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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

FIREMAN'S FUND INSURANCE)
COMPANY,)
)
Plaintiff,)
)
v.)
)
UNITED STATES FIDELITY AND)
GUARANTY COMPANY; ST PAUL)
MARINE AND FIRE INSURANCE)
COMPANY; TRAVELERS CASUALTY)
AND SURETY COMPANY; and)
TRAVELERS PROPERTY CASUALTY)
INSURANCE COMPANY,)
)
Defendants.)

No. CV-09-263-HU

OPINION & ORDER

James M. Hillas
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4 Attorney for Defendants

5 HUBEL, Magistrate Judge:

6 Plaintiff Fireman's Fund Insurance Company brings this
7 indemnity, contribution, and subrogation action against defendants
8 United States Fidelity & Guaranty Company, St. Paul Marine & Fire
9 Insurance Company, Travelers Casualty & Surety Company, and
10 Travelers Property Casualty Insurance Company (collectively
11 "Travelers"). Defendants move to dismiss plaintiff's claims for
12 common law indemnity and equitable contribution.

13 All parties have consented to entry of final judgment by a
14 Magistrate Judge in accordance with Federal Rule of Civil Procedure
15 73 and 28 U.S.C. § 636(c). I deny the motion.

16 BACKGROUND

17 The following facts are taken from the First Amended
18 Complaint.

19 Grayco Resources, Inc. owned certain real property located at
20 737 SW 17th Avenue in Portland (referred to as "the Project").
21 From July 1, 1997, to June 30, 2000, Grayco obtained property
22 insurance coverage for the Project in three separate policies: (1)
23 from July 1, 1997 to June 30, 1998; (2) from July 1, 1998, to June
24 20, 1999; and (3) from July 1, 1999, to June 30, 2000. Each is
25 referred to separately in the singular ("Travelers Policy") and
26 collectively in the plural ("Travelers Policies").

27 Plaintiff began insuring the Project at the end of the final
28 Travelers Policy on July 1, 2000.

1 The Project was a five-story apartment building that was
2 substantially completed in early 1998. Following its completion,
3 water intrusion was observed inside the building which resulted in
4 the need for costly periodic maintenance of the Project. The
5 Project's general contractor and design team began efforts to
6 correct the water intrusion problem.

7 Grayco hired a research and design firm to conduct a pervasive
8 investigation of the Project. The firm reported its findings to
9 Grayco in August 2003. The findings showed that water damage had
10 occurred since construction and had deteriorated portions of the
11 Project to the point of imminent collapse.

12 Grayco notified Travelers and plaintiff of the results of its
13 investigation and made claims for the loss associated with the
14 property damage under the Travelers policies and plaintiff's
15 policies. Travelers refused and failed to pay Grayco for the loss.

16 In February 2005, plaintiff paid Grayco \$589,000 on account of
17 the loss. And, in connection with the loss, plaintiff incurred
18 legal expenses of \$18,319.24. As a result, the total amount paid
19 by plaintiff in connection with the loss is \$607,319.24 (referred
20 to as "Fireman's Fund Payment").

21 Plaintiff alleges that the claim it paid was a continuing loss
22 that had accrued during the period of time that Travelers insured
23 the Project, even though the extent of the damage suffered from the
24 continuing loss was not discovered until Grayco received the result
25 of its investigation in August 2003. As a result, plaintiff
26 contends, Travelers is legally required to reimburse plaintiff for
27 those monies that plaintiff paid to Grayco, their mutual insured,
28 on behalf of Travelers.

1 made a claim against Travelers under the Travelers Policies for the
2 loss, but Travelers wrongfully and without justification failed to
3 pay Grayco its claim arising out of such property damage. First
4 Am. Compl. at ¶ 13.

5 Travelers was under a continuing obligation to reimburse
6 Grayco for the property damage to the Project that accrued during
7 the term of the Travelers Policies even at such time that Fireman's
8 Fund commenced to insure the Project. Id. at ¶ 14. By paying the
9 full amount of Grayco's property damage claim in connection with
10 the Project, plaintiff discharged both its and Travelers' duties to
11 Grayco relative to the property damage claim. Id. at ¶ 15.

12 Because plaintiff paid money to Grayco for the benefit of
13 Travelers and discharged Travelers' liability under the terms and
14 conditions of the Travelers Policies, plaintiff contends it is
15 entitled to indemnification from Travelers for the amount of its
16 payment to Grayco on behalf of Travelers in an amount to be
17 determined at trial, but not less than \$220,000. Id. at ¶ 16.

18 Defendants make two arguments in support of dismissing this
19 claim. First, they argue that plaintiff has not alleged that it
20 shared a "common," yet alone "identical" duty Travelers owed to
21 Grayco. Second, defendants contend that plaintiff does not claim,
22 as between plaintiff and Travelers, that Travelers should pay all
23 of the monies that plaintiff paid to Grayco.

24 Defendants rely solely on Safeco Insurance Company v. Russell,
25 170 Or. App. 636, 13 P.3d 519 (2000), in support of their first
26 argument. There, the plaintiff's insureds were in an automobile
27 accident with the defendant. Under the uninsured motorist (UM)
28 coverage of the insurance policy, the plaintiff paid its insureds

1 for their damages and injuries as a result of the accident. The
2 plaintiff then sued the defendant for common-law indemnity.

3 In its complaint, the plaintiff alleged that it was entitled
4 to indemnity because the defendant's "'fault is active, primary and
5 of a different character than the liability of plaintiff to [its
6 insureds], which is based on contract.'" Id. at 638, 13 P.3d at
7 520 (quoting Complaint; ellipsis and brackets omitted). The
8 Complaint also alleged that in "'comparing the fault or liability
9 of the parties, it is such that law and equity should require
10 defendant to indemnify plaintiff for the sums it paid to
11 [plaintiff's insureds].'" Id. (quoting complaint, brackets
12 omitted).

13 The trial court granted the defendant's motion to dismiss for
14 failure to state a claim. The court reasoned that the plaintiff
15 failed to allege facts sufficient to state a cause of action for
16 common law indemnity because the plaintiff failed to allege that
17 the plaintiff and the defendant had a common duty to a third party
18 in either tort or contract. Id.

19 On appeal, the parties agreed that because the plaintiff did
20 not file the action against the defendant until more than five
21 years after the accident, the basis for the plaintiff asserting an
22 indemnity claim was the plaintiff's need to assert a claim that was
23 not subject to the two-year statute of limitations that barred any
24 subrogated claim for negligence that the plaintiff might have had
25 against the defendant. Id. at 639, 13 P.3d at 520.

26 At the beginning of its discussion, the appellate court
27 described the plaintiff's argument on appeal as follows:

28 Plaintiff argues that the trial court erred in holding

1 that the parties must share "identical legal duties to a
2 third party in order for indemnity to be available."
3 According to plaintiff, such a rule would undermine the
4 equitable nature of common-law indemnity, which is
5 designed to shift a loss to the party who, in fairness,
6 ought to bear it. For the following reasons, we conclude
7 that the trial court did not err.

8 Id.

9 The court then stated the standard for a common-law indemnity
10 claim:

11 In an action for common-law indemnity, the claimant
12 must allege and prove that (1) he or she has discharged
13 a legal obligation owed to a third party; (2) the
14 defendant was also liable to the third party; and (3) as
15 between the claimant and the defendant, the obligation
16 should be discharged by the latter. Fulton Ins. v. White
17 Motor Corp., 261 Or. 206, 493 P.2d 138 (1972) (relying on
18 rule stated in Restatement of the Law of Restitution § 76
19 at 331 (1937)).

20 * * *

21 [I]t is not enough that the parties are each liable to
22 plaintiff's insureds. In order to trigger a right of
23 indemnity, their liability must also depend on a common
24 duty. The test stated in Fulton must be understood
25 accordingly.

26 Id. at 639, 640, 13 P.3d at 520, 521.

27 The court of appeals concluded that the common-law indemnity
28 claim should be dismissed for failure to meet the second element-
29 that "the parties did not owe a common duty to plaintiff's
30 insureds[.]" Id. at 641, 13 P.3d at 521. The court explained that
31 the plaintiff's relationship to its insureds was based on
32 principles of contract which were distinct from the duty of care
33 that the defendant owed the insureds in tort. Id. "A UM insurer
34 such as plaintiff is entitled to subrogation against an alleged
35 tortfeasor based on the contract with its insured." Id. But,
36 without a common duty, no common law indemnity claim could be
37 sustained.

1 Based on Safeco, defendants here argue that parties to a
2 common-law indemnity claim must owe an "identical" duty to a third
3 party. Plaintiff responds that the "identical" language is taken
4 from the court's description of the plaintiff's argument in Safeco,
5 and is not the law which requires a "common" obligation, not an
6 identical one.

7 I agree with plaintiff. The law, as stated in Safeco, is that
8 a common duty is required. As can be seen from the quotes above,
9 the court described the plaintiff's argument using the term
10 "identical." Although the court stated that the trial court did
11 not err, the use of the term "identical" was a quote from the
12 plaintiff's argument. Every affirmative statement of the law by
13 the Safeco court includes a reference to common duties, not
14 identical ones. No other case supports defendants' position.

15 I reject defendants' argument that the parties in a common law
16 indemnity action must have owed identical duties to a third party.
17 It is sufficient that they owed a common obligation.

18 Plaintiff argues that both it and Travelers owed a common
19 obligation with respect to the Grayco loss because they both
20 insured the Property against risk of such loss. Plaintiff contends
21 that as stated in its First Amended Complaint, the loss suffered by
22 the insured was of a continuing nature. First Am. Compl. at ¶ 11
23 ("claim paid by [plaintiff] was a continuing loss . . .").
24 Plaintiff states that the state of imminent collapse associated
25 with the Project at the time it compensated the insured was a
26 result of damage that accrued over a period of years, during which
27 both Travelers and plaintiff insured the Property. Plaintiff
28 further states that both it and Travelers owed an obligation to the

1 insured to cover the loss and because the loss suffered was a
2 result of indivisible and continuing injury that occurred
3 throughout both insurer's policy periods, the loss that plaintiff
4 discharged was "common" to both Travelers and plaintiff. See Id.
5 at ¶ 8 (water damage had occurred since construction and had
6 deteriorated portions of the Project to the point of imminent
7 collapse); Id. at ¶ 15 (by paying the full amount of Grayco's
8 property damage claim, plaintiff discharged both its and Travelers'
9 duties to Grayco relative to the property damage claim).

10 Although the Amended Complaint does not use the term "common
11 duty," the allegations here suffice because plaintiff alleges that
12 damage was ongoing, occurring during each policy's period, and that
13 both plaintiff and Travelers had duties to Grayco relative to the
14 damage caused by the water intrusion.

15 Next, defendants argue that the indemnity claim must be
16 dismissed because plaintiff fails to seek all of the money it paid
17 to Grayco. Defendants contend that by seeking only \$220,000 out of
18 the \$607,319.24 it paid, the claim cannot be considered one for
19 indemnity which defendants describe as "an all or nothing
20 proposition." Defts' Mem. at p. 5.

21 As indicated above, the third element for a common-law
22 indemnity claim requires that "as between the claimant and the
23 defendant, the obligation should be discharged by the latter."
24 Fulton Ins., 261 Or. at 210, 493 P.2d at 141. Defendants note that
25 the use of the words "the obligation," with the definite article
26 preceding the singular noun, means that the claim must relate to a
27 singular, whole obligation. Defendants argue that because
28 plaintiff seeks only part of the payment it made to Grayco,

1 plaintiff cannot establish a common law indemnity claim.

2 Generally, I agree with defendants' understanding of the law.
3 Oregon cases have clearly held that "[i]ndemnity is the shifting of
4 responsibility from the shoulders of one person to another." Piehl
5 v. The Dalles General Hosp., 280 Or. 613, 621, 571 P.2d 149, 153
6 (1977) (internal quotation omitted); Burton v. Mackey, 104 Or. App.
7 361, 364, 801 P.2d 865, 866 (1990) ("Indemnity shifts the loss to
8 one who ought, in equity, to bear it."); see also Star Mountain
9 Ranch v. Paramore, 98 Or. App. 606, 609, 780 P.2d 758, 759 (1989)
10 (noting that in Fulton, the court explained that the claimant in a
11 common-law indemnity claim, while legally liable to the injured
12 third party, must have "secondary" as opposed to "primary"
13 liability, or must have "passive" as opposed to "active" fault).

14 In this case however, the issue is not a single accident tort
15 claim, nor is it a single breach of a single contractual
16 obligation. Rather, the water intrusion suffered by the Property
17 raises the issue of continuing occurrences, arising from leaks and
18 damage from leaks. In such cases, while defendant may not be
19 "primarily" liable for the entire sum paid by plaintiff to Grayco,
20 defendant may indeed be primarily liable for segregable portions of
21 the damage and when viewed in such a manner, equitable principles
22 may justify shifting the entire responsibility for that portion to
23 defendant as opposed to plaintiff.

24 For example, as I explained in oral argument on the motion,
25 consider three hypothetical pieces of sheetrock in the Property
26 that sustained damage as a result of water intrusion. The first
27 piece was damaged only by a leak that first occurred during a
28 Travelers' policy period, and the leak was repaired before

1 plaintiff's policy period commenced. However, the damage from that
2 leak was not repaired and this piece of sheetrock continued to
3 deteriorate further, during the plaintiff's policy period.

4 The second piece of sheetrock was damaged by a leak that
5 started during a Travelers policy period, and continued into the
6 period when plaintiff's policy was in force. This leak caused
7 damage in both policy periods. The damage during either policy
8 period required replacement of the piece of sheetrock without
9 consideration of the damage sustained during the other policy
10 period.

11 The third piece of sheetrock was damaged as a result of a leak
12 that did not occur until plaintiff's policy was in effect.

13 The law regarding common-law indemnity would not allow
14 indemnity for the damage to the third piece of sheetrock. The
15 second piece of sheetrock would be suitable for a claim of
16 contribution, but not indemnity. But, the first piece of sheetrock
17 suggests that a claim for common-law indemnity would be
18 appropriate. The insurers owed a common duty to the insured and as
19 between plaintiff and defendants, equity would view defendants as
20 primarily liable.

21 The facts at issue here indicate that there may well be some
22 causes and some damages/losses for which both plaintiff and
23 defendants owed a common duty to Grayco, and for which plaintiff or
24 defendants may be viewed as primarily or secondarily liable. As
25 plaintiff noted during oral argument, it seeks "not less than
26 \$220,000," and thus, it is not restricting its damages request to
27 only a portion of what it paid to Grayco. Because the facts as
28 alleged in the Amended Complaint show that plaintiff may be able to

1 establish that some portion of the money it paid arose out of a
2 common duty owed to Grayco by plaintiff and defendants, but that as
3 between plaintiff and defendants, defendants should be seen as
4 primarily liable, I do not dismiss the common-law indemnity claim.

5 II. Equitable Contribution Claim

6 Plaintiff's second claim is for equitable contribution. In
7 support of this claim, plaintiff makes the following allegations:
8 during the time the Project was insured under the Travelers
9 Policies, Grayco incurred property damage to the Project which
10 resulted in financial loss. Subsequently, Grayco made a claim
11 against Travelers under the Travelers Policies for the loss, but
12 Travelers wrongfully and without justification failed to pay Grayco
13 its claim arising out of such property damage. First Am. Compl. at
14 ¶ 18. Plaintiff alleges that Travelers was under a continuing
15 obligation to reimburse Grayco for the property damage to the
16 Project that occurred during the term of the Travelers Policies
17 even at such time that plaintiff commenced to insure the Project.
18 Id. at ¶ 19. By paying Grayco's property damage claim in
19 connection with the Project, plaintiff discharged both its and
20 Travelers' duties to Grayco relative to the property damage claim.
21 Id. at ¶ 20. Because plaintiff paid money to Grayco for the
22 benefit of Travelers for a loss that should have been paid by
23 Travelers under the Travelers Policies, plaintiff is entitled to
24 equitable contribution from Travelers on account of its payment to
25 Grayco in an amount to be determined at trial, but not less than
26 \$220,000. Id. at ¶ 21.

27 Defendants move to dismiss this claim because, defendants
28 contend, plaintiff was required, under Oregon Revised Statute §

1 (O.R.S.) 31.810¹, to commence the action within two years of the
2 date that payment was made. According to paragraph 10 of the First
3 Amended Complaint, payment to Grayco was made in February 2005.
4 Defendants contend that the statute of limitations on plaintiff's
5 contribution claim expired in February 2007. This action was not
6 filed until January 2009, almost two years beyond the limitations
7 period. Thus, defendants argue, the equitable contribution claim
8 must be dismissed.

9 The statute, appearing in O.R.S. Chapter 31 which is entitled
10 "Tort Actions," provides, in pertinent part:

11 If there is no judgment for the injury or wrongful
12 death against the tortfeasor seeking contribution, the
13 right of contribution of that tortfeasor is barred unless
14 the tortfeasor has either:

15 (a) Discharged by payment the common liability
16 within the statute of limitations period applicable
17 to the claimant's right of action against the
18 tortfeasor and has commenced action for
19 contribution within two years after payment; or

20 (b) Agreed while action is pending against the
21 tortfeasor to discharge the common liability and
22 has within two years after the agreement paid the
23 liability and commenced action for contribution.

24 O.R.S. 31.810(4).

25 I agree with plaintiff that O.R.S. 31.810(4) does not apply to
26 plaintiff's contribution claim in this case. This case has no
27 relationship to a tort claim, either in the underlying relationship
28 between plaintiff, defendants, and Grayco, or between plaintiff and
29 defendants as consecutive insurers. The statute of limitations for
30 a claim by Grayco as to its insurance contracts, would be the six-

31 ¹ Defendants mistakenly refer to O.R.S. 18.450. In 2003,
32 the Oregon Legislature renumbered that statute to O.R.S. 31.810.

1 year statute applicable to contract claims. O.R.S. 12.080(1). The
2 tortfeasor contribution statute, by appearing in a chapter bearing
3 the title "Tort Actions," and by using terms such as "injury,"
4 "wrongful death," and "tortfeasor," is limited to tort claims.
5 This is not such a case. See Fireman's Fund Ins. Co. v. Oregon
6 Auto Ins. Co., No. 06-35913, 2008 WL 4946279, at *2 (9th Cir. Nov.
7 6, 2008) (unpublished) ("Insurers that insure the same risk under
8 separate policies with the insured are not joint tortfeasors or co-
9 obligors").²

10 I further agree with plaintiff that this claim is equitable in
11 nature. See Carolina Cas. Ins. Co. v. Oregon Auto Ins. Co., 242
12 Or. 407, 417, 408 P.2d 198, 203 (1965) ("[a]n insurer's rights
13 against its co-insurer for contribution arises out of the equitable
14 doctrine which holds that one who pays money for the benefit of
15 another is entitled to be reimburse[d]. . . . Such rights do not
16
17

18 ² Defendants chide plaintiff for citing this unpublished
19 case. In the Ninth Circuit, however, unpublished dispositions
20 issued after January 1, 2007, may be cited, though they are
21 deemed "not precedent, except when relevant under the doctrine of
22 law of the case or rules of claim preclusion or issue
23 preclusion." Ninth Cir. Rule 36-3; see also Fed. R. App. P. 32.1
24 (prohibiting courts from prohibiting or restricting the citation
25 of federal judicial opinions that have been designated
26 unpublished after January 1, 2007). Here, this recent statement
27 of the relevant law by the Ninth Circuit is appropriately cited,
28 even if it may not be deemed "precedent." Moreover, I reject
defendants' argument that this statement of the law is specific
to the environmental claim contribution statute, O.R.S.
465.480(4). While the court was analyzing the right to
contribution in that particular statute, its statement regarding
an insurer's rights against a co-insurer was a general statement
of the law and was not restricted to the environmental claim
context.

1 arise by way of subrogation.") (citations omitted)³; see also TIG
2 Ins. Co. v. Travelers Ins. Co., No. CV-00-1780-ST, 2003 WL
3 24051560, at *4 (D. Or. Mar. 24, 2003) (noting, in a case involving
4 underlying allegations of sexual abuse, that Oregon law permits an
5 insurer to seek contribution from another insurer for its
6 respective share of a covered loss, and stating that "[t]his
7 equitable right of contribution among consecutive insurers is
8 beyond dispute").

9 As an equitable claim, plaintiff's contribution claim is
10 subject to the doctrine of laches. Frasier v. Nolan, 195 Or. App.
11 211, 215, 98 P.3d 392, 395 (2004) ("A claim in equity is subject to
12 the doctrine of laches, which dictates that a party may not delay
13 in asserting a claim for an unreasonable amount of time after
14 obtaining full knowledge of the relevant facts when the delay
15 results in substantial prejudice to the opposing party.").

16 The laches inquiry looks at whether (1) the plaintiff
17 unreasonably delayed its claim; (2) "with full knowledge of all
18 relevant facts"; and (3) which resulted in such substantial
19 prejudice to the defendant that it would be inequitable for the
20 court to grant relief to the plaintiff. In re Marriage of Menard,
21 180 Or. App. 181, 185, 42 P.3d 359, 3262 (2002). "Courts often
22 look to an analogous statute of limitation to define a
23 presumptively reasonable period within which one may file a claim

24
25 ³ I attribute the Carolina Casualty's later statement that
26 "[t]his is a law action," to be a description of how the court
27 viewed the case for purposes of disposition on appeal. Given the
28 context in which the statement was made, this is the most
reasonable explanation for the court's statement which is at odds
with the court's preceding explanation of the equitable origins
of an insurer's rights to seek contribution from a co-insurer.

1 in equity." Frasier, 195 Or. App. at 215, 98 P.3d at 395.

2 Plaintiff argues that O.R.S. 12.080, providing a six-year
3 statute of limitations for actions upon a "contract or liability,
4 express or implied," is most analogous to an equitable contribution
5 claim. Plaintiff notes that in Owings v. Rose, 262 Or. 247, 497
6 P.2d 1183 (1972), the Oregon Supreme Court held that the six-year
7 statute of limitations for contracts applied to a common law
8 indemnity claim. Id. at 261-62, 497 P.2d at 1189-90. The court
9 rejected the defendants' argument that the two-year tort statute
10 should apply. Id.

11 Plaintiff contends that as with common law indemnity, equity
12 is the guiding principle behind equitable contribution. Plaintiff
13 notes that O.R.S. 12.080 applies to all actions relating to implied
14 "contracts or liabilities." Because equitable contribution, like
15 common law indemnity, creates an implied liability on the part of
16 a nonpaying co-insurer, plaintiff argues that the six-year period
17 of limitation is far more applicable than the two-year period
18 imposed by O.R.S. 31.810.

19 Defendants contend that the statute of limitations that is
20 most analogous to the equitable contribution claim is the statute
21 set for statutory contribution, not the statute set for contract
22 claims. O.R.S. 31.810(4). Defendants argue that under the
23 doctrine of laches, the applicable analogous two-year statute
24 creates a rebuttable presumption of unreasonableness by plaintiff
25 in delaying the filing of the action. Defendants contend that
26 plaintiff has not provided any allegations that could rebut the
27 conclusion that its delay was unreasonable. Given the four-year
28 delay between plaintiff's incursion of loss and the filing of the

1 lawsuit, defendants argue that any reasonable jury should find that
2 defendant suffered prejudice.

3 I agree with plaintiff. For the reasons explained above,
4 O.R.S. 31.810 is not relevant to this claim, either as a statute of
5 limitations applied directly to the claim, or as a "most analogous"
6 statutes in a laches analysis. Instead, the applicable statute is
7 O.R.S. 12.080. Because this is a six-year statute, it does not
8 create a presumption of unreasonableness. To the contrary, it
9 defines a presumptively reasonable period of time. And, any issues
10 of reasonableness in the time of filing are inappropriate to
11 address on a Rule 12(b)(6) motion to dismiss. See Mattson v.
12 Commercial Credit Bus. Loans, 301 Or. 407, 420, 723 P.2d 996, 1003
13 (1986) ("What is an unreasonable length of time is determined by
14 examining all the circumstances."). Similarly, the inquiry into
15 any substantial prejudice to defendants is a factual one.
16 Accordingly, I deny the motion to dismiss the equitable
17 contribution claim.

18 CONCLUSION

19 Defendants' motion to dismiss (#3) is denied.

20 IT IS SO ORDERED.

21 Dated this 29th day of July, 2009.

22
23
24 /s/ Dennis James Hubel
25 _____
Dennis James Hubel
United States Magistrate Judge
26
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