IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE OF IDAHO IN AND FOR THE COUNTY OF KOOTENAI

AMERICAN ECONOMY INSURANCE CO., *Plaintiffs*, vs. **ACCEPTANCE INSURANCE CO..** *Defendants*.	)	Case No. **CV 2003 2536** **MEMORANDUM OPINION AND ORDER ON CROSS MOTIONS FOR SUMMARY JUDGMENT**

I. INTRODUCTION

Hearing on Plaintiff's Motion for Summary Judgment and Defendant's Cross Motions for Summary Judgment was held March 24, 2004. The Court has read the briefs and affidavits on file. The question presented is whether plaintiff American Economy Insurance Company (American) is a principal insurer and must contribute along with Acceptance Insurance Company (Acceptance) to the settlement of Nez Perce County case number CV-2000-2315 (the Lunceford case), or whether American is an excess insurer and need not contribute to the settlement of the Lunceford case. This Court finds the American policy provides excess coverage and is not required to contribute to the Lunceford case settlement. Summary judgment is granted in favor of American, and denied against Acceptance.

II. FACTS

In March 1998 Dan and Louise Howard and Ray J. White & Sons, Inc. (RJW) entered a Real Estate Property Management agreement with respect to a building in Lewiston, Idaho.

Crossley Affidavit, Exhibit 2. RJW was to manage the property for Howards. *Id.* Howards agreed to hold RJW harmless for liability related to management of the property and Howards agreed to carry at their own expense insurance to protect RJW. *Id.* Howards purchased Insurance from Acceptance. (Acceptance Insurance Company policy included with Notice of Filing Documents, filed March 22, 2004). RJW purchased its own insurance policy from American. Crossley Affidavit, Exhibit 1. The American policy includes a "Real Estate Property Managed" endorsement which states the policy is liability coverage in excess of any other available coverage with respect to managed property. *Id.*

On December 17, 1998 Aaron Lunceford was injured on the managed property. Lunceford sued the Howards and RJW in Nez Perce County Case CV-2000-2315. Complaint pp. 6-7. American first tendered the defense of RJW and Acceptance "accepted" that defense. Crossley Affidavit, Exhibits 3 & 5. Later Acceptance demanded at least 25% participation from American in the defense of RJW. Crossley Affidavit, Exhibits 7. The Lunceford suit settled for $150,000.00. Crossley Affidavit, Exhibits 16, 17, and 18. Acceptance contributed $100,000.00 and American contributed. $50,000.00. *Id*.

Conditions in American's payment of the $50,000.00 contribution included: 1) RJW was fully released; 2) Acceptance agreed to have this coverage issue decided by the court in this declaratory judgment action; and, 3) the non-prevailing party agreed to pay the prevailing party's fees and costs for this declaratory judgment action. Crossley Affidavit, Exhibits 17.

III. STANDARD OF REVIEW

> Summary judgment is proper when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Normally, both this Court and the district court will liberally construe the record in favor of the party opposing the motion for summary judgment, drawing all reasonable inferences and conclusions supported by the record in favor of that party. However,

> [w]here, as in this case, both parties file motions for summary judgment relying on the same facts, issues and theories, the parties essentially stipulate that there is no genuine issue of material fact which would preclude the district court from entering summary judgment. As the trier of fact, the district court is free to arrive at the most probable inferences based upon the evidence before it and grant summary judgment, despite the possibility of conflicting inferences. As the trier of fact, the district court is responsible for resolving the possible conflict between inferences.

Farmers Ins. Co. of Idaho v. Talbot, 133 Idaho 428, 431, 987 P.2d 1043, 1046 (1999), (citations omitted).

IV. ANALYSIS

Insurance contracts are considered adhesion contracts and ambiguities are construed against the insurer. *Erland v. Nationwide Ins. Co.,* 136 Idaho 131, 133, 30 P.3d 286, 288 (2001), *citing Mutual of Enumclaw v. Roberts*, 128 Idaho 232, 912 P.2d 119 (1996). Courts are to construe insurance contracts as written and cannot create liability not assumed by the insurer. *Erland,* 136 Idaho at 133, 30 P.3d at 288.

"Other Insurance" clauses fit three general categories: 1) **pro rata** clauses which provide for each involved insurer paying its pro rata share; 2) **excess** clauses which limit one insurer's liability to the amount the loss exceeds the coverage of other valid and collectible insurance; and 3) **escape** clauses, that provide no coverage if there is other valid and collectible insurance. *Sloviaczek v. Estate of Puckett*, 98 Idaho 371, 373, 565 P.2d 564, 566 (1977).

In this case, American claims the "Real Estate Property Managed" endorsement contained in its policy makes American's policy an **excess** policy, where Acceptance claims both policies are primary coverage, and since the "other insurance" clauses in both policies are identical, there should be **pro rata** payment by each insurance company. Amercian's interpretation would have American contributing nothing to the $150,000 settlement of the

Lunceford case, since Acceptance's policy has one million dollar policy limits. Acceptance's interpretation would have American contributing half, or $75,000 of the $150,000 Lunceford settlement, with Acceptance paying the other half.

> The determination of whether a policy of insurance is ambiguous is a question of law for the court. *Farmers Ins. Co. of Idaho v. Talbot*, 133 Idaho 428, 431, 987 P.2d 1043, 1046 (1999). An insurance policy will be found ambiguous if it is reasonably subject to conflicting interpretations. *Id*. at 432, 987 P.2d. at 1047. "Unless a contrary intent is shown, common, non-technical words are given the meaning applied by laymen in daily usage--as opposed to the meaning derived from legal usage--in order to effectuate the intent of the parties." *Mutual of Enumclaw v. Box*, 127 Idaho 851, 853, 908 P.2d 153, 155 (1995).

Howard v. Oregon Mutual Insurance Co., 137 Idaho 214, 218, 46 P.3d 510, 514 (2002).

Acceptance claims that the "other insurance" clauses in both its policy and the American policy are nearly identical and thus, cancel each other out, and that both companies should participate equally as both are primary insurance policies. American argues that due to the "Real Estate Property Managed" endorsement in its policy, American only provides excess insurance. Crossley Affidavit, Exhibit 9. There is no comparable "Real Estate Property Managed" endorsement in the Acceptance policy. American also argues the hold harmless agreement between the Howards and RJW is further evidence that this was the intent of the parties. *Id.* Since this Court finds the American policy is not ambiguous, this Court does not need to consider extrinsic evidence, such as the hold harmless agreement, as evidence of the intent of the parties. The hold harmless agreement is a separate contract, a private contract which does not alter the terms of either policy the Court is interpreting, but the Court notes the hold harmless agreement is consistent with the "Real Estate Property Managed" endorsement. As set forth below, this court finds that the "Real Estate Property Managed" endorsement in the American policy must be read as an integral part of that policy, and that "Real Estate Property Managed" endorsement clearly states the intent of the parties

to that contract (RJW and American), which in turn determines the relationship between the American and the Acceptance policies.

> Determination of whether a document is ambiguous is itself a question of law. Interpretation of an ambiguous document presents a question of fact. On the other hand, interpretation of an unambiguous document is a question of law subject to free review.

Western Heritage Ins. Co. v. Green, 137 Idaho 832, 836, 54 P.3d 948, 951 (2002), citations omitted.

In *Western Heritage Ins. Co.* the Idaho Supreme Court held the trial court erred in finding an endorsement that included a typographical error did not apply. *Western Heritage Ins. Co.* 137 Idaho at 838, 54 P.3d 953. The Idaho Supreme Court held the endorsement was attached to the policy and was clearly part of the policy based on its own language. *Id.*

American cites *Woodson v. A&M Investments, Inc*. 591 So.2d 1345 (La. App. 1991). *Woodson* presents a nearly identical factual situation to the present case. In *Woodson,* there were two insurance policies both containing similar "other insurance" clauses. One policy, the South Carolina policy, also contained an endorsement similar to the Real Estate Property Managed endorsement in the American's policy in the present case. *Woodson.* 591 So.2d at 1347. The court in *Woodson* found the South Carolina policy endorsement expressly stated that it only provided excess insurance, because the liability arose out of A&M's actions as a real estate manager. *Id. Woodson* squarely addresses the issue before the court today. There is nothing about *Woodson* that indicates it is an idiosyncratic decision resulting from Louisiana's different legal genesis. *Woodson* is simply policy language interpretation that is just as applicable under an Idaho law analysis as under a Louisiana law analysis.

Acceptance argues *Century Surety Company v. United Pacific Insurance Company,* 109

Cal.App.4th 1246, 135 Cal. Rptr.2d 879 (Cal.Ct.App.2d Dist. Div. 3, 2003) states the proper legal analysis for the present case. Brief of Defendant in Support of Motion for Summary Judgment, p. 4. However, *Century* deals with four insurance policies that covered **the same insured** for different periods of time. 109 Cal.App.4th at 1251, 135 Cal. Rptr.2d 880. The present case concerns two policies bought by **two different entities**, Howards (through Acceptance) and RJW (through American). That factual difference ameliorates the "public policy" reasons stated by the *Century* court. That factual difference presented in *Woodson* was specifically noted by the California Court of Appeal in footnote thirteen in *Hartford Casualty Insurance Company v. Travelers Indemnity Company,* 110 Cal.App.4th 710, 726, n. 13, 2 Cal.Rptr.3d 18, 30, n. 13 (Ct.App. First Dist. Div.1, 2003).

Century's claim that they provided excess coverage failed because "Century was one of County Line's *primary* insurers…" 109 Cal.App.4th at 1256, 135 Cal.Rptr.2d at 884. The primary distinguishing factor between the present case and *Woodson* on one hand, and *Century* on the other hand, is the presence of a "Real Estate Property Managed" clause in one of the polices, in the present case the American policy. *Century* dealt with four "excess insurance" clauses one of which (an excess clause) conflicted with the other three (pro rata clauses), which created an inequitable result to the *Century* court since all four policies covered the same insured. In the present case, both "excess insurance" clauses are essentially the same (unlike *Century*), and each policy applies to a different insured. Most importantly, it is the "Real Estate Property Managed" endorsement in the American policy that causes this Court to follow the *Woodson* case. The policy in question in *Woodson* had a similar endorsement. 591 So.2d 1345 at 1347.

Not only is the present case factually different than *Century,* but a California case issued after *Century, Hartford Casualty Insurance Company v. Travelers Indemnity Company,* 110 Cal.App.4th 710, 2 Cal.Rptr.3d 18 (Ct.App. First Dist. Div.1, 2003), would support the

interpretation argued by American in the present case. The *Century* court noted a split in the way courts have handled these "other insurance" clause cases, 109 Cal.App 4th at 1258, 135 Cal.Rptr.2d at 886, and *Hartford* again discusses the split in the way these cases have been decided, but on facts more similar to the present case than the *Century* case, *Hartford* comes down in support of American's interpretation of its policy language.

The "other insurance" clauses in the American and Acceptance policies are nearly identical. Crossley Affidavit, Exhibit 1; Notice of Filing Documents, filed March 22, 2004; Memorandum in Support of Plaintiff's Motion for Summary Judgment, p. 6. The wording used in the "other insurance" clauses is also similar to that in the policies discussed in the *Woodson* case. *Woodson.* 591 So.2d at 1346 – 47. Because the loss involved here does not fit into the categories listed in the excess insurance portion of the "other insurance" clauses, the excess provisions in the "other insurance" clauses are not applicable. *Woodson.* 591 So.2d at 1347.

The Real Estate Property Managed endorsement states in part "With respect to your liability arising out of your management of property for which you are acting as real estate manager this insurance is excess over any other valid and collectible insurance available to you." Crossley Affidavit, Exhibit 1. In the present case, as in *Western Heritage,* the endorsement must be read as part of the insurance contract. *Western Heritage Ins. Co.* 137 Idaho at 838, 54 P.3d at 953. This Court finds the American insurance contract is not ambiguous. The Real Estate Property Managed endorsement states clearly the agreement between these parties. That agreement between the insurer and insured expressly states that the policy is excess coverage for liability arising out of the management of property. Crossley Affidavit, Exhibit 1. To read the terms of the unambiguous endorsement differently would fail to construe the contract as written and would create liability that American did not assume. *Erland,* 136 Idaho at 133, 30 P.3d at 288.

Acceptance's argument essentially asks this Court to only look at the identical nature of

the "other insurance" clauses, while ignoring the "Real Estate Property Managed" endorsement in the Acceptance policy. *Erland* makes it clear that this Court is not free to disregard that "Real Estate Property Managed" endorsement in the Acceptance policy.

V. CONCLUSION.

When the policies are read as a whole, it is clear that the express terms of the Real Estate Property Managed endorsement modifies American's policy. That endorsement makes the American policy excess coverage in a case such as this involving liability arising from property managed by RJW. To read the American policy otherwise would create liability not assumed by the insurer. *Erland,* 136 Idaho at 133, 30 P.3d at 288.

VI. ORDER.

IT IS HEREBY ORDERED summary judgment is **GRANTED** in favor of the plaintiff American and **DENIED** as to defendant Acceptance, American's policy is excess to Acceptance's policy and American is entitled to a declaratory judgment in its favor against Acceptance. Counsel for American shall prepare such judgment. By the parties' agreement attorney's fees and costs are awarded to American against Acceptance.

ENTERED this _____ day of April, 2004.

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John T. Mitchell, District Judge