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MEMORANDUM

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Washington Appeals Court Holds That Insureds Only Have to Pay One SIR

On July 7, 2008, the Court of Appeals, Division 1, held that an insured responsible for payment of a self-insured retention (“SIR”) under two policies need only pay the SIR amount once to satisfy the requirement for both policies.

This was the holding in *Bordeaux, Inc. v. American Safety Insurance Company*. There the plaintiff, Bordeaux, was the developer of the Bordeaux Condominiums in Sammamish, Washington.¹ It sold the units, and subsequently the HOA filed a lawsuit against Bordeaux alleging extensive construction defects and resulting property damage at the project. Bordeaux tendered defense and indemnity of the lawsuit to its insurance general liability insurance carriers, American Safety and Steadfast (Zurich). Both insurers agreed to defend under a reservation of rights.

American Safety had insured Bordeaux from September 30, 2000 to September 30, 2001. The Zurich policy period ran from September 30, 2001 to September 30, 2002. Each policy required the insured to pay a \$100,000 SIR per occurrence as a condition precedent to the insurer’s defense and indemnity obligations. The matter settled at mediation, and each insurer agreed to pay a certain sum toward the settlement after Bordeaux satisfied the policies’ SIR requirements. Although Bordeaux had already paid over \$100,000 in satisfaction of the SIR, American Safety refused to fund the settlement, claiming that the first \$100,000 merely satisfied the Zurich policy’s SIR. Instead, American Safety claimed, a second payment of \$100,000 would be required to satisfy American Safety’s SIR. Bordeaux filed suit and won a summary judgment ruling, and American Safety appealed.

The court of appeals held that an insured is not required to pay multiple SIRs for the same claim. It rejected American Safety’s argument that the claims arose from “at least two occurrences,” which occurrences are covered separately under its policy and the Zurich policy.

¹ Bordeaux’s sister corporation, Cameray, Inc., was also a plaintiff in the insurance action due to its construction of a different condominium project. Both entities were covered by the same policies and policy periods, and both entities were denied funding from American Safety until each had paid its SIR twice. The court’s holding applied to each of the developers.

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Instead, the court observed that the American Safety policy simply stated that American Safety will pay covered damages above the amount of the SIR; the policy said nothing about whether or not Bordeaux's obligation to pay the SIR is satisfied when that payment also fulfills a similar obligation under another policy.

Perhaps the most significant portion of the court's holding is its further reasoning in support of its holding: The defense costs incurred by Bordeaux were necessarily related to damages covered by both the American Safety and Zurich policies, and because Washington does not provide an insurer a right of allocation for defense of non-covered claims where they are "reasonably related" to the defense of covered claims, American Safety had no right to allocate some costs to the Zurich SIR and none to American Safety. Thus, where the defense costs paid under the Zurich SIR were also reasonably related to the claim covered under the American Safety policy, American Safety had no right to apportion defense costs.

This is good news for insureds, particularly in progressive loss situations where multiple policy periods may be triggered. Furthermore, although different policies contain different language that may change the result arrived at by the *Bordeaux* court, this second part of the holding may help prevent insurers from attempting to rewrite their policies to achieve a different result.