THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM HORRY COUNTY
Court of Common Pleas

Steven H. John, Circuit Court Judge

Case No. 2004-CP-26-0084

Crossmann Communities of North Carolina, Inc.
and Beazer Homes Investment Corp., ... Appellants,

v.

Harleysville Mutual Insurance Company and
Cincinnati Insurance Company, Respondent

NOTICE OF AMENDED APPEAL
(Cincinnati Insurance Company Issues Only)

Pursuant to Rule 203 of the South Carolina Appellate Court Rules, Crossmann Communities of North Carolina, Inc. and Beazer Homes Investment Corp. (collectively "Beazer") hereby appeal the Orders of the Honorable Steven H. John as to Cincinnati Insurance Company issues dated May 23, 2012 and September 12, 2012 in this action. The Circuit Court's Orders entered on May 23, 2012 and September 12, 2012 denied Beazer any relief against Cincinnati Insurance Company and entered judgment in favor of Cincinnati and against Beazer on the issues on remand from the South Carolina Supreme

Court in *Crossmann Communities of North Carolina, Inc. v. Harleysville Mutual Insurance Company*, 395 S.C. 40, 717 S.E.2d 594 (2011). Beazer received written notice of entry of the Circuit Court's September 12, 2012 Order denying Beazer's Motions under Rule 59 of the South Carolina Rules of Civil Procedure on September 28, 2012.

Respectfully submitted,

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Dated: October 18, 2012

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Harleysville Mutual Insurance Company and
Cincinnati Insurance Company, ... Respondent

PROOF OF SERVICE

I certify that I have served one (1) copy of Appellants' Notice of Amended Appeal by depositing the copies in the United States Mail, postage prepaid, on this date addressed to:

The Honorable Melanie Huggins
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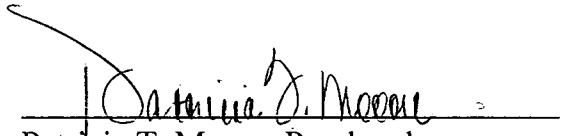

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October 18, 2012

Jenny Abbott Kitchings
Clerk of Court
SC Court of Appeals
1015 Sumter Street
Columbia, SC 29201

Re: Crossmann Communities of North Carolina, Inc. v. Cincinnati Insurance Co., et al.
Civil Action No: 2004-CP-26-0084

Dear Ms. Kitchings:

By letter dated October 16, 2012, we filed a Notice of Appeal, however, there were errors in the documents, including an incorrect caption and incorrect Order attached. The lower Court's civil action number, however, was correct. Therefore, we kindly desire to file the following documents:

1) Notice of Amended Appeal (original and two copies);
2) Proof of Service on the Respondent and lower court (original and two copies);
3) Copy of Order (Cincinnati Insurance) dated May 23, 2012; and
4) Copy of Order (Cincinnati Insurance) dated September 12, 2012.

Please return the clocked copies of the Notice of Amended Appeal and Proof of Service to me in the self-addressed, stamped envelope enclosed. By copy of this letter and Proof of Service, we are hereby serving all counsel of record.

Very truly yours,

BELLAMY, RUTENBERG, COPELAND,
EPPS, GRAVELY & BOWERS, P.A.

David B. Miller

DBM:ptm
Enclosure as noted

cc: The Honorable Melanie Huggins
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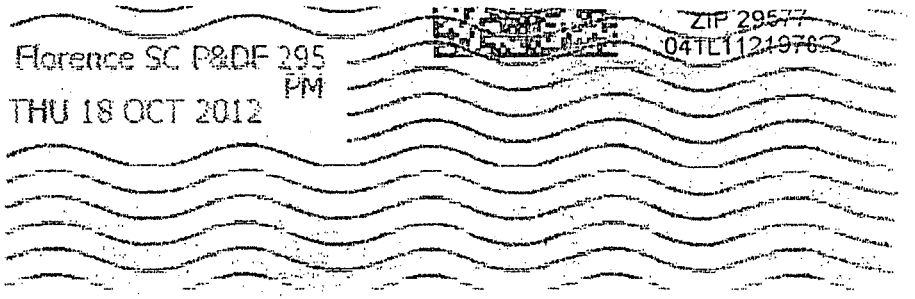

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TO:

Jenny Abbott Kitchings
Clerk of Court
SC Court of Appeals
1015 Sumter Street
Columbia, SC 29201

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF HORRY	)	C/A No. 04-CP-26-0084
Crossmann Communities of North Carolina, Inc., and Beazer Homes Investment Corp.,	)	**ORDER**
Plaintiffs,	)	(Cincinnati Insurance)
	)	Hearing Dates - January 5, 2012 and
v.	)	March 1, 2012
	)	
Harleysville Mutual Insurance Company, Cincinnati Insurance Company,	)	
	)	
Defendants.	)	

FILED
IN MY COUNTY
12 MAY 23 PM 1:59
CLERK OF COURT

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PROCEDURAL HISTORY

Plaintiffs, Crossmann Communities of North Carolina, Inc. (hereinafter "Crossmann"), Beazer Homes Corp., and Daniel Rogers (hereinafter "Plaintiffs"), filed this action in January 2004 seeking a declaratory judgment, breach of contract damages, and other relief from Defendants Harleysville Mutual Insurance Company (hereinafter "Harleysville"), Massachusetts Bay Insurance Company (hereinafter "Massachusetts Bay"), Regent Insurance Company (hereinafter "Regent"), Indiana Insurance Company (hereinafter "Indiana"), Cincinnati Insurance Company (hereinafter "Cincinnati") (collectively the "Insurer-Defendants") and Associated Insurors of Myrtle Beach, Inc. (hereinafter "Associated Insurors").

Plaintiffs' Second Amended Complaint sought, among other things, breach of contract damages and entry of a judgment declaring that all Insurer-Defendants' insurance policies provided coverage for defense costs and indemnity costs incurred by or on behalf of Plaintiffs as a result of underlying property damage lawsuits filed against Plaintiffs or their predecessors in South Carolina state court (hereinafter "Underlying Lawsuits").

Defendants Harleysville, Massachusetts Bay, Regent, and Indiana together paid attorneys' fees and other costs incurred to defend Plaintiffs in the South Carolina Underlying Lawsuits. All Defendants, however, initially denied any obligation to indemnify Plaintiffs for any settlements or judgments that may be entered against Plaintiffs in the South Carolina Underlying Lawsuits.

During the course of this case, Plaintiffs reached settlements with Defendants Regent, Indiana, and Massachusetts Bay pursuant to which those insurers made payments to Plaintiffs under their respective insurance policies. As such, those insurers were dismissed from this action pursuant to a Partial Stipulation of Dismissal filed June 3, 2005 as to Defendant Regent and

Partial Orders of Dismissal and Order Revising Caption filed May 10, 2006 as to Defendants Indiana and Massachusetts Bay.

The three Defendants at trial in January 2007 were Harleysville, Cincinnati, and Associated Insurors. After jury selection, Plaintiffs and Defendant Associated Insurors reached a settlement pursuant to which, among other things, their respective claims against each other were dismissed, without prejudice, pursuant to a Consent Order of Dismissal without Prejudice of Defendant Associated Insurors, Inc. of Myrtle Beach, which was filed February 9, 2007.

During the first day of trial, Plaintiffs and Defendants Harleysville and Cincinnati entered into a Stipulated Agreement which was entered into the record as Court's Exhibit One (1) (hereinafter "Stipulations"). The Stipulated Agreement consists of stipulations of certain facts and further identifies specific issues to be resolved by this Court in resolution of this action without submission of the case to the jury. As such, the jury panel was dismissed and all Parties submitted Post-Trial Briefs setting forth their respective positions on the issues specified in the Stipulations.

Pursuant to the Stipulations, the Parties entered into a Consent Order of Dismissal with Prejudice of Certain Claims against Defendants Harleysville and Cincinnati as filed March 26, 2007. Pursuant to the Consent Order, Plaintiff Daniel Rogers dismissed his claims against Defendants Harleysville and Cincinnati with Prejudice and all Plaintiffs dismissed their claims against Defendants Harleysville and Cincinnati related to the alleged acts and omissions of Associated Insurors, specifically counts 3, 4, 5 and 6, as set forth in Plaintiffs' Second Amended Complaint. The Parties then submitted the case for the Court's determination in accordance with the Stipulations.

The Court entered its Final Order on May 3, 2007. This Order was appealed to the South Carolina Supreme Court pursuant to the stipulations entered into by the Parties. The Supreme Court issued its decision in *Crossmann Communities of North Carolina, Inc., v. Harleysville Mutual Insurance Co.*, 395 S.C. 40, 717 S.E.2d 589 (2011) ("Crossmann II"). The Supreme Court affirmed this Court's earlier judgment in part and vacated it in part. The case was remanded to this Court for an assessment of the two non-settling insurers' (Harleysville and Cincinnati) liability under the *pro-rata* "time on risk" approach set forth in its opinion.

All Parties submitted briefs on the issues set forth in Crossman II upon its remand to this Court. Hearings on the issues on remand were held before this Court on January 5, 2012 and March 1, 2012.

This Order addresses the issues relating to Cincinnati Insurance Company. A separate Order will be entered as to the issues relating to Harleysville Mutual Insurance Company. The issues as to the two carriers are distinct because Harleysville is a primary carrier and Cincinnati is an excess carrier. There are also differences in the applicable periods of coverage.

For the reasons set forth below, I find that the Cincinnati excess coverage has not been triggered for the claims that fall within its policy periods.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has jurisdiction over this action and venue is proper in this Court. The Court concludes that, based upon the Parties' arguments with respect to South Carolina law, and for other applicable "choice of law" factors, the substantive law of South Carolina applies to this case.

Cincinnati issued umbrella liability policies (hereinafter the "Excess Policies") for the period of May 29, 1998 to September 1, 2002 with limits of liability of Ten Million Dollars per occurrence, annual limit and annual aggregate limit.

The Excess Policies define the term "occurrence" to mean "an accident, including repeated exposure to the same general harmful conditions."

The Excess Policies define "property damage" as "physical injury to tangible property, including all loss of use thereof."

The Underlying Lawsuits were filed against Plaintiffs or their predecessors in South Carolina State Court. These cases were:

- *River Oaks Horizontal Property Regime, et al. v. Pinehurst Builders, Inc., et al., Case No. 00-CP-26-5193 ("River Oaks I")*
- *River Oaks II Horizontal Property Regime, et al. v. River Oaks Development Corp., et al., Case No. 01-CP-26-5932 ("River Oaks II")*
- *Waterway Village at River Oaks, et al. v. River Oaks Golf Development Corp., et al., Case No. 01-CP-26-535 ("Waterway Village")*
- *Buck Creek Golf Villas Horizontal Property Regime et al. v. Buck Creek Development Inc., Case No. 02-CP-26-4200 ("Buck Creek")*
- *Lightkeepers Village Homeowners Ass'n. v. Lightkeepers Village, et al., Case No. 00-CP-26-43 ("Lightkeepers Villege")*
- *Rose et al. v. Lightkeepers Village, et al., Case No. 00-CP-26-5363 ("Rose")*

The Plaintiffs in this matter eventually settled all of the South Carolina Underlying Lawsuits by making payments to the homeowner-plaintiffs in those cases in the amounts set forth below:

50/20

UNDERLYING LAWSUIT	NET SETTLEMENT AMOUNTS PAID TO HOMEOWNER-PLAINTIFFS
River Oaks I	$7,425,000.00
River Oaks II	$2,826,500.00
Waterway Village	$3,925,000.00
Buck Creek	$2,194,250.00
Lightkeepers Village / Rose	$400,000.00
TOTAL	**$16,770,750.00**

As set forth in the Parties' detailed Post-Trial Statements in this matter, the Parties developed substantial documentary evidence and testimony during discovery regarding the following topics:

- the manner in which the condominium projects at issue in each of the Underlying Lawsuits was constructed;
- the nature of the construction defects and property damage complained of by the homeowner-plaintiffs in each of the Underlying Lawsuits; and
- the costs to repair each of the condominium projects at issue in the Underlying Lawsuits.

The Stipulations provide, in part, as follows:

(1) If there is an "occurrence" or are "occurrences" under the Harleysville and Cincinnati policies (hereinafter "the Policies"), then the damages at the underlying projects that resulted from water intrusion and that meet the definition of "property damages" in the Policies are $7.2 million. If the trial Court finds that there has been an occurrence or occurrences, then the Court shall find that Plaintiffs' insured loss is

$7.2 million, subject to the Court's rulings on the issues set forth in Paragraphs 8b, 8c, and 8d below.

(2) The Parties agree that the damage referred to in Paragraph One (1) above began within Thirty (30) days after the Certificate of Occupancy was issued for each building and that such damage, and new damage, progressed until repaired or until Beazer Homes paid to settle the underlying cases, whichever came first.

(4) The Parties stipulate to the following facts:

a. The Insureds under the Harleysville and Cincinnati Policies served as the architect, general contractor and the developer at River Oaks I, River Oaks II, Buck Creek, and Waterway Village.

b. The Insureds under the Policies served as the general contractor for Buildings Twenty (20) and Twenty-Eight (28) at Lightkeeper's Village.

c. All of the construction work at all of the underlying projects was performed entirely by subcontractors.

(7) The Parties agree that the record in this case shall consist of all settlement documents, pleadings, discovery, and depositions, in both the coverage cases and the underlying cases which have been produced and exchanged in discovery in this case.

(8) The parties agree that the following matters are the only issues of law to be addressed by Judge John. . .

(8)(b) In the event the Court finds that there was an occurrence or occurrences, how shall the $7.2 million in insured damages referred to in Paragraph 1 above be allocated, whether by "joint and several" or by "time on the risk."

(13) Cincinnati's applicable policies are excess policies with a "follow form" endorsement applicable to completed operations.

Prior to the scheduled trial in January 2007, Crossmann entered into a Settlement Agreement with three (3) of the primary carriers. The carriers, their policy periods and limits are:

Indiana	May 29, 1998 – Aug. 29, 1998	$1 Million/Per Occurrence, Per Year $2 Million/Annual Aggregate
Massachusetts Bay	Aug. 29,1998 – Aug. 29, 2000	$1 Million/Per Occurrence, Per Year $2 Million/Annual Aggregate
Regent	Aug. 29, 2000 – Jan. 1, 2002	$1 Million/Per Occurrence, Per Year $2 Million/Annual Aggregate

Crossmann settled with these carriers for the following amounts:

Indiana	$2.7 Million
Massachusetts Bay	$2.9 Million
Regent	$3 Million

Indiana, Massachusetts Bay and Regent are the three (3) underlying carriers for which Cincinnati provided excess coverage.

THE PARTIES STIPULATED TO $7.2 MILLION IN POTENTIALLY COVERED DAMAGES

The Supreme Court held in *Crossman II* that:

> [N]egligent or defective construction resulting in damages to otherwise non-defective components may constitute "property damage", but the defective construction would not. We find the expanded definition of "occurrence" is ambiguous and must be construed in favor of the insured, and the facts of the instant case trigger the insuring language of Harleysville's policies. We note, however, that various exclusions may preclude coverage in some instances. Because the parties in the present case stipulate not to raise the issue, we do not address any policy exclusions and exceptions.

Crossmann II, 395 S.C. at 50, 717 S.E.2d at 594.

The language in the settling carriers' policies is similar to the relevant language in the Harleysville policy. As agreed to in the Stipulations, Cincinnati's policy is a "follow form" policy. Accordingly, the potentially covered damages in the settling carriers' and the excess policies would be similar because the Cincinnati policy follows the form of the settling carriers' policies.

Crossmann paid a total of Sixteen Million, Seven Hundred Seventy Thousand, Seven Hundred Fifty and no/100 ($16,770,750.00) Dollars to settle the claims in the Underlying Lawsuits. Of this amount, the Parties stipulated that $7.2 Million resulted from water intrusion and met the definition of "property damages" in the Policies. See Stipulation One (1). The balance of the amounts paid, Nine Million, Five Hundred Seventy Thousand, Seven Hundred Fifty and no/100 ($9,570,750.00) Dollars, represents the cost to repair "defective construction" as referenced in *Crossmann II*. *Crossman II*, 395 S.C. at 50, S.E.2d at 594. While Crossmann argues that the measure of Cincinnati's potential liability should be Sixteen Million, Seven Hundred Seventy Thousand, Seven Hundred Fifty and no/100 ($16,770,750.00) Dollars, the Court is bound by the parties' Stipulation that the potentially covered damages are $7.2 Million.

Accordingly, Cincinnati's liability, if any, would be determined utilizing the stipulated amount of $7.2 Million for the Harleysville and Cincinnati coverage periods.

Harleysville's coverage period is August 8, 1993 to August 29, 1998. Cincinnati's period for excess coverage is May 29, 1998 to September 1, 2002. There were various primary carriers during Cincinnati's period of excess coverage.

CINCINNATI'S POTENTIAL LIABILITY IS DETERMINED BY THE USE OF THE "TIME ON RISK" ANALYSIS

The Supreme Court held in *Crossman II* that "time on risk" is the appropriate methodology to use when there are multiple carriers with varying policy periods. Crossmann, however, contends that Cincinnati did not join in Harleysville's appeal and that "joint and

several" liability as set forth in this Court's May 3, 2007 Order is now the law of the case as to Cincinnati.

Plaintiffs argued that Cincinnati's liability is joint and several because it did not appeal this Court's May 3, 2007 ruling that a joint and several allocation approach is appropriate. Plaintiffs claim that Cincinnati's joint and several share is $5,533,872. Their theory is based upon the faulty premise that because Cincinnati did not challenge the Court's ruling regarding the joint and several approach, it is now the law of the case as to Cincinnati.

This argument lacks merit because the law of the case doctrine is not applicable. The Supreme Court has held that a ruling becomes the law of the case "if the **offended** party does not challenge that ruling." *See Lindsay v. Lindsay*, 328 S.C. 329, 338, 491 S.E.2d 583, 587 (Ct. App. 1997) (emphasis added). Here, Cincinnati was not offended, aggrieved or otherwise directly affected by the Court's ruling inasmuch as the Court expressly declined to rule whether Cincinnati's policies provided coverage. In its May 3, 2007 Order, this Court stated in relevant part:

> because the combined limits of the Harleysville policies covering Plaintiffs exceed the $7.2 million in stipulated insured losses as found by the Court, the Court need not rule upon whether the excess/umbrella insurance policies covering Plaintiffs and issued by Cincinnati are presently triggered by Plaintiffs' insured losses in the South Carolina Underlying Lawsuits.

May 3, 2007 Order at 16. Likewise, the Supreme Court's *Crossman II* opinion notes that the Circuit Court did not rule whether Cincinnati's policies provided coverage. *Crossman II.* FN1 395 S.C. at 44, 717 S.E.2d at 591. The Supreme Court stated, "Because the trial court found Harleysville's policies were sufficient to indemnify the entire $7.2 million in stipulated damages, it did not rule on whether Cincinnati's policies provided coverage ..." *Id.* In sum, there was no adverse ruling as to Cincinnati on the issue of joint and several liability from which to appeal because the Court specifically declined to rule on whether Cincinnati's policies provided

coverage at all. Cincinnati was not aggrieved by the Court's order. Thus, the law of the case doctrine has no application here.

Moreover, in arguing that joint and several liability should be applied, the Plaintiffs are surprisingly asking this Court to apply a legal concept that was explicitly and decisively rejected by our State's highest court in *Crossman II*. In *Crossman II*, the Supreme Court stated:

> In this case, Crossmann argues in favor of a "joint and several" approach to the allocation of damages, while Harleysville advocates a pro rata/"time on the risk" approach. We adopt the pro rata/"time on the risk" approach.

Id. S.C. at 59, S.E.2d at 599. The Supreme Court also noted that the joint and several approach has been criticized as "inefficient and wasteful of judicial resources." *Id.* S.C. at 60, S.E.2d at 599. Further, the Court concluded that the pro rata approach is more consistent with meeting public policy goals than the joint and several approach. *Id.* S.C. at 63, S.E.2d at 601. The Supreme Court then remanded this matter and specifically instructed this Court that it was to hold further proceedings consistent with the pro rata/"time on the risk" approach. *Id* at S.C. at 67, S.E.2d at 603. If this Court were to instead now apply a joint and several approach to allocating damages among insurers, as the Plaintiffs request, this would be in direct contravention of the Supreme Court's directive to this Court.

Crossmann further contends that Cincinnati is jointly and severally liable based upon this Court's May 3, 2007 Order, in which judgment was entered on Count II of the Second Amended Complaint. Crossmann contends that Cincinnati is bound by the judgment entered on Count II since it didn't join in Harleysville's appeal.

This argument has no merit. The May 3, 2007 Order entered judgment on Count II (Declaratory Judgment) and stated "the parties' rights and obligations under the respective

policies are as set forth in this Order" (emphasis added). The May 3, 2007 Order specifically stated that the Court did not rule upon whether the Cincinnati policies were triggered.

THE LIMITS OF THE "UNDERLYING INSURANCE" MAY BE EXHAUSTED BY PAYMENT OF CLAIMS BY THE CARRIERS OR CROSSMANN FUNDING THE GAP BETWEEN CARRIERS' PAYMENTS AND THE POLICY LIMITS

Cincinnati issued excess insurance policies, which are not triggered until the policy limits of all underlying and all available coverages have been exhausted. In determining an insurer's duty to provide coverage to a claim, the parties' intent is to be measured solely by the language of the policies unless the language is ambiguous. *B.L.G Enters., Inc. v. First Fin. Ins. Co.*, 334 S.C. 529, 535, 514 S.E.2d 327, 330 (1999). It is undisputed under South Carolina law that terms in insurance policies that are susceptible to more than one reasonable meaning must be construed by the Court strictly against the insurer and in a manner that favors coverage. "Ambiguous or conflicting terms in an insurance policy must be construed liberally in favor of the insured and strictly against the insurer." *Diamond State Insurance Co., v. Homestead Ind., Inc.*, 318 S.C. 231, 236, 456 S.E.2d 912, 915 (1995). *Accord South Carolina Farm Bureau Mutual Ins. Co. v. Courtney*, 349 S.C. 366, 563 S.E.2d 648 (2002). Accordingly, whether an excess insurer's coverage has been triggered depends on the language of the excess insurance contract. *National Union Fire Ins. Co. v. Travelers Ins. Co.*, 214 F3d 1269, 1273 (11th Cir. 2000) (whether an excess insurer's coverage has been triggered depends solely on the terms of the excess insurance contract).

An insurance policy is to be read like any contract, and the words that it contains are to be given their plain and ordinary meaning. The express language of all of the relevant Cincinnati Excess Policies plainly states that the coverage is excess to any available insurance and all underlying policies. The Cincinnati policy issued to Plaintiff provides:

> A. Insuring Agreement
>
> We will pay on behalf of the insured the "ultimate net loss" which the insured is legally obligated to pay as damages in excess of the "underlying insurance" or for an "occurrence" covered by this policy which is either excluded or not covered by "underlying insurance" because of:

> 1. "Bodily injury" or "property damage" covered by this policy occurring during the policy period and caused by an "occurrence"; or
>
> 2. "Personal injury" ... covered by this policy committed during the policy period and caused by an "occurrence"

Cincinnati Commercial Umbrella Liability Policy No. CCC 444 58 40, ("Cincinnati Excess Policy") Section I, A.

"Underlying insurance" is defined to mean:

> the policies of insurance listed in the Schedule of Underlying Policies and the insurance available to the insured under all other insurance policies applicable to the "occurrence." "Underlying insurance" also includes any type of self-insurance or alternative method by which the insured arranged for funding of legal liabilities that affords coverage that this policy covers.

Id. Section V, 16.

Other provisions in Cincinnati's Excess Policies also emphasize the excess nature of the coverage provided. A provision entitled "Other Insurance" states "[t]he insurance provided by this policy is excess over any other valid and collectible insurance, other than insurance written specifically to be excess over this insurance, and shall not be contributory." *See* Cincinnati Excess Policy, Section IV,11.

The Excess Policies also include a Limits of Insurance clause that further explains that the excess coverage provided by Cincinnati is triggered only if the limits of all underlying insurance have been exhausted "by payment of claims." This clause states that the coverage provided by Cincinnati continues as excess coverage if the limits of underlying insurance are reduced by the payment of claims but not exhausted. The Limits of Insurance clause provides:

> a. If the limits of "underlying insurance" have been reduced by payment of claims, this policy will continue in force as excess of the reduced "underlying insurance"; or
>
> b. If the limits of "underlying insurance" have been exhausted by payment of claims, this policy will continue in force as "underlying insurance."

Id. Section III, 4(a), (b).

Under the language of the Cincinnati Excess Policies, the "underlying insurance" can be exhausted either by the underlying carriers paying the full limits available or by Crossmann funding the difference between a settlement for less than the full limits and the limits of the relevant policies.

Accordingly, Cincinnati's Excess Policies will be triggered if the amount of damages paid in settlement of the underlying cases, as calculated on the "time on risk" method set forth by the Supreme Court, exceeds the limits of the "underlying insurance" for each policy period.

CINCINNATI'S EXCESS POLICIES HAVE NOT BEEN TRIGGERED FOR THE VARIOUS PERIODS AT ISSUE

Cincinnati had coverage for the period May 29, 1998 to September 1, 2002. The underlying insurance policy periods and limits are:

Indiana	May 29, 1998 – Aug. 29, 1998	$1 Million/Per Occurrence, Per Year $2 Million/Annual Aggregate
Massachusetts Bay	Aug. 29,1998 – Aug. 29, 2000	$1 Million/Per Occurrence, Per Year $2 Million/Annual Aggregate
Regent	Aug. 29, 2000 – Jan. 1, 2002	$1 Million/Per Occurrence, Per Year $2 Million/Annual Aggregate

There is an issue as to whether there has been a single occurrence or multiple occurrences. It is not necessary, however, for the Court to resolve this issue. Based on the stipulated damages of $7.2 Million, Cincinnati's Excess Policies are not triggered, regardless of whether the $1 Million per occurrence or $2 Million annual aggregate limits are used.

The Supreme Court provides a default rule for determining damages that occur during a particular period:

> [I]t is a default rule that assumes the damage occurred in equal portions during each year that it progressed. If proof is available showing that the damage progressed in some different way, then the allocation of losses would need to conform to that proof.

> However, absent such proof, assuming an even progression is a logical default.

Crossmann II, 395 S.C. at 65, 717 S.E.2d at 602.

The parties' experts provided methods of allocating damages pursuant to *Crossman II* and the Stipulations. In general, the damages are allocated evenly over the period from thirty (30) days after the Certificate of Occupancy was issued until repairs were completed or the underlying lawsuits were settled.

The Court must determine the appropriate methodology to use in comparing the limits of the underlying policies to the damages that have been allocated for the various policy periods. While this could be done based on policy years, Crossman contends that the most appropriate method is to use a daily calculation.

The Court finds that the daily method of calculation would be appropriate since Indiana had coverage for less than a full year and Regent had coverage for less than two full years.

Crossmann set forth a methodology for calculating the per day loss on each project in its Brief. The Court finds that, while the methodology is reasonable, the stipulated amount of covered damages must be utilized, rather than the total settlement paid by Crossmann.

The first step is to allocate the stipulated damages among the five underlying lawsuits. This is done by comparing the amount of the settlement in each case to the total settlement amount of $16,770.750.00. The percentage thus calculated is then applied to the stipulated damages of $7.2 Million to determine a pro-rata allocation for each settlement. This calculation is shown in Exhibit A.

The next step is to prorate the stipulated loss amount per project over the number of days of progressive loss. The number of days is based upon a commencement date of 30 days after

the Certificate of Occupancy was issued until repairs were completed or the underlying case was settled (Stipulation No. 2). This calculation is set forth in Exhibit B.

This results in a Daily Loss Amount of $2,136.00.

The final step is to compare the Daily Loss Amount to the Daily Underlying Policy Limit. If the policy limits of $1 Million per occurrence, per year is applied, the Daily Underlying Policy Limit is $2,740.00.

Accordingly, Cincinnati's Excess Policy is not triggered since the underlying limit is greater than the stipulated amount of daily loss. This is reflected in Exhibit C.

It is not necessary for the Court to address the issue of whether the $2 Million annual aggregate limit for multiple occurrences would apply, since the result would be the same as for the lower limits.

SETTLEMENTS PAID BY THE UNDERLYING INSURERS ARE IRRELEVANT TO CINCINNATI'S LIABILITY

The Parties presented information and various arguments relating to the relevance of the settlement amounts paid by the settling Insurers (Indiana, Massachusetts Bay and Regent).

There are issues raised by Crossman's internal allocation of these proceeds.

Crossman unilaterally determined the allocation among policy periods, projects and underlying lawsuits. There also may be inconsistencies between Crossman's position on single occurrence or multiple occurrances for some of the settling Insurers.

These issues and arguments need not be considered because the Cincinnati Excess Policies define "Underlying Insurance" to include any type of self insurance or alternative methods of funding of Crossmann's liabilities. The relevant comparison, as set forth above, is to compare the stipulated damages allocated during the various periods of underlying insurance to the limits of the primary coverage.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that

For the reasons set forth above and based upon the record herein, the damages allocated to the various policy periods of the underlying primary carriers using the "time on risk" analysis are less that the limits of the underlying insurance. Accordingly, Cincinnati's Excess Policies have not been triggered for any of these periods.

The Honorable Steven H. John
~~Presiding~~ Judge, Fifteenth Judicial Circuit

This 23rd day of May, 2012
Conway, South Carolina

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EXHIBIT A

SUMMARY OF SETTLEMENTS AND ALLOCATION OF STIPULATED DAMAGES

LAWSUIT	SETTLEMENT AMOUNT	PERCENT OF SETTLEMENT	ALLOCATION OF STIPULATED DAMAGES
River Oaks I	$7,425,000	44.27%	$3,187.440
River Oaks II/Lorenzi	$2,826,500	16.85%	$1,213,200
Waterway Village	$3,925,000	23.40%	$1,684,800
Buck Creek	$2,194,250	13.08%	$941,760
Lightkeepers Village/Rose	$400,000	2.40%	$172,800
TOTALS:	**$16,770,750**	**100%**	**$7,200,000**

EXHIBIT B

CALCULATION OF DAILY LOSS AMOUNTS BY PROJECT

PROJECT	STIPULATED LOSS AMOUNTS		AVERAGE DAYS OF PROGRESSIVE LOSS		PER DAY LOSS
River Oaks I	$3,187.440	÷	3,659	=	$871
River Oaks II/Lorenzi	$1,213,200	÷	2,592	=	$468
Waterway Village	$1,684,800	÷	3,316	=	$508
Buck Creek	$941,760	÷	3,730	=	$252
Lightkeepers Village/Rose	$172,800	÷	4,707	=	$37
			TOTAL:		**$2,136 Loss/Day**

EXHIBIT C

CINCINNATI'S TIME-ON-RISK LIABILITY TO BEAZER

UNDERLYING INSURER	DAILY LOSS AMOUNT	-	DAILY[1] UNDERLYING POLICY LIMIT	=	CIN. SHARE/DAY	×	DAYS	=	CIN. SHARE
Indiana	$2,136		$2,740	=	0	=	92	=	$0
Massachusetts Bay	$2,136		$2,740	=	0	=	730	=	$0
Regent	$2,136		$2,740	=	0	=	459	=	$0
							TOTAL:	=	$0

[1]Policy limits of $1 Million per occurrence, per year.

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF HORRY	)	C/A No. 04-CP-26-0084
Crossmann Communities of North Carolina, Inc., and Beazer Homes Investment Corp.,	)	**ORDER**
Plaintiffs,	)	(Cincinnati Insurance)
v.	)	Hearing Date – August 27, 2012
Harleysville Mutual Insurance Company, Cincinnati Insurance Company,	)	
Defendants.	)	

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This matter is before the Court pursuant to Crossmann Communities of North Carolina, Inc. and Beazer Homes Investment Corporation's (collectively "Beazer") Motion to Alter, Amend or Reconsider pursuant to Rule 59(e), South Carolina Rules of Civil Procedure. A hearing on this motion was held on August 27, 2012. The motion is directed to and in response to this Court's Order as to Cincinnati Insurance Company ("Cincinnati") dated May 23, 2012. The factual background and procedural history of the case are set forth in the Court's May 23, 2012 Order.

For the reasons set forth below, Beazer's Motion to Alter, Amend or Reconsider is denied.

As set forth in its motion, Crossmann requests the Court to reconsider its May 23, 2012 Order by arguing the following:

1. Payments by Beazer or by insurers to resolve third-party claims against Beazer in states other than South Carolina must apply to establish exhaustion.

2. Even if the Court focuses on South Carolina claims against Beazer, the limits of the policies underlying in the Cincinnati policies are exhausted.

3. Because Cincinnati did not appeal from the Court's May 2007 Final Judgment and Order, Cincinnati is bound by that judgment which held, in part, that any triggered insurance policy is jointly and severally liable for all of Beazer's loss.

In addition, in its brief, Beazer requested limited discovery as to the intent of the parties in entering into the stipulations dated January 29, 2007 and indicated that it would submit a supplemental brief regarding the issue. Beazer did not submit a supplemental brief and did not argue this at the August 27, 2012 hearing. Accordingly, it is deemed abandoned and denied.

While it is undisputed that Beazer paid substantial sums to settle claims in other jurisdictions, Beazer failed to demonstrate what portion of the monies paid, if any, were for covered claims as set forth in *Crossmann Communities of North Carolina, Inc., v. Harleysville*

Mutual Insurance Co., 395 S.C. 40, 717 S.E.2d 589 (2011) ("*Crossmann II*"). Further, Beazer has failed to identify what part of any alleged covered claims would be allocated to the Cincinnati policy periods utilizing the pro rata/time on risk methodology as set forth in *Crossmann II*. Only "property damages" caused by an "occurrence" that occurred during Cincinnati's policy period would act to exhaust the underlying CGL limits.

In an effort to show that the amounts paid to settle cases in other states should be considered in this litigation, Beazer relies on statements contained in its Answers to Interrogatories in this matter dated July 24, 2006. (Plaintiff's Exhibit 2 at the August 27, 2012 hearing). The response Beazer relies upon is set forth on page 3 of Plaintiff's Exhibit 2. The discovery response states that in the Indiana and Kentucky cases, Beazer faced "losses arising from third-party claims for property damage caused by acts or omissions of subcontractors." Beazer did not state in its discovery response that any property damage was caused by an "occurrence" as defined in *Crossmann II* or that it occurred during Cincinnati's policy period. Further, during the August 27, 2012 hearing, Beazer did not present any evidence to the Court that any property damage in the Indiana and Kentucky cases was caused by an "occurrence" as defined in *Crossmann II* or that it occurred during Cincinnati's policy period.

The Court has examined the January 29, 2007 stipulations of the parties, the evidence presented during the course of this litigation and the memoranda submitted by the parties. The Court's Order of May 23, 2012 represents the exercise of "sound discretion . . . to arrive at a reasonable methodology" to determine the underlying damages. *Crossmann II* at 395 SC at 65, 717 S.E.2d at 602.

Beazer has not presented any new or different information that requires modification of the Court's May 23, 2012 order as to the application of payments in other states by Beazer.

As to the second argument presented by Beazer, Beazer previously stipulated that the covered damages were $7.2 million. While the settlements paid by Indiana, Massachusetts Bay and Regent may have been for covered damages, the Court's May 23, 2012 Order did not allocate these settlements to particular claims. Instead the Court examined the underlying damages using the pro rata/time on risk methodology set forth in *Crossmann II*. Since the damages occurring during Cincinnati's policy periods did not exceed the limits (not amounts actually paid) of the underlying insurance, Cincinnati's excess policies were not triggered.

The third issue is whether Cincinnati's exposure should be determined using the pro rata/time on risk methodology set forth in *Crossmann II*, or whether the Court should use a joint and several approach.

As set forth in Footnote 1 of *Crossmann II*, this Court "did not rule on whether Cincinnati policies provided coverage" in its May 3, 2007 Order. Accordingly, this Court must now follow the methodology established in *Crossmann II*, ie., pro rata/time on risk.

Beazer has not presented any new or different information that requires modification of the Court's May 23, 2012 order on this issue.

The Court has carefully considered the entirety of the January 29, 2007 stipulations, how the stipulations affected the parties' rights, and the record before it. While this Court appreciates the argument of counsel for Beazer, it declines to change its previous ruling and reaffirms the May 23, 2012 Order as to Cincinnati Insurance *in toto*.

Accordingly, the Beazer's Motion to Alter, Amend or Reconsider is denied.

AND IT IS SO ORDERED.

The Honorable Steven H. John
Resident Judge, Fifteenth Judicial Circuit

This 12th day of September, 2012
Conway, South Carolina