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No. 64063-1-I

COURT OF APPEALS, DIVISION
OF THE STATE OF WASHINGTON

MUTUAL OF ENUMCLAW INSURANCE COMPANY,
Plaintiff/Respondent

v.

ONEBEACON INSURANCE COMPANY
Defendant/Appellant

APPELLANT'S REPLY BRIEF

GORDON THOMAS HONEYWELL LLP
Joanne Thomas Blackburn, WSBA No. 21541
Michelle A. Menely, WSBA No. 28353
2100 One Union Square
Seattle WA 98101
(206) 676-7500
Attorneys for Appellant OneBeacon
Insurance Company

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A. INTRODUCTION

Mutual of Enumclaw argues in their Response Brief that there are various allocation methodologies which can be applied in an insurance allocation dispute between two insurance carriers. (See Mutual of Enumclaw Response Brief at pg. 8.) However, it never puts forth any argument or discussion as to which of the nine different allocation methods it proposes should apply to the present lawsuit. Moreover, most of these methods have been used to allocate risks which were truly shared equally between insurers as opposed to here, where OneBeacon argues that the business risk exclusions serve to bar coverage for a substantial portion of the loss. One of these nine methods, the time on risk method is the very method which OneBeacon argues should be applied and is commonly applied in Washington for the very reason that it takes into account differences in what is covered when coverage overlaps in part, but not in full.

The new issue that is raised by Mutual of Enumclaw in its response brief is its argument that there is no relevance of the sales data for certain units related to this question of allocation. In fact, this is not true. Washington law allows allocation based upon the business risk exclusions contained in OneBeacon's policy. Moreover, Mutual of Enumclaw does not disagree that the various exclusions raised by OneBeacon are applicable. Instead, it contends that the exclusions should not be applied because OneBeacon failed to "present facts necessary to enforce the

exclusions." (See Mutual of Enumclaw Response Brief at pg. 11.) This is also not accurate. Finally, Mutual of Enumclaw ("MOE") requests that it be awarded attorneys' fees, but failed to provide any basis for such an award. This action was not a subrogation claim but a contribution claim and according to Washington law, if there is not a statutory or contractual obligation to reimburse a "prevailing" party's attorneys' fees, the Court cannot go outside of that to award such fees.

B. ARGUMENT

1. MOE's Recitation of the Various Possible Allocation Methods is Unsupported and Irrelevant.

There is no dispute but that a trial court has broad discretion in determining the correct allocation of indemnity costs between two insurance carriers. In fact, the sole issue in this case has not been the trial court's authority to allocate but has, instead, been what type of allocation should be imposed and how that allocation should be computed. With that focus in mind OneBeacon provided the trial court (and this Court) not only with the rationale and authority to allocate indemnity costs based on a pro rata, time-on-the-risk basis, but also provided both to this Court and to the trial court, the factual basis to support the proposed allocation method.¹ Specifically, OneBeacon supplied sales data which demonstrated the applicability of two exclusions to coverage, namely the J5 and J6

¹ See OneBeacon's Opening Brief, pg. 16 - 19; *see also*, declaration of Anthony Riggio in Support of OneBeacon's Motion for Summary Judgment (CP115-118); declaration of Terri Vancil in Support of OneBeacon's Motion for Partial Summary Judgment (CP195-356 (specifically CP 198-201 and exhibits thereto (CP202-356).

exclusions. As addressed in more detail in the prior submissions, the J5 and J6 exclusions bar coverage for "that particular part of real property on which [the insured] or any contractors or subcontractors working directly or indirectly on [the insured's] behalf are performing operations . . ." unless the work at issue has been "put to its intended use,"² defined as **"When that part of the work done at a job site has been put to its intended use by any person or organization other than another contractor or subcontractor working on the same project."**³ As a result of the sales data, *i.e.* when a non-contractor put the work to use, coupled with the language of the applicable exclusions, OneBeacon demonstrated that a pro-rata, time on the risk allocation method was appropriate.

In contrast to OneBeacon, MOE's position, both at the trial court and here, has been to simply set forth a laundry-list of possible allocation methods. However, MOE has **never** provided any facts, rationale, authority or even argument to support imposing any of the listed possible allocation methods. Instead, it appears that MOE simply wants this Court to divine the reason why imposing any given allocation would be appropriate. Just as it is not the job of the appellate court to search through a record to identify facts supporting a party's position,⁴ this Court should not be required to search through the record to establish the

² See OneBeacon's Opening Brief, pg. 17- 18.

³ CP68-69.

⁴ See, *e.g.*, *Ludeman v. Dept. of Health* 89 Wn. App. 751, 761, 951 P.2d 266 (1997).

arguments that MOE could have made with respect to applying any given allocation method. Instead, because OneBeacon provided the facts, rationale and authority supporting its position, this Court should adopt OneBeacon's position.

2. The Sales Data Supplies the Factual Basis for Imposing a Pro Rata Time-on-the-Risk Allocation as the Sales Data Demonstrates Which of the Units Comprising the Queen Anne Square Condominiums Had Been "Put to Their Intended Use."

MOE's assertion is that OneBeacon failed to provide any factual evidence to support its position and that the sales data is irrelevant and incorrect. The sales data information was provided to the trial court as factual evidence upon which an appropriate allocation could be premised with proper consideration that OneBeacon only owes for that part of the loss for which it agreed to insure. The trial court's authority to allocate indemnification costs based upon ownership data cannot seriously be disputed. Indeed, that very issue was addressed by this Court in *State Farm Fire Cas. Co. v. English Cove Ass'n., Inc.*, 121 Wn. App. 358, 88 P.3d 986 (2004). The issue in *English Cove* was two-fold: Whether the "owned property exclusion" was triggered and, if so, what allocation method should be employed relative to that exclusion. *Id.* at 370. After determining that the exclusion applied to those portions of the project upon which the insured retained an ownership interest, this Court held that it would be proper to allocate losses as between the owned and non-owned portions of the property. *Id.*

Here, OneBeacon seeks nothing more. That is, OneBeacon seeks an allocation which enforces its policy exclusions. In doing so, OneBeacon submitted factual evidence (the sales data) demonstrating that the policy exclusion barring coverage for units which had not been "put to their intended use," e.g., sold, was triggered. Thus, because there was a factual basis for allocating losses as between "covered" and "uncovered" claims, specifically between those units which had been sold ("put to their intended use") and those that had not, OneBeacon met its burden of demonstrating an equitable allocation based on a pro-rata, time-on-the-risk basis as the most appropriate formulae for the facts of this case. MOE never raised this exclusion or similar exclusions in their policies because all the units were completed and sold by the expiration of the MOE policies.

3. There is No Basis to Award Attorneys' Fees to MOE.

MOE seeks an award of attorneys' fees on appeal. However, except for a partial citation to *Olympic Steamship*, MOE fails to explain the basis for an award of fees. MOE's request for fees should be denied as per the American Rule, attorneys' fees are not to be awarded as costs absent a contract, statute, or recognized equitable exception. *City of Seattle v. McCready*, 131 Wn.2d 266, 274, 931 P.2d 156 (1997).

Here, there is no contract between these two carriers and there is not a statutory basis for fees in an equitable contribution action between two carriers. Consequently, the only basis for a fee award would be if a

"recognized equitable exception" applied. While MOE has identified as *Olympic Steamship* as its "equitable exception," *Olympic Steamship* does not apply to his case.

Olympic Steamship allows a court to award attorneys fees "incurred by an insured in compelling an insurer to assume the burden of legal action to obtain the full benefit of his her contract." *City of Seattle v. McCready*, 131 Wn.2d at fn. 6. The rationale underlying an award of *Olympic Steamship* fees is the unequal bargaining power between an insurer and an insured. In fact, the *McCready* court specifically noted that

[a]lthough one of the rationales behind the *Olympic S.S.* rule is based on a theory of implied contract, **the rationales explicitly relied upon by the *Olympic S.S.* court were the equitable notions regarding the disparity in bargaining power between insureds and insurers, and attorney fees as damages.** *Olympic S.S.*, 117 Wn.2d at 52-53, 811 P.2d 673.

Id. (emphasis added).

Here, MOE cannot realistically contend that this rationale applies to an action between two insurance carriers with equal bargaining power. Fees should not be awarded.

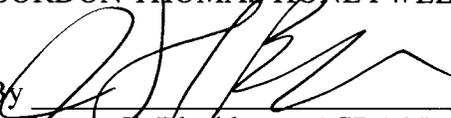
C. CONCLUSION

OneBeacon asks for nothing more than enforcement of the terms of its policy, including the exclusions to coverage. OneBeacon has provided factual evidence demonstrating the applicability of exclusions to coverage and demonstrating why the trial court erred in reaching its conclusion.

Indeed, the trial court's allocation method actually imposed indemnity obligations onto OneBeacon which OneBeacon never agreed to assume. In the absence of compelling equitable reasons, a court should not impose an obligation on an insurer that contravenes a provision in the insurance policy. *Signal Companies, Inc. v. Harbor Ins. Co.*, 27 Cal.3d 359, 369, 165 Cal. Rptr. 799 (1980). This Court should reverse the trial court's allocation method and should impose a pro-rata, time-on-the-risk allocation between these two carriers which allocation method is based upon the factual evidence submitted by OneBeacon.

RESPECTFULLY SUBMITTED this 5th day of April, 2009.

GORDON THOMAS HONEYWELL, ^{LLP}

By 

Joanne T. Blackburn, WSBA No. 21541

jblackburn@gth-law.com

Michelle A. Menely, WSBA No. 28353

mmenely@gth-law.com

Attorneys for Appellant

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