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WASHINGTON COURT ENFORCES 'ANTI-STACKING' PROVISION TO PREVENT APPLICATION OF MULTIPLE POLICIES FOR CONTINUING WATER DAMAGE

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On April 12, 2010, the Washington Court of Appeals Division One decided *Certain Underwriters at Lloyd's London v. Valiant Ins. Co.,* --- P.3d ----, 2010 WL 1427571 (Wash., Apr. 12, 2010), holding that Zurich's anti-stacking provision, which limited an insured's recovery to one policy limit per "occurrence" when the insured held two or more Zurich policies, did not conflict with the 'Limits of Insurance' provision, and was neither ambiguous, nor violated public policy. In addition, the court held that water intrusion damage to a building was a single "occurrence" despite the fact that the damage occurred at different locations, different times, and over a period of five years.

UNDERLYING CLAIM
The claim for insurance in *Certain Underwriters* arose from water damage caused by construction defects. Stratford Constructors built Chateau Pacific, a four-story retirement center in Lynnwood, Wash. Stratford completed construction of the four-story building in 2000. However, a 2005 moisture mapping survey revealed "numerous points of water intrusion." Subsequent investigations revealed the water damage was caused, in part, by improper installation of windows, roofing, and stucco, by one or more subcontractors. The water intrusion started "soon after construction was complete" in 2000 and continued for five years.

THE POLICIES
Stratford's primary CGL policies were issued by two Zurich affiliates: Valiant (1999 to 2000) and Northern (2000 to 2002) (collectively the "Zurich Policies"), and Underwriters (2002 to 2004).

ZURICH POLICIES ANTI-STACKING AND 'LIMITS OF INSURANCE' PROVISIONS
The Zurich Policies contained an anti-stacking provision which stated, in relevant part,

"If this Coverage Form and any other Coverage Form or policy issued to you by us or any company affiliated with us apply to the same 'occurrence,' the maximum Limit of Insurance under all the Coverage Forms or policies shall not exceed the highest applicable Limit of Insurance under any one Coverage Form or policy."

The Zurich Policies also contained a 'Limits of Insurance' provision, which provided, in relevant part, "The limits of this Coverage Part apply separately to each consecutive annual period . . . ."

SETTLEMENT AND DISPUTE BETWEEN ZURICH AND UNDERWRITERS
In light of the anti-stacking provision in the Zurich Policies, Zurich argued its coverage obligation to Stratford was limited to one policy limit ($1 million) per "occurrence," because Stratford held three policies issued by Zurich or its affiliates. As a result, Zurich contributed only $1 million (on behalf of Valiant) towards the $5 million settlement agreement, and argued that nothing was owed for the two years of coverage afforded by the Northern policies. Believing that Zurich was required to contribute a total of $3 million ($1 million for each policy year between 1999 to 2002), Underwriters sued Zurich for equitable contribution.

ONE OCCURRENCE
In a 3-0 decision, the court rejected the argument that evidence of "varying causes" of leaks was sufficient evidence for a jury to find more than one cause of water damage, and thus more than one "occurrence." The court added that the "key" to Zurich's argument was found in the Zurich Policies' plain language definition of "occurrence." Occurrence was defined as an accident, including "continuous and repeated exposure" to harmful conditions. As a result, the court held the factual situation was analogous to the facts of *American*

National Fire Insurance Co. v. B & L Trucking & Construction Co., 134 Wn.2d 413, 951 P.2d 250 (1998) (continuous leaching of contaminates over several years was one "occurrence," not a series of "multiple polluting events"), because "the property damage was caused by a single occurrence of continuous exposure to water intrusion." It is interesting to note that while the *B & L Trucking* court found joint and several liability for successive insurers, the *Valiant* court relied on *B & L Trucking* to limit those same insurers' exposures by enforcing the anti-stacking provision.

ANTI-STACKING

Underwriters argued that the anti-stacking provision was ambiguous because it conflicted with the 'Limits of Insurance' provisions. An insurance contract is ambiguous only if it is susceptible to two or more reasonable interpretations. Underwriters argued that the anti-stacking provisions entitled the insured to $1 million, and the 'Limit of Insurance' sections afforded the insured $3 million, and this conflict between provisions created an ambiguity. The court disagreed with this argument because the Zurich Policies all applied to the same "occurrence." Thus, the anti-stacking provision limited coverage to the highest applicable policy limit under *any one* of those policies. In addition, the court held that the anti-stacking provision did not violate public policy because insurers are free to limit the amount of available coverage in a situation where there is joint and several liability among insurers. The court added "Washington courts rarely invoke public policy to override the express terms of an insurance policy."

This decision is important because it gives force and effect to policy language intended to restrict exposure to a single policy limit through the use of an anti-stacking provision.

To discuss any questions you may have regarding the opinion discussed in this Alert, or how it may apply to your particular circumstances, please contact William F. Knowles (wknowles@ cozen.com or 206.224.1289) and Josh Springer (jspringer@cozen. com or 206.224.1254).