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No. 66900-1-I

DIVISION I, COURT OF APPEALS  
OF THE STATE OF WASHINGTON

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NATIONAL FIRE & MARINE INSURANCE COMPANY,  
a Nebraska corporation,  
Plaintiff-Respondent

v.

CERTAIN UNDERWRITERS AT LLOYD'S LONDON, an English  
corporation which issued Policy No. A99BF02 and LIBERTY MUTUAL  
INSURANCE COMPANY, a Massachusetts corporation,  
Defendants-Appellants

and

MUTUAL OF ENUMCLAW INSURANCE COMPANY, a Washington  
corporation; THE OHIO CASUALTY INSURANCE CO., an Ohio  
corporation; WEST AMERICAN INSURANCE COMPANY, an Ohio  
corporation, MARYLAND CASUALTY COMPANY, a Maryland  
corporation, ASSURANCE COMPANY OF AMERICA, a New York  
corporation, AMERICAN HOME ASSURANCE COMPANY, a Texas  
corporation, UNITED STATES FIRE INSURANCE COMPANY, a New  
Jersey corporation and OLD REPUBLIC INSURANCE COMPANY, a  
Pennsylvania corporation,

Defendants.

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ON APPEAL FROM KING COUNTY SUPERIOR COURT  
(Trial Court Judge Regina Cahan)

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BRIEF OF APPELLANT LIBERTY MUTUAL INSURANCE  
COMPANY

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## I. INTRODUCTION AND SUMMARY

In this insurance contribution action, National Fire & Marine Insurance Company (“National Fire”) seeks to recover costs it incurred in defending its insureds, Wellington Cheswick, LLC and associated entities and individuals (collectively, “Wellington”) in a lawsuit alleging construction defects in a condominium project. National Fire issued a primary insurance policy to Wellington for the policy period March 10, 2002, to March 10, 2003. National Fire defended Wellington in the underlying lawsuit, and subsequently sought contribution for defense costs from Certain Underwriters at Lloyd’s, London (“Lloyd’s”), who issued two primary policies to Wellington, first from February 1, 2001, to February 1, 2002, and second from February 1, 2001, to March 10, 2002. National Fire also sought contribution for defense costs from Liberty Mutual Insurance Company (“Liberty”), who issued an umbrella insurance policy to Wellington that sat atop the underlying Lloyd’s primary policy from February 1, 2001, to February 1, 2002, and February 1, 2001, to March 10, 2002. A chart identifying and providing a graphical depiction of these insurance policies is attached hereto as Appendix A. (CP 261.)

This appeal presents a simple question: Where one or more primary insurance policies have a duty to defend all claims against the insured, is the umbrella insurance policy also obligated to contribute to

those same defense costs? Under Washington law, the answer is unequivocally no, and the trial court erred in concluding otherwise.

The trial court resolved the coverage issues on summary judgment, holding first that Lloyd's had a duty to defend. (CP 1258.) That holding has not been challenged on appeal. The trial court did not distinguish between "covered" and "non-covered" claims, and held "it is impossible to distinguish fees between covered and uncovered claims." (CP 1258-59.) Under well-established Washington law, where covered and non-covered claims are "reasonably related," a primary insurer has a duty to defend *all* claims against its insured – including the "non-covered" claims. Lloyd's therefore had a duty to defend *all* claims against Wellington, and thus to contribute with National Fire to *all* defense costs.<sup>1</sup>

Despite its holding that Lloyd's had a duty to defend Wellington against all claims against it in the underlying lawsuit pursuant to Lloyd's primary policy, the trial court went on to find that Liberty also had a duty to defend under its umbrella policy, and was therefore liable to contribute to the very same defense costs for which the underlying primary insurer, Lloyd's, was indisputably liable. This holding results in the absurd

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<sup>1</sup> National Fire has since resolved its contribution claim against Lloyd's, and the parties have stipulated to vacating the judgment as it relates to Lloyd's, while leaving the holdings discussed above intact for purposes of this appeal.

scenario in which an umbrella insurer is required to contribute to defense costs that are also undisputedly covered by the underlying primary policy – contrary to the entire purpose of an umbrella policy. In so ruling, the trial court failed to apply Washington’s “most important” rule of insurance policy interpretation: to apply clear and unambiguous policy language as written.

Liberty’s umbrella policy states that Liberty has a duty to defend only where the occurrence is “not covered by any underlying policies listed in the Schedule of Underlying Insurance or any other policy providing coverage to the ‘Insured.’” The undisputed facts of this case, and the trial court’s undisputed findings, establish that Liberty had no duty to defend Wellington pursuant to its umbrella policy because two primary policies – the Lloyd’s policy and the National Fire policy – each provided coverage to Wellington. And because Liberty had no duty to defend Wellington under the terms of its umbrella policy, it is not liable to National Fire for defense costs. The trial court’s judgment should be reversed.

## **II. ASSIGNMENT OF ERROR AND ISSUES PRESENTED**

This appeal presents a single assignment of error. The superior court erred when it entered its February 1, 2001, order granting National Fire’s motion for summary judgment and denying Liberty’s motion for

summary judgment, holding that Liberty had a duty to defend Wellington on the undisputed facts of this case. The superior court further erred when it entered its February 22, 2011, order denying Liberty's motion for reconsideration. The issues pertaining to this assignment of error are:

1. Whether the language in the Liberty Policy, which provides that Liberty has a duty to defend only where the occurrence is "not covered by any underlying policies listed in the Schedule of Underlying Insurance or any other policy providing coverage to the 'Insured,'" is clear and unambiguous?

2. Whether Liberty had a duty to defend when both Lloyd's and National Fire undisputedly each had a duty to defend all claims against Wellington, and National Fire did in fact defend those claims?

### **III. STATEMENT OF THE CASE**

#### **A. The Underlying Construction Defect Case.**

This coverage dispute arises out of a construction defect case against Wellington, which was the common insured of Lloyd's, National Fire, and Liberty. Wellington was the developer of the Cheswick Lane Condominiums (the "Condominiums"), which consisted of twenty-nine buildings built in three stages from March 20, 2000, to June 30, 2003. (CP 74.) The underlying plaintiff, Cheswick Lane Condominium Owners Association (the "Association") filed suit against Wellington on

December 14, 2004, (the “Underlying Suit”), alleging construction defects caused a breach of implied warranty under the Washington Condominium Act, breach of the implied warranty of habitability, breach of express and contractual warranties, breaches of fiduciary duty, and various transfers between the Wellington entities violated Washington’s Uniform Fraudulent Transfer Act. (CP 87-95.)

Following receipt of the Association’s complaint, Wellington tendered defense and indemnity to its primary insurers, Lloyd’s and National Fire. Wellington’s primary policies during the relevant time periods were as follows:

- Policy No. A99BF021 (“Lloyd’s Policy I”), issued by Certain Underwriters at Lloyd’s of London (“Lloyd’s”). Lloyd’s Policy I was effective from February 1, 2000, to February 1, 2001. (CP 97-124.)
- Policy No. A01BF118 (“Lloyd’s Policy II”), issued by Lloyd’s. Lloyd’s Policy II was effective from February 1, 2001, to March 20, 2002. (CP 126-74.)<sup>2</sup>

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<sup>2</sup> The Lloyd’s policies are not meaningfully distinguishable from one another, and because the trial court’s holding that Lloyd’s had a duty to defend Wellington in the Underlying Lawsuit is not challenged in this appeal, there is no need to distinguish between the two Lloyd’s policies. This brief will therefore sometimes refer to a Lloyd’s Policy.

- Policy No. 72LP149441 (“National Fire Policy”) issued by National Fire. The National Fire Policy was effective from March 10, 2002, to March 10, 2003. (CP 176-259.)<sup>3</sup>

Wellington provided a notice of claim to National Fire on November 4, 2004. (CP 263-86.) National Fire retained defense counsel for Wellington on January 24, 2005 (CP 288), and issued a letter reserving its rights to deny indemnity. (CP 292-96.) National Fire provided Wellington with a complete defense to all of the allegations in the Underlying Suit. (CP 305.)

Wellington also tendered defense of the Underlying Suit to Lloyd’s on March 2, 2005. (CP 307-12.) Lloyd’s did not respond until December 29, 2005. (CP 76-85.) Lloyd’s agreed to defend some, but not all, Wellington entities. (CP 566-634.)<sup>4</sup> As discussed below, the trial court later held that Lloyd’s duty to defend applied to all claims against all Wellington entities. (CP 1258-59.)

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<sup>3</sup> For a graphical depiction of Wellington’s insurance profile, see Appendix A. (CP 261.)

<sup>4</sup> Page 8 of each letter from Lloyd’s coverage counsel, Robertson Clark, LLP, states that Lloyd’s agreed to participate in the defense of each identified Wellington entity, subject to a reservation of rights. (*E.g.*, CP 573.)

In addition to Wellington's primary insurance policies, Liberty issued an umbrella policy to Wellington, which sat above Lloyd's Policy II:

- Policy No. LQ1-B71-077026-011 ("Liberty Policy"), issued by Liberty. The Liberty Policy was in effect from February 1, 2001, to March 20, 2002. (CP 315-52.)

The Liberty Umbrella Policy provides a duty to defend only in limited circumstances, where (1) the insured's primary policies are exhausted by payment of claims, and (2) where no other insurance policy provides coverage:

*We will have the right and duty to investigate any "claim" and defend any "suit" seeking damages covered by the terms and conditions of this policy when:*

*1. the applicable Limits of Insurance of the underlying policies listed in the Schedule of Underlying Insurance and the Limits of Insurance of any other insurance providing coverage to the "Insured" have been exhausted by actual payment of "claims" for any "occurrence" to which this policy applies; or*

*2. damages are sought for any "occurrence" which is covered by this policy but not covered by any underlying policies listed in the Schedule of Underlying Insurance or any other policy providing coverage to the "Insured."*

(CP 316.) The parties agree, and National Fire conceded, that Liberty owed no duty to defend under Section III.A.1, because it is undisputed that the primary policies were not "exhausted by actual payment of 'claims.'" (CP 316.)

Because the Liberty Policy is an umbrella policy, Wellington did not tender the defense of the Underlying Suit to Liberty when it tendered to its primary insurers, Lloyd's and National Fire. Instead, Wellington asked Liberty to defend for the first time on August 11, 2005, and only then because Lloyd's had not yet responded to Wellington's tender. (CP 358-63.) However, on June 16, 2006, Wellington informed Liberty that "Lloyd's is ostensibly participating in the defense [of Wellington] in the above-referenced lawsuit but has not yet paid any defense fees or costs. The National Fire & Marine Insurance Company is also participating in Wellington's defense . . . ." (CP 74.)

Because Wellington informed Liberty that National Fire was defending it, and Lloyd's was at least "ostensibly participating" with National Fire in the defense, Liberty understood that its duty to defend was not triggered, and it therefore declined to participate in the defense.

**B. Settlement of the Underlying Action and Commencement of This Contribution Action.**

In August 2006, settlement was reached in the Underlying Suit, contingent upon an agreement to fund the settlement between Wellington and its insurers. (CP 70.) Ultimately, although it had no duty to defend the Underlying Suit, Liberty agreed to contribute \$300,000 toward settlement on behalf of Wellington, to go with \$600,000 each from the

primary insurers, Lloyd's and National Fire.<sup>5</sup> (CP 70.) Liberty contributed to the settlement pursuant to a clause in its policy stating that where it has no duty to defend, it "will, however, have the right and will be given the opportunity to participate in the settlement, defense and trial of any 'claim' or 'suit' relative to any 'occurrence' which, in our opinion, may create liability on our part under the terms of this policy." (CP 317.) Proving that no good deed goes unpunished, National Fire brought this case, seeking contribution from both Lloyd's and Liberty for defense costs incurred by National Fire prior to settlement of the Underlying Suit.<sup>6</sup>

The trial court decided this case in a set of cross-motions for summary judgment, only one of which is at issue in this appeal. In the first set, not at issue but highly relevant to this appeal, Lloyd's argued it had no duty to defend pursuant to several exclusions in its policies, while

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<sup>5</sup> In fact, Liberty had no duty to indemnify Wellington, either. Liberty's umbrella policy provides that even where coverage exists, the duty to indemnify arises only after exhaustion of the underlying policy limits by actual payment of claims. (CP 315-16.) There is no dispute that the underlying Lloyd's Policy II was not exhausted, because Lloyd's contributed only \$600,000 to the settlement – 60 percent of its policy limits. (CP 70.) Nevertheless, Wellington's primary insurers, Lloyd's and National Fire, refused to fund the entire settlement, and Liberty stepped in to prevent the deal from falling through.

<sup>6</sup> National Fire also sought, and received, contribution from various other insurance companies who issued policies to subcontractors hired by Wellington to work on the Condominium. Those insurers have settled, and National Fire's contribution claims against them are not before this Court.

National Fire argued these exclusions did not clearly preclude indemnity and Lloyd's therefore had a duty to defend. (CP 781-87.) The trial court granted National Fire's motion and denied Lloyd's, holding that Lloyd's had a duty to defend Wellington, and that any potentially "non-covered" claims under the Lloyd's policy were "reasonably related" to the covered claims (CP 1258-59), and that Lloyd's was therefore not entitled to allocate defense costs between covered and any "non-covered" claims. The trial court therefore held that Lloyd's was required to pay 40 percent of all defense costs.<sup>7</sup> (CP 1259.) Critically, Lloyd's has dismissed its appeal of the trial court's holding,<sup>8</sup> and National Fire and Liberty have agreed that for purposes of this appeal the trial court's holdings concerning Lloyd's duty to defend remain undisturbed.

In the second set of cross-motions, which are contested in this appeal, Liberty argued it had no duty to defend Wellington under the plain language of its umbrella policy because (a) the Lloyd's policies provided

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<sup>7</sup> National Fire also sought, and received, contribution from various other insurance companies who issued policies to subcontractors hired by Wellington to work on the Condominium. Those insurers have settled, and National Fire's contribution claims against them are not before this Court.

<sup>8</sup> Lloyd's and National Fire settled their dispute after the trial court entered judgment, and the judgment as against Lloyd's was vacated. Importantly, however, the parties agreed that for purposes of this appeal, the trial court's rulings with respect to Lloyd's duty to defend remain in place.

coverage, and (b) National Fire provided coverage. National Fire argued Liberty was required to defend under its umbrella policy notwithstanding the fact that two primary insurers were obligated to provide a complete defense to, and contribution to indemnification of, the claims against Wellington. The trial court granted National Fire's motion and denied Liberty's, holding that Liberty was obligated to contribute up to 20 percent of the total defense costs. (CP 1259.) The trial court entered judgment in favor of National Fire (CP 1272-75), and Liberty filed this timely appeal. (CP 1278-79.)

#### IV. ARGUMENT

##### A. This Court Must Conduct a De Novo Review of the Trial Court's Summary Judgment Orders.

This Court reviews an order of summary judgment de novo, engaging in the same inquiry as the trial court, "treating all facts and reasonable inferences from the facts in a light most favorable to the nonmoving party." *Sammamish Community Mun. Corp. v. City of Bellevue*, 107 Wn. App. 686, 689, 27 P.3d 684 (2001) (quoting *Enterprise Leasing, Inc. v. City of Tacoma*, 139 Wn.2d 546, 551, 988 P.2d 961 (1999)). Summary judgment is appropriate only if the pleadings, affidavits, depositions, and admissions on file demonstrate the absence of

any genuine issues of material fact, and the moving party is entitled to judgment as a matter of law. *Id.*; CR 56(c).

Similarly, “(t)he interpretation of an insurance policy is a question of law reviewed de novo.” *Bordeaux, Inc. v. American Safety Ins. Co.*, 145 Wn. App. 687, 693, 186 P.3d 1188 (2008) (citing *Alaska Nat’l Ins. Co. v. Bryan*, 125 Wn. App. 24, 30, 104 P.3d 1 (2004)). For the reasons explained below, a de novo review compels reversal of the trial court’s grant of summary judgment to National Fire on the coverage issues addressed herein. The plain terms of the policy and undisputed facts demonstrate that Liberty is entitled to judgment as a matter of law.

**B. The Trial Court Erred by Failing to Apply the Liberty Policy’s Clear and Unequivocal Language as Written.**

Liberty cannot be liable for contribution to National Fire for defense costs unless National Fire establishes that Liberty had a duty to defend Wellington pursuant to the terms of Liberty’s umbrella policy. *Mutual of Enumclaw Ins. Co. v. USF Ins. Co.*, 164 Wn.2d 411, 419, 191 P.3d 866 (2008). Liberty’s duty to defend claims is governed exclusively by the language of Section III.A of the Liberty Policy, which provides:

We will have the right and duty to investigate any “claim” and defend any “suit” seeking damages covered by the terms and conditions of this policy when:

1. the applicable Limits of Insurance of the underlying policies listed in the Schedule of Underlying Insurance and the

Limits of Insurance of any other insurance providing coverage to the “Insured” have been exhausted by actual payment of “claims” for any “occurrence” to which this policy applies; or

2. damages are sought for any “occurrence” which is covered by this policy but not covered by any underlying policies listed in the Schedule of Underlying Insurance or any other policy providing coverage to the “Insured.”

(CP 316.) Because National Fire does not contend that either its policy or the Lloyd’s policy was “exhausted by actual payment of ‘claims,’” only Section III.A.2 is at issue in this appeal.

The “most important” principle of interpretation is that “if the policy language is clear and unambiguous, we must enforce it as written; we may not modify it or create ambiguity where none exists.” *Quadrant Corp. v. American States Ins. Co.*, 154 Wn.2d 165, 171, 110 P.3d 733 (2005). This Court has adopted and repeated this fundamental tenet numerous times in recent years. *See, e.g., Black v. National Merit Ins. Co.*, 154 Wn. App. 674, 679, 226 P.3d 175 (2010); *Kim v. Allstate Ins. Co., Inc.*, 153 Wn. App. 339, 363 n.7, 223 P.3d 1180 (2009); *Australia Unlimited, Inc. v. Hartford Cas. Ins. Co.*, 147 Wn. App. 758, 765-66, 198 P.3d 514 (2008).

In addition, Washington courts must “construe an insurance policy as a whole, and give a fair, reasonable, and sensible construction as would be given by the average person purchasing insurance.” *Bushnell v. Medico Ins. Co.*, 159 Wn. App. 874, 881, 246 P.3d 856 (2011). They

must also interpret insurance policies in light of their purpose. *See, e.g., State Farm Fire and Cas. Co. v. Piazza*, 132 Wn. App. 329, 333, 131 P.3d 337 (2006). Indeed, this Court cannot determine National Fire’s claim for contribution against Liberty “in a vacuum,” but must instead consider it “in light of the total insuring intent of all the parties.” *Safeco Ins. Co. of Illinois v. Automobile Club Ins. Co.*, 108 Wn. App. 468, 479, 31 P.3d 52 (2001).

Thus, to properly interpret the scope of Liberty’s duty to defend in this case, the Court should “consider the nature and purpose of primary and excess insurance policies.” *Id.* “Primary policies are exactly that, the first line of defense in the event of accident or injury.” *Id.* Conversely, the purpose of an umbrella policy is to provide coverage for costs not covered by other policies, whether due to exhaustion or because coverage for those costs is excluded by the terms of the other policies. *See, e.g., Safeco Ins. Co. of Illinois v. Automobile Club Ins. Co.*, 108 Wn. App. 468, 479-80, 31 P.3d 52 (2001) (“The purpose of an umbrella policy is to protect the insured in the event of a catastrophic loss in which liability damages exceed available primary coverage”).

The trial court failed to follow these clear interpretive rules in this case. The plain and unequivocal language of the Liberty Policy provides that Liberty had no duty to defend pursuant to its umbrella policy where,

as here, it is undisputed that the insured's primary insurers had a duty to defend and did, in fact, provide a defense. It was therefore error to require Liberty to contribute to defense costs for a defense it did not owe.

**C. Liberty Had No Duty to Defend Pursuant to the Clear and Unequivocal Language of the Liberty Policy.**

The Liberty Policy provides that Liberty has a duty to defend only when “damages are sought for any ‘occurrence’ which is covered by this policy *but not covered by any underlying policies listed in the Schedule of Underlying Insurance or any other policy providing coverage to the ‘Insured.’*” (CP 316, Liberty Policy, Section III.A.2 (emphasis added).) Here, it is now undisputed that two primary insurance policies – Lloyd’s and National Fire’s – provided coverage to Wellington in the Underlying Lawsuit. Each had a duty to defend all claims against Wellington, and each indemnified Wellington by contributing to the settlement in the underlying case. Indeed, it is undisputed that National Fire actually paid all defense costs throughout the Underlying Lawsuit without any segregation between covered and allegedly “non-covered” claims. This undisputed fact forecloses Liberty’s duty to defend as a matter of law.

**1. The language of Section III.A.2 is clear and unequivocal, and must be enforced as written.**

Pursuant to the above-quoted language, Liberty has no duty to defend if “any other policy” of insurance provides “coverage.” This is the common-sense result of the Liberty Policy’s plain language, and its role as an umbrella policy: the Liberty umbrella policy was intended to provide a defense only where Wellington’s other insurance policies, such as the Lloyd’s and Nation Fire primary policies, did not. If one or more primary insurance policies cover the insured’s defense costs, the purpose of an umbrella policy is simply not implicated, and the umbrella insurer has no duty to defend. As demonstrated below, both Lloyd’s and National Fire had a duty to defend Wellington from all claims in the underlying lawsuit. Pursuant to the Liberty Policy’s plain terms, Liberty’s duty to defend only applies if there is no “coverage.” The sole issue in this appeal is whether there was “coverage” for the defense costs for which National Fire seeks contribution, where it is undisputed that both Lloyd’s and National Fire had a duty to defend? The answer to that question is “yes.”

The term “coverage” in Section III.A.2 is not defined, and is therefore to be given its plain, ordinary, and popular meaning. *Moeller v. Farmers Ins. Co. of Washington*, 155 Wn. App. 133, 141, 229 P.3d 857 (2010). Washington courts may turn to standard dictionaries to determine

a term's plain meaning. *Id.* Black's Law Dictionary 422 (9th ed. 2009), defines "coverage" as "(i)nclusion of a risk under an insurance policy; the risks within the scope of an insurance policy." "Coverage" is also defined as "(i)nclusion in an insurance policy" and "(t)he extent of protection afforded by an insurance policy." THE AMERICAN HERITAGE COLLEGE DICTIONARY 320 (3d ed. 2000). As such, common sense dictates that the question whether there is "coverage" for any sum, such as defense costs, is a matter of asking whether the cost is within the scope of the policy – i.e., whether the insurer is obligated to pay it. Here, it cannot be disputed that Lloyd's and National Fire provided "coverage" for the defense costs in the Underlying lawsuit because (a) National Fire agreed to pay and *actually paid the defense costs for which it now seeks reimbursement*, and (b) the trial court held that Lloyd's likewise had a duty to defend Wellington – a finding which has not been challenged and is therefore a verity on appeal. *See Robel v. Roundup Corp.*, 148 Wn.2d 35, 42, 59 P.3d 611 (2002).

Certainly, that is how other courts have interpreted the term "coverage" in similar situations. In *Federal-Mogul U.S. Asbestos Personal Injury Trust v. Continental Cas. Co.*, \_\_\_ F.3d \_\_\_, 2011 WL 2652232 (6th Cir. 2011) (slip copy), the Sixth Circuit confronted the same issue: whether an umbrella insurer had a duty to defend where several primary insurers had a duty to defend? There, the umbrella insurance

policy provided a duty to defend “(w)hen an occurrence is not covered by the underlying insurance listed in the underlying insurance schedule *or any other underlying insurance collectible by the insured*, but covered by the terms of this policy . . . .” *Id.* at \*3. The *Federal-Mogul* court dismissed the insured’s claim pursuant to Rule 12(b)(6), holding that because the insured alleged that several primary insurers were defending, it could not state a claim for defense under the umbrella policy. *Id.* (“Continental contends that because other underlying primary insurance policies are defending the Vellumoid claims, their duty to defend under the DSSP is not yet triggered. We agree.”) The Sixth Circuit therefore equated “coverage” in the above-quoted policy language with the primary insurers’ duty to defend. This Court should do the same.

To be sure, “coverage” cannot be equated solely with an insurer’s duty to indemnify. Liability insurance policies generally provide two benefits to the policy and corresponding obligations on the insurer: a duty to defend and a duty to indemnify. The dictionary definitions discussed above make no distinction between “coverage” for defense and “coverage” for indemnity, and the Washington Supreme Court has commented “(t)he duty to defend is a valuable service paid for by the insured and one of the principal benefits of the liability insurance policy.” *Woo v. Fireman’s Fund Ins. Co.*, 161 Wn.2d 43, 54, 164 P.3d 454 (2007).

Any definition of “coverage” that does not include the duty to defend – and therefore defense costs – is flatly unreasonable and must be rejected. *Quadrant*, 154 Wn.2d at 171 (“if the policy language is clear and unambiguous, we must enforce it as written; we may not modify it or create ambiguity where none exists”).

Not only is this interpretation consistent with case law and common sense, it is compelled by the language of Liberty’s umbrella policy. The provision of the Liberty Policy that contains the term “coverage” is itself entitled “DEFENSE” and is unambiguously intended to define the circumstances under which Liberty’s duty to defend may be triggered. (CP 316.) Under Washington law, the Court must interpret the terms of the Liberty Policy in context. *See Spratt v. Crusader Ins. Co.*, 109 Wn. App. 944, 951, 37 P.3d 1269 (2002) (rejecting insured’s interpretation of policy terms because it was “not reasonable in the context of the policy or of the common definitions of the terms”). Thus, the context of Section III.A.2 dictates that the term “coverage” refers to Wellington’s primary insurers’ duty to defend. Moreover, if Liberty intended the term “coverage” in Section III.A.2 to mean “indemnity” to the exclusion of “defense,” it would have used language akin to that found immediately above in Section III.A.1 – which provides a duty to defend

after the primary policies “have been exhausted by actual payment of ‘claims.’” (CP 316.)

Finally, practical considerations compel a finding that the term “coverage” in Section III.A.2 refers to the duty to defend, and not solely to the duty to indemnify. Under Washington law, the duty to indemnify is implicated only “when an insured is actually liable to a claimant and that claimant’s injury is covered by the language of the policy.” *Mutual of Enumclaw Ins. Co. v. USF Ins. Co.*, 164 Wn.2d 411, 421 n.7, 191 P.3d 866 (2008). If the term “coverage” referred only to the primary insurers’ duty to indemnify, then it would be impossible to determine whether they provided “coverage” – and therefore whether Liberty had a duty to defend – until *after* a determination on the merits of the claim against its insured. Of course, by that time, Liberty’s duty to defend is of no use to the insured, and Liberty could not discharge it in any meaningful way.<sup>9</sup>

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<sup>9</sup> Even more bizarrely, because indemnification depends on a finding that the insured is “actually liable,” *Mutual of Enumclaw*, 164 Wn.2d at 421 n.7, there would never be “coverage” under a primary policy if the insured were found to be not “actually liable” – regardless of the terms of the primary policy. In short, the primary insurer could trigger Liberty’s duty to defend – and shift the defense costs that it owed to the umbrella insurer – simply by successfully defending the insured. This is not how Washington courts determine a primary insurer’s duty to defend. *See National Sur. Corp. v. Immunex Corp.*, 162 Wn. App. 762, ¶ 24, 256 P.3d 439 (2011) (holding “the duty to defend is triggered if the insurance policy conceivably covers the allegations in the complaint”). And it is not how this Court should determine whether the Lloyd’s and National Fire  
(continued . . .)

Applying the plain meaning of the term “coverage” in the context of Section III.A.2, entitled “DEFENSE,” the Court should hold that the Lloyd’s and National Fire policies provided “coverage” to Wellington if they had a duty to defend Wellington in the Underlying Lawsuit. As explained below, they did.

**2. The trial court erred in holding that Liberty had a duty to defend Wellington because the Lloyd’s Policy provided “coverage.”**

The trial court held that Lloyd’s had a duty to defend Wellington in the Underlying Lawsuit under the London Policy.<sup>10</sup> (CP 1258.) This holding was urged by both National Fire and Liberty, and is a verity on appeal. See *Robel*, 148 Wn.2d at 42. It also ends the inquiry into Liberty’s duty to defend under the umbrella policy: the occurrence was “covered” by one of the “underlying policies listed in the Schedule of Underlying Insurance” (CP 316), namely the Lloyd’s Policy, Liberty had no duty to defend pursuant to the clear and unambiguous language of its umbrella policy.

It does not matter if Lloyd’s ultimately would not have had a duty to indemnify some of the claims asserted by the Association against

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(. . . continued)

policies provided “coverage” to Wellington under Section III.A.2 of the Liberty Policy.

<sup>10</sup> The Lloyd’s Policy was listed in the Liberty Policy’s Schedule of Underlying Insurance. (CP 335.)

Wellington, because Lloyd's undisputedly had a duty to defend all the claims. In its order, the trial court suggested that Lloyd's would not have a duty to indemnify all of the claims. (CP 1258-59.) What matters is that the trial court unequivocally held that "(e)ach of the claims asserted against the insurers (sic) are . . . reasonably related to each other," and found that "it is impossible to distinguish fees between covered and uncovered claims." (CP 1258-59.) This finding has not been challenged, and is a verity on appeal. *See Robel*, 148 Wn.2d at 35. Washington law governing Lloyd's duty to defend Wellington in this situation is clear.

Under Washington law, "(n)o right of allocation exists for the defense of non-covered claims that are 'reasonably related' to the defense of covered claims." *Bordeaux, Inc. v. American Safety Ins. Co.*, 145 Wn. App. 687, 698, 186 P.3d 1188 (2008) (quoting *Nordstrom, Inc. v. Chubb & Son, Inc.*, 820 F. Supp. 530, 536 (W.D. Wash.1992)); *see also Waite v. Aetna Cas. & Sur. Co.*, 77 Wn.2d 850, 859, 467 P.2d 847 (1970) (apportionment between covered and non-covered losses appropriate only where "reasonable basis"); *State Farm Fire & Cas. Co. v. English Cove Ass'n, Inc.*, 121 Wn. App. 358, 88 P.3d 986 (2004) (same). In short, where the covered and non-covered claims against the insured are

reasonably related, a primary insurer has the duty to defend all the claims, including the so-called “non-covered” claims.<sup>11</sup>

In sum, the trial court’s uncontested holdings that (1) Lloyd’s had a duty to defend Wellington, and (2) the covered and any unidentified “non-covered” claims under the Lloyd’s Policy were “reasonably related,” together compel the conclusion that Lloyd’s had a duty to defend all claims asserted against Wellington in the Underlying Suit, and to pay all defense costs. That undisputed duty means that there was no lack of “coverage” within the meaning of Section III.A.2 of Liberty’s umbrella policy, and thus Liberty had no duty to defend.

**3. The trial court erred in holding that Liberty had a duty to defend Wellington because the National Fire Policy provided coverage.**

Even if National Fire could somehow overcome the fact that the primary Lloyd’s Policy provided coverage for each and every dollar that National Fire now seeks from Liberty’s umbrella policy, it cannot escape an even more fundamental conflict with the Liberty Policy’s clear language. Section III.A.2 also states that Liberty has a duty to defend only

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<sup>11</sup> This is the rule in most states. *See, e.g., Timberline Equip. v. St. Paul Fire and Marine Ins. Co.*, 281 Or. 639, 645, 576 P.2d 1244 (1978); *Klamath Pac. Corp. v. Reliance Ins. Co.*, 151 Or. App. 405, 418, 950 P.2d 909 (1997) (applying rule to require defense even after “covered” claim was dismissed).

where “damages are sought for any ‘occurrence’ which is . . . not covered by . . . *any other policy providing coverage to the ‘Insured.’*” (CP 316 (emphasis added).) This clear and unambiguous language precludes National Fire’s contribution claim seeking defense costs from Liberty because *National Fire’s own policy* provided “coverage” to Wellington and falls squarely within the meaning of the phrase “any other policy providing coverage to the ‘Insured.’” Indeed, it is undisputed that National Fire actually provided that coverage to Wellington by defending *all* claims against it – and paying *all* defense costs – throughout the Underlying Lawsuit.

Again, the Sixth Circuit’s opinion in *Federal-Mogul* is highly instructive. There, the insured, *Federal-Mogul*, sought a declaration that Continental had a duty to defend it against certain claims pursuant to an umbrella policy issued by Continental. *Federal-Mogul*, 2011 WL 2652232, \*1. Federal Mogul held three primary policies, issued by Travelers Indemnity Company (“Travelers”), Globe Indemnity Company (“Globe Indemnity”), and Liberty Mutual Insurance Company (“Liberty Mutual”), and while the Travelers policy was alleged to be exhausted, Globe Indemnity and Liberty Mutual were defending Federal Mogul against the claims. *Id.*

The Continental umbrella policy contained “duty to defend” language that is not meaningfully distinguishable from that of the Liberty Policy in this case, stating:

When an occurrence is not covered by the underlying insurance listed in the underlying insurance schedule or any other underlying insurance collectible by the insured, but covered by the terms of this policy, without regard to the retained limit contained herein, the company in addition to the applicable limits of liability shall:  
(a) defend any suit against the insured . . . .

*Id.* at \*3 (emphasis added). The court noted that the Travelers policy was the only one listed in Continental’s “underlying insurance schedule,” while “the other two primary policies covering the [] claims, issued by Liberty Mutual and Globe Indemnity, are not listed in the schedule.” *Id.*

The *Federal-Mogul* court succinctly stated the gravamen of the case: “Continental contends that because other underlying primary insurance policies are defending the [] claims, their duty to defend under the [umbrella policy] is not yet triggered. We agree.” *Id.* It noted the insured’s allegation that all three primary policies provided coverage for the claims, and that at least Globe Indemnity and Liberty Mutual were providing a defense. The Court reasoned: “These allegations are dispositive of the issue before us, for the plain language of the [umbrella policy] provides that Continental must defend only where an occurrence is not covered by the underlying insurance listed in the schedule (the Travelers Policy), ‘or any other underlying insurance collectible by the

*insured.”* *Id.* (emphasis in original). Thus, the Court held that even if the underlying Travelers policy had been exhausted and therefore had no duty to defend, Continental had no duty to defend under its umbrella policy because other primary policies were defending the insured, and were included in the plain meaning of the phrase “any other underlying insurance collectible by the insured.” *Id.*

This case is not meaningfully distinguishable. Indeed, to the extent any distinction may be drawn between the policy language at issue in *Federal-Mogul* and this case, Liberty’s umbrella policy language is better for Liberty, because Section III.A.2 includes “any other policy providing coverage to the ‘Insured’” without qualification. (CP 316.) There can be no dispute that the National Fire Policy provided coverage to Wellington for the claims asserted against it in the Underlying Lawsuit, including each and every dollar of defense costs it now seeks to recover from Liberty. (CP 11, ¶ 22.) Thus, there is no dispute that National Fire provided “coverage” to Wellington.<sup>12</sup>

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<sup>12</sup> Indeed, if the National Fire Policy did not provide coverage to Wellington for the defense costs it now seeks to recover, it would have acted as a volunteer, and would not be entitled to contribution under Washington law. *Hartford Ins. Co. v. Ohio Cas. Ins. Co.*, 145 Wn. App. 765, 774, 189 P.3d 195 (2008) (“An insurer who acts as a volunteer in making payment on behalf of its insured will lose the right to recover contribution from other insurers on the loss.”).

National Fire may seek to escape the clear and unequivocal language of Section III.A.2 by arguing the phrase “any other policy of insurance providing coverage to the ‘Insured’” (CP 316), refers only to insurance policies sharing the same policy period as the Liberty Policy. Such an argument was implicitly rejected by the Sixth Circuit in *Federal-Mogul*, and is precluded by the plain policy language. An undefined term in an insurance policy, such as “any other policy” in the Liberty Umbrella Policy, “must be given its ‘plain, ordinary, and popular’ meaning.” *Holden v. Farmers Ins. Co. of Washington*, 169 Wn.2d 750, 756, 239 P.3d 344 (2010) (quoting *Kitsap County v. Allstate Ins. Co.*, 136 Wn.2d 567, 576, 964 P.2d 1173 (1998)). Washington courts have properly afforded the term “any” an expansive interpretation when used in insurance policies. *See, e.g., Spratt v. Crusader Ins. Co.*, 109 Wn. App. 944, 951, 37 P.3d 1269 (2002) (interpreting “any” to mean “whatever kind or quantity” and “ALL”) (quoting WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 210 (1993)). Courts have therefore afforded the phrase “any other insurance providing coverage” an appropriately broad interpretation. *See, e.g., JPI West Coast Constr. v. RJS & Assoc., Inc.*, 68 Cal. Rptr. 3d 91, 156 Cal. App. 4th 1448 (2007) (holding that other policy on which insured was “additional insured” fell within the meaning of “any other insurance providing coverage”). In short, “any” means any.

This Court should apply the plain language of Liberty’s umbrella Policy as written, and should not insert a temporal limitation into the policy language where it has been omitted. *Quadrant*, 154 Wn.2d at 171 (holding “if the policy language is clear and unambiguous, we must enforce it as written; we may not modify it”). This interpretive rule applies with particular force where, as here, a temporal limitation was explicitly included in other provisions of the Liberty Policy, but conspicuously omitted from Section III.A, governing the duty to defend. For example, such a temporal qualification is explicitly provided in Section II.G:

We will be liable only for that portion of damages, subject to the Each Occurrence Limit stated in the Declarations, in excess of the “retained limit,” which is the greater of:

1. the total amounts stated as the applicable limits of the underlying policies listed in the Schedule of Underlying Insurance and the applicable limits of *any other insurance providing coverage to the “Insured” during the Policy Period*; or
2. the amount stated in the Declarations as Self-Insured Retention as a result of any one “occurrence” not covered by the underlying policies listed in the Schedule of Underlying Insurance nor by *any other insurance providing coverage to the “Insured” during the Policy Period . . . .*

(CP 315 (emphasis added).) If the phrase “any other policy” in Section III.A was limited to policies during the Liberty Policy’s own period, Section III.A would include the phrase “during the Policy Period” like

Section II.G. It does not, and this Court should not insert the phrase “during the Policy Period” where it has been omitted.

Liberty had no duty to defend Wellington pursuant to its umbrella policy because two primary insurers – Lloyd’s and National Fire – undisputedly provided coverage for the same occurrence, and paid all of Wellington’s defense costs. The trial court erred as a matter of law in failing to dismiss National Fire’s claim for contribution to defense costs against Liberty.

V. CONCLUSION

This Court should reverse the trial court’s grant of summary judgment, and remand for entry of judgment in favor of Liberty, dismissing National Fire’s claims against Liberty.

RESPECTFULLY SUBMITTED this 19 day of October  
2011.

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**CERTIFICATE OF SERVICE**

I, Terri L. Potter, under penalty of perjury under the laws of the State of Washington, that on October 19, 2011, I served a copy of the foregoing document on all counsel of record as indicated below:

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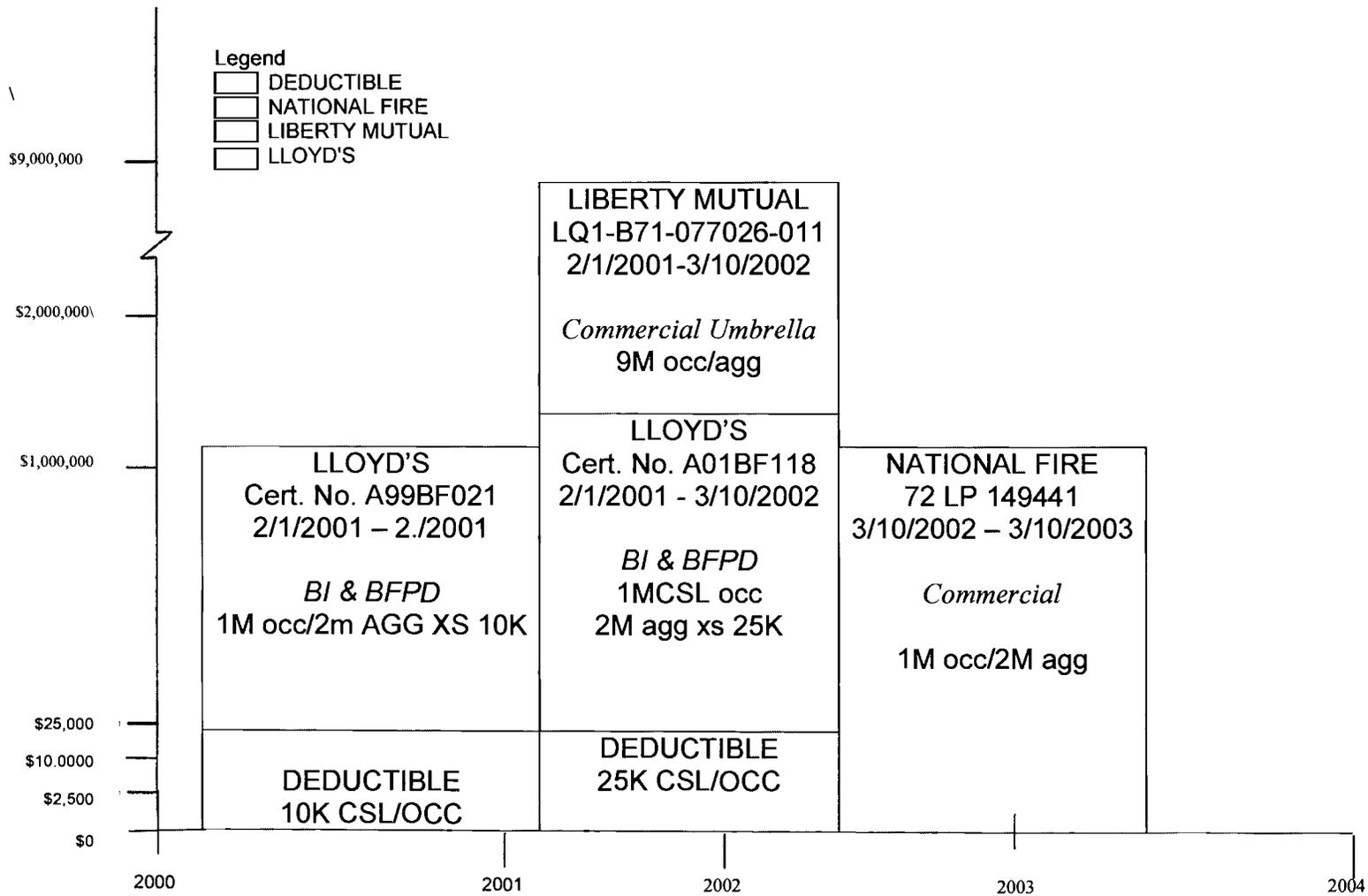
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Executed on this 19<sup>th</sup> day of October, 2011, at Seattle, Washington.

  
Terri L. Potter

APPENDIX A

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