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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

WEYERHAEUSER COMPANY, a
Washington corporation,

Plaintiff,

v.

INSURANCE COMPANY OF THE STATE
OF PENNSYLVANIA, a Pennsylvania
corporation,

Defendant.

THE INSURANCE COMPANY OF THE
STATE OF PENNSYLVANIA, a
Pennsylvania corporation,

Third-Party Plaintiff,

v.

FIREMAN'S FUND INSURANCE
COMPANY, a California corporation,
APPALACHIAN INSURANCE
COMPANY, a Rhode Island corporation, and
EMPLOYERS SURPLUS LINES
INSURANCE COMPANY, a Delaware
corporation,

Third-Party Defendants.

C08-1037Z

ORDER

1 THIS MATTER comes before the Court on Third Party Defendant Fireman’s Fund
2 Insurance Company’s Motion for Summary Judgment, docket no. 43. Having considered the
3 pleadings and declarations in support of and in opposition to the motion, the Court now
4 enters the following Order.

5 **I. BACKGROUND**

6 **A. Underlying Liabilities**

7 In May 2007, Weyerhaeuser Company (“Weyerhaeuser”) settled three asbestos
8 bodily-injury lawsuits. Kurtz Decl., docket no. 53, Ex. A at 2, Ex. B at 2-3. The three
9 plaintiffs in the asbestos lawsuits alleged bodily injury from asbestos exposure during the
10 following periods of time: Plaintiff 1, from 1957 to 2006; Plaintiff 2, direct exposure from
11 1967 to 1976, and bystander exposure from 1976 to 2002; and Plaintiff 3, from 1942 to 1989.
12 McDougall Decl., docket no. 45, Ex. A at 4-5; Kurtz Decl., Ex. A at 2, and Ex. B at 2- 3.¹
13 Weyerhaeuser sought reimbursement for those settlements (the “Underlying Liabilities”)
14 from several of its liability insurers.

15 **B. Weyerhaeuser’s Complaint Against ISOP**

16 In July 2008, Weyerhaeuser brought the present action against The Insurance
17 Company of the State of Pennsylvania (“ISOP”) to enforce an “Umbrella Policy” that
18 allegedly attached above a primary-layer policy issued by Fireman’s Fund Insurance
19 Company (“Fireman’s Fund”). Compl., docket no. 1, ¶¶ 4.5, 4.6; *see also* First Am. Compl.,
20 docket no. 6, ¶¶ 4.5, 4.6. On May 28, 2009, the Court dismissed Weyerhaeuser’s claims
21 against ISOP pursuant to a confidential settlement agreement that fully satisfied
22 Weyerhaeuser’s reimbursement claims against ISOP. Kurtz Decl. ¶ 1; Stipulation and Order,
23 docket no. 61.

24
25 ¹ The identity of the underlying plaintiffs in the asbestos cases, and the particulars of
26 those settlements, are the subject of confidentiality agreements and shall not be disclosed
herein.

1 **C. ISOP’s Third-Party Claims for Contribution Against Fireman’s Fund**
2 **and Other Insurance Companies**

3 On August 15, 2008, ISOP brought a third-party complaint against three insurance
4 companies, including Fireman’s Fund, alleging claims for contribution. ISOP’s Third-Party
5 Compl. for Contribution, docket no. 8, at 14-16.² In its Third-Party Complaint, ISOP alleged
6 that “Fireman’s Fund failed to pay its allocable share of settlement amounts and defense
7 costs resulting from the Underlying Liabilities.” *Id.* at 15, ¶ 4.1. Fireman’s Fund now moves
8 for summary judgment on ISOP’s claim for contribution against Fireman’s Fund.

9 **D. Fireman’s Fund’s Primary Liability Policies**

10 Fireman’s Fund issued primary liability policies to Weyerhaeuser from 1954 to 1978.
11 Lewis Decl., docket no. 44, ¶ 3. Although the specific terms vary in each policy year, all
12 policies contain a minimum deductible, per occurrence limits, and aggregate limits for
13 bodily-injury claims arising out of the products hazard. *Id.* ¶ 3; *see, e.g., id.* ¶ 6, Ex. B (the
14 “LC1675400 Policy” in effect from Jan. 1, 1968 to Jan. 1, 1978) at 17-19 (outlining
15 conditions of coverage, including limitations on liability and deductibles); *see id.*, Ex. B at
16 22-23 (defining “bodily injury,” “occurrence,” and “products hazard”).

17 The LC1675400 Policy imposed the following requirement on the insured (i.e.,
18 Weyerhaeuser):

19 If the insured carries other insurance with [Fireman’s Fund] covering a loss
20 also covered by this policy, (other than a policy described in Condition O) the
21 insured must elect which policy shall apply and [Fireman’s Fund] shall be
22 liable under the policy so elected and shall not be liable under any other policy.

22 *Id.*, Ex. B at 29 (the “Other Insurance” provision). Materially identical language appears in
23 every other primary policy issued by Fireman’s Fund. *Id.* ¶ 6.

24
25 ² On June 5, 2009, the Court dismissed ISOP’s contribution claim against Third-Party
26 Defendant Appalachian Insurance Company. Stipulation and Order, docket no. 67. ISOP’s
contribution claim against Third-Party Defendant Employers Surplus Lines Insurance
Company remains in the case.

1 September 28, 2007 Letter regarding the first asbestos lawsuit, Weyerhaeuser tendered the
2 claim “to the 1975 policy year of Fireman’s Fund policy number LC1675400,” and made no
3 mention of any other Fireman’s Fund policy. *Id.*, Ex. A at 4. In the October 30, 2007 Letter
4 regarding the second and third asbestos lawsuits, Weyerhaeuser tendered the claim to
5 Fireman’s Fund “to the extent that the underlying Fireman’s Fund coverage is not exhausted”
6 by the claim regarding the first asbestos lawsuit. *Id.*, Ex. B at 4.

7 **F. Fireman’s Fund’s Payments to Weyerhaeuser Under the Fireman’s Fund**
8 **LC1675400 Policy for the 1975 Policy Year**

9 Fireman’s Fund reimbursed Weyerhaeuser for a portion of the Underlying Liabilities
10 pursuant to the Fireman’s Fund LC1675400 Policy for the 1975 policy year. Lewis Decl.
11 ¶¶ 8, 10, Exs. D and F (Fireman’s Fund’s checks to Weyerhaeuser). Weyerhaeuser has taken
12 the position that, “In response to Weyerhaeuser’s tender of the Underlying Liabilities for
13 reimbursement, Fireman’s Fund promptly paid a full per-occurrence limit, plus defense
14 costs,” for two of the three cases at issue between Weyerhaeuser and ISOP, and “[t]he
15 aggregate limit of the Fireman’s Fund primary policy were fully exhausted by those
16 payments.” First. Am. Compl. ¶ 4.6. Fireman’s Fund did not pay Weyerhaeuser on the third
17 case because the products-aggregate limit had been exhausted by the first two cases, and,
18 regardless of exhaustion, Weyerhaeuser’s deductible was greater than its costs, which were
19 only defense costs. McDoughall Decl., Ex. A at 5.

20 **II. DISCUSSION**

21 **A. Summary Judgment Standard**

22 The Court should grant summary judgment if no genuine issue of material fact exists
23 and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). The
24 moving party bears the initial burden of demonstrating the absence of a genuine issue of
25 material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). A fact is material if it
26 might affect the outcome of the suit under the governing law. *Anderson v. Liberty Lobby*,

1 *Inc.*, 477 U.S. 242, 248 (1986). When a properly supported motion for summary judgment
2 has been presented, the adverse party “may not rely merely on allegations or denials in its
3 own pleading.” Fed. R. Civ. P. 56(e). Rather, the non-moving party must set forth “specific
4 facts” demonstrating the existence of a genuine issue for trial. *Id.*; *Anderson*, 477 U.S. at
5 256. All “justifiable inferences” are to be drawn in favor of the non-moving party.
6 *Anderson*, 477 U.S. at 255. When the record, however, taken as a whole, could not lead a
7 rational trier of fact to find for the non-moving party, summary judgment is warranted. *See*
8 *Miller v. Glenn Miller Prod., Inc.*, 454 F.3d 975, 988 (9th Cir. 2006).

9 **B. Equitable Contribution**

10 Equitable contribution “allows an insurer to recover from another insurer where both
11 are independently obligated to indemnify or defend the same loss.” *Mut. of Enumclaw Ins.*
12 *Co. v. USF Ins. Co.*, 164 Wn.2d 411, 419 (2008). The duty to defend and the duty to
13 indemnify are distinct: “the duty to defend arises when a complaint contains any allegations
14 that could make an insurer liable to an insured under the policy, while the duty to indemnify
15 arises when an insured is actually liable to a claimant and the claimant’s injury is covered by
16 the language of the policy.” *Id.* at 421 n.7.

17 An insurer is excused from its duty to contribute to a settlement where an insured has
18 not tendered a claim to the insurer. *See id.* at 421 (“[A]n insurer cannot be expected to
19 anticipate when or if an insured will make a claim for coverage.”) (citations omitted). Thus,
20 the duties to defend and indemnify “do not become *legal obligations* until a claim for defense
21 or indemnity is tendered.” *Id.* at 421 (emphasis in original). A claim for defense is tendered
22 when the insured affirmatively informs the insurer that its participation is desired. *Id.*; *see*
23 *also Unigard Ins. Co v. Leven*, 97 Wn. App. 417, 426-27 (1999). Under Washington law, the
24 duty to defend is broader than the duty to indemnify and is more easily triggered. *See Mut.*
25 *of Enumclaw Ins. Co.*, 164 Wn.2d at 421.

1 The rule that the duties to defend and indemnify do not become legal obligations until
2 a claim for defense or indemnity is tendered “is largely consistent with the ‘selective tender’
3 rule.” *Id.* The selective tender rule “states that where an insured has not tendered a claim to
4 an insurer, that insurer is excused from its duty to contribute to a settlement of the claim.”
5 *Id.* The selective tender rule “has sound underpinnings” because it “preserves the insured’s
6 right to invoke or not to invoke the terms of its insurance contracts.” *Id.* at 421-22. The
7 Washington Supreme Court elaborated further:

8 An insured may choose not to tender a claim to its insurer for a variety of
9 reasons. Like a driver involved in a minor accident, an insured may choose not
10 to tender in order to avoid a premium increase. The insured may also want to
11 preserve its policy limits for other claims, or simply to safeguard its
12 relationship with its insurer. Whatever its reasons, an insured has the
13 prerogative not to tender to a particular insurer.

14 *Id.*

15 **1. Weyerhaeuser’s Selective Tender**

16 The issue before the Court is whether Fireman’s Fund satisfied its duty to indemnify
17 Weyerhaeuser for the Underlying Liabilities.⁵ ISOP argues that Fireman’s Fund has a duty
18 to indemnify Weyerhaeuser under the multiple policies listed in the 2006 Letters, which
19 included the LC1675400 Policy but also included many other policies that have not been
20 exhausted, or, at a minimum, under the LC1675400 Policy for more than just the 1975 policy
21 year.

22 There are no genuine issues of material fact precluding summary judgment. Rather,
23 the legal significance of the asserted facts is in dispute. In this case, the duty to indemnify

24 ⁵ Fireman’s Fund has satisfied its duty to defend because it reimbursed Weyerhaeuser
25 for nearly all of its defense costs. Because the duty to defend arises when an insured
26 receives notice that its participation is requested in regard to a particular case, the 2006
Letters likely invoked Fireman’s Fund’s duty to defend. The Court does not need to reach
the issue, however, of whether the 2006 Letters or the 2007 Letters constituted tender of
Weyerhaeuser’s claim for defense costs, because ISOP does not appear to be seeking
contribution from Fireman’s Fund for any defense costs, even those related to the third
asbestos case, which were less than Weyerhaeuser’s deductible.

1 regarding the first asbestos case did not *arise* until that case was settled on May 14, 2007,
2 and the duty to indemnify regarding the second and third asbestos cases did not *arise* until
3 they were settled on May 30, 2007. *See Mut. of Enumclaw Ins. Co.*, 164 Wn.2d at 421 n.7
4 (The duty to indemnify only “arises when an insured is actually liable to a claimant and that
5 claimant’s injury is covered by the language of the policy.”). Fireman’s Fund’s duty to
6 indemnify for the three asbestos cases did not become a legal obligation until Weyerhaeuser
7 tendered a claim for indemnity to Fireman’s Fund. *See id.* at 421. The Court finds, as a
8 matter of law, that Weyerhaeuser selectively tendered the claims for indemnity to the
9 Fireman’s Fund LC1675400 Policy for the 1975 policy year, when it sent Fireman’s Fund the
10 letter dated September 28, 2007 concerning Plaintiff 1, and the letter dated October 30, 2007
11 concerning Plaintiffs 2 and 3. Kurtz Decl., Exs. A and B. Although Weyerhaeuser’s 2006
12 Letters, see Kurtz Decl. Exs. C and D, stated that “Weyerhaeuser hereby tenders these
13 lawsuits for defense and indemnity,” these statements did not create a *legal obligation* for
14 Fireman’s Fund to *indemnify* Weyerhaeuser because Weyerhaeuser was not “actually liable”
15 to the asbestos plaintiffs at that time. Similarly, the letters dated May 4, 2007, and May 18,
16 2007, see Kurtz Decl., Exs. E and F, did not create a legal obligation on the part of Fireman’s
17 Fund to indemnify Weyerhaeuser because they were sent before the respective settlements of
18 the first and second asbestos lawsuits. Because of Weyerhaeuser’s selective tender to the
19 Fireman’s Fund LC1675400 Policy for the 1975 policy year, Fireman’s Fund is excused from
20 indemnifying Weyerhaeuser through other policies or policy years under Washington law.⁶

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22 ///

24 ⁶ The Court does not base its ruling on the Orders submitted by the parties in
25 *Weyerhaeuser Company v. Fireman’s Fund Insurance Company*, Case No. C06-1189-MJP.
26 Nor does the Court base its ruling on the asserted reimbursement agreement between
Weyerhaeuser and Fireman’s Fund. The Court DENIES ISOP’s requests for further
discovery pertaining to these matters.

1 **2. Potential Coverage Under Multiple Policies**

2 Under a “triple trigger” theory that applies to injuries arising from asbestos exposure,
3 “[p]olicy coverage is triggered by a claim that a victim was either exposed to asbestos
4 products, suffered exposure in residence, or manifested an asbestos-related disease during the
5 policy period.” *Villella v. Pub. Employees Mut. Ins. Co.*, 106 Wn.2d 806, 813 (1986). ISOP
6 argues that this theory applies to the underlying actions,⁷ and, accordingly, that multiple
7 policies were triggered and multiple policy limits are available. This argument fails to
8 distinguish between trigger and tender. What coverage might have been triggered is a
9 separate issue from what coverage Weyerhaeuser actually sought through its tender of its
10 claims for indemnity. One insurer (i.e., ISOP) does not have the right to tender a claim to
11 another insurer (i.e., Fireman’s Fund). *See Mut. of Enumclaw Ins. Co.*, 164 Wn.2d at 421
12 (“Equity provides no right for an insurer to seek contribution from another insurer who has
13 no obligation to the insured.”). It is not appropriate to apply this theory in this case because
14 Weyerhaeuser selectively tendered the claim to the Fireman’s Fund LC1675400 Policy for
15 the 1975 policy year, and Weyerhaeuser was entitled to do so under Washington Law. *See*
16 *id.* at 421-22.

17 **III. CONCLUSION**

18 The Court GRANTS Third Party Defendant Fireman’s Fund Insurance Company’s
19 Motion for Summary Judgment, docket no. 43, and DISMISSES with prejudice ISOP’s claim
20 against Fireman’s Fund for contribution. The Court DENIES ISOP’s requests for further
21 discovery.

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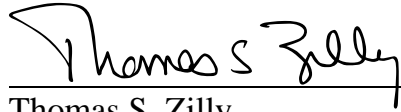
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25 ⁷ ISOP argues that Plaintiff 1’s exposure triggered policies issued from 1957 to 1978,
26 Plaintiff 2’s exposure triggered policies issued from 1967 to 1978, and Plaintiff 3’s exposure
triggered policies issued from 1954 to 1978. ISOP’s Opp’n, docket no. 51, at 13.

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IT IS SO ORDERED.

DATED this 10th day of August, 2009.


Thomas S. Zilly
United States District Judge