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December 23, 2016

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Re: *Currie et ux v. Safeco Insurance Company of Oregon*
Cross motions for summary award

Gentlemen:

This is an action on an insurance policy. The parties filed cross motions for summary award. On December 22, 2016, a hearing was held on the cross motions for summary award. At the hearing, I informed the attorneys for the parties that I am retiring from the practice of law and that I have submitted papers to the Oregon State Bar which will provide for my retirement on January 15, 2017.

This letter ruling provides for expedited dates for the filing of the post-hearing cost bill. If either party objects to this schedule, please let me know, and I will attempt to delay the date of my retirement long enough to complete and submit the rulings in this case.

The City of Portland records, upon which both parties rely, reveal that the sewer system surcharged due to heavy rainfall in the area. The parties agree that heavy rainfall caused the City of Portland sewer system adjacent to plaintiffs' home to surcharge, which means that rain water overwhelmed the sewer system and caused sewage to flow backwards under pressure. As a result, water from the sewer pipes discharged into plaintiffs' basement through a drain in the floor.

The first two sentences of paragraph 4. of the complaint allege:

"On or about December 7, 2015, rain water pooled in the street adjacent to the [plaintiffs'] home. Someone removed a manhole cover, which caused the water to flow into the sewer and caused water and sewage to flow into the [plaintiffs'] home." Paragraph 4.

Plaintiffs have moved to amend the complaint in order to conform it to the undisputed evidence in the summary judgment record showing that the sewer surcharge was caused by heavy rainfall, not by the removal of a manhole cover. Plaintiffs' reply memorandum in support of motion for summary award, page 6.

Oregon follows the rule that if facts appear in the summary judgment record which would justify an amended complaint, the complaint may be treated as though it were already amended to conform. *Hussey v. Huntsinger*, 72 Or App 565, 569 (1985). I am treating the complaint as though it had already been amended to conform to the facts.

Defendant relies on the water damage exclusions to covered building property losses, which exclude loss caused by:

- “c. water which escapes or overflows from sewers or drains located off the residence premises; [or]
- “d. water which escapes or overflows from drains or related plumbing appliances on the residence premises. However, this exclusion does not apply to overflow and escape caused by malfunction on the residence premises, or obstruction on the residence premises, of a drain or plumbing appliance on the residence premises***[.]” Exhibit 3 to Currie Declaration in support of plaintiffs' motion for summary award, page 37, Building Property Losses We Do Not Cover, paragraph 10. c. and d.

Plaintiffs argue that “escape” does not describe what happened in plaintiffs' basement. Plaintiffs rely on the dictionary definition of “escape” adopted by the court in *Lumbermens Mut. Cas. Co. v. S-W Industries, Inc.*, 23 F3d 970, 982 (6th Cir 1994) which defines an “escape” as an “evasion of or deliverance from what confines, limits, or holds.” Plaintiffs argue that the event was not an escape because water was not confined in the sewer and because the sewer pipe did not break. Rather, sewage simply flowed backwards through the open sewer lateral leading to the plaintiffs' basement.

Plaintiffs also argue that “overflow” does not describe what happened in plaintiffs' basement. Plaintiffs rely on the definition of “overflow” adopted by the court in *Cardio Diagnostic Imaging, Inc. v. Farmers Ins. Exch.*, 212 Cal App4th 69, 76 (2012), in which the court defined “overflow” as “water that spills over from a sewer, drain, or sump*** due to a blockage.” Plaintiffs argue that there is no evidence that water built up behind a blockage. Rather, sewage flowed backwards through the unobstructed sewer lateral leading to the plaintiffs' basement.

Defendant, relying on paragraph 10. d., argues that water from the sewer pipes escaped or overflowed from the drain on the residence premises. Defendant's motion for summary award, page 7.

Defendant relies on four cases, *Hallsted v. Blue Mountain Convalescent Center, Inc.*, 595 P2d 574 (Wn App 349 1979); *Haines v. United Security Ins. Co.*, 602 P2d 901 (Colo App 1979); *Old Dominion Ins. Co. v. Elysee, Inc.*, 601 So2d 1243 (Fla App 1992); and *Pichel v. Dryden Mut. Ins. Co.*, 986 NYS2d 268 (NY App Div 2014). In each case the exclusion was different from the exclusion in the instant case.

In *Hallsted* the sewer under the street in front of plaintiff's home became clogged. As a result, sewage backed up through sewer pipes to plaintiff's home and flowed out of the commode in her second floor bathroom. The policy excluded loss caused by water which backs up through sewers or drains. The court held that the exclusion was unambiguous and excluded coverage.

In *Haines* heavy rainfall entered a sewer line. Excessive pressure in the line caused raw sewage to be discharged into plaintiff's basement. The policy excluded loss caused by water which backs up through sewers or drains. The court, relying on *Hallsted* held that coverage was excluded.

In *Elysee* a blockage in a main drain pipe caused sewage from adjoining stores to back up and caused flooding in plaintiff's store. The policy excluded loss caused by water that backs up from a sewer or drain. The court, citing *Hallsted* and *Haines*, held that coverage was excluded.

In *Pichel*, two apartment buildings sustained substantial water damage when waste water entered the first floor apartments through toilets, bathtubs and condensation drains. The policy's water damage exclusion excluded loss caused by water which backs up through sewers or drains. A second exclusion provided that there was coverage for loss caused by the accidental leakage, overflow or discharge of liquids from a plumbing system.

The court held that there was an ambiguity in the two provisions, and resolved the ambiguity by holding that water damage caused by a backup/overflow that originates from a pipe or clogged drain located within the insured's property line comes from the insured's plumbing system and is covered; and if the cause of the backup/overflow is from outside the insured's property boundaries, such as a clogged municipal sewer that forces water from outside the insured's plumbing system to overflow, the sewer or drain exclusion is applicable.

The trial court had granted plaintiff's motion for summary judgment. The court

held that it was an issue of fact as to what caused the backup and the location of the problem. Accordingly, the court reversed the summary judgment in favor of plaintiff and remanded the case for trial.

Defendant argues that the exclusion in the instant case is similar to the exclusions in *Hallsted*, *Haines* and *Elysee*. Defendant's motion for summary award, pages 8-9; defendant's response to plaintiff's motion for summary award, pages 7-8. I disagree.

In *Hallsted*, *Haines* and *Elysee* the loss was caused by a backup from a sewer or drain and the applicable exclusion excluded loss caused by water that backs up from a sewer or drain. Defendant's water exclusion excludes loss caused by water which escapes or overflows from sewers or drains located off the residence premises and water which escapes or overflows from drains or related plumbing appliances on the residence premises. Defendant's water exclusion does not exclude loss caused by back up.

The distinction between *Pichel* and this case requires more explanation. Defendant's policy excludes loss caused by water which escapes or overflows from sewers or drains located off the residence premises, or water which escapes or overflows from drains or related plumbing appliances on the residence premises. There is coverage for "overflow and escape caused by malfunction on the residence premises, or obstruction on the residence premises, of a drain or plumbing appliance on the residence premises."

Plaintiffs do not contend that the loss was caused by an overflow and escape caused by a malfunction or obstruction on the residence premises or a drain or plumbing appliance on the residence premises.

In *Pichel* the policy excluded loss caused by water which backs up through sewers or drains, and covered loss caused by the accidental leakage, overflow or discharge of liquids from a plumbing system. The court held that if the cause of the backup/overflow is from outside the insured's property boundaries, the exclusion for loss caused by back up through sewers or drains applies; and if the damage was caused by a backup/overflow that originated from a pipe or clogged drain located within the insured's property line it came from the insured's plumbing system, and there was coverage.

The significant distinction is that defendant's water exclusion excludes coverage for loss caused by water which escapes or overflows from sewers or drains located off the residence premises or from drains or related plumbing appliances on the residence premises. The exclusion in *Pichel* excluded loss caused by water which backs up through sewers or drains and covered loss caused by accidental leakage, overflow or discharge of liquids from a plumbing system.

Plaintiffs point out that the court in *Cardio Diagnostic Imaging* highlighted the distinction between an “overflow,” the term used in defendant’s exclusion, and a “back up,” the term used in the *Hallsted*, *Haines*, *Old Dominion Ins. Co.*, and *Pichel* exclusions. Defendant argues that *Cardio Diagnostic Imaging* did not recognize a distinction between the terms “overflows” and “backs up.” Defendant’s response to plaintiffs’ motion for summary award, page 9; and plaintiffs’ reply in support of motion for summary award, pages 3-4. I agree with plaintiffs and disagree with defendant.

In *Cardio Diagnostic Imaging*, a malfunctioning toilet failed to shut off the intake of water. There was a blockage in the sewer line about 20 to 40 feet from the toilet. Because of the blockage, the toilet overflowed, causing water to leak into business premises.

The policy contained a water exclusion that excluded damages caused by “[w]ater that backs up or overflows from a sewer, drain or sump.” The court held that the phrase “backs up or overflows from” a sewer or drain “unambiguously makes a distinction between water that backs up from a sewer or drain and water that overflows from a sewer or drain.” 212 Cal App4th at 74. The court adhered to the principle that policy language should be construed so as to give effect to every term, and held that it must interpret the water exclusion “in a way that gives meaning to both ‘backs up’ and ‘overflows.’” *Id.*

The court held that the exclusion was unambiguous on its face:

“A lay person would understand it to include both water that comes up out of a sewer drain, or sump (‘backs up’) and water that spills over from a sewer, drain, or sump (‘overflows’) due to a blockage.” *Id.* at 76.

The court held that the cause of the damage was an overflow, which was excluded. The court stated:

“The toilet was attached to a drain. Ordinarily, the water (or other substances) that enter the toilet flow through the drain into pipes that lead to the sewer system. If there is a blockage in the pipes or sewer system, the pipes leading to the drain will be filled and any additional water will overflow into, and eventually out of, the toilet. That is what happened here.” *Id.*

Defendant argues that the terms “escape,” “overflow,” “discharge,” “back up” and “release” all have the same meaning and refer to the same cause of loss. Defendant’s reply, page 2 (“overflow” and “discharge” are synonymous, “overflows” and “escapes” describe the

peril that caused the plaintiffs' loss); page 3 (courts have used the terms "escape," "overflow," "discharge," or "back up" interchangeably); page 4 (the terms "back up," "release," "escape," and "overflow" all have the same meaning and refer to the same cause of loss).

Plaintiffs cite the rule that an insurance policy must be interpreted "so that no part of it is ignored and effect can be given to every word and phrase." *Hoffman Constr. Co. v. Fred S. James & Co. of Or.*, 313 Or 464, 472 (1992). I disagree with defendant and agree with plaintiffs.

I hold that sub-paragraph 10. c. of the water exclusion does not apply because water did not "escape" or "overflow" from sewers or drains located off the residence premises; and sub-paragraph 10. d. does not apply because water did not "escape" or "overflow" from drains or related plumbing appliances on the residence premises.

Defendant also relies on the acts or decisions exclusion, which excludes losses caused by:

"Acts or Decisions, including the failure to act or decide, of any person, group, organization or governmental body. However, any ensuing loss not excluded is covered." Exhibit 3 To Currie Declaration in support of plaintiffs' motion for summary award, page 38, Building Property Losses We Do Not Cover, paragraph 16.

Defendant relies on plaintiffs' failure to install a backflow device. Plaintiffs argue that the acts or decisions exclusion is taken literally, "it would exclude coverage from all acts and decisions of any character of all persons" and would "leave the insurance policy practically worthless." *Jussim v. Massachusetts Bay Ins. Co.*, 597 NE2d 1379, 1382 (Mass App 235 1992), *aff'd as amended on other grounds*, 610 NE2d 954 (1993). I agree with plaintiffs and disagree with defendant. Even if plaintiffs' losses are related to someone's act or decision, their losses were not the direct result of such act or decision, and their losses fall within the exception which provides that "any ensuing loss not excluded is covered."

Defendant has offered as an exhibit an Oregon endorsement for back up of sewers, drains and sumps which covers loss caused by water "which backs up through or overflows from: 1. a sewer of drain; or 2. a sump, sump pump, or other type system, on the covered location designed and used to drain sub-surface water from the foundation area." Exhibit A to Mueller Declaration in support of defendant's response to plaintiffs' motion for summary award.

The Mueller declaration states that the endorsement was available to the plaintiffs

when they purchased the policy from Safeco. Defendant argues that the fact that it offered the endorsement supports the conclusion that plaintiffs' loss is not covered.

I disagree. The issue is whether the loss is covered under the policy that the plaintiffs purchased, and I have held that the loss is covered. The only thing that the back up endorsement proves is that defendant does recognize a distinction between "backs up" and "overflows," as evidenced by the language of the endorsement.

Plaintiffs claim \$6,013.93 in clean-up costs and \$6,594.00 in personal property losses which defendant does not dispute. I will award those damages to plaintiffs.

Plaintiffs claim \$496.64 per month for loss of use of their home. Defendant does not contest the amount, but argues that plaintiffs are not entitled to loss of use damages. However, the policy covers "direct physical loss to property" and defines "property damage" to mean "physical damage to or destruction of tangible property, including loss of use of this property." I hold that plaintiffs are entitled to recover \$496.64 per month for loss of use. Accordingly, the judgment in this case will include loss of use calculated at 16.328 times the number of days from December 7, 2015 to the date of entry of judgment.

Plaintiff's claim \$12,646.00 for damage to their home. This amount is based on an estimate prepared by Sunset Northwest, LLC, for the cost of repairs. Exhibit 7 to Currie Declaration, pages 1-3. Defendant investigated the loss and prepared an estimate of the cost of repairs in the amount of \$6,924.69, less a deductible of \$500.00. Defendant's Exhibit B to Hedberg Declaration in support of defendants' response to plaintiff's motion for summary award, pp. 1-7.

Defendant contends that plaintiffs are entitled to recover only the actual cash value of the damaged property. Defendant relies on a policy provision which provides:

"If the cost to repair or replace is \$1,000 or more, we will pay the difference between actual cash value and replacement cost only when the damaged or destroyed property is repaired or replaced."
Exhibit 3 to Currie Declaration, page 46, Loss Settlement, Replacement Cost, paragraph 5. a.(3).

Defendant argues that since the plaintiffs have not repaired the damage to the dwelling, they are not entitled to recover the replacement cost. Plaintiffs argue that they are unable to repair their home because defendant refuses to pay for the repair work. The applicable rule is that if the insured opts to replace the damaged property, the only requirement is that the insured complete the replacement within a reasonable time. *Bourrie v. U. S. Fidelity and*

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Guaranty Ins. Co., 75 Or App 241, 246 (1985). Given the fact that the defendant denied coverage for the loss, I hold that it was reasonable for the plaintiffs to refrain from incurring the expense of replacement until there is a final judgment on whether there is coverage.

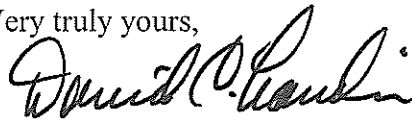
Accordingly, I hold that plaintiffs are entitled to recover the replacement cost for the damages caused by the water loss. I am inclined to award plaintiffs damages in the amount of the Sunset estimate. However, by agreement of the parties, the parties have the option to offer evidence on this issue on January 9, 2017.

Plaintiffs are not entitled to recover their claim for lost work damages because there is no coverage under the policy for that expense.

Plaintiffs claim interest on the loan for the clean-up work. Plaintiffs also claim prejudgment interest. I will decide the issue of whether plaintiffs are entitled to recover prejudgment interest at the same time that I rule on objections to the cost bill. If the plaintiffs are awarded prejudgment interest, they will not be entitled to a separate recovery for interest on the loan. If plaintiffs are not entitled to recover prejudgment interest, I will award interest on the loan in the award amount.

If there is a hearing on January 9, 2017, I will issue a ruling that day. The statement of attorney fees and costs and disbursements will be due on the following day, January 10, 2017. Objections to the statement of attorney fees and costs and disbursements will be due on January 11, 2017 and the response to objections will be due on January 12, 2017.

Very truly yours,

A handwritten signature in black ink, appearing to read "David C. Landis". The signature is written in a cursive style with a large initial "D".

David C. Landis