

UNITED STATES DISTRICT COURT
DISTRICT OF OREGON
PORTLAND DIVISION

SENECA INSURANCE COMPANY,
a New York corporation,

Plaintiff,

vs.

JAMES RIVER INSURANCE COMPANY,
an Ohio corporation,

Defendant.

No. 03:14-cv-00108-HU

OPINION AND ORDER ON
MOTION FOR SUMMARY JUDGMENT

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HUBEL, Magistrate Judge:

The plaintiff Seneca Insurance Company ("Seneca") brings this action against the defendant James River Insurance Company ("James River"), seeking a declaratory judgment that James River has a duty to defend its insured Superwall Design, LLP ("Superwall"), in an action pending in the Multnomah County

1 Circuit Court entitled *S.D. Deacon Corp. of Oregon v. Superwall*
2 *Design, LLP*, Case No. 1209-11587 (the "underlying action").
3 Seneca also seeks a money judgment for 50% of its defense costs
4 in defending Superwall and one of its principals, Paul Maughan,
5 in the underlying action.

6 The case is before the court on Seneca's motion for summary
7 judgment, Dkt. #10. The motion is fully briefed, and the court
8 heard oral argument on the motion on July 17, 2014. The parties
9 have consented to jurisdiction and the entry of final judgment
10 by a United States Magistrate Judge, in accordance with Federal
11 Rule of Civil Procedure 73(b). Accordingly, the court turns to
12 consideration of the motion.

13 Notably, as James River pointed out during oral argument,
14 Seneca's Complaint only makes a claim for relief regarding James
15 River's duty to defend Superwall; the Complaint asks nothing
16 with regard to Maughan. The court denied Seneca's oral motion
17 to amend its Complaint to include a claim for Maughan's defense,
18 without prejudice to the filing of a formal motion to amend,
19 should Seneca so desire. Similarly, the court's ruling on the
20 current motion for summary judgment applies only to James
21 River's duty to defend Superwall, not Maughan.

22 23 **I. SUMMARY JUDGMENT STANDARDS**

24 Summary judgment should be granted "if the movant shows that
25 there is no genuine dispute as to any material fact and the
26 movant is entitled to judgment as a matter of law." Fed. R.
27 Civ. P. 56(c)(2). In considering a motion for summary judgment,
28 the court "must not weigh the evidence or determine the truth of

1 the matter but only determine whether there is a genuine issue
2 for trial." *Playboy Enters., Inc. v. Welles*, 279 F.3d 796, 800
3 (9th Cir. 2002) (citing *Abdul-Jabbar v. General Motors Corp.*, 85
4 F.3d 407, 410 (9th Cir. 1996)).

5 The Ninth Circuit Court of Appeals has described "the
6 shifting burden of proof governing motions for summary judgment"
7 as follows:

8 The moving party initially bears the burden
9 of proving the absence of a genuine issue of
10 material fact. *Celotex Corp. v. Catrett*,
11 477 U.S. 317, 323, 106 S. Ct. 2548, 91 L.
12 Ed. 2d 265 (1986). Where the non-moving
13 party bears the burden of proof at trial,
14 the moving party need only prove that there
15 is an absence of evidence to support the
16 non-moving party's case. *Id.* at 325, 106 S.
17 Ct. 2548. Where the moving party meets that
18 burden, the burden then shifts to the non-
19 moving party to designate specific facts
20 demonstrating the existence of genuine
21 issues for trial. *Id.* at 324, 106 S. Ct.
22 2548. This burden is not a light one. The
23 non-moving party must show more than the
24 mere existence of a scintilla of evidence.
25 *Anderson v. Liberty Lobby, Inc.*, 477 U.S.
26 242, 252, 106 S. Ct. 2505, 91 L. Ed. 2d 202
27 (1986). The non-moving party must do more
28 than show there is some "metaphysical doubt"
as to the material facts at issue.
*Matsushita Elec. Indus. Co., Ltd. v. Zenith
Radio Corp.*, 475 U.S. 574, 586, 106 S. Ct.
1348, 89 L. Ed. 2d 528 (1986). In fact, the
non-moving party must come forth with
evidence from which a jury could reasonably
render a verdict in the non-moving party's
favor. *Anderson*, 477 U.S. at 252, 106 S. Ct.
2505. In determining whether a jury could
reasonably render a verdict in the non-
moving party's favor, all justifiable
inferences are to be drawn in its favor.
Id. at 255, 106 S. Ct. 2505.

In re Oracle Corp. Securities Litigation, 627 F.3d 376, 387 (9th
Cir. 2010).

1 **II. CHOICE OF LAW**

2 Both Seneca and James River are foreign corporations
3 authorized to write insurance in Oregon. It is undisputed that
4 both Superwall's conduct, and the resulting injury alleged in
5 the underlying action, occurred in Oregon. Therefore, Oregon
6 law controls the resolution of the parties' dispute. See ORS
7 § 15.440(3)(a).
8

9 **III. BACKGROUND FACTS**

10 The underlying action alleges construction defects in the
11 Sand & Sea Condominiums, a 60-unit complex located in Seaside,
12 Oregon. In its original Complaint in the underlying action, S.D.
13 Deacon Corp. ("Deacon") alleged that in February 2011, it
14 entered into a contract with the Sand & Sea unit owners
15 association (the "Association") "for the reconstruction and
16 renovation of various portions of Sand & Sea, including to the
17 curtain wall assemblies at the Project[.]" Dkt. #11-1, ¶ 5.
18 Deacon subcontracted with Superwall "for work on the Curtain
19 Wall Renovation. . . ." *Id.*, ¶ 6.

20 At some point *not specified in the Complaint*, the
21 Association "notified Deacon of property damage and construction
22 defect issues allegedly arising out of, or relating to, the
23 Curtain Wall Renovation at Sand & Sea." *Id.*, ¶ 8. Deacon
24 investigated the Association's allegations, a process in which
25 Deacon claims Superwall declined to participate. *Id.*, ¶¶ 9 &
26 10. As a result of its investigations, Deacon concluded the
27 alleged property damage was "the result of . . . construction
28 defects, inadequate or inappropriate usage of materials,

1 violations of the applicable state and local building codes, and
2 violations of the relevant industry standards, arising from, or
3 relating to, the work performed by Superwall as part of the
4 Curtain Wall Renovation." *Id.*, ¶ 11 (listing over 50 alleged
5 problems resulting from Superwall's work).

6 Deacon claimed these conditions "caused significant and
7 ongoing property damage at Sand & Sea, including damage to the
8 structure, damage to the exterior and interior components, and
9 damage to various other components of the Project, as well as
10 loss of use and enjoyment damages." *Id.*, ¶ 12. Further, Deacon
11 alleged all of the listed "defects, deficiencies, and property
12 damage" were directly and proximately caused by "Superwall's
13 faulty workmanship; inadequate or inappropriate application and
14 usage of materials; noncompliance with applicable state and
15 local building codes; violation of relevant manufacturers'
16 specifications and/or installation instructions; and, violation
17 of relevant industry standards." *Id.*, ¶ 13.

18 Deacon claimed it incurred costs exceeding \$1.78 million to
19 effect repairs to Sand & Sea. It further claimed Superwall
20 declined to participate in any of the repairs. *Id.*, ¶¶ 14 & 15.

21 It appears Deacon put Superwall on notice of the
22 construction defect claims in a letter dated January 24, 2012.
23 See Dkt. #11-5, p. 1 (referencing the letter). On June 18,
24 2012, in a letter to James River and Travelers Casualty
25 Insurance Company of America ("Travelers"), Deacon tendered its
26 claim "as additional insured on Superwall's policy of insurance"
27 issued by James River and Travelers. *Id.* Deacon filed the
28 underlying action against Superwall, and provided James River

1 with a copy of the Complaint via e-mail on October 25, 2012.
2 See Dkt. #11-6. According to James River, the e-mail was its
3 first notice that the underlying action had been filed. *Id.*

4 Deacon amended its Complaint in the underlying action twice;
5 its First Amended Complaint is not part of the record before
6 this court. In its Second Amended Complaint, Deacon added as a
7 defendant one of Superwall's principals, Paul Maughan. Deacon
8 alleged Maughan's under-funding of Superwall caused Superwall
9 financial problems that "materially affected the outcome of the
10 Project as Superwall was incapable of paying the wages of [its]
11 employees and/or laborers and the material suppliers for the
12 Project." Dkt. #11-2, ¶ 5. Deacon also added as a defendant
13 Beeline Glass Company of Oregon ("Beeline"), which Deacon hired
14 "[o]n or about July 8, 2011, . . . to supplement and assist
15 Superwall's labor needs. . . ." *Id.*, ¶ 9; see *id.*, ¶ 4.

16 Superwall filed third-party claims against the project's
17 architect, the Association's property manager, Beeline, and
18 numerous subcontractors and materials suppliers. See Dkt. #16-
19 1. In its pleading, Superwall alleged that after it was notified
20 by Deacon of leaks in the curtain wall system, "Deacon and
21 Superwall both performed extensive investigations to find the
22 causes of the leaking." *Id.*, ¶ 10. Superwall claims the
23 alleged deficiencies in its work, and the property damage
24 allegedly resulting therefrom, resulted from the architect's
25 improper design, oversight, and administration of the project,
26 and defects in the work and/or materials supplied by the other
27 third-party defendants. *Id.* On the issue of when Superwall
28 performed work on the Project, Superwall alleged it was

1 subcontractor on the Project “[i]n 2011,” *id.*, ¶ 1; and it
2 “performed work on the Project in the summer of 2011,” *id.*, ¶ 9.
3 Superwall alleged remedial work was performed on the Project in
4 the fall of 2011, *id.*, ¶¶ 2 & 3; “late 2011,” *id.*, ¶ 10; in
5 2012, *id.*, ¶ 5; and “between March and June 2012,” *id.*, ¶ 12.
6 See *id.*, ¶¶ 15, 20. Superwall amended its Third-Party Complaint
7 twice, but did not clarify its allegations regarding when its
8 work was performed or when any damage allegedly occurred. See
9 Dkt. ##16-2 & 16-3.

10 On October 11, 2013, Deacon, through its attorney, issued
11 a supplemental tender of defense and indemnity to James River.
12 Dkt. #18, ECF p. 3. In the letter, Deacon indicated James River
13 had insured Superwall from September 16, 2011, to January 11,
14 2012, under policy number 00050164-0. *Id.*, ECF p. 4. Deacon
15 requested “a formal coverage decision” from James River. *Id.*
16 In response, on December 5, 2013, James River issued a denial of
17 coverage, “[b]ased on the allegations [in the underlying action]
18 and policy terms,” with no accompanying explanation. *Id.*, ECF
19 p. 9. Seneca filed the present action on January 21, 2014.

20 21 **IV. RELEVANT POLICY PROVISIONS**

22 James River insured Superwall under commercial general lia-
23 bility policy No. 00050164-0 (the “Policy”), evidencing a policy
24 period of September 26, 2011, to September 26, 2012. Dkt. #11-
25 3, ECF p. 1. The policy was canceled effective January 11,
26 2012. *Id.*, ECF p. 63.

27 In their summary judgment papers, the parties identify
28 several policy provisions as relevant to Seneca’s motion for

1 summary judgment. The court has quoted, below, all of the
2 policy provisions identified by the parties in the order in
3 which those provisions appear in the Policy. (All emphases
4 shown below are in the policy itself.)

5 **SECTION I - COVERAGES**

6 **COVERAGE A BODILY INJURY AND PROPERTY DAMAGE
7 LIABILITY**

8 **1. Insuring Agreement**

9 **a.** We will pay those sums that the insured
10 becomes legally obligated to pay as
11 damages because of "bodily injury" or
12 "property damage" to which this
13 insurance applies. We will have the
14 right and duty to defend the insured
15 against any "suit" seeking those
16 damages. However, we will have no duty
17 to defend the insured against any
18 "suit" seeking damages for "bodily
19 injury" or "property damage" to which
20 this insurance does not apply. . . .

21 * * *

22 **b.** This insurance applies to "bodily
23 injury" and "property damage" only if:

- 24 **(1)** The "bodily injury" or "property
25 damage" is caused by an
26 "occurrence" that takes place in
27 the "coverage territory";
- 28 **(2)** The "bodily injury" or "property
damage" occurs during the policy
period; and
- (3)** Prior to the policy period, no
insured listed under Paragraph **1.**
of Section **II** - Who Is An Insured
and no "employee" authorized by
you to give or receive notice of
an "occurrence" or claim, knew
that the "bodily injury" or
"property damage" had occurred, in
whole or in part. If such a
listed insured or authorized
"employee" knew, prior to the
policy period, that the "bodily
injury" or "property damage" oc-
curred, then any continuation,
change or resumption of such

1 "bodily injury" or "property
2 damage" during or after the policy
3 period will be deemed to have been
4 known prior to the policy period.

5 **c.** "Bodily injury" or "property damage"
6 which occurs during the policy period
7 and was not, prior to the policy
8 period, known to have occurred by any
9 insured listed under Paragraph **1.** of
10 Section **II** - Who Is An Insured or any
11 "employee" authorized by you to give or
12 receive notice of an "occurrence" or
13 claim, includes any continuation,
14 change or resumption of that "bodily
15 injury" or "property damage" after the
16 end of the policy period.

17 **d.** "Bodily injury" or "property damage"
18 will be deemed to have been known to
19 have occurred at the earliest time when
20 any insured listed under Paragraph **1.**
21 of Section **II** - Who Is An Insured or
22 any "employee" authorized by you to
23 give or receive notice of an
24 "occurrence" or claim:

25 * * *

26 **(2)** Receives a written or verbal
27 demand or claim for damages
28 because of the "bodily injury" or
"property damage"; or

(3) Becomes aware by any other means
that "bodily injury" or "property
damage" has occurred or has begun
to occur.

* * *

Dkt. #11-3, ECF p. 4.

2. Exclusions

This insurance does not apply to:

* * *

j. Damage To Property

"Property damage" to:

* * *

1 (5) That particular part of real prop-
2 erty on which you or any
3 contractors or subcontractors
4 working directly or indirectly on
your behalf are performing opera-
tions, if the "property damage"
arises out of those operations; or

5 (6) That particular part of any
6 property that must be restored,
7 repaired or replaced because "your
work" was incorrectly performed on
it.

8 * * *

9 Paragraph (6) of this exclusion does
10 not apply to "property damage" included
in the "products-completed operations
11 hazard".

12 * * *

13 **1. Damage To Your Work**

14 "Property damage" to "your work"
15 arising out of it or any part of it and
included in the "products-completed
operations hazard".

16 This exclusion does not apply if the
17 damaged work or the work out of which
the damage arises was performed on your
18 behalf by a subcontractor.

19 *Id.*, ECF pp. 7-8.

20 **SECTION V - DEFINITIONS**

21 * * *

22 **13.** "Occurrence" means an accident,
including continuous or repeated
23 exposure to substantially the same
general harmful conditions.

24 * * *

25 **17.** "Property damage" means:

26 **a.** Physical injury to tangible prop-
erty, including all resulting loss
27 of use of that property. All such
loss of use shall be deemed to
28

1 occur at the time of the physical
2 injury that caused it; or

- 3 **b.** Loss of use of tangible property
4 that is not physically injured.
5 All such loss of use shall be
6 deemed to occur at the time of the
7 "occurrence" that caused it.

8 * * *

9 **22.** "Your work":

10 **a.** Means:

11 (1) Work or operations performed
12 by you or on your behalf; and

13 (2) Materials, parts or equipment
14 furnished in connection with
15 such work or operations.

16 **b.** Includes

17 (1) Warranties or representations
18 made at any time with respect
19 to the fitness, quality,
20 durability, performance or
21 use of "your work"; and

22 (2) The providing of or failure
23 to provide warnings or
24 instructions.

25 *Id.*, ECF pp. 17-19.

26 **CLAIM(S) IN PROGRESS EXCLUSION**

- 27 **a.** This policy does not apply to
28 "bodily injury", "personal and
advertising injury" or "property
damage" which begins or takes
place before the inception date of
coverage, whether such "bodily
injury", "personal and advertising
injury" or "property damage" is
known to an insured, even though
the nature and extent of such
damage or injury may change and
even though the damage may be
continuous, progressive, cumu-
lative, changing or evolving, and
even though the "occurrence"
causing such "bodily injury",

1 "personal and advertising injury"
2 or "property damage" may be or may
3 involve a continuous or repeated
4 exposure to substantially the same
5 general harm.

6 b. All "property damage" to units of
7 or within a single project or
8 development, and arising from the
9 same general type of harm, shall
10 be deemed to occur at the time of
11 damage to the first such unit,
12 even though the existence, nature
13 and extent of such damage or
14 injury may change and even though
15 the "occurrence" causing such
16 "property damage" may be or
17 involve a continuous or repeated
18 exposure to substantially the same
19 general harm which also continues
20 or takes place (in the case of
21 repeated exposure to substantially
22 the same general harm) during the
23 policy term.

24 *Id.*, ECF pp. 46-47.

25 **V. DISCUSSION**

26 **A. Duty to Defend**

27 "The seminal case regarding the duty to defend under Oregon
28 law is *Ledford v. Gutoski*, 319 Or. 397, 877 P.2d 80 (1994)."
Fred Shearer & Sons, Inc. v. Gemini Ins. Co., 237 Or. App. 468,
475, 240 P.3d 67, 72 (2010). In *Ledford*, the Oregon Supreme
Court explained the general standards for determining whether an
insurer has a duty to defend its insured against a particular
claim. The *Ledford* court held the insurer's duty to defend
"depends on two documents: the complaint and the insurance
policy," with the duty to defend arising when "the claim against
the insured stated in the complaint could, without amendment,
impose liability for conduct covered by the policy." *Ledford*,

1 319 Or. at 399-400, 877 P.2d at 82 (citations omitted). In
2 making this analysis, "the court looks only at the facts alleged
3 in the complaint to determine whether they provide a basis for
4 recovery that could be covered by the policy[.]" *Ledford*, 319
5 Or. at 400, 877 P.2d at 82 (citations omitted). The face of the
6 complaint, itself, should allow the insurer to determine whether
7 it has a duty to defend the insured. *Id.* (citing *Ferguson v.*
8 *Birmingham Fire Ins.*, 254 Or. 496, 505-06, 460 P.2d 342, 346
9 (1969)).

10 The duty to defend arises "if the complaint provides any
11 basis for which the insurer provides coverage." *Ledford*, 319
12 Or. at 400, 877 P.2d at 83 (emphasis in original; citation
13 omitted). This is true even if some of the conduct alleged in
14 the complaint falls outside the policy's coverage, with any
15 ambiguity as to coverage being "resolved in favor of the
16 insured." *Id.* The "analysis focuses on the *allegations* in the
17 complaint[] rather than the claims identified in it." *Nat'l*
18 *Union Fire Ins. Co. of Pittsburgh Pa. v. Starplex Corp.*, 220 Or.
19 App. 560, 584, 188 P.3d 332, 346-47 (2008) (emphasis in
20 original; internal quotation marks, citation omitted); accord
21 *Anderson Bros., Inc. v. St. Paul Fire & Marine Ins. Co.*, 729
22 F.3d 923, 936 (9th Cir. 2013) (quoting *Starplex*).

23 The Oregon Supreme Court has rejected the notion that a com-
24 plaint must allege the specific time when a covered event
25 occurred. In *Bresee Homes, Inc. v. Farmers Insurance Exchange*,
26 353 Or. 112, 293 P.3d 1036 (2012), the court found it
27 "noteworthy" that the insurer *could not determine* from a reading
28 of the complaint whether or not the alleged damage occurred

1 during the policy period. *Bresee*, 353 Or. at 122, 293 P.3d at
2 1042. The court noted that at the time the claim was tendered
3 for defense, the issue of when the claimed damage actually
4 occurred was one that would be determined in the litigation, and
5 its resolution could affect the insurer's duty to *indemnify*, but
6 the duty to defend was based solely on the language of the
7 complaint and the policy. *Bresee*, 353 Or. at 123-24, 293 P.3d
8 at 1042. The court held, "Our analysis of the duty to defend
9 focuses on those allegations [in the complaint,] whether or not
10 different or additional facts might be adduced at trial."
11 *Bresee*, 353 Or. at 123, 293 P.3d at 1042.

12 In the present case, the quoted provisions indicate the
13 Policy will pay for "property damage" that (1) is caused by an
14 "occurrence"; (2) occurs during the policy period; and (3) was
15 unknown to the insured prior to the policy period. The Policy
16 excludes, among other things, property damage resulting from the
17 insured's work "incorrectly performed," except work performed by
18 a subcontractor; and property damage which begins prior to the
19 inception date of the Policy, even though such damage may be
20 "continuous, progressive, cumulative, changing or evolving,"
21 whether or not the damage is known to the insured.

22 Seneca argues that under *Ledford* and its progeny, James
23 River clearly has a duty to defend Superwall in the underlying
24 action. Deacon's Complaint alleges property damage to Sand & Sea
25 caused by an occurrence. Both the original Complaint and the
26 Amended Complaint are silent with regard to *when* the alleged
27 damage occurred, and when Superwall knew of the alleged damage.
28 Thus, Seneca argues, Deacon's claim against Superwall *as stated*

1 *in the Complaint* could impose liability for conduct covered by
2 the Policy. Dkt. #10.

3 James River argues Deacon's pleadings contain allegations
4 from which James River could conclude the alleged damage
5 occurred before the Policy's effective date of September 26,
6 2011, excluding such damage from coverage under the Policy.
7 James River relies on Deacon's allegation that it had to hire
8 Beeline to supplement and assist Superwall's work in July 2011.
9 Thus, James River reasons, the fact that Superwall performed
10 work on the Project in the summer of 2011, coupled with Deacon's
11 allegations that Superwall's work was defective, clearly
12 demonstrates the alleged damage occurred, or began to occur,
13 prior to the Policy's effective date.

14 James River further argues it is undisputed that "rain fell"
15 and "air moved" in Seaside, Oregon, "at some point between the
16 summer of 2011 and the inception of [the Policy] in late Septem-
17 ber." Dkt. #15, ECF p. 3. Thus, according to James River,
18 "[t]he laws of nature dictate that at least some alleged damage
19 in the form of air and water intrusion occurred before the
20 effective date of [the Policy]." *Id.* Whether or true or not,
21 these "undisputed" facts are not alleged in the Complaint and do
22 not appear in the Policy. Whether or not the weather conditions
23 might be helpful in considering a duty-to-indemnify question,
24 they are useless when considering the duty to defend.

25 James River also argues Superwall's allegations in its third-
26 party pleadings constitute a "judicial admission" that James
27 River owes no duty to defend. James River argues that
28 Superwall's "affirmative allegations . . . that it performed

1 work in the summer of 2011 and that remedial work was performed
2 in the fall of that year" establish that the damage would have
3 had to occur prior to inception of the James River policy. *Id.*,
4 ECF pp. 7-8.

5 The court finds James River's arguments are inconsistent
6 with Oregon law, and often are looking through the wrong end of
7 the telescope. The fact that Superwall performed work on the
8 Project in the summer of 2011 does not mean its work was
9 finished prior to inception of the Policy. Nor does the fact
10 that "rain fell" and "air moved" between the time Superwall
11 began work on the Project and the Policy's issuance reasonably
12 lead to a conclusion that "at least some alleged damage"
13 occurred prior to the Policy's issuance. (Further, as noted
14 above, the Complaint contains no factual allegations regarding
15 the weather.) Similarly, an allegation that remedial work was
16 performed in the fall of 2011 does not establish *when* in the
17 fall the remedial work was performed. In the Northern
18 Hemisphere, fall, or autumn, generally is defined as extending
19 from the autumnal equinox, occurring on September 22nd or 23rd,
20 and the winter solstice, occurring on December 21st or 22nd.
21 *See, e.g., Encyclopaedia Britannica Online Academic Edition,*
22 "Autumn," [http://www.britannica.com/EBchecked/](http://www.britannica.com/EBchecked/topic/45215/autumn)
23 [topic/45215/autumn](http://www.britannica.com/EBchecked/topic/45215/autumn) (Jul. 2, 2014). Thus, all but three or four
24 days of the fall season occurred *after* the inception of the
25 Policy.

26 James River's attempt to rely on Superwall's third-party
27 pleadings is misplaced, for two reasons. First, the court looks
28 only at the language of the applicable policy and the Complaint

1 that raises the claim; the allegations of third-party pleadings
2 are irrelevant as to the insurer's original duty to defend. Put
3 another way, it is the Complaint, if anything, against which
4 James River must defend, not the third-party complaint. Second,
5 Superwall's third-party pleadings do not provide any further
6 clarification regarding when Superwall's work was performed, or
7 when damage allegedly occurred.

8 Although the evidence at trial may show that, indeed, damage
9 occurred, or began to occur, prior to the Policy's inception,
10 thereby eliminating James River's duty to *indemnify* Superwall,
11 nothing in Deacon's or Superwall's pleadings requires such a
12 conclusion. James River could not eliminate the possibility
13 that the alleged damage occurred during the policy period based
14 on the allegations of the Complaint. See *Bresee*, 353 Or. at
15 122, 293 P.3d at 1042. Accordingly, the court finds James
16 River's duty to defend was triggered by the allegations in
17 Deacon's original Complaint, and the duty was not extinguished
18 by any allegation in Deacon's amended pleadings. Seneca's
19 motion for summary judgment on James River's duty to defend is
20 **granted.**

21 22 ***B. Participation in Defense Costs***

23 The Oregon Supreme Court has long held that "the loss as
24 between insurers should be 'prorated in the ratio which the
25 limits of the policies bear to the total coverage.'" *Certain*
26 *Underwriters at Lloyd's London & Excess Ins. Co., Ltd. v. Mass.*
27 *Bonding & Ins. Co.*, 235 Or. App. 99, 112, 230 P.3d 103, 112
28 (2010) (quoting *Lamb-Weston, Inc. v. Or. Auto Ins. Co.*, 219 Or.

1 130, 137, 341 P.2d 643, 647 (1959)). Seneca argues that because
2 the policy limits of its own policy and the James River policy
3 are \$1 million per occurrence, therefore, Seneca and James River
4 each should be responsible for 50% of the defense costs in the
5 underlying action.

6 However, the parties have agreed that the court should not
7 decide the issue of the amount of defense costs at this
8 juncture, reserving that decision until Seneca has filed a
9 detailed motion and exhibits to which James River then may
10 respond. The court agrees, and reserves ruling on the issue.
11 Further, it makes sense, in terms of judicial economy, for the
12 court to take up the matter of damages after ruling on any
13 motion Seneca files to amend its Complaint to add a claim for
14 Maughan's defense, and any motion for summary judgment with
15 regard to Maughan's defense.

16
17 **VI. CONCLUSION**

18 Seneca's motion for summary judgment (Dkt. #10) is **granted**
19 **in part and reserved in part.** The court finds James River has
20 a duty to defend Superwall, and the duty commenced upon the
21 filing of the underlying action.

22 The court reserves ruling on the amount of Seneca's damages
23 until Seneca files its detailed motion for defense costs.

24 IT IS SO ORDERED.

25 Dated this 16th day of July, 2014.

26
27 /s/ Dennis J. Hubel
28

Dennis James Hubel
Unites States Magistrate Judge

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