or progressively deteriorating injury or damage, that first occurs prior to the effective date of this policy, or
2. any injury or damage, including continuous or progressively deteriorating injury or damage, that first occurs prior to the effective date of this policy, continues through the policy term and ends after the expiration date of this policy ...¹⁴⁸

Thus, if there was “continuous or progressively deteriorating injury or damage,” it need only have commenced before June 1, 2001, for coverage to be excluded under the third policy. Of course, if there was no occurrence and resulting property damage before June 1, 2001, then neither the Valiant policy, nor the first Northern policy, would have a duty to pay.

G. The Court Correctly Considered the Supplemental Beatty Declaration and Exhibits.

The trial court properly denied Underwriters’ motion to strike the Supplemental Declaration of Jacquelyn Beatty that attached various documents tending to show that, before the Underlying Action settled, both Underwriters’ and Stratford’s attorneys viewed the case as

policy period does not mean that all of the property damage from all causes first occurred prior to the policy period.”).

¹⁴⁸ CP 116.

involving one occurrence. The documents in question were either produced by Zurich in this litigation, or prepared by counsel for Underwriters and Stratford in the Underlying Action.

Underwriters essentially conceded the documents' authenticity during argument below.¹⁴⁹ Meanwhile, Underwriters apparently forgot that their own counsel and their representative had submitted similar declarations purporting to authenticate documents of which neither declarant had personal knowledge. For example, Underwriters' coverage counsel in this action described policies that she did not underwrite or issue.¹⁵⁰ Underwriters' representative, Mary Anne Vorndran, identified reports prepared by experts for GCG against which her insured, Stratford, was adverse.¹⁵¹ Apparently, what is good for the goose is not good for the gander.

In any event, Underwriters' objections to Ms. Beatty's supplemental declaration, based upon an asserted lack of authentication and hearsay, were not and are not well taken. First, as noted, Underwriters' counsel conceded below that the documents' authenticity is not truly in dispute. Authentication "is satisfied by evidence sufficient

¹⁴⁹ RP 31.

¹⁵⁰ CP 160-162.

¹⁵¹ CP 144-159.

to support a finding that the matter in question is what its proponent claims.”¹⁵² Rather, counsel’s concern appears to have been with “using those letters for some sort of factual support,”¹⁵³ but Underwriters never identify what facts they are concerned about. What Underwriters really want is for the Court to refuse to consider documents written by its coverage attorney to Stratford, and by Stratford’s attorney to Zurich, showing that before the Underlying Action was settled, both Underwriters and Stratford considered the property damage at Chateau Pacific to be the result of one occurrence.

To the extent Underwriters have a hearsay objection, it is barely referenced in their brief and contains no legal support.¹⁵⁴ Exhibit A to Ms. Beatty’s declaration is a reservation of rights letter from Zurich to Stratford, and therefore a Zurich (and Stratford) business record, kept in the ordinary course of business.¹⁵⁵ This document — sent to Stratford and copied to its counsel — also was produced by Zurich to Underwriters in discovery, indicated by the Bates numbered stamp on the bottom, and authenticated at that time by a Zurich representative. Exhibit B,¹⁵⁶ also

¹⁵² ER 901. *See also United States v. Black*, 767 F.2d 1334, 1342 (9th Cir. 1985) (“The question of authenticity is left to the discretion of the trial judge and is reviewed on appeal under an abuse of discretion.”).

¹⁵³ RP 31.

¹⁵⁴ App. Br. at 38.

¹⁵⁵ CP 182–186. *See* ER 803(6); RCW § 5.45.020.

¹⁵⁶ CP 188.

produced in discovery, is a policy document, and thus a business record.

Exhibit C,¹⁵⁷ an email exchange between Ms. Beatty and Stratford's personal counsel, is a business record kept by Ms. Beatty, which includes her own statements, which are not hearsay under ER 801(c). The statements of "Stratford's personal counsel, Greg Harper, [Stratford owner] Bernie Conley, and Stratford's representative, Victoria Chaussee"¹⁵⁸ are not hearsay pursuant to ER 801(d)(2) as Underwriters have "obtained an assignment of rights from the insured, Stratford," to pursue its claims in this case.¹⁵⁹ Exhibit D¹⁶⁰ is a letter from Underwriters' attorney, Jerret Sale, and Exhibit E¹⁶¹ is a letter from Stratford's attorney, Mr. Harper, which are not hearsay under ER 801(d)(2). An opposing party also may not subsequently challenge an attorney's ability to authenticate documents attached to her declaration that were previously provided by the opposing party without objection as to their authenticity.¹⁶² The trial court did not abuse its discretion in refusing to strike the Supplemental Beatty Declaration.

¹⁵⁷ CP 190-200.

¹⁵⁸ App. Br. at 38.

¹⁵⁹ App. Br. at 5.

¹⁶⁰ CP 202-207.

¹⁶¹ CP 209-211.

¹⁶² *See, e.g., Maljack Prods., Inc. v. GoodTimes Home Video Corp.*, 81 F.3d 881, 889 n. 12 (9th Cir. 1996).

VI. Conclusion

As this Court said in *Polygon*, a jointly and severally liable insurer may control the allocation of liability by writing into its policy provisions specifically aimed at doing so. Anti-stacking clauses, which are enforceable in Washington and not against public policy, are an established way to achieve this objective. Here, there is no real dispute that a single occurrence, *i.e.*, “continuous or repeated exposure to substantially the same general harmful conditions,” caused the damage at Chateau Pacific for which the underlying settlement was paid, and Underwriters correctly do not dispute Valiant’s and Northern’s affiliation. Based on the clear application of Zurich’s anti-stacking clause, and also because the Continuing Damage Endorsement in Northern’s second policy applies, Zurich asks this Court to affirm the decision of the trial court.

Respectfully submitted this 4th day of November, 2009.

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COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

CERTAIN UNDERWRITERS AT LLOYD'S LONDON,
subscribing to Policy Nos. A02BF387 and CJ352084,

Appellant,

v.

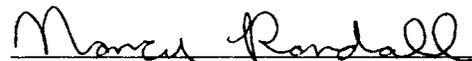
VALIANT INSURANCE COMPANY and
NORTHERN INSURANCE COMPANY OF NEW YORK,

Respondents.

CERTIFICATE OF SERVICE

I hereby certify that on November 4, 2009, I caused to be served
a copy of Brief of Respondents by Legal Messenger on the following:

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