

64749-1

64749-1

No. 64749-1
(King County No. 09-2-10932-0 SEA)

COURT OF APPEALS OF THE STATE OF WASHINGTON,
DIVISION I

NO BOUNDARIES, LTD., a Washington corporation, and NBL II, LLC,
a Washington limited liability company,

Petitioners,

v.

PACIFIC INDEMNITY COMPANY
(a member of the CHUBB GROUP OF INSURANCE COMPANIES),
an insurer authorized by the Washington Insurance Commissioner,

Respondent.

2008 SEP 1 11:41 AM
COURT OF APPEALS
DIVISION I

POLICYHOLDERS'
REPLY BRIEF

Thomas F. Ahearne, WSBA No. 14844
Jason R. Donovan, WSBA No. 40994
Attorneys for Petitioners

FOSTER PEPPER PLLC
1111 Third Avenue, suite 3400
Seattle, WA 98101-3299
Telephone: (206) 447-4400
Telefax: (206) 447-9700
E-mail: ahearne@foster.com
 donoj@foster.com

ORIGINAL

TABLE OF CONTENTS

	<i>Page</i>
I. INTRODUCTION	1
II. FACTS	2
A. The Insurance Company Does Not Dispute The Underlying Facts Set Forth In The Policyholders’ Opening Brief.	2
B. The Additional “Facts” Alleged In The Insurance Company’s Response Are Neither Relevant Nor Accurate.....	2
1. The Trial Court Ruling Was Not Based On Any “Undisputed” Factual Finding About The Timing Of Repairs.....	3
2. The Timing Of Repairs Is Not Even Relevant Under The Policy Language At Issue.	3
3. Although Not Relevant, Repair Work <u>Was</u> Started Before The New Ordinance Took Effect – despite the insurance company’s four year delay.	4
4. Repairs Are <u>Not</u> Cheaper Under The New Ordinance.....	5
5. The Trial Court Ruled That The Policy Provisions At Issue Do <u>Not</u> Apply To The Commercial Building Code Ordinance In Effect At The Time Of The Building’s Damage.....	7
III. LAW	8
A. The Insurance Company’s Response Does Not Dispute The Policyholders’ Summary Of Governing Washington Law.....	8
1. Insurance Policies Are Read As A Lay Person Would Read Them.....	8

2.	Policy Language Susceptible To More Than One Interpretation Is Read In The Policyholders’ Favor.....	8
3.	An Insurance Company Cannot “Interpret” Its Policy To Include Language Different From What It Wrote.	9
4.	An Insurance Company Likewise Cannot Ignore The Policy Language It Wrote.	10
B.	The Insurance Company’s Response Does Not Dispute The Policyholder’s Interpretation Of The Policy’s “Valuation” Provision.	11
C.	The Insurance Company’s Alternative Interpretation Of The Policy’s “Ordinance Or Law” Provision Fails Under Washington Law.	13
1.	The insurance company does not dispute the policyholders’ interpretation of the <i>first</i> and <i>third</i> parts of this provision.	13
2.	The insurance company’s interpretation of the <i>second</i> part of this provision fails under Washington Law.	15
(a)	Insurance Policies Are Read As A Lay Person Would Read Them – and the insurance company’s interpretation does not do that.	18
(b)	The Insurance Company’s Offering An Alternative Interpretation Does Not Negate The Fact That Its Policy Language Is Susceptible To More Than One Interpretation – and thus that provision still must be interpreted in the policyholders’ favor.....	19
(c)	The Insurance Company Cannot Now “Interpret” The Policy Language It Wrote To Include Language Different From What It Wrote.	20

(d)	The Insurance Company Likewise Cannot Ignore The Policy Language It Wrote Setting The Insured Value “At The Time Of Loss”	21
IV.	CONCLUSION	22

TABLE OF AUTHORITIES

American National Fire Ins. v. B&L Trucking And Construction,
134 Wn.2d 413, 951 P.2d 250 (1998)10

Boeing Co. v. Aetna Casualty & Surety,
113 Wn.2d 869, 784 P.2d 507 (1990)8, 10

Dickson v. USF&G,
77 Wn.2d 785, 466 P.2d 515 (1970) 10

Emter v. Columbia Health Services,
63 Wn. App. 378, 819 P.2d 390 (1991),
review denied, 119 Wn.2d 1005, 832 P.2d 488 (1992)..... 10

Grange Insurance Company v. Brosseau,
113 Wn.2d 91, 776 P.2d 123 (1989)8

Morgan v. Prudential Insurance,
86 Wn.2d 432, 545 P.2d 1193 (1976)9

Odessa School District v. Ins. Co. of America,
57 Wn. App. 893, 791 P.2d 237 (1990).....9

*Public Utility District No. 1 of Klickitat County v. International
Insurance Company*,
124 Wn.2d 789, 797, 881 P.2d 1020 (1994) 1

Panorama Village Condominium Owners Ass'n v. Allstate,
144 Wn.2d 130, 26 P.3d 910 (2001)10

Phil Schroeder Inc. v. Royal Globe Ins. Co.,
99 Wn.2d 65, 659 P.2d 509 (1983)9

Shotwell v. Transamerica Title,
91 Wn.2d 161, 588 P.2d 208 (1978)8

United Pacific Ins. Co. v. Larsen,
44 Wn. App. 529, 723 P.2d 8 (1986)..... 10

I. INTRODUCTION

The issue before this Court is whether Washington law interprets the two policy provisions at issue to apply to Seattle's commercial building code ordinance in effect at the time of the damage to the policyholders' building (i.e., Seattle Ordinance 121519). The trial court ruled as a matter of law that it does not. The trial court certified (and this Court accepted) interlocutory review because the interpretation of the policy's "Valuation" and "Ordinance Or Law" provisions is a controlling question of law.¹

The policyholders' Opening Brief explained why Washington law requires those two policy provisions to be interpreted to apply to the ordinance in effect at the time of the building's damage, and how that interpretation gives meaning to the language of both provisions as written by the insurance company in this case.

The insurance company's Response does not address the policyholders' explanation. Instead, the insurance company offers a different interpretation of the policy language it wrote.

¹ April 14, 2010 ruling granting discretionary review under RAP 2.3(b)(4) ("the trial court's certification that the coverage dispute involves a controlling question of law ... is well taken"); accord, Public Utility District No. 1 of Klickitat County v. International Insurance Company, 124 Wn.2d 789, 797, 881 P.2d 1020 (1994) ("The interpretation of insurance policies is a question of law").

Part III below explains why the insurance company's alternative interpretation does not defeat the policyholders' interpretation under Washington law.

Since the insurance company's Response also attempts to distract the Court with some irrelevant (and inaccurate) representations about certain "facts", however, Part II first disposes of those red herrings before turning to the legal interpretation issue that is before this Court.

II. FACTS

A. The Insurance Company Does Not Dispute The Underlying Facts Set Forth In The Policyholders' Opening Brief.

The insurance company's Response does not dispute the facts set forth at pages 5-9 of the Policyholders' Opening Brief. The policyholders accordingly do not repeat or re-emphasize those facts here.

B. The Additional "Facts" Alleged In The Insurance Company's Response Are Neither Relevant Nor Accurate.

Instead of disputing any of the facts set forth in the Policyholders' Opening Brief, the insurance company's Response alleges some additional "facts", apparently to distract attention away from the policy interpretation issue at hand. The following paragraphs therefore briefly note why those allegations are neither relevant nor accurate.

1. The Trial Court Ruling Was Not Based On Any “Undisputed” Factual Finding About The Timing Of Repairs.

The insurance company indicates that the trial court based its ruling on an “undisputed” factual finding that no repairs were performed while Seattle Ordinance 121519 was in effect.²

But the trial court made no such factual finding.³

As the trial court itself confirmed, its ruling was instead based on its interpretation of the policy language at issue as a question of law.⁴

2. The Timing Of Repairs Is Not Even Relevant Under The Policy Language At Issue.

The insurance company’s allegation that no repairs were performed while Ordinance 121519 was in effect is also irrelevant to the policy interpretation issue at hand. That is because, as the legal discussion in Part III below confirms, the insurance company wrote the policy

² *Insurance Company’s Response at p.3, last two paragraphs.*

³ *If the trial court made the “undisputed” factual finding alleged by the insurance company’s Response Brief, that factual finding would have been set forth in the trial court’s partial summary judgment Order pursuant to CR 56(d). (“If on motion under the rule judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the court at the hearing of the motion, by examining the pleadings and the evidence before it and by interrogating counsel, shall if practicable ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. It shall thereupon make an order specifying the facts that appear without substantial controversy, and directing such further proceedings in the action as are just. Upon the trial of the action, the facts so specified shall be deemed established, and the trial shall be conducted accordingly.”) (underline added). But notably absent from the trial court’s Order are any factual findings, much less an “undisputed” factual finding that no repairs were performed while Seattle Ordinance 121519 was in effect.*

⁴ *CP 218, lines 6-18.*

provisions at issue to set the insured value of a loss at the time of damage

– not at the time of repairs.

3. Although Not Relevant, Repair Work Was Started Before The New Ordinance Took Effect – despite the insurance company’s four year delay.

The insurance company’s allegation that no repairs were performed while Ordinance 121519 was in effect⁵ is also contradicted by the insurance company’s own admissions and documents in the record showing that some of the repair work was in fact commenced before that Ordinance was repealed in the end of 2007.⁶

The insurance company’s insinuation that the policyholders did not move promptly to complete the repairs insured by the policy also omits the foundational fact that it was the insurance company who delayed this matter for four years before finally responding to the policyholders’ claim concerning this loss – a clearly unlawful delay in light of the 30 day

⁵ E.g., *Insurance Company’s Response at p.3, first full paragraph* (“It was undisputed that NBL had not repaired the damage” before the new Seattle Ordinance took effect at the end of 2007).

⁶ E.g., CP 58 (“Pacific Indemnity admits that NBL performed temporary repairs following the June 22 [2005] incident”); CP 59 (“Pacific Indemnity admits that in December 2006, it provided NBL with payment for initial expenses and for the cost of repair set forth in the July 2006 Paul Davis Restoration cost estimate”); CP 19, 4th para. (insurance company payment for such building repairs and debris removal relating to the collapse claim); CP 31, 7th entry in left column (insurance company payment for emergency repair work performed before May 2007); CP 47-48 (insurance company payment for repair work performed between July 2005 and February 2007); CP 156, 168-170 (insurance company invoices produced in discovery acknowledging the performance of repair work in 2005, 2006, and 2007).

deadlines and other prompt response requirements imposed upon the insurance company by Washington insurance law.⁷

4. Repairs Are Not Cheaper Under The New Ordinance.

Similarly unsupported by the record is the insurance company's allegation that the minimum standards of Seattle's new commercial building code ordinance are cheaper than those of the Seattle Ordinance in effect at the time of the building's damage. To the contrary, once either

⁷ E.g., WAC 284-30-330, -350, -360, -370, and -380; RCW 48.30.015; *Bosko v. Pitts & Still*, 75 Wn.2d 856, 864-65 (1969) (insurer's duty of reasonable diligence responding to insured's claim). Yet, as one of the documents in the record in this case summarized, the repair delay about which the insurance company now complains about on appeal was caused by the insurance company's unlawful claims handling: "When the basement collapse at the Metropole Building happened, the 2003 Seattle Building Code was the version in effect, and that 2003 Code [Seattle Ordinance 121519] continued to be the one that applied to the repairs for almost 29 months after the collapse—in other words, the entire time the damage should have and would have been repaired but for the dilatory conduct of Chubb [the parent insurer] and its recommended contractor, Paul Davis Restoration, which, as a practical matter, prevented the collapse from being repaired before the subsequent fire on May 21, 2007. Chubb's prior representative was guilty of egregious foot-dragging in his response to and handling of that damage repair. Chubb's adjustor, Michael Blackburn, visited the damaged basement immediately after the collapse happened [June 2005], but then was never seen again. He was too busy to visit in response to the calls of Chubb's insured, even though Mr. Blackburn's office was in Seattle. It was hard for Chubb's insured to even get telephone responses from him. (Indeed, Reyn Yates of NBL twice received phone calls of apology from Mr. Blackburn's supervisor in Arizona stating that Mr. Blackburn's lack of responsiveness and poor handling of the claim was not what Chubb considered proper.)". CP 51. It was not until four years later – January 2009 – that the insurance company finally responded to the policyholders' insurance claim by denying coverage under the Seattle Ordinance enacted 2 ½ years after the time of loss. CP 19, 21, 145:12-146:2.

Ordinance is triggered, the minimum repair standards under both are basically the same.

As the trial court's certification ruling explained, the reason this policy interpretation dispute presents a controlling issue of law has to do with whether those minimum standards are triggered. If the insured value of this loss in this case is measured under the Ordinance in effect at the time of damage (the policyholders' interpretation), no trial on this trigger issue is needed because the minimal repair cost admitted by the insurance company pulls the code upgrade trigger.⁸ On the other hand, if the insured value of this loss is instead measured under the subsequent Ordinance in effect at the time of repairs (the insurance company's interpretation), the repair number admitted by the insurance company does not by itself pull the code upgrade trigger. A time-consuming trial would therefore be required to determine what repair costs are appropriate to consider and whether those appropriate repair costs are enough to trigger code upgrades under the higher trigger threshold in the newer ordinance. The minimum standards once triggered, however, do not change.⁹

⁸ See *Policyholders' Opening Brief* at p.5-7.

⁹ CP 218:6-18. *The facts and numbers establishing this point are set forth at pages 5-7 of the Policyholders' Opening Brief. As also noted in that Brief, the policyholder maintains that the insurance company's repair cost number is too low – but that does not matter for the policy interpretation issue at hand. Policyholders' Opening Brief at p.6 n.10.*

5. The Trial Court Ruled That The Policy Provisions At Issue Do Not Apply To The Commercial Building Code Ordinance In Effect At The Time Of The Building's Damage.

The insurance company represents to this Court that the “trial court did not hold, as NBL asserts, that ‘the policy’s Valuation and Ordinance Or Law provisions do not apply to the Seattle commercial building code ordinance in effect at the time of the loss or damage.’”¹⁰

But the insurance company is incorrect. NBL specifically requested a declaration that “[t]he building Ordinance in effect at the time of the basement damage in this case, Seattle Ordinance 121519 (Seattle 2003 Building Code), applies to the Valuation provision and Ordinance Or Law provision in the insurance policy.”¹¹ The trial court denied NBL’s request for partial summary judgment on that issue, and ruled as a matter of law that the Ordinance in effect at the time of the basement damage in this case, Seattle Ordinance 121519 (Seattle 2003 Building Code), does not apply to the Valuation provision and Ordinance Or Law provision in the insurance policy.¹² And it is that policy interpretation ruling that is the subject of this appellate review.

¹⁰ *Insurance Company’s Response at p.4, second full paragraph.*

¹¹ *CP 154: 14-17.*

¹² *CP 192:17-18.*

III. LAW

A. The Insurance Company's Response Does Not Dispute The Policyholders' Summary Of Governing Washington Law.

1. **Insurance Policies Are Read As A Lay Person Would Read Them.**

The insurance company's Response does not dispute that Washington law requires this Court to read the policy provisions at issue as a lay person would read them.¹³ Consistent with this mandate of Washington law, the insurance company's Response agrees that this Court should give the policy provisions at issue "a fair, reasonable, and sensible construction as would be given by an average insurance purchaser."¹⁴

2. **Policy Language Susceptible To More Than One Interpretation Is Read In The Policyholders' Favor.**

The insurance company's Response does not dispute that whenever a policy's wording is fairly susceptible to more than one interpretation, the interpretation most favorable to the policyholder must be employed – even if it's not the interpretation the insurance company had intended.¹⁵

¹³ *Policyholders' Opening Brief at p.10 & n.22 (and quoting Boeing Co. v. Aetna Casualty & Surety, 113 Wn.2d 869, 881 (1990) ("The proper inquiry is ... whether the insurance policy contract would be meaningful to the layman. The language of insurance policies is to be interpreted in accordance with the way it would be understood by the average man....")*

¹⁴ *Insurance Company's Response at pp.17-18; accord Grange Insurance Company v. Brosseau, 113 Wn.2d 91, 95, 776 P.2d 123 (1989) (policy should "be given a fair, reasonable, and sensible construction that comports with how it would be viewed by an average person purchasing of insurance.") (internal quotation marks and citation omitted)*

¹⁵ *Policyholders' Opening Brief at pp.10-11 & nn. 23-26 (quoting, e.g., Shotwell v. Transamerica Title, 91 Wn.2d 161, 167-68, 588 P.2d 208, 212 (1978)*

Although the insurance company attempts to dismiss this rule by saying the policyholders aren't arguing that the policy language is ambiguous, the insurance company ignores the fact that Washington insurance law defines "ambiguous" to simply mean fairly susceptible to more than one reasonable interpretation.¹⁶ And that is precisely the case insisted upon by the insurance company here since it is arguing its policy language is fairly susceptible to an alternative interpretation different from the reasonable interpretation explained in the policyholders' Opening Brief.

3. An Insurance Company Cannot "Interpret" Its Policy To Include Language Different From What It Wrote.

The insurance company's Response does not dispute that Washington law recognizes that insurance companies know how to protect

("Where a provision of a policy of insurance is capable of two meanings, or is fairly susceptible of two constructions, the meaning and construction most favorable to the insured must be employed, even though the insurer may have intended otherwise.") (underline added) and 91 Wn.2d at 167-68 (this pro-policyholder reading applies with even greater force to language that the insurance company invokes to limit or restrict payment under the insurance policy); Phil Schroeder Inc. v. Royal Globe Ins. Co., 99 Wn.2d 65, 69, 659 P.2d 509, 511 (1983); Odessa School District v. Ins. Co. of America, 57 Wn.App. 893, 897, 791 P.2d 237 (1990) (insurance policy's wording must "be liberally construed to provide coverage whenever possible") (underline added); Phil Schroeder Inc. v. Royal Globe Ins. Co., 99 Wn.2d 65, 69, 659 P.2d 509, 511 (1983) ("any doubts, ambiguities and uncertainties arising out of the language used in the policy must be resolved in [the policyholder's] favor.") (underline added)).

¹⁶ E.g., Morgan v. Prudential Insurance, 86 Wn.2d 432, 435, 545 P.2d 1193 (1976) (policy provision is considered "ambiguous" when it is fairly susceptible to two different interpretations, both of which are reasonable).

themselves with the policy language they write,¹⁷ and that Washington law accordingly does not allow an insurance company to “interpret” its policy to effectively employ language different from the language it wrote.¹⁸

4. An Insurance Company Likewise Cannot Ignore The Policy Language It Wrote.

The insurance company’s Response also points out that “a policy should be construed so as to give effect to each provision.”¹⁹ This is a corollary to the previously noted rule of construction – for just as the insurance company cannot insert policy language that it did not include, it likewise cannot nullify (ignore) policy language that it did include.

¹⁷ *Policyholders’ Opening Brief at p.12 & n.29 (citing Panorama Village Condominium Owners Ass’n v. Allstate, 144 Wn.2d 130, 141 (2001) (the insurance industry “knows how to protect itself and it knows how to write exclusions and conditions”) (citing Boeing v. Aetna Casualty & Surety, 113 Wn.2d 869, 887 (1990)).*

¹⁸ *Policyholders’ Opening Brief at p.11 & n.28 (citing, e.g., American National Fire Ins. v. B&L Trucking And Construction, 134 Wn.2d 413, 430 (1998) (“We will not add language to the policy that the insurer did not include.”); see also, Emter v. Columbia Health Services, 63 Wn. App. 378, 382-83 (1991), *review denied*, 119 Wn.2d 1005 (1992) (Washington law does not even allow the insurer to insert commas it had omitted); United Pacific Ins. Co. v. Larsen, 44 Wn. App. 529, 532 (1986) (per Utter, J.) (refusing to allow the insurance company to “interpret” the policy language at issue to have the same meaning as more explicit language used elsewhere, noting that the insurance company’s other policy language showed that it “knew how to limit coverage to the scope [it argued in the instant case]. That it employed different and less explicit language in the [the sentence at issue] is evidence that it meant to convey a different meaning.”); accord, Dickson v. USF&G, 77 Wn.2d 785, 789 (1970) (when insurer uses certain language in one situation but not in a second situation, it manifests an “obvious intent” that that certain language does not apply in the second situation).*

¹⁹ *Insurance Company’s Response at p.14, end of 1st para. (citing Allstate Ins. v. Peasley, 131 Wn.2d 420, 429, 932 P.2d 1244 (1997)).*

B. The Insurance Company's Response Does Not Dispute The Policyholder's Interpretation Of The Policy's "Valuation" Provision.

The full text of the policy's Valuation provision is at page 13 of the Policyholders' Opening Brief (also Appendix page 1 to this Reply).

Although the insurance company disagrees with the policyholders' interpretation of the subsequent Ordinance Or Law provision, the insurance company's Response does not dispute that its Valuation provision has the meaning explained in the Policyholders' Opening Brief.

First, the policy's Valuation provision cements the point in time at which the value of the policyholders' loss will be measured. It states: "Lost or damaged covered property will be valued at the cost to repair or replace such property at the time of loss or damage". Policyholder's Opening Brief at 13-14.

The insurance company's Response agrees with the policyholders' interpretation, confirming that the policy's Valuation provision (CP 128) measures the value of an insured loss "at the time of the loss or damage".²⁰

The insurance company's Response also agrees that Seattle Ordinance 121519 was the commercial building code ordinance in effect at the time of loss or damage in this case.²¹

²⁰ Insurance Company's Response at p.15, 1st para. under section B.1.

²¹ Insurance Company's Response at p.7 & n.5; accord, Policyholders' Opening Brief at pp.5-6.

Second, the policy's Valuation provision sets a cap on the amount the policy will pay. It states the policy will pay "not more than you actually spend to repair or replace such property". Policyholder's Opening Brief at 13-14.

The insurance company's Response agrees with the policyholders' interpretation, confirming that this "actually spend" cap limits the policy's payments to repair work the policyholder actually performs.²²

Third, the policy's Valuation provision tells the policyholder when that capped amount will be paid. It states: "Payments ... will not be made until the completion of the repairs". Policyholder's Opening Brief at 13-14.

The insurance company's Response agrees with the policyholders' interpretation, arguing that the policy's Valuation provision requires NBL to complete repairs to receive payment.²³

²² *Insurance Company's Response at p.13, 1st para. ("the policy pays for repairs actually performed") (underline added).*

²³ *Insurance Company's Response at p.19, 2nd para. (referring to the policy's Valuation provision as its "Replacement Cost Basis" paragraph).*

C. **The Insurance Company's Alternative Interpretation Of The Policy's "Ordinance Or Law" Provision Fails Under Washington Law.**

The full text of the policy's Ordinance Or Law provision is at page 16 of the Policyholders' Opening Brief (also Appendix page 2 to this Reply).

1. **The insurance company does not dispute the policyholders' interpretation of the *first* and *third* parts of this provision.**

Different ordinances and laws are in effect at different times. The *first* part of the policy's "Ordinance Or Law" provision accordingly specifies an effective date for the pool of ordinances and laws to which the policy applies – i.e., ordinances or laws regulating zoning, land, or use or construction of a building which are "in effect at the time of loss or damage". Policyholder's Opening Brief at 16-17.

The insurance company's Response agrees with this part of the policyholders' interpretation of the Ordinance Or Law provision, insisting that there is no dispute this provision dictates that the Ordinance in effect at the time of loss is the one that applies "because that is exactly what the policy says", and that "there is no dispute that only those ordinances or laws in effect at the time of a loss are covered by the Ordinance Or Law provision."²⁴

²⁴ *Insurance Company's Response at p.4, bottom para. and p.12, 2nd from bottom para.*

The insurance company's insistence that its Ordinance Or Law provision applies only to Ordinances in effect at the time of the loss makes sense – for as the Policyholders' Opening Brief explained (and the insurance company's Response does not in any way dispute), building code requirements typically become more stringent over time, and thus typically increase the cost of repairing a damaged building. By writing its Ordinance Or Law provision to apply to ordinances in effect at the time of the building's damage (instead of subsequent ordinances in effect at the time of later repairs), the insurance company secures certainty against potentially higher code related amounts by firmly setting the measure for the insured value it is contractually obligated to pay at the time of the loss rather than at the time of its subsequent repair.²⁵

And with respect to this *first* part of the policy's Ordinance Or Law provision, the insurance company's Response agrees that Seattle Ordinance 121519 was the commercial building code ordinance in effect at the time of policyholders' loss.²⁶

The *third* part of the policy's Ordinance Or Law provision specifies the costs that the policy will pay. It promises to pay the

²⁵ *Policyholders' Opening Brief at p.19.*

²⁶ *Insurance Company's Response at p.7 & n.5; accord, Policyholders' Opening Brief at pp.5-6.*

policyholder the cost to repair the building “to the minimum standards of such ordinance or law”. Policyholder’s Opening Brief at 18. The insurance company’s Response does not dispute that this *third* part of its Ordinance Or Law provision is the part that specifies the costs that the policy will pay.

Instead, as discussed in the following section, the insurance company’s policy interpretation dispute in this case boils down how the *second* part of its Ordinance Or Law provision should be read to limit the scope of applicable ordinances identified in the *first* part of that provision.

2. The insurance company’s interpretation of the *second* part of this provision fails under Washington Law.

As the Policyholders’ Opening Brief explained, the pool of ordinances and laws regulating zoning, land, or use or construction of a building which are “in effect at the time of loss or damage” is rather large. For example, Seattle has ordinances that affect the repair of a *residential* building as well as ordinances that affect the repair of a *commercial* building.²⁷

The record in this case also confirmed that both types of ordinances – *commercial* and *residential* – were “in effect at the time of loss or damage”.²⁸

²⁷ See, e.g., CP 152:13-154:1.

²⁸ See, e.g., CP 152:13-154:1.

The *second* part of the policy's Ordinance Or Law provision limits that pool of building ordinances in effect at the time of the building's damage to the subset that "affects the repair or replacement of the lost or damaged building" insured by the policy – which in the case of the Metropole Building here, is the subset of Seattle building ordinances that affect the repair of a *commercial* building.²⁹ And as noted before, the insurance company's Response agrees that Seattle Ordinance 121519 was the *commercial* building code ordinance in effect at the time of the loss in this case.³⁰

In other words, the term "affects" as used in the *second* part of the policy's Ordinance Or Law provision simply serves to limit the broad scope of ordinances or laws initially specified in the *first* part – reducing that scope from every ordinance and law in effect at the time of the loss or damage that regulates zoning, land, or use or construction of a building to only those in effect at that time of the loss which affect repairs of the specific building insured by the policy. And as noted before, since the specific building insured by the policy at issue in this case is a *commercial* building, it is the *commercial* building code ordinance in effect at that time

²⁹ For building code purposes, the Metropole Building is a commercial building rather than a residential building. CP 153:15-154:1 .

³⁰ Insurance Company's Response at p.7 & n.5; accord, Policyholders' Opening Brief at pp.5-6.

(Seattle Ordinance 121519) that applies under the policy language the insurance company wrote.

The insurance company's Response offers a different interpretation of the phrase "affects the repair or replacement of the lost or damaged building". The insurance company interprets that phrase to add a requirement that the ordinance in effect at the time of the loss also be in effect at the time of repairs so its enforcement actually affects the costs of the repair – successfully arguing below that the Ordinance Or Law language it wrote should be interpreted to say that "if enforcement of the Building Code actually affects the cost of repair, the increased costs will be covered".³¹ It then reiterates that same point to this Court, arguing that the its policy should not be interpreted to apply to the commercial building code ordinance in effect at the time of the loss (Seattle Ordinance 121519) because that ordinance cannot now "be enforced with regard to repairs to the Metropole Building."³²

The insurance company's alternative interpretation of the policy language it wrote, however, fails under Washington law for at least four separate reasons.

³¹ CP 174:19-21.

³² Insurance Company's Response pp.7-8 at n.6.

(a) Insurance Policies Are Read As A Lay Person Would Read Them – and the insurance company’s interpretation does not do that.

The plain language of the policy’s Ordinance Or Law provision says that it applies to the ordinance in effect at the time of the loss. The average person purchasing insurance would therefore read the policy to apply to the ordinance in effect at the time of the loss (i.e., Seattle Ordinance 121519).

Interpreting the policy’s Ordinance Or Law provision to instead say it applies only to ordinances that are in effect at the time of the loss and in effect at the time of repairs makes no sense from the average lay reader’s perspective.

Interpreting the policy’s Ordinance Or Law provision to apply only to ordinances that are in effect both at the time of loss and at the time of repairs also leads to an absurd result – for that interpretation automatically nullifies the policyholders’ coverage if a new Ordinance takes effect between the time of loss and the time of repairs.³³ Under the insurance company’s interpretation, if insured property damage occurs one day, but

³³ CP 196 (“As the insurance company reluctantly conceded during oral argument, there is no policy language that requires the insurance company to pay for code upgrades mandated by Ordinance 122528 (which adopted the “2006 Building Code”). The insurance company accordingly cannot (and hence does not) dispute that its policy language interpretation nullifies coverage under its Ordinance Or Law provision whenever a new ordinance or law goes into effect after the insured loss but before repairs can be done.

a new building code ordinance goes into effect the next day, coverage under the policy's Ordinance Or Law provision is nullified. One simply cannot say with a straight face that such nullification is the understanding that a lay person would have from the policy language written by the insurance company in this case.

Since Washington law requires the policy's Ordinance Or Law provision to be read as a lay person would read it (supra Part III.A.1), the insurance company's alternative interpretation of its policy language fails under Washington law.

(b) The Insurance Company's Offering An Alternative Interpretation Does Not Negate The Fact That Its Policy Language Is Susceptible To More Than One Interpretation – and thus that provision still must be interpreted in the policyholders' favor.

As noted earlier, the insurance company's Response does not address the interpretation of the two policy provisions explained in the Policyholders' Opening Brief. Instead, the insurance company offers an alternative interpretation that focuses on the *second* part of its policy's Ordinance Or Law provision.

Even if the insurance company's alternative interpretation was a reasonable way to interpret its Ordinance Or Law provision, however, that

would not negate the fact that the policyholders' interpretation is a different, reasonable interpretation.

Since Washington law requires the policy's Ordinance Or Law provision to be interpreted in favor of the policyholder if that provision is reasonably susceptible to more than one interpretation (supra Part III.A.2), the insurance company's simply offering an alternative interpretation of its policy language is insufficient under Washington law.

(c) The Insurance Company Cannot Now "Interpret" The Policy Language It Wrote To Include Language Different From What It Wrote.

The insurance company could have written its Ordinance Or Law provision to apply to ordinances "in effect at the time of repairs". But it didn't.

It could have written its policy to set the value of the insured loss at the time of repairs. But it didn't.

It could have written its Ordinance Or Law provision to cover only those costs which are caused by the enforcement of an ordinance in effect at the time of repairs – language that the insurance company in this case does not dispute is common in other code related policy provisions.³⁴ But the insurance company in this case didn't do that either.

³⁴ *Policyholders' Opening Brief at p.21, top half of page.*

Since Washington law prohibits the insurance company from “interpreting” its Ordinance Or Law provision to include language different from what it wrote (supra Part III.A.3), the insurance company’s attempt to now “interpret” its policy to effectively include such language that it had omitted fails under Washington law.

(d) The Insurance Company Likewise Cannot Ignore The Policy Language It Wrote Setting The Insured Value “At The Time Of Loss”.

As explained earlier, the insurance company’s Response agrees with the policyholders’ interpretation of the Valuation provision at issue, and that that provision (CP 128) establishes that the policy measures the value of an insured loss “at the time of the loss or damage”.³⁵

The insurance company’s interpretation of its Ordinance Or Law provision, however, contradicts the policy’s Valuation provision – for under the insurance company’s interpretation of that Ordinance Or Law provision, the policy instead measures the value of the insured loss at the time of repairs.

As explained earlier, the insurance company’s Response also agrees with the policyholders’ interpretation of the *first* part of the policy’s Ordinance Or Law provision, and that that *first* part dictates the

³⁵ *Supra Part III.B (citing, e.g., Insurance Company’s Response at p.15, 1st para. under section B.1).*

policy's Ordinance Or Law provision applies to the ordinances or laws in effect at the time of the loss.³⁶

The insurance company's interpretation of the *second* part of that provision, however, contradicts the *first* part – for under the insurance company's interpretation, the Ordinance Or Law provision applies to the ordinances or laws in effect at the time of repairs.

Since Washington law prohibits the insurance company from “interpreting” its Ordinance Or Law provision to ignore the other language it wrote in the two provisions at issue (supra Part III.A.4), the insurance company's alternative interpretation contradicting that other language fails under Washington law.

IV. CONCLUSION

The insurance policy's Valuation and Ordinance Or Law provisions both specify the time at which the policy will measure the insured value of a loss. They both specify that that time is “at the time of loss or damage”.

The insured building that was damaged in this case was a *commercial* building.

³⁶ *Supra Part III.C.1 (citing, e.g., Insurance Company's Response at p.4, bottom para. and p.12, 2nd from bottom para.)*.

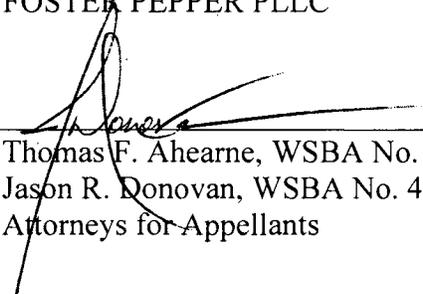
Seattle Ordinance 121519 was the commercial building code ordinance in effect at the time of that damage.

Seattle Ordinance 121519 is therefore the commercial building code ordinance that applies under the plain language of the Valuation and Ordinance Or Law provisions in this case.

The trial court's interpretation of the policy provisions at issue was accordingly wrong. Washington law dictates that Seattle Ordinance 121519 – the Seattle commercial building code ordinance in effect at the time of the June 2005 damage to the Metropole Building – is the ordinance that applies under the policy's Valuation and Ordinance Or Law provisions. Washington law therefore requires the trial court's policy interpretation ruling to be reversed.

RESPECTFULLY SUBMITTED this 7th day of September, 2010.

FOSTER PEPPER PLLC



Thomas F. Ahearne, WSBA No. 14844
Jason R. Donovan, WSBA No. 40994
Attorneys for Appellants

DECLARATION OF SERVICE

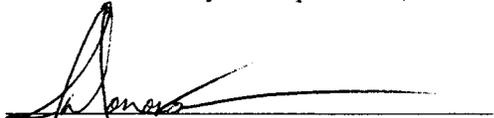
I, Jason R. Donovan, declare under penalty of perjury under the laws of the State of Washington that I am now and at all times mentioned herein, a resident of the State of Washington, over the age of eighteen years, not a party to or interested in the above-entitled action, and competent to be a witness herein.

On September 7, 2010, I caused to be served in the manner noted copies of the foregoing upon designated counsel:

John D. Wilson, Jr., WSBA #4828
David M. Jacobi, WSBA # 13524
Alfred E. Donohue, WSBA #32774
Shawnmarie Stanton, WSBA #20112
Wilson Smith Cochran Dickerson
1700 Financial Ctr., 1215 4th Ave.
Seattle, WA 98161-1007
Phone: 206-623-4100
Fax: 206-623-9273
Email: wilson@wscd.com
Email: donohue@wscd.com
Counsel for Respondent Pacific Indemnity Company

- Via U.S. Mail
- Via Facsimile
- Via Messenger
- Via Email

DATED in Seattle, Washington on this 7th day of September, 2010.



Jason R. Donovan

The policy's Valuation provision.

Replacement Cost Basis

Lost or damaged covered property will be valued at the cost to repair or replace such property **at the time of loss or damage**, but not more than you actually spend to repair or replace such property at the same or another location for the same use or occupancy. There is no deduction for physical deterioration or depreciation.

If you replace the lost or damaged covered property, the valuation will include customs duties incurred.

If you do not repair or replace the covered property, we will only pay as provided under Actual Cash Value Basis.

If you commence the repair or replacement of the lost or damaged covered property within 24 months from the date of the loss or damage, we will pay you the difference between the actual cash value and the lesser of the:

- Replacement cost **at the time of loss or damage**; or
- Actual cost you incur to repair or replace.

Payments under the Replacement Cost Basis will not be made until the completion of the repairs or the replacement of the covered property.

CP 128, also at CP 148:8-19 (**emphasis added**).

