

HONORABLE RONALD B. LEIGHTON

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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

OHIO CASUALTY INSURANCE
COMPANY, an Ohio corporation,

Plaintiff,

v.

CHUGACH SUPPORT SERVICES,
INC., et al.,

Defendants.

SHON E. FROSTAD, as Personal
Representative of the Estate of Bradley J.
Frostad,

Third-Party
Plaintiff,

v.

R-CUSTOM EXCAVATION, et al.,

Third-Party
Defendants.

CASE NO. C10-5244RBL

ORDER GRANTING SUMMARY
JUDGMENT

THIS MATTER is before the Court on its own Motion to Reconsider the Order Denying Plaintiff's Summary Judgment [Dkt. #66]. The Court has reviewed the materials for and against

1 the Motion for Summary Judgment and the subsequent Motion for Reconsideration [Dkt. #67].
2 The Court heard oral argument on October 3, 2011. For the following reasons, the Court grants
3 the Motion for Summary Judgment in favor of Plaintiff Ohio Casualty.

4 **I. BACKGROUND**

5 Chugach Support Services, Inc., a general contractor, entered into a Master Subcontract
6 with Security Resources International (“SRI”) for services to be performed at Langley Air Force
7 Base, Virginia. The written contract is dated January 16, 2007. The agreement at paragraph 13
8 covers the topic of Insurance:

9 During the term of this Subcontract and any project awarded to the
10 Subcontractor hereunder, the Subcontractor will, at its sole
11 expense, secure and maintain and will file with Chugach, proper
12 and acceptable evidence of the following described insurance,
13 which coverages shall (1) be secured with an insurance company
14 acceptable to Chugach, (2) be issued as primary Policy not
15 contribution with and not in excess of any primary and/or excess
16 coverages carried by Chugach, and (3) contain loss payable clauses
17 satisfactory to Chugach for applicable coverages.

18 Neither SRI, nor its principal, Ron Long, obtained insurance as required by the Master
19 Subcontract. On October 17, 2007, SRI signed and accepted a proposal for work by R-Custom.
20 The proposal does not mention insurance. R-Custom was insured by Ohio Casualty. A month
21 after executing the SRI – R-Custom agreement (November 14, 2007), Long requested R-
22 Custom’s principal, Rick Larson, to provide a Certificate of Insurance naming Chugach as
23 additional insured on R-Custom’s Ohio CGL policy. Long and SRI requested that “no info be
24 sent to Chugach Support, please fax to Angela at SRI.”

On December 13, 2007, SRI made an additional request for a Certificate of Insurance
showing SRI as additional insured. The question before this Court is whether the production of a

1 Certificate of Insurance is sufficient to bind Ohio Casualty pursuant to the plain language of its
2 own policy.

3 The Court must view the policy in its entirety, *see Hess v. North Pacific Ins. Co.*, 122
4 Wn.2d 180, 186 (1993), and give effect to each provision in the policy. *Kish v. Ins. Co. of N.*
5 *Am.*, 125 Wn.2d 164, 170 (1994).

6 The Court has construed two provisions, in particular, in the Ohio Casualty Policy.

7 Who Is An Insured – Section II is amended to include as an insured any
8 person whom you are *required to name* as an additional insured in this
9 policy *in a written contract* or written agreement. The written contract or
10 written agreement must be currently in effect or becoming effective during
11 the term of this policy and executed prior to the “bodily injury”, “property
12 damage” or “personal and advertising injury”.

13 If the additional insured’s policy has an other insurance provision making
14 its policy excess, and *a named insured* agreed *in a written contract* or
15 written agreement to provide the additional insured coverage on a primary
16 and noncontributory basis, this policy shall be primary and we will not
17 seek contribution from the additional insured’s policy for damages we
18 cover.

19 [Dkt. #27-2 at pp. 7-8]

20 The symmetry of these two provisions is unmistakable, yet this Court has previously
21 found one to be ambiguous and the other one not. This approach confounds the parties and the
22 process of interpretation of otherwise common language. The additional insured language says
23 that Ohio will add as an additional insured any person “you (R-Custom) are required to name as
24 an additional insured on this policy in a written contract or written agreement.” The requirement
is fulfilled by specifying the additional insured in a written contract or written agreement that is
executed prior to the loss.

25 In similar fashion, the Ohio policy provides a choice of excess or primary coverage. The
26 choice must be made in the same “written contract” or “written agreement.” If the person named

1 as additional insured (Chugach or SRI) has a separate insurance policy, which has an Other
2 Insurance provision making its policy excess, and a named insured (R-Custom) has agreed in a
3 written contract or written agreement to provide the additional coverage on a primary and
4 noncontributory basis, the Ohio policy shall be primary and (Ohio) will not seek contribution
5 from the additional insured's policy for damages (Ohio) cover.

6 This Court has previously said that the terms "written contract" or "written agreement" in
7 conjunction with the term "required" in one place in the policy are undefined and susceptible of
8 two reasonable meanings. [See Order on SJ, Dkt. #66]. The Court concluded that the status of
9 "additional insured" can be conferred by fulfilling the requirement, orally.

10 But in a related provision the words "written contract" or "written agreement" in
11 conjunction with the term "agreed," does not give two reasonable meanings, although the verb
12 "agreed" standing alone says nothing about a writing. These two views of the same terms do not
13 make sense. The Court now holds that the language in both provisions is clear, concise and
14 unambiguous.

15 **II. SUMMARY JUDGMENT STANDARD**

16 Summary judgment is appropriate when, viewing the facts in the light most favorable to
17 the nonmoving party, there is no genuine issue of material fact which would preclude summary
18 judgment as a matter of law. Once the moving party has satisfied its burden, it is entitled to
19 summary judgment if the non-moving party fails to present, by affidavits, depositions, answers to
20 interrogatories, or admissions on file, "specific facts showing that there is a genuine issue for
21 trial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986). "The mere existence of a scintilla of
22 evidence in support of the non-moving party's position is not sufficient." *Triton Energy Corp. v.*
23 *Square D Co.*, 68 F.3d 1216, 1221 (9th Cir. 1995). Factual disputes whose resolution would not
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1 affect the outcome of the suit are irrelevant to the consideration of a motion for summary
2 judgment. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). In other words,
3 “summary judgment should be granted where the nonmoving party fails to offer evidence from
4 which a reasonable [fact finder] could return a [decision] in its favor.” *Triton Energy*, 68 F.3d at
5 1220.

6 III. ANALYSIS

7 **A. An Insurance Policy Must be Read as a Whole to Determine its Meaning, and a** 8 **Court Must Not Give it a Strained or Forced Construction Rendering Policy** 9 **Language Ineffective.**

9 When interpreting an insurance contract, courts look to the whole contract, giving it a
10 fair, reasonable, and sensible construction. *Holden v. Farmers Ins. Co. of Washington*, 169
11 Wn.2d 750, 755-56, 239 P.3d 344 (2010). Washington law provides that an “[i]nsurance
12 contract should be given a practical and reasonable, rather than a literal, interpretation, and
13 should not be given a construction which would lead to an absurd conclusion or render the policy
14 nonsensical or ineffective.” *Washington Public Utility Districts’ Utilities Sys. v. Public Utility*
15 *Dist. No. 1 of Clallam Cty.*, 112 Wn.2d 1, 11, 771 P.2d 701 (1989). Put another way, a court
16 construing policy language “may not give an insurance contract a strained or forced construction
17 which would lead to an extension or restriction of the policy beyond what is fairly within its
18 terms. *McAllister v. Agora Syndicate, Inc.*, 103 Wn. App. 106, 11 P.3d 859 (2000), quoting
19 *Morgan v. Prudential Ins. Co. of Am.*, 86 Wn.2d 432, 434, 545 P.2d 1193 (1976). The rule that
20 ambiguous contract language is to be construed in favor of the insured and most strongly against
21 the insurer should not be permitted to have the effect of making a plain agreement ambiguous.
22 *McAllister*, 103 Wn. App. At 110, citing *West Am. Ins. Co. v. State Farm Mut. Auto. Ins. Co.*, 80
23 Wn.2d 38, 44, 491 P.2d 641 (1971).

1 The additional-insured endorsement at issue here is not unusual. This and substantially
2 identical wording has been interpreted by courts in other jurisdictions without finding the
3 ambiguities that Chugach claims exist. For example, in *Lloyd's v. American Safety* a California
4 federal court addressing an endorsement with the “required to be named as an Additional Insured
5 in a written contract” language found no ambiguity and ruled that there was no coverage,
6 because no written contract between the developer and the insured contractor required contractor
7 to name developer as an additional insured, and the broker was not able to create a binding
8 agreement by issuing a certificate of insurance. *Certain Underwriters at Lloyd's of London v.*
9 *American Safety Ins. Services, Inc.*, 702 F.Supp.2d 1169 (D.C. Cal. 2010). And in *Utica*, the
10 New York Appellate Department found this endorsement was not ambiguous, and ruled there
11 was no coverage where there was no “written contract” executed prior to the loss, as the
12 endorsement required. *Burlington Ins. Co. v. Utica First Ins. Co.*, 71 A.D.3d 712, 896 N.Y.S.2d
13 433 (N.Y.A.D. 2 Dept. 2010).

14 **B. The Policy Language Requires That a Written Contract or Written Agreement**
15 **Must Be Executed Prior to the Injury.**

16 The Court’s prior Order on Summary Judgment [Dkt. #66] addressed the additional-
17 insured endorsement in R-Custom’s Ohio Casualty policy, which defined “who is an insured” to
18 include:

19 Any person or organization whom you are required to name as an
20 additional insured on this policy in a written contract or written
21 agreement. The written contract or written agreement must be
22 currently in effect or becoming effective during the term of this
23 policy and executed prior to the “bodily injury,” “property
24 damage” or “personal and advertising injury.”

22 Chugach must present evidence that an executed, written agreement or written contract
23 requiring Chugach be named an additional insured was executed before the loss. “The entire
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1 contract must be construed together in order to give force and effect to each clause.” *Morgan v.*
2 *Prudential Ins. Co. of America*, 86 Wn.2d 432, 434, 545 P.2d 1193 (1976).

3 **C. There is No Ambiguity as to Who Must Be a Party to the Contract for**
4 **Additional-Insured Coverage Because Clear Policy Language Defining “You” as**
5 **the Named Insured, R-Custom.**

6 This policy language speaks for itself, and is undisputed. In order for Chugach to be an
7 additional insured, “you,” meaning the named insured R-Custom, must be “required” to name
8 Chugach an additional insured in a written contract or written agreement, executed prior to the
9 loss.

10 This is clear not only from the additional-insured insuring agreement but also from a
11 later, consistent, provision in the additional-insured endorsement.

12 If the additional-insured’s policy has an Other Insurance provision
13 making its policy excess, and a Named Insured has agreed in a
14 written contract or written agreement to provide the additional-
15 insured coverage on a primary and noncontributory basis, this
16 policy shall be primary and we will not seek contribution from the
17 additional-insured’s policy for damages we cover.

18 This provision makes clear that: (1) the Named Insured (R-Custom Excavation) – not someone
19 else – must agree to provide the additional-insurance coverage; (2) that agreement by R-Custom
20 must be in a written contract or written agreement; and (3) the agreement to provide the
21 additional-insured coverage must be in the written contract or written agreement.

22 Ignoring clear policy language to manufacture ambiguity makes Chugach’s interpretation not
23 only unreasonable but wrong. No reasonable construction of the policy can render this language
24 meaningless. A court may not construe a policy so as to create an ambiguity that does not exist.

1 **D. Chugach’s Interpretation Gives the Insurance Policy Language a Strained and**
2 **Forced Construction Rendering Policy Language Meaningless or Ineffective, and**
3 **Creating Ambiguity Where None Exists.**

4 Chugach argues that the policy language including as an insured “any person or
5 organization whom you are required to name as an additional insured on this policy in a written
6 contract or written agreement” does not require a single contract. According to Chugach, this
7 endorsement permits (1) a “requirement,” meaning here an oral agreement to agree, and (2) a
8 separate and unintegrated written contract or written agreement, between various possible
9 parties, naming Chugach as an additional insured, but not necessarily with any binding effect.
10 Chugach would also have “agreement” and “contract” defined by the dictionary, because the
11 policy did not provide a definition. Chugach’s interpretation is both unreasonable and wrong.

12 1. Chugach’s interpretation reads an oral “agreement to agree” into language calling
13 for a written contract, rendering words ineffective and creating an absurd result.

14 It is true that the endorsement might have been a bit clearer if the word order were
15 changed, but that does not mean it is ambiguous. Nor does the fact that parties offer opposing
16 meanings make the language ambiguous. *Mayer v. Pierce County Medical Bureau, Inc.*, 80 Wn.
17 App. 416, 421, 909 P.2d 1323 (1995). Policy language should be given a practical rather than
18 overly literal meaning. *Washington Public Utility Districts’ Utilities Sys. v. Public Utility Dist.*
No. 1 of Clallam Cty., 112 Wn.2d 1, 11, 771 P.2d 701 (1989).

19 Chugach’s interpretation would allow “required” to mean an oral agreement to agree later
20 in a written contract. But oral agreements to agree are unenforceable. *Washington Public Utility*
21 *Districts’ Utilities Sys.*, 112 Wn.2d at 11. An oral agreement to make a written agreement would
22 not be binding on R-Custom – and the word “required” would become ineffective. To read an
23 unenforceable oral agreement into the policy in this context is absurd. Chugach is manifestly
24 unable to show that there is any written, executed contract/agreement that required R-Custom to

1 name Chugach as an additional insured. To get around this, Chugach asks the Court to insert an
2 oral contract into this endorsement, even though it expressly requires a writing.

3 Second, even if Chugach were correct and an oral agreement to agree were sufficient to
4 satisfy the “required” portion of the provision, Chugach’s theory still fails on the remaining
5 language – that R-Custom must meet this requirement by naming Chugach as an additional
6 insured in a written contract or written agreement. Of the collection of documents Chugach
7 offered, none bound R-Custom to provide Chugach with insurance. Even if there is some leeway
8 about what constitutes a “written agreement,” it must still be binding on R-Custom. If the
9 writing does not bind R-Custom, then the Court is asked to read the policy to require an
10 unenforceable oral agreement to make an unenforceable written agreement. This is an absurd
11 and impractical result that is not a reasonable interpretation of the policy. Other jurisdictions
12 have found no ambiguity in this language and have correctly found no need to make such a
13 strained construction of this endorsement. *See Certain Underwriters at Lloyd’s of London v.*
14 *American Safety Ins. Services, Inc.*, 702 F.Supp.2d 1169 (C.D. Cal. 2010).

15 Chugach’s interpretation of the policy language tortuously separates the provisions what:
16 “required to name” – from the how: “in a written contract or written agreement” – when this is
17 not needed to understand the provision. Ambiguity is not necessarily to be found in the fact that
18 a word or phrase isolated from its context is susceptible of more than one meaning.” *Ayres v.*
19 *Prudential Ins. Co. of America*, 602 F.2d 1309, 1311 (9th Cir. 1979). Chugach’s parsing makes
20 the words “required,” “written” and “executed” meaningless and ineffective. Washington law
21 construes the language of an insurance policy to give meaning to all the words of the policy.
22 *Boeing Co. v. Aetna Cas. & Surety Co.*, 113 Wn.2d 869, 876, 784 P.2d 507 (1990).

1 2. Dictionaries offer no definition of the phrases at issue, while Washington law
2 determined what is a “written contract.”

3 While it is true that Washington courts may look to dictionaries for the plain meaning of
4 undefined words, this is not a hard and fast rule. The Washington Supreme Court in *State Farm*
5 *v. Ruiz* stated that in *Boeing*, “we did not intend to suggest that courts should ignore the technical
6 meaning of a word when the legal significance of that word would be understood by a common
7 person.” *State Farm Mut. Auto. Ins. Co. v. Ruiz*, 134 Wn.2d 713, 720, 952 P.2d 157 (1998),
8 citing *Boeing Co.*, 113 Wn.2d at 881. The terms “written contract” and “written agreement”
9 would also be understood to have legal meanings beyond a common dictionary definition.

10 Washington law does not require a court to read the dictionary definitions of individual
11 words in isolation from the surrounding context of the policy. *See Polygon NW v. American*
12 *Nat’l Fire Ins. Co.*, 143 Wn. App. 753, 786, 189 P.3d 777, *review denied*, 164 Wn.2d 1033
13 (2008) (criticizing a party’s attempt to read individual words “costs” and “taxed” in isolation
14 from the surrounding provisions, giving those words the dictionary definitions most favorable to
15 their case). Under Washington law, “[i]f parties to an insurance contract use words having a
16 specific legal meaning, they will be presumed to have intended that those words be construed in
17 accordance with established rules of law.” *Polygon NW*, 143 Wn. App. at 788, *citing Burnhard*
18 *v. Reischman*, 33 Wn. App. 569, 577, 658 P.2d 2 (1983). Indeed, “contract,” “written contract”
19 and even “written agreement” are legal terms well-defined by law. Therefore the parties would
20 be presumed to intend that they would be construed under Washington law.

21 Washington law does not elevate dictionary definitions above its own case law, or define
22 the existence of a legally binding contract or agreement by whether it meets the dictionary
23 definition. Chugach has failed to show the required “written contract” or “written agreement” as
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1 a matter of Washington law. This Court’s prior Order ignored Washington law in favor of
2 Chugach’s dictionary definition, and was manifest error.

3 **E. The Documents Relied Upon by Chugach Do Not Satisfy the Ohio Policy’s**
4 **requirements.**

5 Chugach’s argument that a Certificate of Insurance issued by a broker can be the “written
6 agreement” required under the policy is manifestly unreasonable. A Certificate of Insurance
7 does not contain all the elements of a “written contract” or “written agreement” under
8 Washington law. Instead, it expressly disclaims any promise of coverage. On its face, the
9 Certificate states that it is issued as a matter of information only and confers no rights upon the
10 certificate holder, and does not amend, extend, or alter the coverage afforded by the policies. By
11 its own terms, it does not “agree” to anything except the existence of a policy. An insurance
12 certificate, as stated in Washington law, is only evidence of the existence of a policy. *Postlewait*
13 *Construction v. Great American Insurance*, 106 Wn.2d 96, 100-101, 720 P.2d 805 (1986). As a
14 matter of law, it cannot satisfy the requirements of a written contract or written agreement.

15 **IV. CONCLUSION**

16 For the foregoing reasons, the Court **GRANTS** summary judgment in favor of Ohio
17 Casualty [Dkt. #66]. Ohio Casualty is entitled to declaratory judgment that under its policy
18 issued to R-Custom Excavation, Ohio Casualty has no duty to defend Chugach and SRI and no
19 duty to indemnify Chugach and SRI for the money they have paid as a result of the *Frostad* suit.

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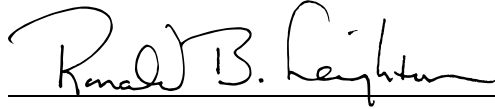
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1 The Motions in Limine [Dkt. #s 105, 106, 109] are **DENIED AS MOOT**. Ohio Casualty's
2 Motion for Reconsideration [Dkt. #116] is **DENIED AS MOOT**.

3 **IT IS SO ORDERED.**

4 DATED this 6th day of October, 2011.

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6 RONALD B. LEIGHTON
7 UNITED STATES DISTRICT JUDGE
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