2011

UTAH BUSINESS INSURANCE COMPANY v. WORKERS COMPENSATION FUND : Brief of Appellee

Utah Supreme Court

IN THE SUPREME COURT OF THE STATE OF UTAH

WORKERS COMPENSATION FUND	)	
	)	**RESPONSE BRIEF OF PLAINTIFF/APPELLEE WORKERS COMPENSATION FUND**
Plaintiff/Appellee,	)	
	)	
vs.	)	
	)	**Supreme Court No. 20110744-SC**
UTAH BUSINESS INSURANCE COMPANY,	)	**Trial Court No. 100914170**
	)	
Defendant/Appellant.	)	

RESPONSE BRIEF OF APPELLEE WORKERS COMPENSATION FUND,

Appeal from Entry of Judgment by the Honorable Paul G. Maughan, Third District Court Judge

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STATEMENT OF THE JURISDICTION OF THE SUPREME COURT

This appeal was retained by the Supreme Court pursuant to Utah Code Ann. §78A-3-102.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

ISSUE 1: Did the trial court correctly grant Workers' Compensation Fund's Motion for Partial Summary Judgment determining that Utah Business Insurance Company should equally share the liability for payment of the catastrophic worker's compensation claim of the employee of the employer both carriers insured?

Standard of Review: A trial court's decision to grant a motion for summary judgment is a question of law that is reviewed for correctness, granting no deference to the trial court.[1]

ISSUE 2: Should Workers Compensation Fund and Utah Business Insurance Company equally share the liability for payment and administration of a catastrophic loss claim made by the employee of their insured Pioneer Roofing?

Standard of Review: A trial court's decision to grant a motion for summary judgment is a question of law that is reviewed for correctness, granting no deference to the trial court.[2]

ISSUE 3: In the event of two workers' compensation insurance policies with overlapping

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[1] *Petersen v. Riverton City*, 243 P.3d 1261, 1264 (Utah 2010).

[2] *Id.*

coverage periods, do identical "Other Insurance"[3] provisions in the two policies require the insurance carriers to equally share the workers' compensation liability for catastrophic accidental injuries to the insured employer's employee which occurred during the period of overlap?

Standard of Review: A trial court's decision to grant a motion for summary judgment is a question of law that is reviewed for correctness, granting no deference to the trial court.[4]

ISSUE 4: Should the court follow traditional written contract interpretive principles or should Utah adopt the small minority interpretive doctrine of "targeted tender" which gives the insured employer the right to disregard the "Other Insurance" clause in its workers' compensation insurance contracts?

Standard of Review: A trial court's granting of summary judgment to not apply a novel legal theory that has never been applied to a workers compensation setting is a question of law that is reviewed for correctness, granting no deference to the trial court.[5]

ISSUE 5: In the event of overlapping insurance coverages, should an employer be allowed to unilaterally choose to which of the two workers' compensation insurances it will tender a

---

[3]Both policies contain the following:

> *We will not pay more than our share of benefits and costs covered by this insurance and other insurance or self-insurance. Subject to any limits of liability that may apply, all shares will be equal until the loss is paid. If any insurance or self-insurance is exhausted, the shares of all remaining insurance will be equal until the loss is paid.*

[4]*Petersen v. Riverton City*, 243 P.3d 1261, 1264 (Utah 2010).

[5]*Id.*

workers' compensation claim to the exclusion of liability for the carrier not chosen for the tender[6]?

Standard of Review: A trial court's granting of summary judgment and refusal to adopt a novel legal theory that has never been applied to a workers compensation setting is a question of law that is reviewed for correctness, granting no deference to the trial court.[7]

DETERMINATIVE STATUTES AND RULES

Utah Code Ann. §31A-22-1002. Duration of coverage:

> (1) Any insurer assuming a workers' compensation risk shall carry it until the policy is canceled, either:
>
> (a) by agreement between the Division of Industrial Accidents in the Labor Commission, the insurer, and the employer; or
>
> (b) after:
>
> (i) notice by the insurer to the employer as provided in Section 31A-21-303; and
>
> (ii) notice to the Division of Industrial Accidents in the Labor Commission as provided in Section 34A-2-205.
>
> (2) Subsection (1) does not affect the requirements of Section 31A-22-1001.

Utah Code Ann. §31A-22-1006. Insurer's constructive knowledge:

> Every workers' compensation policy or contract shall contain a provision that, as between the employee and the insurer, notice to or knowledge of the occurrence of the injury on the part of the employer is considered to be notice or knowledge to the insurer. This provision shall also state that the insurer is bound by and subject to the orders, findings, decisions, and awards rendered against the employer for the payment of compensation on account of compensable accidental injuries or occupational disease

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[6]"Targeted Tender Doctrine"

[7]*Petersen v. Riverton City*, 243 P.3d 1261, 1264 (Utah 2010).

disability.

Utah Code Ann. §34A-2-201. Employers to secure workers' compensation benefits for employees - Methods:

> An employer shall secure the payment of workers' compensation benefits for its employees by:
>
> (1) insuring, and keeping insured, the payment of this compensation with the Workers' Compensation Fund;
>
> (2) insuring, and keeping insured, the payment of this compensation with any stock corporation or mutual association authorized to transact the business of workers' compensation insurance in this state; or
>
> (3) obtaining approval from the division in accordance with Section 34A-2-201.5 to pay direct compensation as a self-insured employer in the amount, in the manner, and when due as provided for in this chapter or Chapter 3, Utah Occupational Disease Act.

Utah Code Ann. §34A-2-205(1)(a) - (c). Notification of workers' compensation insurance coverage to division - Cancellation requirements - Penalty for violation:

> (1) (a) An insurance carrier writing workers' compensation insurance coverage in this state or for this state, regardless of the state in which the policy is written, shall file notification of that coverage with the division or the division's designee within 30 days after the inception date of the policy in the form prescribed by the division.
>
> (b) A policy described in Subsection (1)(a) is in effect from inception until canceled by filing with the division or the division's designee a notification of cancellation in the form prescribed by the division within ten days after the cancellation of a policy.
>
> (c) Failure to notify the division or its designee under Subsection (1)(b) results in the continued liability of the carrier until the date that notice of cancellation is received by the division or the division's designee.

Utah Code Annotated §34A-2-401(1)-(2). Compensation for industrial accidents to be paid:

> (1) An employee described in Section 34A-2-104 who is injured and the dependents of each such employee who is killed, by accident arising out of and in the course of the employee's employment, wherever such injury occurred, if the accident was not purposely self-inflicted, shall be paid:
>
> (a) compensation for loss sustained on account of the injury or death;
> (b) the amount provided in this chapter for:
> (i) medical, nurse, and hospital services;
> (ii) medicines; and
> (iii) in case of death, the amount of funeral expenses.
>
> (2) The responsibility for compensation and payment of medical, nursing, and hospital services and medicines, and funeral expenses provided under this chapter shall be:
> (a) on the employer and the employer's insurance carrier; and
> (b) not on the employee.

STATEMENT OF THE CASE

Statement of the Nature of the Case and the Course of Proceedings

Appellee Workers Compensation Fund ("WCF") filed a complaint[8] on August 5, 2010 against Utah Business Insurance Company ("UBIC") for declaratory relief pursuant to the Utah Declaratory Judgments Act, Utah Code Ann. §§78B-6-401 *et seq.* WCF asked the trial court both in its Complaint and by Motion for Partial Summary Judgment filed on March 11, 2011[9] to find the twin[10] WCF and UBIC workers' insurance policies

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[8]R. 1-18.

[9]R. 53-55.

[10]Both insurance carriers use preprinted Utah Insurance Department approved insurance policies. The language and paragraph numbering in the two policies are

insuring employer Pioneer Roofing Company ("Pioneer") were both in effect on the day Pioneer employee Russell Antone ("Antone") was catastrophically injured while in the course and scope of his employment. Consistent with its vision of duty to the Utah Workers Compensation Act ("the Act"), WCF initially assumed and has continued to pay benefits to injured worker Antone as required by the Act. The medical expenses paid to date exceed $2,000,000. UBIC has refused to participate in the adjustment and payment Mr. Antone's benefits as called for by the Act and its contract with Pioneer.

The coverage period for WCF's expiring Pioneer policy was from April 1, 2007 through March 31, 2008[11]. UBIC's policy was effective from February 22, 2008, through February 22, 2009[12]. Mr. Antone's accident occurred on March 21, 2008, during the period of policy overlap.

Utah law requires the application of the "Other Insurance" clauses in the overlapping contracts. The identical contract forms contain the following provision:

> ***E. Other Insurance***
>
> *We will not pay more than our share of benefits and costs covered by this insurance and other insurance or self-insurance. Subject to any limits of liability that may apply, all shares will be equal until the loss is paid. If any insurance or self-insurance is exhausted, the shares of all remaining*

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identical. The pre-approved forms use the language authored by the National Council of Compensation Insurance, the State of Utah's compensation rate-making contractor.

[11]R. 71.

[12]R. 76-77.

insurance will be equal until the loss is paid.[13]

WCF asked the court to grant it a partial summary judgment determining the two insurance carriers are obligated to pay equal shares of the liability for Mr. Antone's injuries based on the overlapping coverage and as Pioneer had contracted with each carrier in the "other insurance" clauses. The trial court granted WCF's Motion on July 26, 2011.[14] UBIC filed its Notice of Appeal on August 16, 2011.[15]

STATEMENT OF FACTS

1. Russell Antone was catastrophically injured on March 21, 2008, when he fell through a skylight at a construction project while in the course and scope of his employment with Pioneer roofing.[16] Mr. Antone is now a permanent resident in a 24 hour per day skilled nursing facility.[17]

2. WCF has paid all medical expenses and weekly compensation benefits required by the Workers Compensation Act on Mr. Antone's claim. The total medical expenses paid to date exceed $2,000,000.

3. Pioneer maintained concurrent and overlapping workers compensation insurance policies with both WCF and UBIC on the date of Mr. Antone's accident. Both

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[13]R. 81-82 and R. 92.

[14]R. 378-385.

[15]R. 386-396.

[16]R. 4, 58, 112.

[17]*Id.*

insurance carriers use preprinted Utah Insurance Department approved insurance policies. The language and paragraph numbering in the two policies are identical. The pre-approved forms use the language authored by the National Council of Compensation Insurance ("NCCI"), the State of Utah's compensation rate-making contractor.[18] As a result, the language in Pioneer's WCF and UBIC policies are identical, including the "other insurance" clauses:

> *We will not pay more than our share of benefits and costs covered by this insurance and other insurance or self-insurance. Subject to any limits of liability that may apply, all shares will be equal until the loss is paid. If any insurance or self-insurance is exhausted, the shares of all remaining insurance will be equal until the loss is paid.*[19]

4. Pioneer's 2008 UBIC workers compensation contract clearly and unambiguously states more than 30 time its UBIC policy was effective beginning February 22, 2008.[20] Every premium billing invoice provided to Pioneer by UBIC beginning with the February 2008 billing affirms the policy period runs from February 22, 2008 to February 22, 2009.[21]

5. UBIC billed, and Pioneer paid, monthly premium beginning February 22, 2008. Those payments included the partial month of February 22, 2008 through February

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[18]R. 56. (WCF discussed the source of the identical contract forms in its Memorandum in Support of Motion for Partial Summary Judgment. UBIC assented to the statement without opposition.)

[19]R. 81-82 and R. 92

[20]R. 203-231.

[21]R. 234-247.

29, 2008 and all of March 2008.[22] UBIC sent Pioneer a letter verifying February 22, 2008 as the inception date. UBIC specifically requested payroll information for the dates February 22, 2008 through February 29, 2008. The letter also requested premium payment for the partial month of February 2008.[23]

6. Pioneer reviewed its 2008 UBIC policy at the time of the policy's inception.[24] Pioneer received and paid every premium billing invoice from February 2008 to February 2009. Each billing identified the policy effective date of February 22, 2008.[25] Pioneer also paid premiums to WCF on its WCF policy for February 2008 and March 2008.[26]

7. In February 2011, UBIC allegedly credited the premium back to Pioneer that it accepted three years earlier. That "credit" occurred after the Complaint was filed, after initial disclosures, after UBIC's response to WCF's initial discovery requests, and more than a year after UBIC was notified of the overlapping coverage issue by WCF.[27]

8. It wasn't until after WCF filed its complaint that UBIC demonstrated any concern regarding Pioneer's overlapping policies. Only after WCF filed this lawsuit did

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[22] *Id.*

[23] R. 250-251.

[24] R. 125-127.

[25] R. 234-247.

[26] R. 254.

[27] R. 271-272.

UBIC disavow the February 22, 2008 effective date of its 2008 Pioneer policy.[28]

The following is a detailed chronology of additional facts and procedural history both before and after litigation commenced in this case that will assist the Court in determining the lack of merit of UBIC's appeal. (See also Attachments 1 and 2 for demonstrative exhibit time-lines of the pre and post complaint history of the case.)

The Parties' Correspondence and Procedural History

9. **March 10, 2010**: WCF put UBIC on notice of the overlapping coverage by letter to UBIC's CFO Brad Simons.[29]

10. **March 30, 2010**: UBIC responded through its counsel of record. UBIC requested, among other things:

> *A copy of the WCF policy for the employer which was, per your letter, effective April 1, 2007 through March 31, 2008, including a copy of any and all riders, extensions, limitations, exclusions, etc., relating to the policy.*[30]

11. **April 7, 2010**: WCF responded to UBIC's March 30, 2010 letter. WCF provided complete copies of: (a) WCF's policy with John Stout/Pioneer roofing; (b) the Employer's First Report of [Antone's] Injury; (c) a current payment history; and (d) all medical records associated with the treatment of Mr. Antone for his March 21, 2008

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[28]R. 22-27, 122-123.

[29]R. 271-272.

[30]R. 275-276.

injury.[31] In return, WCF also requested a copy of UBIC's 2008 Pioneer policy and all documentation that is a part of the policy.[32] UBIC didn't respond.

12. **May 24, 2010**: WCF wrote UBIC another letter stating[33];

> *On . . . May 10, 2010. I left you a telephone message . . . As of today, WCF has not received any verbal or written response . . .*
>
> *Please provide WCF with the requested material ... by Friday, June 4, 2010. If WCF does not hear from you by then we will assume you wish to litigate this matter . . .*

13. **May 28, 2010**: UBIC requested an additional two weeks from June 4, 2010, to respond.[34] UBIC did not respond.

14. **August 5, 2010**: WCF filed the Complaint against UBIC, requesting the court to order UBIC to pay its 50% pro-rata share of the Antone claim.

15. **September 13, 2010**: WCF's Complaint was served on UBIC. [35]

16. **October 8, 2010**: More than three weeks after UBIC was served WCF's Complaint, non-party John Stout, Pioneer's owner, wrote a letter to UBIC. In that letter, Mr. Stout states he did "not want to get UBIC involved in [Mr. Antone's] claim."[36] He

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[31]R. 279-280.

[32]*Id.*

[33]R. 283.

[34]R. 286.

[35]R. 289-291.

[36]R. 346.

expressed no concern regarding his overlapping WCF and UBIC workers compensation policies before evident post-Complaint contact by UBIC representatives.

17. **October 13, 2010**: UBIC filed its Answer to WCF's complaint.[37]

18. **December 3, 2010**: The parties exchanged their URCP 26(a) initial disclosures. UBIC did not describe any detail of its 2008 Pioneer UBIC policy in its disclosures or provide a copy of the policy.[38]

19. **December 16, 2010**: Approaching three years from the effective date of the UBIC contract, Mr. Stout sent another tardy letter to UBIC. In the letter Mr. Stout requested, for the first time, to have his 2008 UBIC policy revised to reflect a policy effective date following the Antone accident and the expiration of his WCF policy.[39] This request was more than three months after WCF's complaint had been served, and quite apparently, after post-Complaint contact by one or more UBIC representatives.

20. **January 6, 2011**: WCF served its "First Set of Interrogatories and Requests for Production of Documents to Defendant." WCF again requested complete copies of all of UBIC's Pioneer policies.[40]

21. **January 19, 2011**: UBIC began the process of reforming Pioneer's 2008

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[37]R. 22-27.

[38]R. 40-45.

[39]R. 347.

[40]R. 294-298.

UBIC contract to change the effective date of the policy from the original date of February 22, 2008 to April 1, 2008.[41] Again, this process began months after litigation began.

22. **February 16, 2011**: UBIC responded to WCF's January 6, 2011 discovery requests.[42] UBIC's president, Ron Nielsen verified by signature that the effective date of UBIC's Pioneer policy was February 22, 2008.[43] UBIC's discovery responses included only parts of the 2008 Pioneer policy. It did not include a copy of the form that included the "other insurance" clause.

23. **February 17, 2011**: WCF's counsel wrote a letter to UBIC's counsel requesting that;

> *. . . UBIC respond completely to WCF's request for a complete copy of the at issue UBIC Policy Number: WC320-00003222008A covering Pioneer Roofing including a copy of any and all riders, extensions, limitations, exclusions, etc., relating to the policy.*[44]

24. **February 18, 2011**: On February 18, 2011, one day after WCF requested a complete copy of UBIC's 2008 Pioneer policy and two days after UBIC president Ron Nielsen verified the February 22, 2008 effective date, UBIC issued a "reformed" Pioneer policy. The only policy "revision" was to change the effective date from February 22,

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[41]R. 301-303.

[42]R. 306-314.

[43]*Id.*

[44]R. 317-319.

2008 to April 1, 2008.[45]

25. **February 22, 2011**: UBIC filed its "Supplemental Responses to Plaintiff's First Set of Requests for Production of Documents," which included a complete copy of Pioneer's 2008 UBIC policy.[46] On this same date, UBIC affirmed "after an exhaustive search" that "all 2008 policy documents have been produced."[47] UBIC did not disclose the February 18, 2011 attempt to "reform" the effective date of the 2008 contract.

26. **March 11, 2011**: WCF filed its "Motion for Partial Summary Judgment Regarding 'Other Insurance.'"[48]

27. **March 28, 2011**: UBIC filed its "counter motion for Summary Judgment" and supporting memorandum.[49]

28. **March 28, 2011**: UBIC filed its "Third Supplemental Disclosures" in which, for the first time, it disclosed its reformation attempt dated one month earlier - more than five months after the Complaint was filed.[50]

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[45]R. 129-150.

[46]R. 204-231.

[47]R. 323.

[48]R. 53-55.

[49]R. 97-99.

[50]R. 129-150, 157.

From Utah Labor Commission Records

The following reflects Utah Labor Commission Records:

29. **February 21, 2008**: Pioneer was insured by WCF policy #1452208.[51]

30. **February 22, 2008**: Pioneer was insured by two workers compensation policies, WCF policy #1452208 and UBIC policy #WC32000003222008A.[52]

31. **March 21, 2008**: Mr. Antone was injured. Pioneer was insured by two workers compensation policies, WCF policy #1452208 and UBIC policy #WC32000003222008A.[53]

32. **February 21, 2009**: Pioneer's UBIC policy #WC32000003222008A expired.[54]

33. **February 22, 2009**: Pioneer renewed its insurance coverage with UBIC. A new policy number was assigned: WC32000003222009A.[55] This is exactly one year from the original policy effective date of February 22, 2008.

34. **February 21, 2010**: Pioneer's UBIC policy #WC32000003222009A expired.[56]

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[51]R. 327.

[52]R. 328-239.

[53]R. 330-331.

[54]R. 332.

[55]R. 333.

[56]R. 334.

35. **February 22, 2010**: Pioneer's 2009 UBIC policy lapsed. Pioneer had no workers compensation insurance coverage with any insurance carrier as of this date.[57]

Pioneer's coverage lapsed exactly two years from the date of Pioneer's original UBIC policy effective date of February 22, 2008. February 22 of each year was noted as the anniversary Pioneer's UBIC policies would either lapse or be renewed. UBIC had no workers compensation coverage from February 22, 2010 until it began a new policy with UBIC policy #WUB0001241 with the effective date of April 1, 2010.[58] (Note: It was during the 2010 lapse of coverage when UBIC was notified by WCF of its probable liability exposure for the Antone accident)[59]

36. After UBIC filed a reformed Pioneer contract on February 18, 2011, the Labor Commission records show UBIC had two Pioneer policies from the period of April 1, 2008 through March 31, 2009.[60] The policy beginning April 1, 2008 is UBIC's reformed policy in which the original policy period dates were altered.[61] Pioneer's original 2008 UBIC policy effective February 22, 2008 has not been altered or canceled on the Labor Commission's records.[62]

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[57]R. 335.

[58]R. 336-337.

[59]R. 272-273.

[60]R. 340-343.

[61]*Id.*

[62]See Utah Code Ann. 34A-2-205.

SUMMARY OF THE ARGUMENT

This case involves a catastrophic workers' compensation injury claim. The claim is reserved by WCF for many millions of dollars. The novel and first impression "Targeted Tender Doctrine" argument raised by UBIC, if adopted by the Court, will have a wider reach than the case at bar. A decision adverse to WCF could require prospective amendment to workers' compensation contract forms, reevaluation of premium structures for Utah employers, and reevaluation of premiums charged primary carriers for their claim reinsurance. Adopting UBIC's arguments regarding contract interpretation, will affect the structure of the Workers' Compensation Act, particularly those areas dealing with the commencement and duration of an insurance carriers' liability to cover injuries to injured Utah employees.

More particularly, WCF asks the Supreme Court to sustain the trial court's determination to apply the twin "Other Insurance" clauses in the employer's overlapping WCF and UBIC workers compensation insurance policies. UBIC filed a counter-motion with its response to WCF's motion. Accompanying its responsive memorandum UBIC submitted exhibits it created after the commencement of the lawsuit. The UBIC exhibits were created in an effort to reform the effective dates of its contract with the employer. The claim was mistake of fact.

The trial court agreed the parol evidence rule precludes extra-contractual evidence to contradict clear and unambiguous terms. All documentary evidence presented by UBIC in its attempt to show mutual mistake of intent was created or not disclosed until after WCF demanded contribution and/or after the complaint was filed and/or after URCP 26(a) initial disclosures and/or even after UBIC responded to WCF's directed discovery requests. Not until responding to WCF's Motion for Partial Summary Judgment did UBIC disclose and/or create and/or produce

most of its principal exhibits. The trial court ruled, if admitted, such evidence does not reach the "clear and convincing" standard required to reform a contract.

The strongest of public policies applies to the provisions of the Utah Workers' Compensation Act (the "Act"). The Supreme Court opined:

> *Workers' compensation not only is a "question...of...importance to the public," but also furthers a "public interest [that] is so strong...that we should place the policy beyond the reach of contract"* [Citation omitted]*...The legislature itself has placed workers' compensation "beyond the reach of contract."...*[W]*orkers' compensation represents a clear and substantial public policy...*[63]

An integral part of that *policy* [which is] *beyond the reach of contract*, is a legislatively set bright line to protect injured workers and to advise employers and insurance carriers of their respective responsibilities. Every insurance carrier that writes a policy of workers' compensation insurance is obligated to provide coverage until formal cancellation of the policy. *Failure to notify the* [Labor Commission] *results in the continued liability of the carrier until the date that notice of cancellation is received by the* [Labor Commission][64]. Deviation from that standard would be a grievous corruption of the Utah Workers' Compensation Act. It would set in motion the potential for insurance carriers disputing coverage to delay payments to injured employees

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[63]*Touchard v. La-Z-Boy*, 2006 Ut 71 at P16-17; 148 P.3d 945, 951 (Utah 2006).

[64]Utah Code Ann. Section 34A-2-205(1)(b) & (c):

(b) A policy...is in effect from inception until canceled by filing with the division...a notification of cancellation...within ten days after the cancellation of a policy.

(c) Failure to notify the division...results in the continued liability of the carrier until the date that notice of cancellation is received by the division...

while the disputes wound their way through litigation. Such corruption of the obvious legislative intent cannot be tolerated. Application of the law leaves no room for post accident contractual manipulation as suggested by UBIC. Application of the law leaves no room for any inference of post accident collusion. There is no evidence the Utah Labor Commission received any notice from UBIC of its intent to change the coverage commencement date until after February of 2011–nearly three years after the employee's accident.

Finally, UBIC's reliance on the "targeted tender doctrine" is misplaced. It is a very small minority doctrine not adopted by Utah. This Court should follow the traditional, majority and most conceptually sound approach. The National Counsel of Compensation Insurance ("NCCI") and Utah Insurance Department approved forms used by both carriers include identical "other insurance" clauses. They are not meaningless. The employer contracted with both WCF and UBIC. Both contracts provide resolution for concurrent coverage. Each carrier is obligated to pay its proportionate share. Applying the "targeted tender doctrine" giving the insured the choice between two concurrent coverages puts the insured employer in the unfortunate position of breaching either one or the other of the insurance contracts. Applying the "targeted tender doctrine" makes clear and unambiguous contracted terms meaningless. In this instance the doctrine is contrary to traditional contract construction rules and Utah's Workers' Compensation Act. The doctrine sets in motion opportunities for mischief. WCF's motion for partial summary judgment regarding other insurance was correctly granted. UBIC's counter motion for summary judgment was correctly denied.

ARGUMENT

I. NO FURTHER EVIDENCE IS NECESSARY TO ESTABLISH THAT PIONEER'S UBIC POLICY WAS EFFECTIVE BEGINNING FEBRUARY 22, 2008.

UBIC argues it was entitled to additional discovery before the trial court entered its summary judgment. Further factual discovery was unnecessary for either the trial court or this Court to determine that February 22, 2008 was the effective date of Pioneer's 2008 UBIC policy. The parol evidence rule precludes any extra-contractual evidence from being considered when the terms of an integrated contract are clear and unambiguous. As held by this Court:

> *. . . [the parol evidence rule] operates in the absence of fraud to exclude contemporaneous conversations, statements, or representations offered for the purpose of varying or adding to the terms of an integrated contract.*[65]

Pioneer's 2008 UBIC policy clearly and unambiguously states more than thirty times that coverage commenced February 22, 2008. UBIC should not be allowed to present extra-contractual parol evidence to alter the clear effective date of that policy. To do so would violate well established rules of contract interpretation.

A. UBIC and Pioneer Intended their 2008 Policy to Become Effective On February 22, 2008.

The actions of UBIC and Pioneer contemporaneous to the time they signed the 2008 UBIC contract, and in the months and years that followed, demonstrate that February 22, 2008 was the intended effective date. WCF recognizes that a Court of

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[65] *Union Bank v. Swenson*, 707 P.2d 663, 665 (Utah 1985)

equity may reform a contract and look to parol evidence to reform a contract in the event of a mutual mistake of the parties.[66] However, no mutual mistake exists in this case. The actions of UBIC and Pioneer *contemporaneous* with the signing of Pioneer's original 2008 UBIC policy clearly demonstrates that they both intended February 22, 2008 to be the effective date of the policy.

This Court has established the applicable rule:

> *. . . A party may not sign a contract and thereafter assert ignorance or failure to read the contract as a defense. . .*
>
> *. . . a person who, having the capacity and an opportunity to read a contract, is not misled as to its contents . . . and . . .* ***cannot avoid the contract on the ground of mistake*** *if he signs it . . . To permit a party, when sued on a written contract, to admit that he signed it but to deny that it expresses the agreement he made or to allow him to admit that he signed it but did not read it or know its stipulations would absolutely destroy the value of all contracts. The purpose of the rule is to give stability to written agreements and to remove the temptation and possibility of perjury, which would be afforded if parol evidence were admissible.*[67]

By Affidavit attached to UBIC's response memorandum in this matter Pioneer owner, John Stout, stated "upon receipt of the policy from UBIC **I reviewed it** . . ."[68] As the party who drafted the policy, UBIC also, by necessity, reviewed the policy documentation before formalizing it.

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[66] *Rick Warner Truckland v. Kurt F. Sirstins*, 838 P.2d 666, 670 (Utah 1989).

[67] *John Call Engineering v. Manti City Corporation*, 743 P.2d 1205, 1208 (Utah 1987), quoting Garff *Realty Co. v. Better Buildings, Inc.* 234 P.2d 842, 843 (Utah 1951). (Emphasis Added)

[68] R. 125-127.

As the drafting party, UBIC inserted the effective date for Pioneer's UBIC policy as February 22, 2008 over thirty times in the contract.[69] It is not a contractual term that is inconspicuously hidden somewhere deep inside the pages of a wordy document. The policy effective date appears on the cover page of the policy itself and on nearly every single page of the policy thereafter. It is inconceivable that UBIC and Pioneer were not aware of the policy effective date in the contract when the policy was formalized. To allow UBIC and Pioneer, who both read and reviewed the contract, to avoid the policy effective date that was so clearly outlined and assented to by both contracting parties is the evil the court warned would "absolutely destroy the value of all contracts."

Even if extra contractual parol evidence were allowed, the parol evidence *contemporaneous* with the contract formation and during the policy period also unmistakably proves that February 22, 2008 was the intended effective date. Every UBIC premium invoice sent to Pioneer from February 2008 to February 2009 states "**Policy Period: 02/22/2008** to 02/22/2009."[70] Pioneer made monthly premium payments to UBIC for that time period.[71] UBIC affirmed by letter to Pioneer that February 22, 2008 was the inception date of the policy:

> *. . . Since **your policy was incepted on February 22nd**, you are only obligated to report your payroll form from February 22nd to February 29th.*

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[69]R. 204-231.

[70]R. 234-247. [Emphasis Added]

[71]*Id.*

This premium and reporting form is due March 20th.[72]

Pioneer made a partial month premium payment to UBIC in response to this letter and the premium invoice in the amount of $257.63 for the period February 22, 2008 through February 29, 2008. Pioneer also paid $1231.83 of premium to UBIC for the full month of March 2008, the month of Mr. Antone's accident.[73]

Finally, Pioneer's 2008 UBIC policy expired on February 21, 2009.[74] Pioneer renewed its UBIC policy and was assigned a new UBIC policy number on February 22, 2009, exactly one year after the original effective date of the UBIC policy.[75] Pioneer's 2009 UBIC policy subsequently expired again on February 21, 2010, after which UBIC failed to maintain any active workers compensation insurance for a period of time.[76] Pioneer's UBIC policies either lapsed or were renewed on February 22 of every year. Pioneer and UBIC's intent regarding the February 22, 2008 effective date at the time of the policy formation and during the policy period is clear. There was no mutual mistake of fact. UBIC and Pioneer both assented to the February 22, 2008 effective date by signing the contract and by their actions during the policy period.

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[72]R. 250. (Emphasis Added)

[73]R. 234-235.

[74]R. 332-333.

[75]*Id.*

[76]R. 334-337.

B. The Trial Court Correctly Disregarded Pioneer and UBIC's Post Complaint, Self Serving Claims of an Alleged Intent to Commence Their Policy on April 1, 2008, Rather than February 22, 2008 and Correctly Refused to Allow Any Further Discovery Pursuant to Rule 56(f) on that Issue.

UBIC's and Pioneer's post complaint, self serving statements regarding their alleged intent to commence the UBIC policy term on April 1, 2008, rather than February 22, 2008, is not supported by the evidence. There is no objective evidence contemporaneous with the policy formation or during the policy period of the contract that supports UBIC's mutual mistake argument. The only evidence UBIC has produced in support its mutual mistake argument, or that it could possibly produce with further discovery, is self serving and subjective post-Complaint testimony from its officers and John Stout. UBIC should not be allowed to present anything other than evidence created contemporaneously to the contract formation itself to support mutual mistake of fact.[77]

The trial court also correctly decided, as a matter of law, that "no reasonable jury could conclude that the parties agreed to [the effective date of April 1, 2008]."[78] No reasonable jury would determine in this case that the policy effective date was anything other than February 22, 2008. That result is inevitable based on the evidence that was before the trial court or any suspect post-Complaint testimony evidence UBIC has already provided or could potentially provide through further discovery.

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[77] *Union Bank v. Swenson*, 707 P.2d 663, 665 (Utah 1985)

[78] *Johnson v. Morton Thiokol, Inc.*, 818 P.2d 997, 1001 (Utah 1991).

1. UBIC's Post-Complaint, Self Serving Statements Regarding Its Pioneer Contract Inception Date Under the Circumstances of this Case Is Not Clear and Convincing Evidence of Mutual Mistake of Fact.

Any post-complaint statements from its officers or John Stout that UBIC has already produced regarding the parties' intent, or that it could potentially produce with further discovery, would need to be reviewed by the trial court and this Court with the highest degree of skepticism and scrutiny. UBIC claims mutual mistake of the parties regarding the policy effective date to avoid the parol evidence rule and in an attempt to avoid its obligations under the "other insurance" clause of Pioneer's 2008 UBIC policy. Mutual mistake of the contracting parties is an exception to the parol evidence rule. However, "where the document is unambiguous on its face, the challenging party must present proof of mistake by **clear and convincing evidence**."[79] This Court has recognized the importance of imposing the highest burden of proof on parties claiming mutual mistake in an attempt to alter or reform the unambiguous terms of a written contract:

> *. . . In such case the burden rests upon the moving party of overcoming the strong presumption arising from the terms of the written instrument.* ***If the proofs are doubtful or unsatisfactory, if there be a failure to overcome this presumption by testimony entirely plain and convincing beyond reasonable controversy, the writing will be held to express correctly the intention of the parties . . .***

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[79] *Louis L. Timm v. T. Lamar Dewsnup*, 921 P.2d 1381, 1392 (Utah 1996). [Emphasis Added]

> *. . . If it were once established that the effect of a written instrument could be avoided by a bare preponderance of parol evidence, the gates to perjury would soon be wide open. . .*[80]

This Court continued;

> *The evidence necessary to establish a mutual mistake, and to warrant a court of equity in correcting a written instrument, must be such as to leave* ***no reasonable doubt*** *in the mind of the court, and when the mistake is denied . . . the proof must be strong to overcome such denial.* ***If the evidence is at all loose, confused, contradictory, or uncertain, it is insufficient to support a decree for the reformation of a written instrument.***[81]

The Court "must be persuaded by **the clearest kind of evidence** that a mistake has been made by both parties."[82]

The trial court correctly ruled that UBIC was unable to meet this high burden. First and foremost, the intended February 22, 2008 effective date of Pioneer's and UBIC's workers compensation contract was clear and unambiguous from the documentary parol evidence created contemporaneously with the policy formation and during the policy period. The circumstances under which UBIC has developed, or will be able to develop its post complaint testimony parol evidence regarding mutual mistake is suspect at best and a calculated manipulation of evidence at worst. It is not and would not be "convincing beyond reasonable controversy." The post-complaint timing, lack of

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[80] *Deseret National Bank v. Henry Dinwoody*, 53 P.215, 216 (Utah 1898). Emphasis added.

[81] *Id.* at 217. Emphasis added.

[82] *Reid D. Bench v. Erma Pace*, 538 P.2d 180, 182 (Utah 1975) Emphasis added.

contemporaneous evidence supporting the alleged mutual mistake, and UBIC's self interest in producing statements from its officers or encouraging such statements from Pioneer claiming mutual mistake of the contract inception date invariably leads to "reasonable doubt". There is reasonable doubt regarding whether the statements from UBIC's agents truly demonstrate UBIC's intent at the time of the contract formation or whether it is a belated ploy to avoid its contractual liability on a costly claim.

A brief outline of the pre and post-complaint actions by UBIC in this case highlights the suspect nature of its attempts to belatedly change the history of its 2008 Pioneer policy. WCF refers the Court to the chronological outline of events surrounding this litigation in its Statement of Facts above to support this point.

In short, WCF informed UBIC of the overlapping coverage on March 10, 2010.[83] UBIC was served with WCF's complaint on September 13, 2010 in which WCF requested equitable pro rata contribution from UBIC for the amounts WCF has paid on Mr. Antone's claim. Less than one month later on October 8, 2010, and only five days before UBIC filed its Answer, John Stout, Pioneer's owner, sent a letter to UBIC stating he did not want UBIC involved in Mr. Antone's claim.[84] He did not raise any concern about the UBIC policy effective date at this time. This was not spontaneous correspondence from Pioneer. It was the first time in over three years since Antone's

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[83]R. 271-272.

[84]R. 346.

accident that Pioneer raised any concerns about its policy coverage with UBIC or WCF. All reasonable inferences are that UBIC contacted John Stout about this litigation and urged him to write the letter.

Two weeks after initial disclosures were exchanged, John Stout sent another letter to UBIC dated December 16, 2010 in which he refined his concerns to more fully fit UBIC's claim of mutual mistake by claiming, for the first time, that it intended its 2008 UBIC policy to commence on April 1, 2008, rather than February 22, 2008.[85] Again, all reasonable inferences are that this letter was not spontaneous and was sent after further contact by one or more UBIC representatives.

Further, only two weeks after WCF sent discovery notices requesting copies of all of UBIC's Pioneer policy documentation and related correspondence, UBIC unilaterally commenced the process of reforming its 2008 Pioneer policy on January 19, 2011 without WCF's or the trial court's knowledge.[86] On February 18, 2011, more than five months after UBIC was served with WCF's complaint, UBIC issued a reformed contract altering the effective date of Pioneer's 2008 policy from February 22, 2008 to April 1, 2008 and filed the reformed contract with the Utah Labor Commission.[87] UBIC filed the revised contract despite UBIC president Ron Nielsen's verification on February 16, 2011 that

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[85]R. 347.

[86]R. 301-303.

[87]R. 129-150.

February 22, 2008 was the policy inception date.[88]

UBIC assured WCF following supplemental discovery responses dated February 22, 2011 that it had provided all of Pioneer's 2008 policy documents. However, it failed to disclose its attempts to reform its 2008 Pioneer policy or the reformed contract filed with the Labor Commission only four days earlier. The reformed contract was not disclosed to WCF until after WCF filed its Motion for Partial Summary Judgment in a further discovery supplementation dated March 25, 2011.[89] The trial court correctly refused to allow such manipulation of evidence by granting WCF's motion and disregarding the reformed contract.

UBIC also claimed before the trial court that it credited Pioneer with the premiums it received for February 2008 and March 2008 to buttress its mistake of fact argument.[90] However, this alleged credit occurred in February 2011, more than five months after this litigation began and more than one year after it was put on notice of Pioneer's overlapping coverage. UBIC had no problem accepting Pioneer's premium money for the overlap period and keeping it in its coffers until after this litigation commenced. Only when it became apparent that holding on to those premiums would make it contractually obligated to pay its share of Mr. Antone's claim did it credit the premium back.

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[88]R. 305-313.

[89]*Id.*

[90]R. 107, 122-123.

UBIC's post-Complaint actions to avoid liability were not mere coincidence or a product of the discovery process. It was a calculated effort to change history. It was a calculated effort by UBIC to manipulate the clear uncontroverted facts to avoid its contractual liability. There is reasonable doubt regarding the legitimacy of any of Pioneer's or UBIC's post-Complaint statements. That includes the affidavits of Pioneer owner John Stout and UBIC president Ron Nielsen that were submitted with UBIC's response memorandum in opposition to WCF's Motion for Partial Summary Judgment.[91]

Any post complaint parol evidence statements or testimony produced by UBIC to support its mutual mistake claim will not be "convincing beyond reasonable controversy." UBIC has not, and will not, be able to meet its burden of proving "by the clearest kind of evidence" that there was a mutual mistake of fact to overcome the parol evidence rule in this case. The contract and contemporaneous documentary evidence are unmistakably clear. Pioneer and UBIC intended the policy to be effective on February 22, 2008. No reasonable jury could find otherwise.

2. UBIC has Already Provided All Documentary Evidence Regarding Its 2008 Pioneer Policy and None of It Supports UBIC's Alleged Mistake of Fact Regarding the February 22, 2008 Pioneer Policy Inception Date.

WCF has received every document in UBIC's possession related to Pioneer's 2008 UBIC policy. On January 6, 2011 WCF sent discovery requests to

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[91]R. 122-127.

UBIC in which it specifically requested, in pertinent part[92]:

REQUEST NO. 2: *Please provide a complete and accurate copy of UBIC's workers compensation policies or policies covering Pioneer Roofing Company.*

REQUEST NO. 7: *A copy of all letters, e-mail, and any other correspondence whether hard copy or electronic between UBIC and Pioneer Roofing Company regarding Pioneer Roofing Company's workers compensation coverage with either UBIC or WCF.*

REQUEST NO. 10: *A copy of all documents, letters, e-mail and other correspondence, whether hard copy or electronic between any UBIC representative and any broker or insurance company regarding procurement or underwriting of UBIC's Pioneer roofing Company workers compensation policy.*

REQUEST NO. 11: *A copy of all UBIC underwriting documents related to UBIC's Pioneer Roofing Company's workers compensation policy.*

UBIC responded to WCF's discovery requests on February 16, 2011 and by supplement on February 22, 2011.[93] In its discovery responses UBIC's president, Ron Nielsen, confirmed that February 22, 2008 was the effective policy date.[94] UBIC confirmed that "all 2008 policy documents have been produced."[95] WCF also has produced all documentary evidence of its 2008 policy with Pioneer. Thus, the further

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[92]R. 294-298.

[93]R. 306-314.

[94]*Id.*

[95]R. 323.

documentary discovery requested by UBIC would not have revealed any more documents.

None of the 2008 Pioneer policy documents or related correspondence produced by UBIC created contemporaneously with the policy formation or life of the policy support a date other than February 22, 2008 as the policy effective date. None of it discusses Pioneer's WCF policy or the March 31, 2008 lapse date. UBIC simply has no objective documentary evidence that shows the policy inception date should have been anything other than February 22, 2008. There was no mutual mistake of fact regarding the February 22, 2008 inception date and the trial correctly refused to allow further discovery pursuant to Rule 56(f) on that issue.

II. PUBLIC POLICY PRECLUDES POST ACCIDENT INCEPTION DATE REFORMATION OF WORKERS COMPENSATION INSURANCE POLICIES.

An employer and insurance carrier should not be allowed to reform the effective date of a workers compensation contract years after its inception and after a worker is injured during the policy period. It invites collusive mischief to avoid costly claims. It corrupts the clear statutorily mandated public policy of inclusive workers' compensation insurance coverage and speedy payment of medical expenses and weekly compensation benefits to injured workers. UBIC's attempt to recreate the history of its policy of insurance exemplifies the potential for such mischief. A bright line rule against reformation of clear and unambiguous workers compensation insurance contracts post liability incurring event is spelled out in the Utah Workers Compensation Act.

The Utah Supreme Court strongly reminded employers and their insurance carriers of the dominating public policy behind the Workers Compensation Act in the recent *Touchard v. La-Z-Boy* case:

> *Workers' Compensation not only is a "question ...of...importance to the public," but also furthers a "public interest* ***[that] is so strong...that we should place the policy beyond the reach of contract.***"[96]

This dominating public policy applies to reformation of clear and unambiguous workers compensation contracts, especially after an accident occurs. The overarching public policy of the Workers Compensation Act in favor of coverage for injured workers dictates that such reformations not be allowed.

The overarching public policy favoring coverage and timely payment of benefits to injured workers is clear by the coverage requirements outlined in the Workers Compensation Act. Once an employer receives notice of a workplace injury it is required to "file a report with the [Labor Commission] . . ."[97] When that report of injury has been filed then payment of benefits by the employer, or its insurance carrier[s], is statutorily mandated.

Utah Code Annotated §34A-2-401 provides:

> *(1) An employee . . .who is injured . . . by accident arising out of and in the course of the employee's employment, wherever such injury occurred . . .* ***shall be paid****:*

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[96]*Touchard v. La-Z-Boy,* 148 P.3d 545 (Utah 2006), 2006 Utah Lexis 207 at P 16. Emphasis added.

[97]Utah Code Ann. §34A-2-407(5)(a).

(a) compensation for loss sustained on account of the injury or death;

(b) the amount provided in this chapter for:

(i) medical, nurse, and hospital services;

(ii) medicines. . .

(2) ***The responsibility for compensation and payment*** *of medical, nursing, and hospital services and medicines, and funeral expenses provided under this chapter* ***shall be****:*

(a) on the employer and ***the employer's insurance carrier****;* (Emphasis Added)

An employer's report of an injury to the Labor Commission is statutorily required. Likewise, payment of benefits to an injured worker by an employer's insurance carrier[s] is statutorily required. That mandatory coverage and payment of benefits is in line with the strong public policy outlined in *Touchard v. La-Z-Boy.* Reformation of a workers compensation contract after an employee is injured during the policy period directly impacts the statutorily mandated rights of injured workers to receive workers compensation benefits in the event of a workplace injury.

Allowing UBIC and Pioneer to alter the effective date of its policy years after Mr. Antone's accident would create a dangerous precedent and severely undermine the strong public policy of the Workers Compensation Act. It would invite insurance carriers to engage in self-serving mischief to avoid their statutory obligations to provide workers compensation benefits on potentially costly claims. The overarching public policy of the

Workers Compensation Act's guaranteed coverage for injured workers precludes UBIC's claim of mutual mistake of fact and its post-accident attempts at policy period reformation.

III. UBIC'S ORIGINAL 2008 PIONEER POLICY IS STILL ACTIVE PURSUANT TO SECTION UTAH CODE ANN. §34A-2-205 RESULTING IN UBIC'S CONTINUED LIABILITY FOR A PRO-RATA SHARE OF MR. ANTONE'S CLAIM.

UBIC's original 2008 Pioneer policy is still active pursuant to the Workers Compensation Act and covers Mr. Antone's March 21, 2008 industrial injury. Utah Code Annotated §34A-2-205 states;

> *(b) A [workers compensation] policy . . .* ***is in effect from inception until canceled*** *by filing with the division . . . a notification of cancellation in the form prescribed by the division within ten days after the cancellation of a policy.*
>
> *(c) Failure to notify the division . . .* ***results in the continued liability of the carrier****. . .*[98]

This strict requirement is also affirmed in Utah Code Ann. §31A-22-1002:

> *(1) Any insurer assuming a workers' compensation risk shall carry it until the policy is canceled, either:*
>
> *(a) by agreement between the Division of Industrial Accidents in the Labor Commission, the insurer, and the employer; or*
>
> *(b) after:*
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> *(i) notice by the insurer to the employer as provided in Section 31A-21-303; and*
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> *(ii)* ***notice to the Division of Industrial Accidents in the Labor Commission as provided in Section 34A-2-205.***
>
> (Emphasis Added)

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[98]Utah Code Annotated §34A-2-205 (Emphasis Added)

UBIC has not issued a notification of cancellation of its 2008 Pioneer policy with an effective date February 22, 2008. In fact, the current Labor Commission records verify that UBIC's 2008 policy still covers the date of Mr. Antone's March 21, 2008 accident.[99] UBIC attempted to skirt around this rule and avoid coverage for the March 21, 2008 accident by filing another 2008 Pioneer policy with the Labor Commission in February or March 2011 with a reformed policy effective date of April 1, 2008.[100] However, the Labor Commission records now merely show that there were two Pioneer UBIC policies in 2008, one commencing February 22, 2008 and the other on April 1, 2008.[101]

The original policy covering Mr. Antone's accident date is still active. UBIC has not cancelled it. By statute, it "is in effect from inception until canceled." Cancellation should not be allowed if UBIC were to attempt to do so now. Pursuant to the Workers Compensation Act, UBIC's failure to cancel its original 2008 Pioneer policy with the intended February 22, 2008 policy effective date "results in the continued liability" for its pro rata share of the benefits and costs of Mr. Antone's claim.

UBIC argues in its brief that the policy cancellation requirements of the Workers Compensation Act do not preclude raising defenses to its coverage. It states additional fact discovery is necessary to prove it was not responsible for covering Mr. Antone's

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[99]R. 331.

[100]R. 340-341.

[101]*Id.*

injuries. As argued previously, UBIC has not, and will not, be able to prove by "clear and convincing" evidence that it's 2008 UBIC policy did not cover Mr. Antone's accident. UBIC admitted it has already provided all the documentary evidence related to its 2008 Pioneer policy. None of the documentary evidence created contemporaneous with Pioneer's 2008 UBIC policy formation supports UBIC's reformation and mutual mistake arguments.

Any additional fact finding requested by UBIC to cull out post-complaint, self serving testimony from other UBIC or Pioneer personnel will be suspect under the circumstances of this case. UBIC already provided post-complaint affidavits from the UBIC president and Pioneer with statements regarding their intent of the policy effective date.[102] Those post complaint declarations of their alleged intent are contrary to the well established intent within the four corners of the contract itself. The timing and self serving nature of those affidavits on the part of UBIC raise reasonable doubt regarding whether they represent their true intent at the time of contract formation or the are just a belated ploy to avoid liability. Further discovery is unnecessary. The trial court correctly ruled that UBIC's defenses to coverage fail.

Under the requirements of Utah Code Ann. §34A-2-205 and §31A-22-1002, UBIC failed to cancel its 2008 Pioneer workers compensation policy with the inception date of Februaray 22, 2008. That results in UBIC's continued liability under the "other

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[102]R. 122-123, 125-127.

insurance" clause of its 2008 Pioneer contract to pay a pro-rata share of the benefits on Mr. Antone's claim.

IV. THE "TARGETED TENDER DOCTRINE" SHOULD NOT BE APPLIED TO THIS CASE NOR ADOPTED IN UTAH. IT IS CONTRARY TO PIONEER'S WCF AND UBIC CONTRACTS AND CONTRARY TO THE OVERARCHING PUBLIC POLICY OF THE WORKERS COMPENSATION ACT.

UBIC relies on several cases from foreign jurisdictions which apply the "targeted" or "selective" tender doctrine. Such reliance is misplaced. The "targeted tender" doctrine has not been adopted in Utah. The doctrine has been adopted by only a very small number of jurisdictions. It is a legal theory originating in Illinois courts. Based on WCF's research, there are no courts that have applied the doctrine in the workers compensation context of mandatory insurance and mandatory payment of benefits.

UBIC's brief is replete with string cites to foreign jurisdictions analyzing issues other than "targeted tender." The vast majority of cases in UBIC's string cites do not directly analyze the targeted tender doctrine in any context, let alone in the workers compensation arena. Infusion of long string cites in UBIC's brief gives an inaccurate allusion of general acceptance. Again, with emphasis, the "targeted tender" doctrine is a creation of the Illinois courts. Few others have embarked on that path.[103]

This case is distinguishable from the cases in the few jurisdictions that have applied some form of the "targeted tender" doctrine in a liability insurance context. None

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[103]4 Bruner & O'Connor, *Construction Law* (2011) § 11:59

of those cases analyzed the doctrine in the workers compensation context. That distinction is of critical importance. "Targeted tender" is contrary to the concept of protecting injured workers through mandatory insurance required by the workers compensation system in Utah. Its application would force Pioneer to breach one of its workers compensation contracts with WCF or UBIC. The doctrine is contrary to the strong public policy of the Workers Compensation Act.

The traditional, more fair and well reasoned majority approach regarding overlapping coverages with "other insurance" clauses is. . .*when two policies contain pro rata "other insurance" clauses, each insurer is liable for that proportion of loss which the face amount of its policy bears to the "total amount of collectible and valid insurance."*[104] Utah should follow the majority approach. It should allow WCF to exercise its contractual right to receive equitable pro rata contribution from UBIC on Mr. Antone's claim by applying the twin "other insurance" clauses in both UBIC's and WCF's Pioneer contracts. The "targeted tender" doctrine should not be adopted in Utah.

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[104]Aspen Publishers, *Handbook On Insurance Coverage Disputes,* 15th Edition, §11.03[c][I], page 977 citing to *JP. Realty Trust v. Public Service Mutual Insurance* 0., 102 A.D.2d 68, 71-73,476 N.YS.2d 325, 327-328 (1st Dep't 1984), *afl'd,* 64 N.Y.2d 945, 477 N.E.2d 1104, 488 N. YS.2d 650 (1985) in which the court ruled that because both policies contained the identical "contribution by equal shares" language, both insurers were obligated and the contributions should "be by equal shares".

A. The "Targeted Tender" Doctrine is Inconsistent with Pioneer's WCF and UBIC Contracts that Require Immediate Tender of a Workers Compensation Claim Involving Injuries to the Employer's Insurance Companies.

Application of the "targeted tender" doctrine would force Pioneer to breach one of its overlapping workers compensation insurance contracts. The relevant terms of those contracts are clear and unambiguous. When a contract is unambiguous "a court may interpret it as a matter of law"[105], however, "in doing so, a court must attempt to construe the contract so as to harmonize and give effect to all of [its] provisions."[106] This Court should interpret Pioneer's WCF and UBIC contracts so as to give effect to all of the provisions of both contracts. Application of the "targeted tender" doctrine would render some of the contract terms ineffective and meaningless.

First, UBIC's claim that the WCF and UBIC policies don't require a tender of the claim to both insurance companies is inconsistent with the contracts. "Part Four" of both Pioneer's UBIC and WCF contracts specifically required Pioneer to "tell [WCF and UBIC] at once if injury occurs that may be covered by this policy."[107] Thus, Pioneer was contractually required under both its WCF and UBIC contracts to immediately tender the claim to both carriers if an injury occurs that may be covered by the policies. Pioneer did

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[105] *Dixon v. Pro-Image, Inc.*, 987 P.2d 48, 52 (Utah 1999). Citing *Willard Pease Oil & Gas Co. v. Pioneer Oil & Gas Co.*, 899 P.2d 766, 770 (Utah 1995).

[106] *Id.* Citing *Nielsen v. O'Reilly*, 848 P.2d 664, 665 (Utah 1993).

[107] R. 110.

not have the option to forego tendering the claim to UBIC. Failing to do so was a breach of its UBIC contract.

WCF's and UBIC's policies preclude application of the "targeted tender" doctrine in this case. Pioneer's failure to timely tender Mr. Antone's injury claim to UBIC, in violation of its contract, should not absolve UBIC of its contractual responsibility for its pro-rata share of costs on Mr. Antone's claim. There is simply no room for the "targeted tender" doctrine under the clear and unambiguous notice terms of Pioneer's WCF and UBIC contracts requiring a tender of the claim.

Second, adoption of the "targeted tender" doctrine would contravene the clear contractual terms in the twin "Other Insurance" clauses of the contracts and render them meaningless. It would strip WCF of its contractual right of equitable pro rata contribution from a co-insurer allowed by the "other insurance" clause. WCF specifically contracted for that right with Pioneer.

Pioneer also agreed in its WCF contract to "do nothing after an injury occurs that would interfere with [WCF's] right to recover from others."[108] Pioneer's letters to UBIC stating it does not want UBIC involved with Mr. Antone's claim in an attempt to buttress UBIC's "targeted tender" argument runs counter to that contractual duty. In that sense, adopting the "targeted tender" doctrine would also force Pioneer to breach its contract with WCF because the letters interfere with WCF's contractual right to recover an

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[108]R. 95.

equitable contribution for Mr. Antone's claim under the "other insurance" clause from UBIC.

The "Targeted Tender" doctrine is legally unsound and is contrary to long established contract construction rules. It impedes the rights of parties to contract with one another and is contrary to the workers compensation contracts involved in this case. Its adoption would render clear and unambiguous terms in Pioneer's overlapping workers compensation contracts ineffective and meaningless. On the other hand, by not applying the "targeted tender" doctrine to this case, the Court would "harmonize and give effect" to all of the terms of both of Pioneer's WCF and UBIC contracts and would prevent Pioneer from breaching either of the overlapping contracts.

This Court should apply the clear terms of the contracts that Pioneer agreed to with both UBIC and WCF. The fact that Pioneer did not timely tender the claim to UBIC in violation of its UBIC contract does not alter application of the "other insurance" clauses of the contracts. The "other insurance" clauses operate in a workers compensation context regardless of the direction the insured chose to tender the claim. Therefore, Pioneer's tender of the clam to WCF rather than UBIC is irrelevant, violated Pioneer's UBIC contract, and does not prevent WCF from pursuing its right of equitable contribution from UBIC.

B. UBIC Received Notice of Mr. Antone's Accident at the Time of the Accident by Function of Pioneer's UBIC Contract. Following that Notice, the Workers Compensation Act Requires UBIC's Participation in the Payment Benefits for Mr. Antone's Claim.

UBIC argues it did not receive notice of Mr. Antone's accident until WCF's March 2010 correspondence requesting pro-rata contribution for the claim. However, when UBIC received notice of the claim is irrelevant. It is still statutorily and contractually required to participate in the payment of the workers compensation benefits on Mr. Antone's claim.

Pioneer's UBIC contract specifically states, "as between an injured worker and us, we have notice of the injury when you [Pioneer] have notice."[109] In addition, Utah Code Ann. §31A-22-1006 provides:

> ***Every workers' compensation policy*** *or contract shall contain a provision that, as between the employee and the insurer,* ***notice to or knowledge of the occurrence of the injury on the party of the employer is considered to be notice or knowledge to the insurer.*** (Emphasis Added)

Thus, by operation of contract and statute, UBIC had constructive notice of Mr. Antone's accident when Pioneer knew of it at the time of the accident. Whether UBIC had actual notice at the time of the accident is irrelevant to its obligations to perform under its workers compensation contract and under the Workers Compensation Act. Pursuant to the Workers Compensation Act, UBIC's legal notice and coverage of the accident requires UBIC's timely payment of the benefits required by the Act.

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[109]R. 227 (Section H sub-part 1.)

UBIC's Pioneer policy states "this insurance conforms to the parts of the workers compensation law that apply to benefits payable by this insurance."[110] UBIC is contractually liable for the "[workers compensation] benefits payable" to Mr. Antone required by the Workers Compensation Act. As argued previously, Pioneer was statutorily required to file a report of the injury with the Labor Commission. Once that notice was provided, UBIC, as one of UBIC's workers compensation insurers, was then statutorily required to pay the workers compensation benefits mandated by the Act.[111] The overarching public policy in favor of coverage and guaranteed timely payment of benefits for injured workers mandates no less.

The Act does not contemplate a "targeted tender" of a workers compensation claim when there is more than one liable insurance carrier. It does not allow an employer to unilaterally choose not to tender a workers compensation claim to his insurance carrier as the insured is free to do under a liability insurance context. Application of the "targeted tender" doctrine would only create disincentive on the part of overlapping insurance carriers to make timely payments of benefits to an injured worker while they fight over coverage and tender of claim issues.

The "other insurance" clauses were included in the contracts to address the exact situation presented by this case of double coverage and to assure prompt payment of

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[110]R. 227 (Section H sub-part 5. a.)

[111]See Utah Code Ann. §34A-2-401.

benefits without confusion of which carrier should pay benefits. The trial court correctly applied those clauses. There is no room for application of the "targeted tender" doctrine in this case. The legislature did not contemplate adoption of such a doctrine when it passed the Workers Compensation Act nor can it be implied.

The rationale of the few foreign jurisdiction cases cited by UBIC that have applied the "targeted tender" doctrine in a liability insurance context are distinguishable. In those cases immediate notice and tender of a claim to all insurance companies upon the occurrence of a covered claim by the insured was not contractually or statutorily required as it is in this case. UBIC's cited cases are of little or no value in a workers compensation context. They provide no relevant guidance where notice to the insurance carrier and payment of benefits is statutorily required for the benefit of an injured employee.

An employer does not have the option in a workers compensation context in Utah to forego reporting of an injury to its workers compensation insurance carrier[s] or to direct whether one or more carriers, or no carrier, makes payments on the claim. Infusing such a doctrine into Utah's workers compensation system would corrupt the strong public policy of the Workers Compensation Act. It would put Utah's injured workers at risk of not having their statutorily required benefits paid until potentially years after their accident while overlapping insurance carriers squabble regarding coverage issues. That runs contrary to the overarching public policy of the Workers Compensation Act to

provide prompt and guaranteed payment of benefits to injured workers.[112] The "targeted tender" doctrine is not legally or practically sound when applied to Utah's workers compensation system and should not be applied in this case.

C. WCF's Right to Equitable Contribution from UBIC on Mr. Antone's Claim is a Right *Independent* of Any Right of the Insured Pioneer.

UBIC claims WCF has no right of equitable contribution since Pioneer did not affirmatively tender Mr. Antone's claim to or notify UBIC of his accident. This argument fails unless this Court adopts the "targeted tender" doctrine. As argued above, there is no room for UBIC's "targeted tender" argument under the requirements of the Workers Compensation Act or Pioneer's WCF and UBIC contracts making this argument moot. Pioneer was contractually and statutorily required to tender Mr. Antone's claim to both WCF and UBIC, thus bringing the "other insurance" clauses of those contracts into play. However, discussion of equitable contribution claims in general is important because it is a right that is independent of any right conceivably held by Pioneer in relation to Mr. Antone's workers compensation claim.

There are very few Utah cases that analyze equitable contribution claims in much detail. More relevant to this case, no Utah Court has ever analyzed equitable contribution claims in a workers compensation context. However, equitable contribution has been analyzed at length by other states. A right to equitable contribution in an insurance

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[112]See *Touchard v. La-Z-Boy,* 148 P.3d 545 (Utah 2006), 2006 Utah Lexis 207 at P 16.

context "arises when several insurers are obligated to indemnify or defend the same loss or claim, and more than one insurer has paid more than its share of the loss or defended the action without any participation by the others."[113]

Further, "the right to [equitable contribution] ***is not the insured's to disclaim***. It is a right of other insurers, who are not parties to the insurance policy, and it is a right founded not on the concept of third party beneficiaries of contracts, and hence not on the wishes of the insured but rather on notions of equity and unjust enrichment."[114] Finally;

> . . . the 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 claim in the hope the claimant will obtain full payment from another coindemnitor. . .[115]

That reasoning is sound and reasonable. In a very recent California decision dated December 14, 2011, the court analyzed the "targeted" or "selective tender" doctrine directly in relation to this equitable contribution precedent. The defendant insurance company in that case attempted to have the California courts adopt the "targeted tender" or "selective tender" doctrine in California. The California court rebuffed those attempts.

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[113] *Hartford Casualty Ins. Co. v. Mt. Hawley Ins. Co.* 123 Cal. App. 4th 278, 287-288 (2004).

[114] *Underwriters at Lloyd's v. Massachusetts Bonding and Insurance Co.*, 230 P.3d 103, 113 (Ore. 2010), citing *Rhone-Pulenc Inc. v. International Ins. Co.*, 71 F.3d 1299, 1305 (7th Cir. 1995).

[115] *Id.* [Emphasis Added].

The footnote in which this analysis occurred is quoted in its entirety;

> We are unpersuaded that a Washington case on which ASIC relies (*Mutual of Enumclaw Ins. Co. v. USF Ins. Co.,* 191 P.3d 866 [Wash 2008]) should apply here. In that case, the court's analysis was heavily dependant on the so called "selective tender" rule, which appears to bar a participating insurer from seeking contribution from a nonparticipating insurer based solely on whether the insured elected to tender to the nonparticipating insurer. "The selective tender rule has had little traction outside of Illinois" (4 Bruner & O'Connor, *Construction Law* (2011) § 11:59), and the rule appears inconsistent with California law that "the right to equitable contribution exists *independently* of the rights of the insured . . . [and] where multiple insurers . . . 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.*" (*Fireman's Fund Ins. Co. v. Maryland Casualty Co.*, 77 Cal. Rptr. 2d 296 (1998), 65 Cal. App. 4th 1279.) Because *Mutual of Enumclaw* turned principally on rules that appear incompatible with California law, we ascribe no significance to its analysis.[116]

UBIC's argument that the right to tender a claim is a paramount right of the insured is of little value in the context of an equitable contribution claim which is exclusively the right of a plaintiff insurance company and is "independent of the rights of the insured." The decision on which workers compensation insurance carrier should shoulder the burden of Mr. Antone's claim was not Pioneer's to make. Pioneer has no right either by contract or statute to interfere with WCF's equitable contribution claim against UBIC. Further, this recent California decision demonstrates that UBIC incorrectly argues that no state in which the "targeted tender" doctrine has introduced has

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[116] *American States Insurance Company v. National Fire Insurance Company of Hartford*, Case No. D057673, Court of Appeals of California, Fourth District, Division One. Filed December 14, 2011. [Emphasis is the Court's]

failed to adopt the doctrine. The fact still remains that very few jurisdictions have adopted the doctrine and that "it has had little traction outside of Illinois."

The Utah Supreme Court is in harmony with the equitable contribution analysis in California. This Court held;

> We agree with those jurisdictions that have allowed contribution where one insurer has paid more than its fair share of the defense costs. Where it can be shown that a co-insurer failed to defend or failed to pay its fair share of defense expenses, that insurer should not be rewarded and payment excused when another co-insurer has taken upon itself the provision of that defense. Holding otherwise would not only lead to an inequitable result but may also conflict with our stated policy of encouraging prompt payments to the insured, leaving disputes concerning coverage to be determined later.[117]

UBIC's requested application of the "targeted tender" doctrine would create the very evil envisioned by this Court in violation of public policy. It would infuse confusion into Utah's workers compensation system when more than one insurance policy covers a potential claim and discourage prompt payments to an injured worker while insurance companies with that shared liability litigate coverage and tender of claim issues. Like California, the "targeted tender" doctrine is incompatible with Utah law governing equitable contribution. It is also incompatible with the overarching public policy of Utah's Workers Compensation Act which was passed to assure prompt payment of benefits to injured workers and requires tendering of all workers compensation claims to an employer's insurance company or insurance companies. The "targeted tender"

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[117]*Sharon Steel Corporation v. Aetna Casualty and Surety Company*, 931 P.2d 127, 137-138 (Utah 1997).

doctrine should not be adopted in Utah, especially in the workers compensation context, nor should it be applied to this case.

V. WCF WAS A CO-INSURANCE CARRIER WITH UBIC COVERING PIONEER'S LIABILITY TO INJURED EMPLOYEE ANTONE.

UBIC argues that WCF was not an intended third party beneficiary of Pioneer's 2008 UBIC contract and, therefore, cannot seek to enforce the terms of that contract. UBIC's argument is off target. UBIC and WCF are co-insurers of the Antone workers compensation claim. WCF asks only that the clear terms of both contracts be enforced. If they are not enforced, then Pioneer is in breach of the policy:

> *We will not pay more than our share of benefits and costs covered by this insurance* ***and other insurance*** *or self-insurance. Subject to any limits of liability that may apply, all shares will be equal until the loss is paid. If any insurance or self-insurance is exhausted,* ***the shares of all remaining insurance will be equal*** *until the loss is paid.*[118]

UBIC's third party beneficiary argument is superfluous to a resolution of this case. The "other insurance" clause is a Utah Insurance Department approved limitation of both WCF's and UBIC's respective liabilities.

The court should also consider the legislative mandates: (1) WCF as carrier of last resort must accept applications of insurance from all Utah employers;[119] and (2) As part of that mandate, WCF must "provide workers' compensation insurance **at the lowest**

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[118]R. 81-82 and R. 92. [Emphasis Added]

[119]Utah Code Ann. §31A-22-1001.

possible cost to policyholders consistent with maintaining the actuarial soundness . . ."[120] Absent enforcement of the "other insurance" clause, WCF is deprived of a valuable contractual tool to fulfill that mission.

CONCLUSION

UBIC and Pioneer intended their UBIC policy to begin on February 22, 2008. The contract clearly and unambiguously includes that inception date more than 30 times. UBIC billed Pioneer specifically for the partial month of February 2008 and all of March 2008 and Pioneer paid the premium for those months. Mr. Antone's accident occurred during that policy period on March 21, 2008. The "other insurance" clause of Pioneer's 2008 UBIC policy requires UBIC to pay its pro-rata share of Mr. Antone's claim with WCF. The "other insurance" clause is a valuable contractual tool available to WCF to fulfill its mandate as Utah's workers compensation insurer of last resort to provide insurance at the lowest possible rate. As a co-insurer with UBIC, WCF should be allowed to seek enforcement of that term.

UBIC should not be allowed to introduce extra-contractual parol evidence to alter the clear effective date of its 2008 Pioneer policy. UBIC has already provided all the documentary evidence regarding its 2008 Pioneer policy. None of the documentary evidence contemporaneous to the policy formation and during the policy period supports the alleged mistake of fact regarding the policy inception date. Any post-Complaint

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[120]Utah Code Ann. §31A-33-111. (Emphasis Added)

statements from John Stout or UBIC representatives already produced, or that could be produced with further discovery, to support the alleged mistake will not meet the required clear and convincing evidence threshold. Such post-Complaint statements are suspect under the circumstances of this case and should not be allowed. The trial court correctly refused to allow UBIC to introduce parol evidence. No further discovery is necessary to demonstrate February 22, 2008 was the effective date of the policy.

The "targeted tender" doctrine is incompatible with the Utah Workers Compensation Act and the workers compensation contracts at issue in this case. Both of Pioneer's WCF and UBIC contracts require immediate notice/tender of an injured workers claim to both carriers. By contract and statute UBIC had constructive notice of Mr. Antone's injury at the time the accident occurred. Thus, the contracts didn't allow Pioneer to tender Mr. Antone's claim to one insurance carrier and exclude the other. Once that injury occurred UBIC was on notice of it and was statutorily required to pay the benefits to Mr. Antone required by the Workers Compensation Act. In this case, since Pioneer had dual coverage, the "other insurance" clauses of the WCF and UBIC contracts requiring pro-rata contribution from both insurance carriers apply.

There is no room for application of the "targeted tender" doctrine in Utah's workers compensation system. It is contrary to the Act's overarching public policy of mandatory insurance coverage and payment of benefits to injured workers. Adoption of the doctrine would infuse confusion into the workers compensation system and put injured workers at risk that their benefits will not be paid for years while two overlapping insurers litigate coverage and tender of

claim issues. "Targeted tender" is not a sound legal doctrine, especially in the workers compensation context, and should not be adopted in Utah. WCF requests that this Court affirm the trial court's order.

Dated this 12th day of January , 2012

JAMES R. BLACK, P.C.

James R. Black
Matthew J. Black
Counsel for Plaintiff/Appellee Workers Compensation Fun

CERTIFICATE OF COMPLIANCE

Pursuant to Utah Rule of Appellate Procedure 24(f)(1), I hereby certify that this brief complies with the appellate brief type-volume limitations. Excluding those sections exempted by Rule 24(f)(1)(B), this brief contains 12, 523 words.

Dated this 12th day of January , 2012

JAMES R. BLACK, P.C.

James R. Black
Matthew J. Black
Counsel for Plaintiff/Appellee

CERTIFICATE OF SERVICE

I hereby certify that true and correct copies of **RESPONSE BRIEF OF PLAINTIFF/APPELLEE WORKERS COMPENSATION FUND** were hand delivered on the 12th day of January, 2012 to the following:

Michael E. Dyer
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(2 copies; hand delivered)

Utah Supreme Court
Scott M. Matheson Courthouse
450 South State Street, 5th Floor
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Salt Lake City, Utah 84114-0210.

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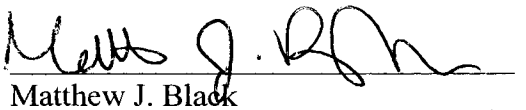


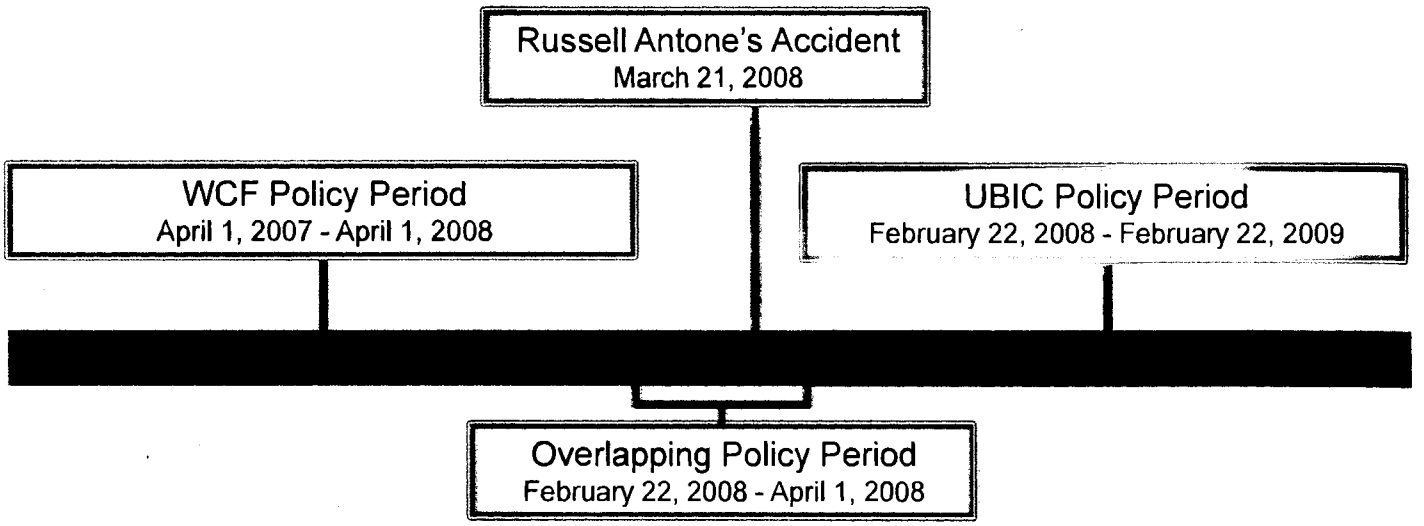
Matthew J. Black

Tab 1

ATTACHMENT 1

Demonstrative Exhibit of Pioneer's Overlapping WCF and UBIC workers compenstion policies.

Pioneer Roofing Workers Compensation Policies



Identical Other-Insurance Clause in Pioneer's WCF and UBIC Contracts

F. We will not pay more than our share of damages and costs covered by this insurance and other insurance or self-insurance ***. . . all shares will be equal until the loss is paid***.

Utah Code Ann. § 34A-2-205

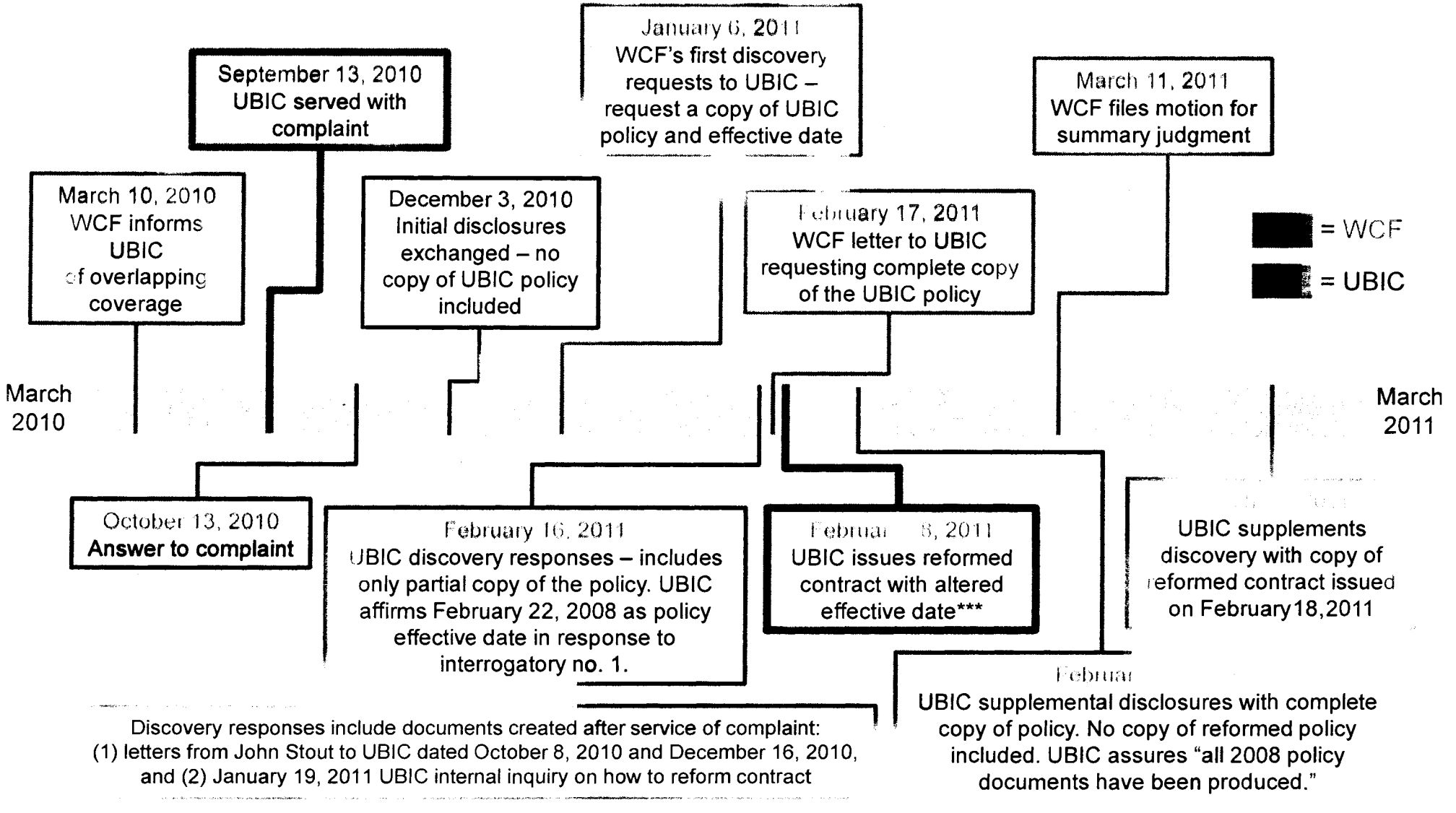
(b) A workers compensation policy ***is in effect from inception until canceled*** *by filing with the [Industrial Accidents] division . . . a notification of cancellation in the form prescribed by the division within ten days after the cancellation of the policy.*

(c) Failure to notify the division . . . ***results in continued liability of the carrier.***

ATTACHMENT 2

Demonstrative Pre and Post-Complaint Timeline

WCF v. UBIC: Pre- and Post-Complaint Timeline



*** The Labor Commission's records still reflect the original February 22, 2008 effective date of Pioneer's UBIC policy because there has been no valid cancellation of the policy as required by UTAH CODE ANN. § 34A-2-205.