Filed 6/16/06 part. pub. order 7/14/06 (see end of opn.)

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION THREE

EMPLOYERS INSURANCE COMPANY OF WAUSAU, Plaintiff and Respondent, v. THE TRAVELERS INDEMNITY COMPANY et al., Defendants and Appellants.	A110973 (San Francisco County Super. Ct. No. 420940)

Defendant insurers in this contribution action[1] challenge a declaratory judgment in favor of Employers Insurance Company of Wausau (Wausau) that requires them to contribute to the cost of defending environmental tort suits filed after their comprehensive settlements with their mutual insured. They also dispute the method the court used to apportion defense costs among the insurers. We hold the trial court correctly required defendants to contribute to defense costs under the principles articulated in *Fireman's Fund Ins. Co. v. Maryland Casualty Co.* (1998) 65 Cal.App.4th 1279 (*Fireman's Fund*), and correctly apportioned defense costs.

BACKGROUND

The facts are not in dispute. The parties sequentially insured a succession of companies that allegedly released hazardous contaminants from a manufacturing plant in

[1] The Travelers Indemnity Company (Travelers), The Continental Insurance Company, Northwestern National Insurance Company of Milwaukee, Wisconsin and National Union Fire Insurance Company of Pittsburgh.

Willits, California. The Willits site was owned and operated by Remco Hydraulics, Inc. from approximately 1948 until 1968, when it was acquired by Stanray Corporation. Stanray was later acquired by Illinois Central Industries, Inc., which later changed its name to Whitman Corporation; Whitman, in turn subsequently merged with PepsiAmericas, Inc.[2]

The Jensen-Kelly *Settlements and Releases*

In 1997 and 1998 Whitman settled with a number of insurers, including defendants, to resolve disputed coverage of environmental claims raised in *Jensen-Kelly Corporation, et al. v. Allianz Underwriters Insurance Company, et al.* (1992) [Super. Ct., L.A. Cty. No. BC069018] (*Jensen-Kelly*).) As part of the *Jensen-Kelly* settlements, Whitman released the defendant insurers from any obligation to defend or indemnify it against past, present and future environmental actions and agreed to indemnify the settling carriers against any claims under their policies, including other insurers' claims for contribution.[3] In return, defendants paid Whitman an aggregate of approximately $24 million.

The Avila *and* Arlich *Actions*

Wausau's claim for contribution was triggered by two cases filed against Whitman. *Avila, et al. v. Willits Environmental Remediation Trust, et al.* (N.D. Cal, No. C-99-3941) (*Avila*) and *Arlich, et al. v. Willits Environmental Remediation Trust, et al.* (N.D. Cal., No. C-01-0266) (*Arlich*), were filed in August 1999 and January 2001, respectively. Several hundred plaintiffs sued Whitman and others for bodily injury and property damage due to chromium contamination that emanated from the Willits site between 1958 and the present.

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[2] For simplicity, we adopt the parties' convention and refer to these various entities jointly as "Whitman."

[3] Defendants are indemnified by Whitman against Wausau's claims in this action, although the indemnity for some of the defendant insurers is subject to a maximum cap.

Wausau was a primary general liability insurer of Whitman (then Stanray) for three years between January 1969 and January 1972. Each of the defendants also provided Whitman primary general liability insurance during the years contamination allegedly occurred. All of the policies contain a substantially similar duty to defend.

The Declaratory Relief Action: Wausau v. Travelers

Whitman tendered the defense of the *Avila* and *Arlich* actions to Wausau. Wausau agreed to participate in defending Whitman pursuant to a full reservation of its rights. It subsequently filed this action for declaratory relief and equitable contribution against the defendants to recover some of its costs of defense in *Avila* and *Arlich*.

After defendants' unsuccessful motion for summary judgment, the action was tried to the court on stipulated facts supplemented by documentary evidence. Defendants' primary contention was that the *Jensen-Kelly* settlement agreements with Whitman barred Wausau's claims for contribution.[4]

The court found Wausau was entitled to contribution under *Fireman's Fund, supra,* 65 Cal.App.4th at p. 1279 and other cases that recognize a direct right of action in favor of an insurer for contribution against others who cover the same risk. The statement of decision explains: "[E]ach insurer has an individual right of equitable contribution. The principle of equity is not based on any right of subrogation to the rights of the insured, and is simply not the equivalent to 'standing in the shoes' of the insured. Rather, the reciprocal contribution rights of primary co-insurers *who have agreed to insure the same risk* are based on the equitable principle that the burden of indemnifying or defending the insured with who[m] each has independently contracted should be borne by all of the insurance contractors together, with the loss equitably distributed among those who share liability for it in direct ratio to the proportion each insurer's coverage bears to the total coverage provided by all of the primary insurance policies. Naturally, the prior release of funds that do exhaust the amount of primary coverage actually

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[4] They also argued, unsuccessfully, that Wausau's claims were barred by late notice, but they do not raise this contention on appeal.

available imposes a defining limitation of individual insurer responsibility. But, under the facts of this case, this appears the primary limit to Plaintiff's claims against other co-insurers."

After moving unsuccessfully for a new trial or, alternatively, to vacate the judgment and enter a different judgment, defendants filed this timely appeal.

DISCUSSION

I. *Standard of Review*

To the extent this case presents purely legal issues, it is subject to de novo review. (*Nguyen v. Calhoun* (2003) 105 Cal.App.4th 428, 437-438.) To the extent the stipulated facts give rise to conflicting inferences, we review the court's resolution of those conflicts for substantial evidence. (*Ibid.*; *McKinney v. Kull* (1981) 118 Cal.App.3d 951, 955; *Winograd v. American Broadcasting Co.* (1998) 68 Cal.App.4th 624, 634-635.)

We review the trial court's selection of a method for allocating defense costs among insurers for an abuse of discretion. (*Centennial Ins. Co. v. United States Fire Ins. Co.* (2001) 88 Cal.App.4th 105, 111 (*Centennial*).)

II. *Fireman's Fund Governs Defendants' Contribution Responsibility*

Is Wausau's right to equitable contribution for the cost of defending *Arlich* and *Avila* barred by defendants' settlements with their insureds (Whitman) in the *Jensen-Kelly* case? To answer that question, we look primarily to *Fireman's Fund* and consider the purpose, application and effect of the equitable contribution doctrine.

Where two or more insurers' policies potentially cover an insured's liability and one of them bears the defense burden alone, the insurer bearing that burden is entitled to equitable contribution from the non-defending carriers. (*Fireman's Fund, supra,* 65 Cal.App.4th at p. 1293; *Aerojet-General Corp. v. Transport Indemnity Co.* (1997) 17 Cal.4th 38, 70, fn. 19; *Montrose Chemical Corp. v. Admiral Ins. Co.* (1995) 10 Cal.4th 645, 687; see Civ. Code, § 1432.) "Equitable contribution permits reimbursement to the insurer that paid on the loss for the excess it paid over its proportionate share of the obligation, on the theory that the debt it paid was *equally* and *concurrently* owed by the other insurers and should be shared by them pro rata in proportion to their respective

coverage of the risk. The purpose of this rule of equity is to accomplish substantial justice by equalizing the common burden shared by coinsurers, and to prevent one insurer from profiting at the expense of others." (*Fireman's Fund, supra,* at p. 1293.)

Fireman's Fund considered the effect of one insurer's settlement and release with its insured on its obligation to contribute to the costs of the insured's defense incurred by another insurer. The insurer from whom contribution was sought claimed that its settlement and release extinguished any claims by other insurers for equitable contribution. (65 Cal.App.4th at pp. 1287-1289.) The court rejected the notion that an insurer could avoid contribution to other insurers by settling with the *policyholder*. "This right of equitable contribution belongs to each insurer individually. It is not based on any right of subrogation to the rights of the insured, and is not equivalent to ' "standing in the shoes" ' of the insured. [Citations.] Instead, the reciprocal contribution rights of coinsurers who insure the same risk are based on the equitable principle that the burden of indemnifying or defending the insured with whom each has independently contracted should be borne by all the insurance carriers together, with the loss equitably distributed among those who share liability for it in direct ration to the proportion each insurer's coverage bears to the total coverage provided by all the insurance policies. . . . [¶] . . . [t]he right to equitable contribution exists *independently* of the rights of the insured. It is predicated on the commonsense principle that where multiple insurers or indemnitors share equal contractual liability for the primary indemnification of a loss or the discharge of an obligation, the selection of which indemnitor is to bear the loss should not be left to the often arbitrary choice of the loss claimant, and no indemnitor should have any incentive to avoid paying a just claim in the hope the claimant will obtain full payment from another coindemnitor." (*Id.* at pp. 1294-1295; see also *Centennial, supra,* 88 Cal.App.4th at pp. 114-115 [insurers' obligations for contribution to other insurers are entirely separate from their obligations to their insured].) Thus, the well-settled rule is that an insurer's obligation to contribute to another insurer's defense or indemnification of a common insured arises independently and is separate from any contractual obligation owed to their insured. (*Fireman's Fund, supra,* at p. 1295; see also *Centennial, supra,* at

pp. 114-115.) Defendants here argue that notwithstanding this rule, they should not be obligated to contribute to Wausau's defense of the *Avila* and *Arlich* cases because they bought back their coverage from Whitman for $24 million. This, they argue, insulates them from application of the rule announced in *Fireman's Fund*.

Defendants attempt to distinguish *Fireman's Fund* on the ground that they settled with Whitman before the *Avila* and *Arlich* actions were filed, while the settlement in *Fireman's Fund* was reached only *after* the underlying suit commenced. It is a distinction without a difference. Neither the language nor reasoning of *Fireman's Fund* suggests that a settling insurer is only responsible for contribution to another for costs of defending cases pending at the time of settlement. Defendants also suggest that, unlike *Fireman's Fund*, they never had a contemporaneous "equal obligation" with Wausau to their insured. But defendants' obligation to their insured arose long ago: long before the *Jensen-Kelly* releases and the *Avila* and *Arlich* actions were filed. (*Fireman's Fund*, *supra*, 65 Cal.App.4th at p. 1304 ["Primary coverage provides immediate coverage upon the 'occurrence' of a 'loss' or the 'happening' of an 'event' giving rise to liability"]; see generally *Montrose Chemical Corp. v. Admiral Ins. Co.*, *supra*, 10 Cal.4th at p. 645 [analyzing "trigger of coverage" question in context of continuous or progressive injury from environmental contamination].) At the time of loss, each insurer had a potential obligation to defend and indemnify Whitman against claims that might arise from a toxic discharge. We are not persuaded that defendants' equitable obligation to share the cost of that defense depends on whether they settled with their insured before, or after, the *Avila* and *Arlich* suits were filed.[5]

Defendants' attempt to characterize Wausau as akin to a third-party beneficiary whose rights were terminated by their settlements and release with their insured is also unpersuasive. The right to equitable contribution is grounded not in contract, but in equity. " 'As a matter of equity, insurers of the "same risk" may sue each other for

[5] Moreover, the settlement agreements reflect that the policies were modified, but not rescinded by any settlement. Except as modified by the agreement, the policies "remain in effect."

contribution. [Citations.] This right is not a matter of contract, but flows " 'from equitable principles designed to accomplish ultimate justice in the bearing of a specific burden.' " ' " (*Fireman's Fund, supra*, 65 Cal.App.4th at pp. 1294-1295.) Wausau's right to contribution is a direct right independent of Whitman's contractual rights under defendant's insurance policies (*id.* at pp. 1301-1302), and is not subject to third party beneficiary principles.

Defendants next contend that their settlement agreements with Whitman modified their insurance policies to reflect a "mutual intention" that their coverages were exhausted.[6] Accordingly, they maintain, they have no further obligation to contribute to their insured's defense. But merely saying a policy is exhausted does not make it so. While Whitman and the settling insurers were free to agree as between themselves to "deem" their policy limits "exhausted," just as they were free to settle their coverage dispute between themselves, there is no evidence that the settlements *actually* exhausted the coverage available under the policies; to the contrary, defendants stipulated before trial that they would not assert that any of the relevant policy limits were exhausted.

Defendants contend that applying *Fireman's Fund* here will contravene public policy by discouraging insurers from settling with their insureds. But balanced against the societal interest in encouraging settlements are other public policy interests and the equitable concerns underlying the well-established rule of contribution between insurers. As stated in *Fireman's Fund* "the reciprocal contribution rights of coinsurers who insure the same risk are based on the equitable principle that the burden of indemnifying or defending the insured with whom each has independently contracted should be borne by all the insurance carriers together, with the loss equitably distributed among those who

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[6] Specifically, they rely on language from the settlement agreements reciting that "The purpose of this Agreement is . . . to terminate and exhaust all coverage potentially available to the Insureds . . . ."; that "It is agreed that . . . all pertinent limits of liability under the Policies listed in Exhibit A hereto . . . are hereby exhausted for Environmental Damage Claims"; and that "Upon execution of this Agreement, Insurers shall have no further duties or obligations based upon, arising out of or related in any way to Environmental Damage Claims under the Policies. . . ."

share liability for it in direct ratio to the proportion each insurer's coverage bears to the total coverage provided by all the insurance polic[i]es." (*Fireman's Fund, supra*, 65 Cal.App.4th at p. 1294.) Defendants provide no authority for their ipse dixit claim that policies favoring the encouragement of settlements militate a rule that would permit a coinsurer to evade its share of the defense burden by separately settling with its insured. Nor is there evidence before us that the *Fireman's Fund* rule in fact discourages settlement. Here, defendants settled with their insurer and anticipated the possibility they could be held liable for contribution. They included in the settlement agreements provisions that require Whitman to indemnify them for such claims. The trial court considered the import of the settlements between defendants and their mutual insured upon this claim for contribution, and in the circumstances determined that contribution would be allowed to "the amount of primary coverage" that was available under the policies. Under *Fireman's Fund* and *Centennial*, that is exactly what the trial court was required to do. We are not persuaded to create an exception to the rule in this case.

III. *The Judgment Is Supported by the Evidence*

Defendants assert the trial court's decision "rests on a finding . . . for which there is no evidence." Specifically, they take issue with one paragraph in the 14-page decision that states: "insurance companies making the business judgment to insure a policyholder will naturally consider what other carriers are involved in the obligation" in "anticipation of co-insurance responsibility" and a right to obtain contribution from those coinsurers. The court found that Wausau issued coverage to Whitman in the expectation that other insurers would be providing coverage and reasoned it would be unfair to deny Wausau contribution given that expectation.[7]

[7] In full, the paragraph reads as follows: "Insurance companies making the business judgment to insure a policyholder will naturally consider what other carriers are involved in the obligation. The exercise of the business judgment to assume responsibility for an insured in the instance of environmental hazard naturally reflects the health of co-insurers who may also be responsible for any contamination. Charging particular rates and agreeing to a certain level of primary responsibility are dependent upon what other primaries potentially may be involved in coverage. Significantly, this is

It is undisputed, and the court acknowledged, that there is no evidence Wausau in fact relied on the existence of other coverage in deciding to insure Whitman. But this challenged finding is not essential to the court's decision. "Where a finding (now a factual determination and a part of the statement of decision) is lacking in evidentiary support, but it is on a matter that is immaterial, or of so little materiality that a finding either way on the matter would not influence the judgment, or for some other reason the finding was unnecessary, other findings being sufficient to support the judgment, the error is harmless." (9 Witkin, Cal. Procedure (4th ed. 1997) Appeal, § 426, p. 473; see also Cal. Const., art. VI, § 13; Code Civ. Proc., § 657.) In denying defendant's motion for a new trial, the court stated that deleting these sentences would not affect its decision, which was based on the undisputed facts that: (1) Wausau and defendants provided primarily liability insurance to Whitman; (2) defendants settled with Whitman before the *Avila* and *Arlich* cases were filed; (3) none of the defendants had made payments in excess of their policy limits; and (4) Wausau paid Whitman's defense costs. These stipulated facts fully support the court's decision. The lack of evidence for the cited finding does not affect the judgment.

IV. *Offset*

Defendants argue they are entitled to an offset for the over $24 million in payments they made to Whitman to settle the *Jensen-Kelly* action because the settlement payments in *Jensen-Kelly* were in exchange for a *release* from future, as well as past and present, claims. They made no showing, however, that they paid anything to defend or

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a business judgment made by both the Plaintiff and the Defendants in this case at the time they contracted with the insured Whitman. Indeed, the notion of equitable contribution reflects the anticipation of co-insurance responsibility among the primaries at the time each primary agreed to co-insure during a relevant period of time. Allowing a particular settlement between the *insured* and one or more primary insurers to essentially extinguish this calculation, said settlement not resulting in the extinction of the actual coverage limit of the settling primary; would disrupt the Plaintiff insurer's understanding of the equities when it signed its policy obligations with Whitman. Equitable contribution as a doctrine would then cease to have the fairness it affords to co-insurers."

settle the *Avila* and *Arlich* claims. The court thus properly found there was no basis on which it could equitably reduce the amount of their contribution obligation to Wausau.

V. *Apportionment of Liability*

"In choosing the appropriate method of allocating defense costs among multiple liability insurance carriers, each insuring the same insured, a trial court must determine which method of allocation will most equitably distribute the obligation among the insurers 'pro rata in proportion to their respective coverage of the risk,' as 'a matter of distributive justice and equity.' [Citation.] As such, the trial court's determination of which method of allocation will produce the most equitable results is necessarily a matter of its equitable judicial discretion." (*Centennial*, *supra*, 88 Cal.App.4th at p. 111.)

The parties agreed at trial that, if defendants were liable for equitable contribution, "time on the risk" was the appropriate method for allocating each insurer's proportionate share of liability for Whitman's defense. This approach is based on the relative duration of coverage afforded by each policy compared with the overall period of coverage. (See *Centennial*, *supra*, 88 Cal.App.4th at pp. 105, 112-113.) Defendants contend the court erred when it included two Travelers' policies in the calculations. We disagree.

The court included six months of coverage under a policy that Travelers issued to Stanray for the period between December 31, 1967 and December 31, 1968, and later extended to January 31, 1969. Defendants contend this policy should not have been considered because Stanray acquired the Willits site from Remco after the policy period began, and neither Remco nor the Willits site were ever added to the policy. But failure to add Remco or the Willits site were not dispositive. Defendants cite *In re S. Kornreich & Sons, Inc. v. Genesis Ins. Co.* (1997) 56 Cal.App.4th 407, 417 for the proposition that risks acquired after a policy commences are not covered unless specifically added to the policy. *Kornreich*, however, addresses a narrow question: whether coverage under a commercial real estate policy providing 90 days' coverage for newly acquired buildings automatically became permanent upon the occurrence of certain conditions. (*Id.* at pp. 416-417.) It does not address general liability coverage of successor corporations and, therefore, does not control analysis of Travelers' defense obligations to Whitman under

the 1967 policy. Moreover, defendants identify no limiting language in the Travelers' policies that would limit the insured risks to indisputably preclude coverage for liabilities arising from the Willits site.

On the other hand, it is undisputed that Stanray was a named insured during the policy period. It is equally undisputed that the underlying complaints alleged Stanray owned and operated the Willits site from 1968 to 1977, during the policy period; that Whitman is its legal successor; and that Whitman is liable for damages resulting from Stanray's activities at the site during the covered period. In the *Arlich* suit, the plaintiffs also alleged that each of the defendants and their corporate predecessors and successors was the agent, employee, joint venturer or alter ego of the others. The *Arlich* complaint thus unambiguously alleged that Stanray, now Whitman, is liable for the actions of Remco, regardless of whether Remco was a named insured. These allegations created a potential for coverage under the policy sufficient to trigger Travelers' broad duty to defend. (*Montrose Chemical Corp. v. Superior Court* (1993) 6 Cal.4th 287, 295.) Accordingly, the trial court did not err when it included the Travelers' policy in the calculation.

We turn next to the court's inclusion of the Travelers' "Premium Computation" policy. Defendants contend that Travelers' policy no. TRL-NSL-139T835-6-76 (the "6-76 policy") should have been excluded from the allocation of defense costs because it covers the same time period (June 1, 1976 to June 1, 1977) as another Travelers' policy, no. TR-NSL-121T165-0-76 (the "0-76" policy). They contend the 6-76 policy did not provide separate coverage, but instead was used only to specify how premiums were to be calculated for a variety of policies as set forth in a "premium computation endorsement." The policy language does not support their position. The declarations page describes the policy as a "comprehensive automobile-general liability policy" and specifies the limit of liability for various types of liability coverage under the policy. The policy contains typical provisions such as definitions, conditions, coverage grants and exclusions. It also includes indemnity and duty to defend language. While it does include a "premium computation endorsement" setting forth the complex mechanism for

computing the premium, defendants identify neither policy language nor any extrinsic evidence suggesting that this endorsement abrogates the coverage otherwise afforded by the policy. The trial court reasonably applied both policies in light of their coverage language.

Lastly, defendants contend that, even if the court correctly included the 6-76 policy, "other insurance" provisions in the two policies issued for the June 1976—June 1977 period require that "any liability be split in half between the two."[8] Treating the policies in this fashion would reduce the time on the risk attributable to Travelers and increase Wausau's proportionate share of defense costs from 14.52 percent to 15.65 percent. The trial court rejected the contention, as do we.

" 'Other insurance' clauses 'limit an insurer's liability to the extent that other insurance may cover the same loss.' [Citation.] ' "Other insurance" clauses become relevant only where several insurers insure the same risk at the *same level* of coverage.' " (*Dart Industries, Inc. v. Commercial Union Ins. Co.* (2002) 28 Cal.4th 1059, 1078-1079, fn. 6, italics omitted.) Defendants fail to cite any authority that such clauses must necessarily limit a *single* insurer's liability where it has chosen to issue overlapping policies to the same insured for the same period of time. In any event, their position is

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[8] The contract language is as follows: "The insurance afforded by this policy is primary insurance, except when stated to apply in excess of or contingent upon the absence of other insurance. When this insurance is primary and the *insured* has other insurance which is stated to be applicable to the loss on an excess or contingent basis, the amount of the company's liability under this policy shall not be reduced by the existence of such other insurance. [¶] When both this insurance and other insurance apply to the loss on the same basis, whether primary, excess or contingent, the company shall not be liable under this policy for a greater proportion of the loss than that stated in the applicable contribution provision below: [¶] (a) Contribution by Equal Shares. If all of such other valid and collectible insurance provides for contribution by equal shares, the company shall not be liable for a greater proportion of such loss than would be payable if each insurer contributes an equal share until the share of each insurer equals the lowest applicable limit of liability under any one policy or the full amount of the loss is paid, and with respect to any amount of loss not so paid the remaining insurers then continue to contribute equal shares of the remaining amount of the loss until each such insurer has paid its limit in full or the full amount of the loss is paid."

inconsistent with the "time on the risk" method of allocation they agreed should be applied to every other policy. Under the agreed approach, the months of coverage afforded by a particular policy are divided by the total months of coverage afforded by all applicable policies to determine the share of defense costs to be allocated to that particular policy. (See *Centennial, supra,* 88 Cal.App.4th at p. 112.) As the trial court observed, defendants' contention that the court should have counted only *half* of Travelers' months on the risk runs counter to the Supreme Court's directive that "the modern trend is to require equitable contributions on a pro rata basis from all primary insurers regardless of the type of 'other insurance' clause in their policies." (*Dart Industries, Inc., supra,* at p. 1080.) And, while defendants note that "other insurance" clauses are "designed to prevent multiple recoveries when more than one policy provided coverage for a particular loss," there seems to be no risk here that the court's allocation scheme will allow Whitman to recover more than its reasonable defense costs or Wausau to obtain contribution from its coinsurers in an amount greater than their proportionate time on the risk allows.

We conclude the court's method of allocation was within its broad discretion.

DISPOSITION

The judgment is affirmed.

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Siggins, J.

We concur:

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McGuiness, P.J.

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Parrilli, J.

Filed 7/14/06

CERTIFIED FOR PARTIAL PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION THREE

EMPLOYERS INSURANCE COMPANY OF WAUSAU, Plaintiff and Respondent, v. THE TRAVELERS INDEMNITY COMPANY et al., Defendants and Appellants.	A110973 (San Francisco County Super. Ct. No. 420940) **ORDER CERTIFYING OPINION FOR PARTIAL PUBLICATION**

THE COURT:

The opinion in the above-entitled matter filed on June 16, 2006, was not certified for publication in the Official Reports. For good cause, respondent's request for partial publication is granted as follows:

Pursuant to California Rules of Court, rules 976 and 976.1, the opinion in the above-entitled matter is ordered certified for publication with the exception of parts I, III, IV and V.

DATED: _____ _____P.J.

Trial Judge:	Honorable Robert L. Dondero
Trial Court:	San Francisco County Superior Court
Counsel for Appellants:	Cooper, White & Cooper John M. Ross Dafna G. Levi
Counsel for Respondent:	Bryan M. Barber Steven D. Meier