IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

NATIONAL FIRE & MARINE INSURANCE COMPANY, a Nebraska corporation, Respondent, v. CERTAIN UNDERWRITERS AT LLOYD'S LONDON, subscribing to policy number A99BF021, Defendant, LIBERTY MUTUAL INSURANCE COMPANY, a Massachusetts corporation, Appellant, MUTUAL OF ENUMCLAW INSURANCE COMPANY, a Washington corporation; THE OHIO CASUALTY INSURANCE CO., an Ohio corporation; WEST AMERICAN INSURANCE COMPANY, an Ohio corporation; MARYLAND CASUALTY COMPANY, a Maryland corporation; ASSURANCE COMPANY OF AMERICA, a New York corporation; AMERICAN HOME ASSURANCE COMPANY, a Texas corporation; UNITED STATES FIRE INSURANCE COMPANY, a New Jersey corporation; and OLD REPUBLIC INSURANCE COMPANY, a Pennsylvania corporation,	)	NOS. 66900-1-I 66901-0-I (Consolidated Cases) DIVISION ONE UNPUBLISHED OPINION FILED: July 16, 2012

Defendants.)

Lau, J. — An insurer's duty to defend arises "if the insurance policy conceivably covers the allegations in the complaint, whereas the duty to indemnify exists only if the policy actually covers the insured's liability."[1] Because the construction defect complaint filed by Cheswick Lane Condominium Owners Association against project developer Wellington Cheswick LLC and others alleges various breach of warranty and liability claims that are conceivably covered by the umbrella policy issued by Liberty Mutual Insurance Company, we conclude Liberty owed a duty to defend Wellington in the construction defect lawsuit. We affirm the trial court's order granting summary judgment in National Fire & Marine Insurance Company's favor.

FACTS

The material facts are not disputed. This duty to defend dispute arises out of a construction defect suit against Wellington Cheswick LLC and its related entities and individuals. Wellington developed the 71-unit Cheswick Lane Condominiums in three phases from March 20, 2000 to June 30, 2002. After completion, Wellington turned over control of the Condominiums to Cheswick Lane Condominium Owners Association in July 2002. The Association sued Wellington in December 2004, alleging mainly that construction defects breached common law, statutory, and contractual warranties. The Association also alleged Washington Uniform Fraudulent Transfer Act, chapter 19.40 RCW, violations.

After receiving the Association's complaint, Wellington tendered its defense and

[1] Woo v. Fireman's Fund Ins. Co., 161 Wn.2d 43, 53, 164 P.3d 454 (2007).

indemnity to its primary insurers, National Fire & Marine Insurance Company and Certain Underwriters at Lloyd's, London. Wellington's primary policies in effect during the relevant times were:

> 1. Policy A99BF021 ("Lloyd's policy I"), issued by Lloyd's, effective from February 1, 2000, to February 1, 2001 (year one).
> 2. Policy A01BF118 ("Lloyd's policy II"), issued by Lloyd's, effective from February 1, 2001, to March 10, 2002 (year two).
> 3. Policy 72LP149441 ("National Fire policy"), issued by National Fire, effective from March 10, 2002, to March 10, 2003 (year three).

Wellington also purchased an umbrella policy[2] from Liberty Mutual Insurance Company. Liberty's umbrella policy was effective in year two (at the same time as Lloyd's policy II) from February 1, 2001, to March 10, 2002.

Wellington tendered its defense to National Fire on November 4, 2004. Several months later, National Fire retained defense counsel for Wellington and issued a letter reserving its rights to deny indemnity. National Fire provided Wellington with a complete defense to all allegations in the underlying suit, incurring $1,457,188.17 in defense costs. Wellington tendered its defense of the underlying suit to Lloyd's on March 2, 2005. Lloyd's responded in December 2005 and neither accepted nor denied the tender. Wellington initially tendered its defense to Liberty on August 11, 2005, requesting that Liberty "determine whether or not it has an obligation to drop down and provide a defense and indemnity to [Wellington] in light of the failure of [Lloyd's] to respond to the tender of defense and immunity." Liberty responded the following month

[2] An umbrella policy provides coverage for amounts exceeding the limits of the underlying policy and protects against gaps in the underlying policy. Prudential Prop. & Cas. Ins. Co. v. Lawrence, 45 Wn. App. 111, 119, 724 P.2d 418 (1986).

and neither accepted nor rejected the tender. Instead, Liberty reserved its rights based solely on policy exclusions excusing its duty to indemnify.

In February 2006, after failing to reach settlement in the underlying suit, the Association amended its complaint to add the builder (Wellington Builders of Washington, Ltd.), five individuals alleged to be members/shareholders of Wellington, and an ownership entity (Wellington Organization, Ltd.) as defendants.[3] This resulted in a second wave of tender letters, including Wellington's re-tender to Liberty in June 2006—to which Liberty did not respond. Lloyd's responded to the second tender in August 2006 by agreeing to participate in the defense of the five individual principals and Wellington Organization, Ltd., subject to a reservation of rights to deny coverage. Lloyd's expressly declined the builder's tender of defense. The builder was one of Liberty's named insureds. Lloyd's never updated its December 2005 equivocal tender response to the developer and its principal (Wellington Cheswick LLC and First Wellington Crown Corporation), each of whom Liberty also insured.

Wellington and the Association settled the underlying suit for $2,497,000 in August 2006. Lloyd's and National Fire each contributed $600,000 and Liberty contributed $300,000 toward the settlement amount. To recoup its defense costs incurred in Wellington's defense, National Fire sued Wellington's other insurers—including Lloyd's and Liberty—alleging equitable contribution by each

[3] Named in the original complaint as defendants were the developer (Wellington Cheswick LLC), its parent company (First Wellington Crown Corp.), and several John Doe defendants.

defendant insurer based on its respective share of these defense costs.

In a series of summary judgments,[4] Liberty moved unsuccessfully to dismiss National Fire's equitable contribution claim. The court also denied Liberty's summary judgment motion on the duty to defend and allocation issues and granted National Fire's cross motions for summary judgment, finding Liberty owed Wellington a duty to defend and liability for contribution to National Fire's defense costs, including accrued prejudgment interest. Liberty appeals the court's adverse summary judgment rulings that (1) concluded that it owed a duty to defend Wellington and (2) imposed contribution liability for defense costs incurred by National Fire.[5]

ANALYSIS

Standard of Review

We review a summary judgment order de novo, performing the same inquiry as the trial court and considering facts and reasonable inferences in the light most favorable to the nonmoving party. Jones v. Allstate Ins. Co., 146 Wn.2d 291, 300, 45 P.3d 1068 (2002). Summary judgment is proper if no genuine issue of material fact remains and the moving party is entitled to judgment as a matter of law. CR 56(c).

Similarly, the construction of an insurance contract is a question of law. State Farm Gen. Ins. Co. v. Emerson, 102 Wn.2d 477, 480, 687 P.2d 1139 (1984); Bordeaux, Inc. v. Am. Safety Ins. Co., 145 Wn. App. 687, 694, 186 P.3d 1188 (2008). Courts

[4] As to the summary judgment motions between Lloyd's and National Fire, those issues were resolved by settlement agreement.

[5] Liberty does not appeal the trial court's equitable allocation for contribution, and National Fire has withdrawn its cross appeal on that issue.

construe insurance policies as contracts. Austl. Unlimited, Inc. v. Hartford Cas. Ins. Co., 147 Wn. App. 758, 765, 198 P.3d 514 (2008). We consider the policy as a whole and give it a "'fair, reasonable, and sensible construction as would be given to the contract by the average person purchasing insurance.'" Weyerhaeuser Co. v. Commercial Union Ins. Co., 142 Wn.2d 654, 665, 15 P.3d 115 (2000) (quoting Am. Nat'l Fire Ins. Co. v. B&L Trucking & Constr. Co., 134 Wn.2d 413, 427-28, 951 P.2d 250 (1998)). "[I]f the policy language is clear and unambiguous, the court must enforce it as written and may not modify it or create ambiguity where none exists." Austl. Unlimited, 147 Wn. App. at 765-66. A policy is ambiguous only if its provisions are susceptible to two different interpretations, both of which are reasonable. Allstate Ins. Co. v. Peasley, 131 Wn.2d 420, 424, 932 P.2d 1244 (1997). We resolve ambiguity in favor of the insured. Moeller v. Farmer's Ins. Co. of Wash., 173 Wn.2d 264, 272, 267 P.3d 998 (2011). When interpreting insurance policies, we are bound by the definitions provided in the policy. Austl. Unlimited, 147 Wn. App. at 766.

Umbrella Policies in Washington

Insureds often purchase excess coverage in the form of umbrella policies. An umbrella policy provides coverage for amounts exceeding the limits of the underlying or primary policy and protects against gaps in that underlying policy. Prudential Prop. & Cas. Ins. Co. v. Lawrence, 45 Wn. App. 111, 119, 724 P.2d 418 (1986). Explained another way, umbrella insurers typically agree to provide not only excess coverage on claims within the ambit of the insured's primary policy, but also primary coverage for those claims not included in the insured's basic primary coverage. We explained this

gap-filling effect[6] in Lawrence:

> The very nomenclature chosen to designate umbrella or catastrophe policies suggests an intent to protect against gaps in the underlying policy. As stated by one authority:
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> > "It should be noted that [catastrophe and umbrella] policies often provide a primary coverage in areas which might not be included in the basic coverage, since it is the intent of the company to afford a comprehensive protection in order that such peace of mind may truly be enjoyed. In those areas, such coverage will, in fact, be primary."

Lawrence, 45 Wn. App. at 119 (emphasis added) (alteration in original) (quoting 8A John Alan Appleman & Jean Appleman, Insurance Law and Practice, § 4909.85, at 452-53 (1981)). Our Supreme Court cited Lawrence when explaining the gap-filling effect:

> In the ordinary case, excess or umbrella coverages are designed to pick up where the primary insurance coverage leaves off, providing an excess layer of coverage above the limit of the primary policy. In fact, such excess policies are designed to protect against gaps in coverage.

Weyerhaeuser, 142 Wn.2d at 707 (citation omitted). Similarly, in MacKenzie v. Empire Insurance Cos., 113 Wn.2d 754, 782 P.2d 1063 (1989), the court recognized that the purpose of an umbrella policy is not necessarily limited to providing an extra layer of insurance above that available under the primary policy:

> This court has previously relied on John Appleman's extensive insurance law text in discussing excess and primary insurance coverage issues. As to "umbrella" policies, a type of excess coverage, Appleman's treatise contains the following pertinent discussion:
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> "Umbrella policies serve an important function in the industry. In this day of uncommon, but possible, enormous verdicts, they pick up this exceptional hazard at a small premium. . . . It may assume as a primary carrier certain coverages not included elsewhere . . . ."

[6] National Fire refers to this gap-filling effect—which occurs when an umbrella policy drops down to cover claims outside the scope of coverage of an underlying primary policy—as "horizontal coverage." In contrast, "vertical coverage" describes an umbrella policy's excess coverage in the event a claim exceeds the primary insurer's policy limits. Resp't's Br. at 9.

MacKenzie, 113 Wn.2d at 757-58 (quoting 8C Appleman, supra, at 107 (emphasis added). See also Christal v. Farmers Ins. Co. of Wash., 133 Wn. App. 186, 195, 135 P.3d 479 (2006) ("Whereas excess policies provide coverage over and above that available through an underlying policy, an umbrella policy may provide primary coverage in areas not otherwise covered.") (emphasis added).

Duty to Defend

In Washington, "'[T]he duty to defend is different from and broader than the duty to indemnify.'" Edmonson v. Popchoi, 172 Wn.2d 272, 282, 256 P.3d 1223 (2011) (alteration in original) (quoting Am. Best Food, Inc. v. Alea London, Ltd., 168 Wn.2d 398, 404, 229 P.3d 693 (2010)). In Woo v. Fireman's Fund Insurance Co., 161 Wn.2d 43, 164 P.3d 454 (2007), our Supreme Court summarized the law governing an insurer's duty to defend:

> The duty to defend "arises at the time an action is first brought, and is based on the potential for liability." Truck Ins. Exch. v. VanPort Homes, Inc., 147 Wn.2d 751, 760, 58 P.3d 276 (2002) (emphasis added). An insurer has a duty to defend 'when a complaint against the insured, construed liberally, alleges facts which could, if proven, impose liability upon the insured within the policy's coverage.'" Id. (quoting Unigard Ins. Co. v. Leven, 97 Wn. App. 417, 425, 983 P.2d 1155 (1999)). An insurer is not relieved of its duty to defend unless the claim alleged in the complaint is "clearly not covered by the policy." Id. (citing Kirk v. Mt. Airy Ins. Co., 134 Wn.2d 558, 561, 951 P.2d 1124 (1998)). Moreover, if a complaint is ambiguous, a court will construe it liberally in favor of "triggering the insurer's duty to defend." Id. (citing R.A. Hanson Co. v. Aetna Ins. Co., 26 Wn. App. 290, 295, 612 P.2d 456 (1980)).[5] In contrast, the duty to indemnify "hinges on the insured's actual liability to the claimant and actual coverage under the policy." Hayden [v. Mut. of Enumclaw Ins. Co.], 141 Wn.2d [55,] 64[, 1 P.3d 1167 (2002)] (emphasis added). In sum, the duty to defend is triggered if the insurance policy conceivably covers the allegations in the complaint, whereas the duty to indemnify exists only if the policy actually covers the insured's liability.
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> "There are two exceptions to the rule that the duty to defend must be

> determined only from the complaint, and both the exceptions favor the insured." Truck Ins., 147 Wn.2d at 761. First, if it is not clear from the face of the complaint that the policy provides coverage, but coverage could exist, the insurer must investigate and give the insured the benefit of the doubt that the insurer has a duty to defend. Id. Notice pleading rules, which require only a short and plain statement of the claim showing that the pleader is entitled to relief, impose a significant burden on the insurer to determine if there are any facts in the pleadings that could conceivably give rise to a duty to defend. Hanson, 26 Wn. App. at 294. Second, if the allegations in the complaint "'"conflict with facts known to or readily ascertainable by the insurer,"'" or if "'"the allegations . . . are ambiguous or inadequate,"'" facts outside the complaint may be considered. Truck Ins., 147 Wn.2d at 761 (quoting Atl. Mut. Ins. Co. v. Roffe, Inc., 73 Wn. App. 858, 862, 872 P.2d 536 (1994) (quoting E-Z Loader Boat Trailers, Inc. v. Travelers Indem. Co., 106 Wn.2d 901, 908, 726 P.2d 439 (1986))). The insurer may not rely on facts extrinsic to the complaint to deny the duty to defend—it may do so only to trigger the duty. Id.
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> . . . . Although the insurer must bear the expense of defending the insured, by doing so under a reservation of rights and seeking a declaratory judgment, the insurer avoids breaching its duty to defend and incurring the potentially greater expense of defending itself from a claim of breach. Id.
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> [5] Fireman's argues that we should adopt a "reasonable expectations" standard in determining whether an insurer has a duty to defend an insured. Suppl. Br. of Resp'ts at 3 (citing E-Z Loader Boat Trailers, Inc. v. Travelers Indem. Co., 106 Wn.2d 901, 907, 726 P.2d 439 (1986)). It argues "an insurer has no duty to defend when the insured can have no reasonable expectation of coverage." Id. It also suggests the Court of Appeals adopted such a test when it concluded, "[n]o reasonable person could believe that a dentist would diagnose or treat a dental problem by placing boar tusks in the mouth while the patient was under anesthesia in order to take pictures with which to ridicule the patient." Id.; Woo, 128 Wn. App. at 103. Fireman's misreads the Court of Appeals' statement. The court was referring to whether a reasonable patient would believe that the dentist would put boar tusks in her mouth whereas Fireman's refers to whether *a* reasonable insured would expect his policy to provide coverage. In any case, neither comports with our established rule regarding the duty to defend, and we decline to adopt Fireman's reasoning.

Woo, 161 Wn.2d at 52-54. In sum, "'if there is any reasonable interpretation of the facts or the law that could result in coverage, the insurer must defend.'" Edmonson, 172 Wn.2d at 282 (quoting Alea, 168 Wn.2d at 405). Once an event triggers the duty to defend, insurers may not desert policyholders while awaiting an indemnity

determination. Alea, 168 Wn.2d at 405.

Under well-settled Washington law noted above, the duty to defend attaches immediately upon the filing of the claim and it is the potential for coverage of the claim that triggers the duty, rather than proof of actual coverage. Woo, 161 Wn.2d at 52-53; Travelers Ins. Cos. v. N. Seattle Christian & Missionary Alliance, 32 Wn. App. 836, 839-40, 650 P.2d 250 (1982). The obligation encompasses any claim that might be covered under any permissible construction of the policy. Baugh Constr. Co. v. Mission Ins. Co., 836 F.2d 1164, 1168 (9th Cir. 1988) (applying Washington law); Travelers, 32 Wn. App. at 839-40. An insurer owes a duty to defend covered claims against the insured but typically owes no duty to defend a claim falling outside policy coverage. Woo, 161 Wn.2d at 57 (trial court properly permitted jury to award damages for breach of duty to defend where claims were arguably covered by policy); Holly Mountain Res., Ltd. v. Westport Ins. Corp., 130 Wn. App. 635, 649-50, 104 P.3d 725 (2005) (trial court erroneously entered judgment for insured where complaint alleged claims that were unambiguously outside scope of policy coverage).

When gaps in a primary policy's coverage trigger the gap-filling provisions in an umbrella policy, Washington courts treat the umbrella policy as a primary policy for purposes of duty to defend and duty to indemnify analysis. See Austl. Unlimited, 147 Wn. App. at 767-78 (applying Woo's duty to defend analysis to an umbrella policy that had dropped down to provide primary coverage).[7]

[7] California also adopts this approach. See Legacy Vulcan Corp. v. Superior Court, 185 Cal. App. 4th 677, 689, 692, 110 Cal. Rptr. 3d 795 (2010) (because the umbrella insurer's coverage dropped down to provide primary coverage to fill gaps in

Liberty's Duty to Defend

Each party contends the Liberty policy's controlling provisions are unambiguous. Liberty argues its policy unambiguously exempts it from defending Wellington, while National Fire argues the policy unambiguously requires Liberty to defend.

Here, the dispute's core question involves two distinct policy sections related to coverage and defense. The policy's coverage clause describes the grant of coverage under Liberty's umbrella policy as follows:

> I. COVERAGE
> We will pay on behalf of the "Insured" those sums in excess of the "Retained Limit" that the "Insured" becomes legally obligated to pay by reason of liability imposed by law or assumed by the "Insured" under an "Insured contract" because of "bodily injury," "property damage," "personal injury," or "advertising injury" that takes place during the Policy Period and is caused by an "occurrence" happening anywhere. The amount we will pay for damages is limited as described below in the Insuring Agreement Section II.

Subsection 2 of the "Defense" clause defines Liberty's defense obligation as follows:

> III. DEFENSE
> A. We will have the right and duty to investigate any "claim" and defend any "suit" seeking damages covered by the terms and conditions of this policy when:
> . . . .
> 2. damages are sought for any "occurrence"[8] which is covered by this policy but not covered by any underlying policies listed in the Schedule of Underlying Insurance or any other insurance providing

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the underlying policy, "the ordinary rules regarding a duty to defend in connection with primary liability coverage apply.").

[8] Liberty's policy defines "occurrence" in relevant part:
"Occurrence" means:
1. as respects "bodily injury" or "property damage," an accident, including continuous or repeated exposure to substantially the same general harmful conditions.

coverage to the "Insured."[9]

Liberty relies on the policy's coverage and defense clauses quoted above to argue that no duty to defend arose because Lloyd's and National Fire provided "coverage" under the policy by defending Wellington and contributing to the underlying settlement. National Fire counters that coverage and defense obligations are not the same and the court's defense obligation finding does not convert uncovered claims into covered claims.

Liberty's contention ignores the well-settled Washington principle discussed above and applied in numerous cases that the duty to defend is different from and broader than an insurer's duty to indemnify.[10] Liberty's policy clearly defines its duty to defend in terms of an occurrence covered by underlying insurance. The policy defines

[9] It is undisputed that Liberty owed no duty to defend under Section III.A.1, which provides that Liberty has a duty to defend when "the applicable Limits of Insurance of the underlying policies listed in the Schedule of Underlying Insurance and the Limits of Insurance of any other insurance providing coverage to the 'Insured' have been exhausted by actual payment of 'claims' for any 'occurrence' to which this policy applies." Here the primary policies were not "exhausted by actual payment of 'claims.'"

[10] Washington courts have treated "coverage" as separate from "defense." See Truck Ins. Exch. v. Vanport Homes, Inc., 147 Wn.2d 751, 755, 58 P.3d 276 (2002) ("We are asked to determine whether policy provisions relieve an insurer of the duty of providing coverage. However, because [the insurer] breached, in bad faith, its duty to defend, we hold that it is estopped from denying coverage.") (emphasis added). See also Vanport Homes, 147 Wn.2d at 763 (agreeing with the trial court that "the denial of coverage and failure to defend were in bad faith.") (emphasis added); Vanport Homes, 147 Wn.2d at 766 (Bridge, J., dissenting) ("[the insurer] possessed a reasonable justification for denying coverage and its duty to defend.") (emphasis added); Austl. Unlimited, 147 Wn. App. at 744 ("The policy therefore requires some causal connection between the injury and the insured's advertising activity before there is coverage or a duty to defend.") (emphasis added).

"occurrence" in terms of an event triggering indemnification.[11] But Liberty attempts to interpret its policy language as a stand-alone contract without regard to controlling Washington law.[12] As discussed above, "[a] duty to defend arises when the complaint is filed, and is to be determined by the allegations contained in the complaint." Guelich v. Am. Prot. Ins. Co., 54 Wn. App. 117, 118, 772 P.2d 536 (1989). Under Woo, Liberty owes a duty to defend if the Association's complaint, construed liberally, alleges facts that could, if proven, impose liability upon Wellington within the umbrella policy's coverage and not within the underlying policies' coverage. Woo, 161 Wn.2d at 52-53; Austl. Unlimited, 147 Wn. App. at 747. Liberty's duty to defend is triggered unless the claims alleged in the complaint are clearly not covered by its umbrella policy. Woo, 161 Wn.2d at 53.

Construing the Association's complaint liberally, certain claims in the underlying suit are conceivably covered under Liberty's umbrella policy and not covered by underlying primary policies, triggering Liberty's duty to defend. First, Lloyd's' initial tender response states that the entire Condominium project could be considered Wellington's product and that the "defective product" exclusion under paragraphs 6(f)(1) and 6(f)(2) of its policy apply to preclude coverage. Lloyd's' defective product exclusion contains no real estate exception. Thus, Lloyd's' defective product exclusion

[11] The parties do not dispute that the duty to indemnify "hinges on the insured's actual liability to the claimant and actual coverage under the policy." Woo, 161 Wn.2d at 53.

[12] We are unpersuaded by Liberty's reliance on non-Washington authority because Woo and related Washington authority control as discussed below.

potentially applies to preclude coverage under its policy. By contrast, Liberty's policy is broader because it contains a narrower product exclusion (the policy excepts real estate from the "your product" definition). The complaint alleges, "The defects or deficiencies described above have resulted in physical damage to the Project" and defines the "Project" as the Cheswick Lane Condominium development. Thus, it is conceivable that a gap in the Lloyd's policy requires Liberty to act as a primary insurer to cover this potential liability, triggering Liberty's duty to defend.

Second, the Lloyd's policy includes a fiduciary exclusion provision, while the Liberty policy contains no exclusion for breach of fiduciary duty claims. The complaint alleges breach of fiduciary duty. This gap conceivably requires Liberty to act as a primary insurer to cover this potential liability, triggering Liberty's duty to defend.

Third, the Lloyd's policy excludes property damage to premises alienated (sold) by the insured arising out of such premises or any part thereof. The Liberty policy contains no similar exclusion. The complaint alleges that the Association initiated the action on behalf of itself and all individual unit owners with respect to matters affecting the Condominium. The complaint also indicates that the insured sold at least some of the units. Because the Lloyd's policy excludes premises alienated and Liberty's does not, this gap conceivably requires Liberty to act as primary insurer to cover this potential liability, triggering Liberty's duty to defend.

Finally, National Fire's policy excludes damages commencing prior to the inception of the policy. National Fire's policy incepted on day one of year three (March 10, 2002, to March 10, 2003) and, thus, excludes any damages commencing in year

two (when Liberty's policy was effective). Coverage gaps conceivably exist that preclude Liberty from relying on National Fire as "any other insurance providing coverage to the 'Insured.'" This conceivability of coverage triggered Liberty's duty to defend. National Sur. Corp. v. Immunex Corp., 162 Wn. App. 762, 774, 256 P.3d 439 (2011), review denied, 173 Wn.2d 1006 (2012).

Liberty fails to refute National Fire's contention that the underlying insurance policies contain exclusions that conceivably trigger primary coverage under Liberty's umbrella policy.[13] When Liberty drops down to become primary insurer in year two for fiduciary duty and alienated property—both of which are alleged in the underlying complaint—this triggers its duty to defend. Liberty claims the trial court's determination that Lloyd's owed a duty to defend covered and uncovered claims because they were reasonably related means there was no lack of "coverage" within the meaning of Section III.A.2 (quoted above) of Liberty's umbrella policy and, thus, Liberty owed no duty to defend. But as discussed above, Liberty's attempt to collapse its duty to defend with "coverage" finds no support in its policy or Washington law. Liberty cites Bordeaux for the proposition that "'[n]o right of allocation exists for the defense of non-covered claims that are "reasonably related" to the defense of covered claims.'" Bordeaux, 145 Wn. App. at 698 (quoting Nordstrom, Inc. v. Chubb & Son, Inc., 820 F. Supp. 530, 536 (W.D. Wash. 1992)).[14] As noted above, Liberty did not appeal the trial

[13] Liberty does not address National Fire's discussion of exclusions in the primary policies other than to claim, in a footnote, that the discussion is "entirely irrelevant." Appellant's Reply Br. at 3 n.1.

[14] But Nordstrom also held, "An insurer is not entitled, however, to re-litigate an

court's equitable allocation for contribution. We do not address this contention to the extent it seeks to challenge the court's allocation ruling.

Liberty argues that even if we adopt "National Fire's unreasonable interpretation of 'coverage,'" it still had no duty to defend because Lloyd's and National Fire "covered" the occurrence by contributing funds to the indemnity settlement in 2006. Appellant's Reply Br. at 15. We reject this claim because (1) Lloyd's and National Fire reserved rights in the construction defect lawsuit, (2) the settlement did not resolve which insurer covered each specific claim, and (3) the trial court in the equitable contribution case made no "coverage" rulings. As we explained above, the duty to defend attaches immediately upon the filing of the claim and it is the potential for coverage of the claim that triggers the duty, rather than proof of actual coverage. Time Oil Co. v. Cigna Prop. & Cas. Ins. Co., 743 F. Supp. 1400, 1419-20 (W.D. Wash. 1990); Travelers, 32 Wn. App. at 839-40. That both Lloyd's and National Fire ultimately contributed to the indemnity settlement is irrelevant as to whether Liberty owed a duty to defend Wellington in the underlying suit.[15]

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underlying action following a settlement. Indeed, the Nodaway court stated: 'It must be remembered, however, that the court is not required to resolve all fact and legal issues in the underlying case, but simply to determine what reasonable allocations should have been made, considering uncertainties in both fact and law known at the time of the settlement.' Nodaway Valley Bank v. Continental Casualty Co., 715 F. Supp. 1458, 1465 (W.D. Mo.1989)." Nordstrom, 820 F. Supp. at 535 (citation omitted).

[15] Had Liberty intended to bind itself to defend the insured only if no other insurer had a duty to defend, it could have included that language in its policy. "'In evaluating the insurer's claim as to meaning of language used, courts necessarily consider whether alternative or more precise language, if used, would have put the matter beyond reasonable question.'" Lynott v. Nat'l Union Fire Ins. Co. of Pittsburgh, Pa., 123 Wn.2d 678, 688, 871 P.2d 146 (1994) (quoting 13 John A. Appleman & Jean Appleman, Insurance Law & Practice § 7403 (1976)). Such language is present in

Under the circumstances here, Liberty "may not put its own interests ahead of its insured's. . . . [It] must defend until it is clear that the claim is not covered." Alea, 168 Wn.2d at 405. Three alternatives were available to Liberty on receiving tender: (1) accept the tender, (2) reject the tender and refuse to defend, or (3) accept under a reservation of rights, file a declaratory action, and defend until the issue of its duty to defend is resolved. Alea, 168 Wn.2d at 405; Truck Ins., 147 Wn.2d at 761; Waite v. Aetna Cas. & Sur. Co., 77 Wn.2d 850, 855, 467 P.2d 847 (1970); Thomas V. Harris, Washington Insurance Law § 14.02, at 14-3 (3d ed. 2010) (discussing the three alternatives). Liberty invoked none of these options. It instead issued an equivocal tender response to Wellington that neither accepted nor denied defense. For the first time, over five years later, Liberty denied its defense obligation when National Fire filed suit claiming equitable contribution. We are unpersuaded by Liberty's logistical and public policy arguments to support its no duty to defend stance because it could have avoided the claimed dire consequences of an adverse interpretation.[16]

We conclude that well-settled Washington duty to defend jurisprudence required

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other insurers' policies. See Travelers Cas. & Sur. Co. v. Am. Int'l Surplus Lines Ins. Co., 465 F. Supp. 2d 1005, 1017 (2006) (Travelers' umbrella insurance policy provided, "We will have no duty to defend any claim or 'suit' that any other insurer has a duty to defend.").

[16] Liberty's public policy arguments are unconvincing, mainly because Liberty appears to assume that under National Fire's analysis, indemnity must be conclusively established before a duty to defend may be imposed. Liberty is incorrect. The duty to defend hinges on potential for coverage of the claims asserted in the complaint. Woo, 161 Wn.2d at 52. Further, if it is not clear from the face of the complaint that the policy provides coverage, but coverage could exist, the insurer must investigate and give the insured the benefit of the doubt that the insurer has a duty to defend. Woo, 161 Wn.2d at 53.

Liberty to defend its insured because the policy provisions conceivably drop down to fill gaps in the primary policies' coverage.

CONCLUSION

Because it is conceivable, when considering the Association's complaint and the insurers' respective policies, that gaps exist in the underlying coverage that required Liberty to provide primary coverage in those areas, Liberty owed a duty to defend Wellington. Accordingly, we affirm the trial court's order granting summary judgment in National Fire's favor.[17]

WE CONCUR:

[17] Given our decision, we need not address Liberty's appeal of the trial court's order denying its motion for reconsideration.