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**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF ARIZONA**

Pinnacle Pines Community Association,  
Plaintiff,  
v.  
Everest National Insurance Company,  
Chartis Specialty Insurance Company,  
Defendants.

No. CV-12-08202-PCT-DGC

**ORDER**

Defendants Everest National Insurance Company (“Everest”) and Chartis Specialty Insurance Company (“Chartis”) have each filed a motion for summary judgment. Doc. 115, 117. Plaintiff Pinnacle Pines Community Association (“Pinnacle Pines”) has filed motions for summary judgment against Everest (Doc. 119) and Chartis (Doc. 120). Chartis has also filed a motion to strike Plaintiff’s rebuttal expert, which Everest has joined. Doc. 124. All motions have been fully briefed. For the reasons that follow, the Court will grant summary judgment for Defendants.<sup>1</sup>

**I. Background.**

Plaintiff is a homeowner’s association “comprised of members who own one or more of the duplexes located in Pinnacle Pines, a 60 unit duplex community in Flagstaff, Arizona.” Doc. 119 at 3. Pinnacle Pines was constructed and sold by Empire Residential

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<sup>1</sup> Defendants’ requests for oral argument are denied because the issues have been fully briefed and oral argument will not aid the Court’s decision. *See* Fed. R. Civ. P. 78(b); *Partridge v. Reich*, 141 F.3d 920, 926 (9th Cir. 1998).

1 Construction, L.P. and Empire Residential Sales, L.P. (“Empire” or the “Empire  
2 entities”) between 2006 and 2008. *Id.* Shortly after construction ceased in 2008,  
3 problems began to arise, including “drainage issues, driveway defects and significant  
4 roof, deck, and door leaks.” *Id.* These construction defects caused mold and mildew  
5 damage in several of the duplexes, leaky sliding glass doors, “rampant” wood rot,  
6 cracking and uneven walkways, and driveways that become icy and dangerous during the  
7 winter due to improper drainage. *Id.* Plaintiff alleges that all units and common areas  
8 were damaged as a result of Empire’s defective construction, and “elected to pursue  
9 Empire for property damage[.]” *Id.* at 4. The Empire entities filed for bankruptcy  
10 protection in April 2008. *Id.* Plaintiff obtained relief from the automatic stay and served  
11 notice of the defects on Empire in February 2010. *Id.* In its order lifting the automatic  
12 stay, “the bankruptcy court approved an assignment to [Plaintiff] of all coverage rights  
13 Empire may have against any insurance carriers arising out of the Pinnacle Pines  
14 construction defect claims.” *Id.*

15 Plaintiff and Empire then arbitrated the construction defect claims, resulting in an  
16 award of \$1,371,220.33 in favor of Plaintiff and against Empire. *Id.* at 5. The award  
17 consisted of \$920,521 in compensatory damages, \$276,156.30 in attorneys’ fees,  
18 \$165,000 in expert witness fees, and \$9,543.03 for arbitration costs. *Id.* The Coconino  
19 County Superior Court entered judgment on September 11, 2013, confirming the  
20 arbitration award. *Id.* Plaintiff filed this action to collect on the judgment against  
21 Defendants, Empire’s excess insurers. *Id.* Both Everest and Chartis contend that they are  
22 not required to pay any portion of the arbitration award.

23 **A. The Everest Policy.**

24 The Everest Policy is a “commercial excess liability policy” that covers “the  
25 ultimate net loss in excess of the ‘underlying limits of insurance’ to which [the Everest  
26 Policy] applies.” Doc. 115 at 5. The underlying insurance policy was a “wrap policy”  
27 issued by Lexington Insurance Company. *Id.* at 4. The Lexington wrap policy (“LWP”)  
28 was effective from May 31, 2007 to June 30, 2008. *Id.* The Everest Policy “follows the

1 terms, definitions, conditions, and exclusions that are contained” in the LWP, and Everest  
2 alleges that the coverage under its policy “will not be broader than the coverage provided  
3 by the [LWP].” *Id.* at 5. The terms of the LWP state that it “applies to ‘bodily injury’  
4 and ‘property damage’ which is not included in the ‘products-completed operations  
5 hazard’ only if: (1) the ‘bodily injury’ or ‘property damage’ is caused by an ‘occurrence’  
6 that takes place in the ‘coverage territory’; and (2) the ‘bodily injury’ or ‘property  
7 damage’ occurs during the policy period.” Doc. 116-1 at 43. The LWP is subject to a  
8 \$250,000 self-insured retention. Doc. 115 at 5. Its \$5,000,000 coverage limits have been  
9 exhausted. *Id.*; Doc. 119 at 7.

10 **B. The Chartis Policy.**

11 The Chartis Policy is a commercial umbrella policy which was effective from  
12 June 1, 2004 through June 1, 2007. Doc. 117 at 3. Chartis alleges that its policy provides  
13 for a “Retained Limit of \$1 Million per Occurrence.” *Id.* at 3. The Chartis Policy defines  
14 “occurrence” with respect to bodily injury or property damage as “an accident, including  
15 continuous or repeated exposure to conditions,” resulting in bodily injury or property  
16 damage as defined by the policy that is “neither expected nor intended from the  
17 standpoint of the Insured.” *Id.*, Doc. 118-3 at 7. “Property Damage” is defined as:  
18 (1) “physical injury to tangible property, including all resulting loss of use of that  
19 property. All such loss of use shall be deemed to occur at the time of the physical injury  
20 that caused it; or” (2) “Loss of use of tangible property that is not physically injured. All  
21 such loss shall be deemed to occur at the time of the Occurrence that caused it.”  
22 Doc. 117 at 3, Doc. 118-3 at 8.

23 The Chartis Policy excludes “Property Damage” arising out of “[a] defect,  
24 deficiency, inadequacy, or dangerous condition in” the insured’s product or work as  
25 defined by the policy. Doc. 117 at 4, Doc. 118-3 at 9. The Chartis Policy defines  
26 “Products-Completed Operations Hazard” as all “Bodily Injury” and “Property Damage”  
27 “occurring away from premises” owned or rented by the insured and “arising out of” the  
28 insured’s product or work, excluding products that are still in the physical possession of

1 the insured, and “work that has not yet been completed or abandoned.” Doc. 118-3 at 8,  
2 Doc. 120 at 6. Work is completed under the policy “when all work called for in [the  
3 insured’s] contract has been completed,” “when all of the work to be done at the site has  
4 been completed if [the] contract calls for work at more than one site,” and “when that part  
5 of the work done at a job site has been put to its intended use by any person or  
6 organization other than another contactor or subcontractor working on the same project.”  
7 Doc. 118-3 at 8, Doc. 120 at 6.

## 8 **II. Legal Standard.**

9 A party seeking summary judgment “bears the initial responsibility of informing  
10 the district court of the basis for its motion, and identifying those portions of [the record]  
11 which it believes demonstrate the absence of a genuine issue of material fact.” *Celotex*  
12 *Corp. v. Catrett*, 477 U.S. 317, 323 (1986). Summary judgment is appropriate if the  
13 evidence, viewed in the light most favorable to the nonmoving party, shows “that there is  
14 no genuine dispute as to any material fact and the movant is entitled to judgment as a  
15 matter of law.” Fed. R. Civ. P. 56(a). Only disputes over facts that might affect the  
16 outcome of the suit will preclude the entry of summary judgment, and the disputed  
17 evidence must be “such that a reasonable jury could return a verdict for the nonmoving  
18 party.” *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

19 “Generally, the insured bears the burden to establish coverage under an insuring  
20 clause, and the insurer bears the burden to establish the applicability of any exclusion.”  
21 *Keggi v. Northbrook Prop. and Cas. Ins. Co.*, 13 P.3d 785, 788 (Ariz. Ct. App. 2000)  
22 (citation omitted). In interpreting an insurance contract, courts “give words their  
23 ordinary, common sense meaning,” and view language used “from the standpoint of the  
24 average layman who is untrained in the law or insurance.” *Aztar Corp. v. U.S. Fire Ins.*  
25 *Co.*, 224 P.3d 960, 966 (Ariz. Ct. App. 2010) (citations omitted). An insurance policy  
26 must also “be construed according to the entirety of its terms and conditions as set forth  
27 in the policy.” A.R.S. § 20-1119. If a clause appears ambiguous, courts interpret it “by  
28 looking to legislative goals, social policy, and the transaction as a whole.” *First Am. Title*

1 *Ins. Co. v. Action Acquisitions, LLC*, 187 P.3d 1107, 1110 (Ariz. 2008).

2 **III. Analysis.**

3 **A. Everest Policy.**

4 **1. Reservation of Rights.**

5 Plaintiff argues that Everest should be estopped from contesting coverage because  
6 it failed to send a reservation of rights letter. Doc. 134 at 14-15. Everest responds that it  
7 was not required to send such a letter. Doc. 138 at 10. As support for its position,  
8 Plaintiff cites *Farmers Insurance Company of Arizona v. Vagnozzi*, 675 P.2d 703, 706  
9 (Ariz. 1983), which it argues binds Everest to the result of the underlying arbitration.  
10 Doc. 134 at 14-15. *Vagnozzi*, however, actually supports Everest’s position. *Vagnozzi*  
11 recognized that when an “insurance company refused to defend an action under  
12 circumstances where it has a duty to defend, it is bound under the doctrine of collateral  
13 estoppel by the facts determined,” but noted that a “party will not be precluded from  
14 litigating policy coverage in a subsequent proceeding if the question of coverage turns on  
15 facts which are nonessential to the judgment of tort liability[.]” 675 P.2d at 705 (citing  
16 *Fuller v. Hartford Accident & Indem. Co.*, 601 P.2d 1360 (Ariz. Ct. App. 1979)).  
17 Assuming without deciding that Everest would be bound by the facts litigated in the  
18 underlying arbitration, it is not estopped from litigating policy coverage issues that were  
19 not addressed in the arbitration. Because the coverage issues in this case turn largely on  
20 facts that were not determined in the arbitration, the Court concludes that Everest was not  
21 required to send a reservation of rights letter in order to preserve its ability to litigate  
22 coverage.

23 **2. Self-Insured Retention.**

24 Everest contends that the LWP is subject to a \$250,000 self-insured retention  
25 (“SIR”) for each occurrence and that Plaintiff has not provided evidence that Empire  
26 satisfied the SIR in this case. Doc. 115 at 8. Plaintiff counters that an unsatisfied SIR is  
27 a policy exclusion that must be established by the insurer. Doc. 134 at 5 (citing *Venissat*  
28 *v. St. Paul Fire & Marine Co.*, 968 So.2d 1063, 1074 (La. App. 3 Cir. 2007)).

1           The parties cite no Arizona authority on whether the insurer or the insured bears  
2 the burden of proving a SIR has been satisfied, and the Court has been unable to locate  
3 any such authority. The *Venissat* case cited by Plaintiff is unconvincing because it cites a  
4 Louisiana standard holding that the insurer bears the burden of establishing any policy  
5 *limits* or exclusions. 968 So.2d at 1074. Arizona law imposes the burden on insurers to  
6 establish the applicability of *exclusions*. *Keggi*, 13 P.3d at 788. The question, then, is  
7 whether the SIR can be considered a policy exclusion.

8           Plaintiff cites no support for its assertion that the SIR is an exclusion under the  
9 LWP, and the language of the LWP suggests that it is not. Section I.A of the LWP  
10 describes the policy’s coverage for property damage and section I.A.2 sets forth  
11 exclusions from that coverage. Doc. 116-1 at 45. The exclusions describe specific risks  
12 not covered, such as those arising from intentional injury, liquor liability, pollution, and  
13 war. *Id.* at 45-54. The SIR is not listed among the exclusions. *Id.* Instead, the SIR is  
14 listed later in the policy as one of the “Conditions Precedent to Coverage.” *Id.* at 71.  
15 Specifically, the policy states that, “[a]s [a] condition[] precedent to coverage,” the  
16 insured must “[p]ay any amounts due or owed under the Retained Amount.” *Id.* Given  
17 this clear language and the absence of an Arizona policy to the contrary, the Court cannot  
18 conclude that the SIR is an exclusion that must be established by the insurer.

19           Plaintiff argues that the insurance coverage remains in place even if Empire did  
20 not satisfy the SIR, and that the amount of the SIR can simply be offset against the  
21 judgment. Doc. 134 at 5. As support, Plaintiff cites *Anderson v. Everest Nat. Ins. Co.*, --  
22 F. Supp. 2d --, 2013 WL 6179419, at \*5 (D. Ariz. Nov. 26, 2013), but *Anderson* did not  
23 hold that an unsatisfied SIR could be offset against a judgment. Rather, *Anderson* denied  
24 a motion to dismiss because the plaintiffs “allege[d] in their complaint that the underlying  
25 insurance is exhausted” and factual issues precluded granting of the motion to dismiss.  
26 *Id.* *Anderson* did not discuss the concept of offset.

27           Plaintiff also argues that courts in other jurisdictions have held that “it would  
28 offend public policy to permit an insurer to avoid its obligations for a judgment in excess

1 of the SIR when an insured cannot satisfy the SIR due to bankruptcy.” Doc. 134 at 6  
2 (citing cases). In each of Plaintiff’s cited cases, however, the courts considered the  
3 state’s public policy or statute prohibiting an insurer from refusing to pay where the  
4 insured could not satisfy the SIR due to bankruptcy or insolvency. *See Rosciti v. Ins. Co.*  
5 *of Pa.*, 659 F.3d 92, 97-98 (1st Cir. 2011) (considering Rhode Island’s public policy “to  
6 prevent insurance companies from avoiding their obligations when an insolvent insured  
7 cannot make an expenditure towards discharging liability”); *Albany Ins. Co. v. Bengal*  
8 *Marine, Inc.*, 857 F.2d 250, 255 (5th Cir. 1988) (discussing a Louisiana statute which  
9 provides that “the insolvency or bankruptcy of the insured shall not release the insurer  
10 from the payment of damages”); *Home Ins. Co. of Ill. v. Hooper*, 691 N.E.2d 65, 70 (Ill.  
11 Ct. App. 1998) (discussing an Illinois statute which guaranteed “that the insolvency or  
12 bankruptcy of the insured will not release the insurer from payment of damages”); *In re*  
13 *Federal Press Co.*, 104 B.R. 56, 62 (Bankr. N.D. Ind. 1989) (considering an Indiana  
14 statute requiring “insurance policies issued in Indiana to contain a provision preventing  
15 the insolvency or bankruptcy of the insured from releasing the insurance carrier from  
16 liability under the policy”).

17 Plaintiff has not identified – and the Court has not found – such a statute or public  
18 policy in Arizona. In the absence of Arizona law or policy prohibiting an insurer from  
19 refusing to pay where an insured is unable to satisfy a policy’s SIR due to bankruptcy or  
20 insolvency, the Court must apply the LWP and Everest Policy by looking to the  
21 “ordinary, common sense meaning” of the policy language. *See Aztar Corp.*, 224 P.3d at  
22 966; *see also Pak-Mor Mfg. Co. v. Royal Surplus Lines Ins. Co.*, No. SA-05-CA-135-RF,  
23 2005 WL 3487723, at \*5-\*6 (W.D. Tex. Nov. 3, 2005) (distinguishing *Hooper* and  
24 *Albany Insurance Company* and interpreting an insurance policy based on “the plain  
25 meaning of the words” because “[u]nder Texas law, insurers are free to issue policies that  
26 relieve them of liability in the bankruptcy context”).

27 The LWP contains a bankruptcy provision: “The bankruptcy or insolvency of you  
28 or your estate will not relieve us of our obligations under this policy.” Doc. 116-1 at 67.

1 The LWP defines “you” as the “Named Insured” (*id.* at 16), which in this case is Empire  
2 (*id.* at 4, 15). Thus, the LWP and the Everest Policy specifically provide that the  
3 insolvency of Empire does not relieve Everest of its insurance obligation.

4 The bankruptcy provision further states that “[i]n the event there is insurance,  
5 whether or not applicable to an ‘occurrence’, offense, claim, or ‘suit’ within the Retained  
6 Amount, you [Empire] will continue to be responsible for the full amount of the Retained  
7 Amount before the Limits of Insurance under this policy apply.” *Id.* at 67. This provision  
8 suggests that Empire remains responsible for the full amount of the SIR even if it  
9 becomes bankrupt, but only “[i]n the event there is insurance.” The “insurance” referred  
10 to in this sentence is not specified, but the following clause – “whether or not applicable  
11 to an ‘occurrence’, offense, claim, or ‘suit’ within the Retained Amount” – suggests that  
12 it is insurance related to the Retained Amount, the SIR. Because the sentence provides  
13 that the insured remains responsible for the full amount of the SIR regardless of  
14 bankruptcy only “[i]n the event” there is such insurance, the Court cannot accept  
15 Everest’s argument that the insured remains responsible for the SIR in all events, even  
16 when there is no insurance that would cover the SIR. Such a reading would mean that  
17 Everest can escape liability under the policy if the insured is unable to pay the SIR due to  
18 bankruptcy, a result clearly inconsistent with the first sentence of the bankruptcy  
19 provision. Because the parties do not suggest that Empire had insurance coverage for the  
20 SIR in this case, this sentence provides no escape hatch for Everest.

21 The bankruptcy provision also states that the insured’s inability to pay the SIR will  
22 not increase the insurer’s obligation under the policy. *Id.* The Court reads this provision  
23 to mean that the insurer cannot be required to pay the amount otherwise within the SIR;  
24 the insurer’s obligation applies only to losses in excess of the SIR. This provision would  
25 suggest that the amount of the SIR, if not paid, should be offset against any recovery  
26 from Everest to ensure that Everest’s obligations under the policy are not increased.

27 Given the language of the bankruptcy provision, the Court concludes that the  
28 bankruptcy of Empire and Empire’s resulting inability to pay the SIR do not absolve

1 Everest from its responsibility to provide insurance coverage. The Court therefore  
2 declines to grant summary judgment for Everest for nonpayment of the SIR.

3 **3. Existence of Coverage.**

4 Everest next argues that Plaintiff must prove the existence of property damage  
5 caused by an “occurrence” that took place in the “coverage territory,” which arose out of  
6 work performed on a designated project during the policy period, and that the “property  
7 damage” occurred after the inception of the policy and prior to the time within which  
8 Plaintiff can bring suit under the policy. Doc. 115 at 8-9. Everest contends that Plaintiff  
9 has failed to do so because construction at Pinnacle Pines began in 2006, but the LWP  
10 and Everest Policy did not come into force until May 31, 2007. *Id.* at 9. Plaintiff  
11 responds that the relevant date for coverage is the date that a plaintiff sustains actual  
12 damage, and argues that insurers must provide coverage for damage that occurs during  
13 the policy period even if it was preceded by other similar damage. Doc. 134 at 7 (citing  
14 *Lennar Corp. v. Auto-Owners Ins. Co.*, 151 P.3d 538, 548 (Ariz. Ct. App. 2007)). It  
15 argues that the “evidence unequivocally proves property damage manifested during the  
16 coverage period, after the expiration of the policy, or after the date of the close of  
17 escrow,” and that coverage under the Everest Policy is therefore triggered. *Id.*

18 The LWP provides, with regard to individual units of construction, that property  
19 damage included in the products-completed operations hazard is covered if all of the  
20 following conditions are met: (1) the property damage is caused by an occurrence that  
21 takes place in the coverage territory; (2) the property damage arises out of a construction  
22 defect attributable to work performed on the designated project during the policy period;  
23 and (3) the construction defect manifests “on or after the expiration of this policy or the  
24 date of close of escrow of the individual unit, whichever occurs first,” but prior to the  
25 time within which a claimant can bring suit or prior to ten years after the expiration of  
26 this policy or close of escrow, whichever occurs first. Doc. 116-1 at 44. Coverage  
27 requirements for property damage to common areas are similar. *Id.*

28 The Everest Policy expired in May 2008, less than ten years ago. Everest does not

1 contend that the “time within which a claimant can bring ‘suit’” has expired. Plaintiff has  
2 alleged the existence of property damage to both individual units and common areas that  
3 occurred within ten years of the expiration of the policy and prior to the expiration of the  
4 statute of limitations for construction defect claims.

5 The existence of coverage, then, turns on whether Plaintiff can show that the  
6 alleged property damage arises out of a construction defect attributable to work  
7 performed on the project during the policy period. Doc. 116-1 at 44. On this point,  
8 Plaintiff presents the inspection record for Lot 3, which appears to show that various  
9 inspections were conducted at Lot 3 after July 27, 2007. Doc. 121-3 at 2. Plaintiff also  
10 filed a supplement to its statement of facts which included the inspection records for  
11 twelve additional lots. Doc. 144-2. Of these inspection records, only ten lots, namely  
12 Lots 11, 12, 13, 14, 22, 23, 81, 82, 83 and 84, had any inspections conducted after  
13 May 31, 2007, the effective date of the policy. Doc. 144-2 at 2-7, 10-13. Plaintiff then  
14 presents a “Defect List and Repair Recommendations” which catalogs construction  
15 defects noted at various individual units at Pinnacle Pines. See Doc. 121-1. Of the  
16 eleven lots for which Plaintiff has presented an inspection record showing that at least  
17 one inspection occurred during the policy period, only six were noted to have  
18 construction defects: Lots 3, 12, 13, 14, 81, and 82.<sup>2</sup>

19 Although Plaintiff contends generally that Pinnacle Pines was constructed between  
20 2006 and 2008, the inspection records for these six lots, without more, are not evidence  
21 that work was performed on these units during the LWP and Everest Policy periods. The  
22 inspection records are evidence of the dates on which inspections were performed, but  
23 they do not show when work was performed. Plaintiff has presented no other evidence  
24 from which a trier of fact could determine when work on these six allegedly defective  
25 units was actually performed. The “Defect List and Repair Recommendations” catalogs

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26  
27 <sup>2</sup> See Lot 3 (Doc. 121-1 at 5, 17, 23, 26, 28, 31, 50, 51); Lot 12 (*id.* at 14, 17, 20,  
28 23, 26, 42, 49, 50); Lot 13 (*id.* at 5, 6, 11, 14, 17, 20, 23, 26, 28, 31, 42, 46, 47, 48, 50,  
51); Lot 14 (*id.* at 5, 6, 17, 20, 23, 26, 34, 37, 40, 42, 45, 46, 48, 52); Lot 81 (*id.* at 5, 6,  
17, 23, 26, 28, 52); and Lot 82 (*id.* at 5, 6, 17, 20, 23, 26, 28, 31, 49, 50, 52).

1 construction defects at various units, but contains no information as to when work on the  
2 units was performed. *See* Doc. 121-1. Plaintiff also submits a “Preliminary Forensic  
3 Geotechnical Investigation” which catalogs damage and defects involving driveways,  
4 sidewalks, and roads (Doc. 121-2), but this document contains no information about  
5 when work on the driveways, sidewalks, and roads was actually performed. Plaintiff’s  
6 statement of facts cites frequently to its arbitration brief (Doc. 116-1 at 185-203) as  
7 evidence of property damage, but Plaintiff has not submitted any of the exhibits  
8 referenced in its arbitration brief and Plaintiff’s arbitration brief is not evidence that work  
9 was performed during the policy period. Plaintiff also presents a spreadsheet purporting  
10 to show the dates that warranty deeds were recorded for various units at Pinnacle Pines  
11 (Doc. 121-4), but this spreadsheet contains the dates that deeds were recorded and does  
12 not show when work was performed on any of the allegedly defective units.

13 Plaintiff purports to set forth Lot 45 as an “example of the issues plaguing  
14 Pinnacle Pines” (Doc. 121, ¶ 47), and submits the purchase agreement for Lot 45  
15 (Doc. 121-6). Plaintiff admits, however, that the roof on Lot 45 was constructed between  
16 January 1, 2006 and December 27, 2006 – outside the relevant policy period. *Id.* This is  
17 also not evidence that any work was performed during the policy period. Additionally,  
18 Plaintiff’s supplemental statement of facts includes a “Report on Job Site Conditions”  
19 dated August 29, 2006 (Doc. 144-1 at 2), but this is not evidence that any work was  
20 performed during the policy period.

21 The only other evidence presented by Plaintiff, aside from the insurance policies  
22 themselves, is a rebuttal expert report. Doc. 136-1.<sup>3</sup> This report, however, is largely an  
23 opinion as to the exposure of Empire’s insurance carriers for property damage at Pinnacle  
24 Pines and contains nothing from which a trier of fact could determine when work was  
25 performed on any of the defective units.

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26  
27 <sup>3</sup> The Court notes that Defendants have filed a motion to strike Plaintiff’s rebuttal  
28 expert report. Doc. 124. The Court concludes that it need not decide the motion to strike  
because, in any event, the expert report contains no evidence that would preclude the  
entry of summary judgment.

1 In sum, Plaintiff has presented no evidence from which a reasonable jury could  
2 conclude that work on these allegedly damaged units was performed during the Everest  
3 Policy period. Plaintiff likewise has not produced evidence that work on any common  
4 areas was performed during the Everest Policy period.

5 Summary judgment is appropriate against a party who “fails to make a showing  
6 sufficient to establish the existence of an element essential to that party’s case, and on  
7 which that party will bear the burden of proof at trial.” *Celotex*, 477 U.S. at 322.  
8 Because Plaintiff has failed to produce evidence that any of its alleged property damage  
9 is attributable to construction defects arising out of work performed during the policy  
10 period, which is an essential element of its case, the Court will enter summary judgment  
11 in favor of Everest with respect to all portions of the Pinnacle Pines development.

12 **B. The Chartis Policy.**

13 **1. Applicability of Retained Limit.**

14 Chartis contends that it is entitled to summary judgment because Plaintiff has  
15 presented no evidence that its \$1 million retained limit has been satisfied. Doc. 117 at 6.  
16 Plaintiff argues that the retained limit does not apply to Pinnacle Pines. Doc. 135 at 5-6.

17 The \$1 million retained limit appears on the final page of the “Retained Limit  
18 Amendatory Endorsement,” which is Endorsement 10 of the Chartis Policy. Doc. 121-7  
19 at 30-33. The first page of the endorsement states that “[w]e will be liable only for that  
20 portion of damages in excess of the limits in the Schedule of Retained Limits[.]” *Id.* at  
21 30. The “Schedule of Retained Limits” appears on the fourth page of the endorsement. It  
22 begins by listing a \$1 million retained limit for “Each and Every Occurrence” for  
23 “General Liability” and “Products/Completed Operations Self Insured Retention.” *Id.* at  
24 33. The Schedule then states, twice, that: “THE FOLLOWING RETENTION APPLIES  
25 TO THE FOLLOWING PROJECT(S) ONLY,” and lists several Empire projects not  
26 including Pinnacle Pines. *Id.* Both of these additional sections specifies that defense  
27 costs do not erode the retained limit, and one includes retained limits of \$1 million for  
28 each occurrence and \$1 million for each accident and each employee policy limit. *Id.*

1 Plaintiff argues that the retained limit does not apply in this case because Pinnacle  
2 Pines is not listed in the Schedule. Chartis argues that Plaintiff’s interpretation ignores  
3 the meaning of the word “following.” Doc. 132 at 11. Chartis asserts that the General  
4 Liability retained limit of \$1 million appears at the outset of the Schedule and the lists of  
5 properties appear only after references to “the following retention,” which cannot include  
6 the preceding retention. *Id.* at 11-13.

7 The Court agrees with Chartis. The Schedule begins with a \$1 million retention  
8 that is not limited to any particular properties. Doc. 121-7 at 33. The Schedule then  
9 states that the “following” retention applies to the “following” properties, and lists  
10 several properties, with some additional information regarding their retentions – that  
11 defense costs do not erode retained limits and some additional retained limits that apply  
12 to each accident and each employee. *Id.* The Court cannot conclude that the initial  
13 retained limit of \$1 million is somehow limited because the Schedule later refers to other  
14 retained limits and properties that “follow.” The Court concludes that the \$1 million  
15 retained limit applies to the “General Liability” and “Products/Completed Operations”  
16 covered by the insurance policy, including Plaintiff’s coverage.<sup>4</sup>

17 **2. Property Damage.**

18 Chartis argues that Plaintiff bears the “burden of establishing that there is more  
19 than at least \$1 Million in Property Damage that took place between June 1, 2004 and  
20 June 1, 2007.” Doc. 117 at 6. As noted above, the Chartis policy provides that “[w]e  
21 will be liable only for that portion of damages in excess of the limits in the Schedule of  
22 Retained Limits[.]” Doc. 121-7 at 30. Elsewhere, the policy provides that Chartis “will  
23 pay on behalf of the [i]nsured those sums in excess of the Retained Limit that the  
24 [i]nsured becomes legally obligated to pay by reason of liability imposed by law or

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25  
26 <sup>4</sup> The Court agrees that the Schedule is not entirely clear. The first reference to a  
27 “following retention” identifies no new or different retention. It does state that defense  
28 costs do not erode the retention, language that does not appear in the retained limit at the  
start of the Schedule, but the absence of an actual new retained limit amount is somewhat  
confusing. This ambiguity, however, concerns the terms of “the following retention,” not  
the retained limit set forth at the beginning of the Schedule. Under no circumstances can  
the Court conclude that the word “following” really means “preceding.”

1 assumed by the [i]nsured under an Insured Contract because of . . . Property Damage[.]”  
2 Doc. 120 at 5. Thus, even if Chartis is liable to Plaintiff under the policy, it is liable only  
3 for property damage incurred by Plaintiff in excess of \$1 million.

4 Plaintiff asserts that the Chartis policy covers “Property Damage” (Doc. 120 at 5-  
5 6, 8-9), and that the Court “needn’t relitigate issues previously adjudicated in a binding  
6 arbitration” (Doc. 120 at 8). But the fact that Plaintiff received an arbitration award of  
7 \$1,371,220.33 does not establish that the entire amount constituted property damage  
8 under the Chartis Policy. To the contrary, Plaintiff acknowledges that the award includes  
9 \$920,521.00 in compensatory damages, \$276,156.30 in attorneys’ fees, \$165,000 in  
10 expert witness fees, and \$9,543.03 for reimbursement of costs. *Id.* at 5. Although  
11 Plaintiff does request attorneys’ fees for its litigation expenses in this case, those fees  
12 would be recoverable under Arizona law only if Plaintiff prevails in establishing that  
13 Chartis is liable to it for property damage. *See* A.R.S. § 12-341.

14 Plaintiff does not contend that Chartis would be responsible under the terms of its  
15 policy for paying the attorneys’ fees, expert witness fees, or costs incurred in the  
16 underlying arbitration, but rather cites to *Desert Mountain Properties Limited*  
17 *Partnership v. Liberty Mutual Fire Insurance*, 236 P.3d 421, 436-37 (Ariz. Ct. App.  
18 2010), for the proposition that it is entitled to fees and costs from the arbitration.  
19 Doc. 120 at 13. In *Desert Mountain*, the court awarded fees based on the principle that  
20 “when one party’s breach of contract places the other in a situation that ‘makes it  
21 necessary to incur expense to protect his interest, such costs and expenses, including  
22 attorneys’ fees should be treated as the legal consequences of the original wrongful act  
23 and may be recovered as damages.’” 236 P.3d at 436 (quoting *Fairway Builders Inc. v.*  
24 *Malouf Towers Rental Co.*, 603 P.2d 513, 529 (Ariz. Ct. App. 1979)). The underlying  
25 arbitration dealt with the liability of the Empire entities for construction defects and did  
26 not concern a breach of contract by Chartis. This authority is therefore not applicable.  
27 Without the arbitration-related fees and expenses, the maximum portion of the arbitration  
28 award that could include covered property damage would be the \$920,521.00 in

1 compensatory damages, which is less than the Chartis Policy's \$1 million retained limit.  
2 Plaintiff thus has presented no evidence from which a trier of fact could conclude that  
3 Chartis is liable to Plaintiff for property damage under the policy.

4 Finally, although Plaintiff does not contend that Chartis failed to send a  
5 reservation of rights letter, it does argue that Chartis "should be barred from denying  
6 coverage because it is not entitled to contest the factual or legal basis for the underlying  
7 Judgment in which it participated." Doc. 143 at 8. As discussed above, however, an  
8 insurer is not precluded from litigating policy coverage if that question turns on facts  
9 which were not determined in the prior action. *See Vagnozzi*, 675 P.2d at 705. Plaintiff  
10 has presented no evidence that the applicability of the Retained Limit of the Chartis  
11 Policy was litigated in the underlying arbitration. The Court will therefore grant  
12 summary judgment for Chartis.

13 **IT IS ORDERED** that Defendants' motions for summary judgment (Docs. 115,  
14 117) are **granted**. Plaintiff's motions for summary judgment (Docs. 119, 120) are  
15 **denied**. Defendant's motion to strike (Doc. 124) is **denied as moot**. The Clerk is  
16 directed to terminate this action.

17 Dated this 9th day of May, 2014.

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21 \_\_\_\_\_  
22 David G. Campbell  
23 United States District Judge  
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