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A Bulletin Dedicated to Recent Developments in the Law of Extracontractual Liability and Claims Handling

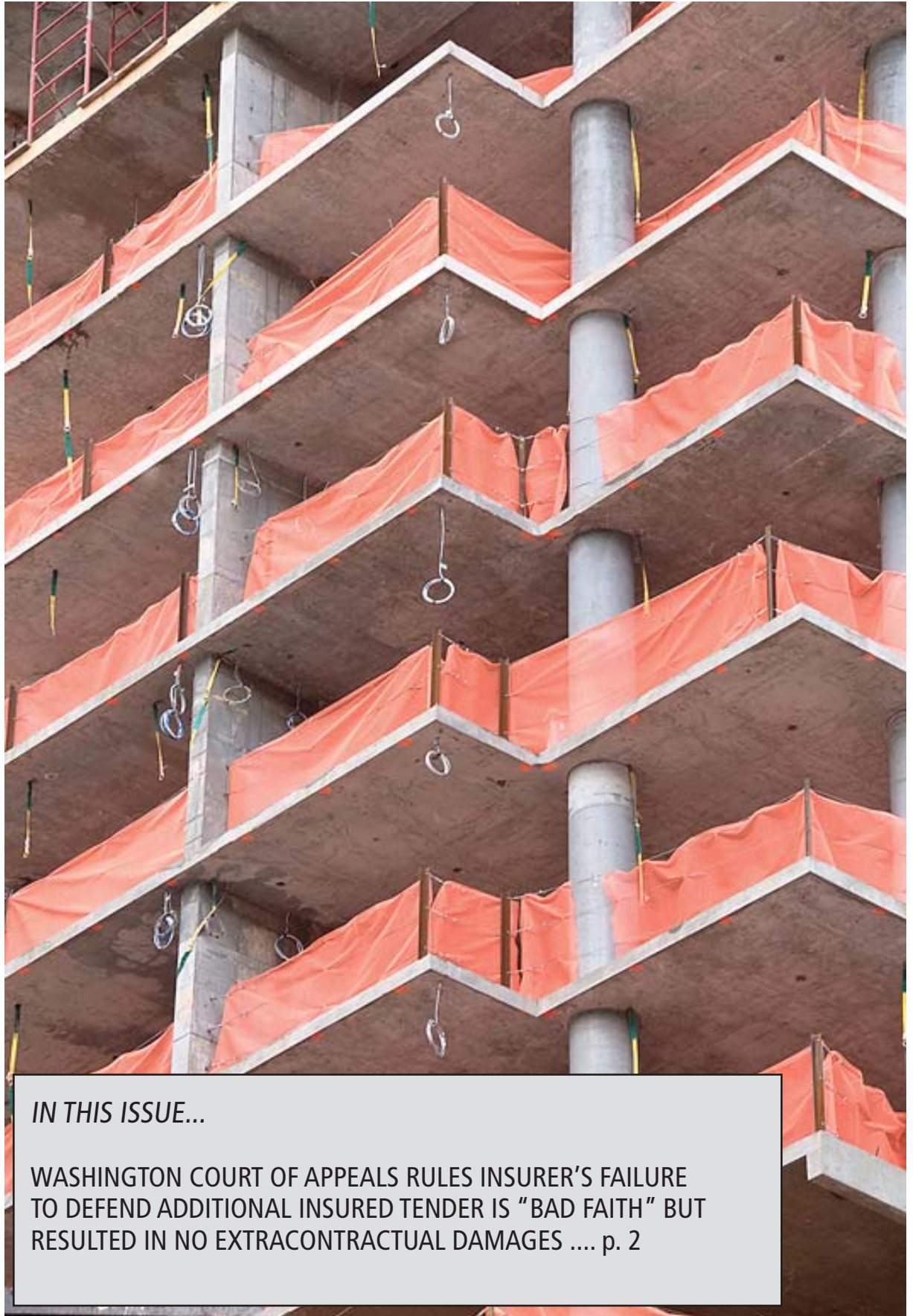
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Todd S. Schenk, Editor
Thomas G. Drennan, Associate Editor
Adam C. Hackett, Associate Editor

Tressler | Attorneys At Law

Soderstrom Maloney & Priess LLP

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WASHINGTON COURT OF APPEALS RULES INSURER'S FAILURE TO DEFEND ADDITIONAL INSURED TENDER IS "BAD FAITH" BUT RESULTED IN NO EXTRACONTRACTUAL DAMAGES

In *Ledcor Industries (USA), Inc. v. Mutual of Enumclaw Insurance Company*, 2009 WL 1191783, Wash.App.Div. 1, the Court of Appeals held that Mutual of Enumclaw ("MOE") acted in "bad faith" by failing to timely accept an additional insured tender and by failing to participate in the defense of the additional insured.

Ledcor, a general contractor for a 25-building condominium development, tendered the defense of a construction defect action to its insurers. While Ledcor's insurers were defending, Ledcor's attorneys made a tender to MOE under a policy MOE issued to one of Ledcor's subcontractors. Fourteen months later, MOE accepted the tender, subject to a reservation of rights, and said that it would appoint an attorney or share in the cost of counsel that was appointed by one of Ledcor's other insurers. Ledcor never responded. MOE never requested any billing information and never appointed defense counsel.

Ledcor paid \$105,000 towards a \$1.25 million settlement in the underlying action and settled its claim against the subcontractor for \$236,000, which MOE paid. Ledcor then sued MOE.

The trial court found that MOE acted in "bad faith" and violated the Consumer Protection Act ("CPA"), and awarded \$101,873.02 in damages for MOE's

unpaid defense obligation. No award under the CPA was rendered because the court found Ledcor did not prove any harm from the CPA violations.

On review, MOE did not dispute that it failed to thoroughly investigate the claims against Ledcor or that it failed to retain defense counsel.

The Court held that the fact Ledcor was defended by other insurers did not relieve MOE of its duties. However, because MOE's failure to timely accept the tender or share in the defense costs made no difference in the outcome, Ledcor could not recover any damages based on "bad faith". Likewise, while MOE's failure to accept the tender for 14 months violated the CPA, Ledcor failed to establish any resulting injury. The Court rejected Ledcor's argument that the use of its own money in funding the underlying settlement was recoverable under the CPA. In addition, since MOE did not force Ledcor to litigate the coverage issues, Ledcor was not entitled to attorney

fees under *Olympic Steamship Co. v. Centennial Insurance Co.*, 117 Wash.2d 37, 811 P.2d 673 (1991).

Defense costs awarded by the trial court, however, were affirmed. Since defense costs attributable to MOE's insured subcontractor were not segregated from costs relating to the work of other subcontractors, the Court held that the trial court properly awarded fees based upon the proportion that Ledcor's \$236,000 settlement contribution bore to the \$1.25 total settlement.



Prepared by Katherine Klima Liner, a partner in our Orange County office.

DECISION WORTH NOTING...



In *Lyons v. Wawanesa General Ins. Co.*, 2009 WL 1077294 (Cal.App.4th Dist. April 22, 2009), the California Court of Appeal upheld the genuine dispute doctrine in a first party insurance "bad faith" case. Richard A. Lyons and Karen M. Bligh-Lyons ("insureds") claimed that Wawanesa General Insurance Company ("Wawanesa") unreasonably and in "bad faith" withheld payment of their fire damage claim, failed to fully investigate their claim, did not reasonably respond to their inquiries, and violated applicable insurance regulations during the handling of their claim. The trial court granted Wawanesa's motion for summary adjudication on the "bad faith" claim pursuant to the genuine dispute doctrine. In upholding the trial court's ruling, the Court of Appeal explained that, under California law, an insurer's denial of a claim or delay in payment of a claim due to the existence of a genuine dispute with its insured as to the existence or amount of coverage does not support a cause of action for "bad faith," even if the insurer is liable for breach of contract. The Court of Appeal found that, even under the insureds' version of facts, there was a genuine issue as to Wawanesa's liability under California law. The record established that Wawanesa fully investigated the insureds' claim and properly relied on the opinions of experts.

HAWAII DISTRICT COURT HOLDS THAT INSURER'S HANDLING OF CLAIMS IN OTHER STATES IS IRRELEVANT TO WHETHER THE INSURER ACTED IN "BAD FAITH" IN EVALUATING A HAWAII CLAIM

In *Mauna Kea Beach Hotel Corp. v. Affiliated FM Ins. Co.*, 2009 WL 1227850 (D.Hawaii May 1, 2009), the United States District Court for the District of Hawaii recently held that evidence of an insurer's handling of claims outside of the State of Hawaii is irrelevant to the determination of whether the insurer engaged in "bad faith" in handling a specific insurance claim in Hawaii or whether it engaged in "bad faith" through a pattern of violating Hawaii Revised Statute § 431.13-103(a).

In *Mauna Kea Beach Hotel*, Mauna Kea Beach Hotel and Hapuna Beach Prince Hotel (collectively "Mauna Key") suffered damages from two earthquakes that occurred on October 15, 2006. Defendant Affiliated FM Insurance Co. ("Affiliated") denied coverage because it did not believe that the damages exceeded \$30 million, as necessary to trigger coverage under its policy. Mauna Key sued Affiliated for "bad faith." Affiliated objected to the Magistrate Judge's ruling granting in part Mauna Key's motion to compel discovery concerning evidence of Affiliated's handling of other insurance claims. In its motion before the District Judge, Affiliated argued that the discovery ordered by the Magistrate was overly burdensome, and suggested that Affiliated should be required to produce only claims which relate to Hawaii or earthquake losses.

The District Court first noted that Hawaii recognizes a claim for "bad faith" in the insurance context, and that "bad faith" claims will lie when an insurance company unreasonably handles or denies payment of a claim, or unreasonably

interprets its own policy. The District Court also observed that Hawaii Revised Statute §431:13-103 ("Statute") allows a claim for unfair business acts or practices where an insurer engages in "committing or performing" various acts "with such frequency as to indicate a general business practice," but such a claim may be brought only by the insurance commissioner, as there is no private right of action for a violation of the Statute.

Although courts applying Hawaii law have held that violations of the Statute may be used as evidence of an insurer's bad faith in handling a specific claim, the District Court held that evidence of the insurer's handling of claims in other states is irrelevant since the handling of foreign claims cannot form the basis for a violation of the Statute. The District Court explained, the "fact that there could be evidence that [Affiliated] engaged in bad faith based upon violations of a state statute in a different state with a different insured and possibly different standards, is not relevant to the determination of whether [Affiliated] has engaged in bad faith with

respect to its handling of [Mauna Key's] particular insurance claim or whether it engaged in bad faith through a pattern of violating Hawaii Revised Statute § 431:13-103(a)." Accordingly, the District Court limited discovery of Affiliated's handling of other claims to those claims which arose in Hawaii. However, the District Court denied Affiliated's request to limit "bad faith" discovery to earthquake related claims because Affiliated had not established that its handling insurance claims related to other perils was irrelevant to its handling of the earthquake claim at issue.



Prepared by Colleen Costello, an associate in our Chicago office.

DECISION WORTH NOTING...



In *McElgunn v. Cuna Mutual Group*, 2009 WL 1254657 (D.S.D. May 4, 2009), the South Dakota District Court recently held that a "bad faith" cause of action can survive a dismissal of breach of contract claims. At the pre-trial conference, Sharon McElgunn ("McElgunn") sought to dismiss her breach of contract claims because they had been since been paid by Cuna Mutual Group ("Cuna"). Cuna then moved for judgment on the pleadings or in the alternative for summary judgment, contending that McElgunn could not proceed with her "bad faith" claim in the absence of her breach of contract claims. The District Court held that McElgunn's "bad faith" claim survived the dismissal of her breach of contract claims because, in South Dakota, an insured is only required to prove that an insurer unreasonably delayed payment of benefits. Here, McElgunn alleged Cuna initially wrongfully denied benefits but then later paid them, thereby delaying payment without a reasonable basis.

Tressler | Attorneys At Law

Soderstrom Maloney & Priess LLP

www.tsmp.com

If you have any questions concerning this bulletin or Tressler's Extracontractual and Claims Handling Practice Group, please contact:

Todd S. Schenk, 312/627-4151, tschenk@tsmp.com
James A. Pinderski, 312/627-4092, jpinderski@tsmp.com
Paul S. White, 310/203-4822, pwhite@tsmp.com

233 S Wacker Drive
22nd Floor
Chicago, IL 60606
312/627-4000
Fax 312/627-1717

744 Broad Street
Suite 1510
Newark, NJ 07102
973/848-2900
Fax 973/623-0405

One Penn Plaza
Suite 4701
New York, NY 10119
646/833-0900
Fax 646/833-0877

2100 Manchester Road
Suite 950
Wheaton, IL 60187
630/668-2800
Fax 630/668-3003

305 West Briarcliff Road
Bolingbrook, IL 60440
630/759-0800
Fax 630/759-8504

3070 Bristol Street
Suite 450
Costa Mesa, CA 92626
714/429-2900
Fax 714/429-2901

1901 Avenue of the Stars
Suite 450
Los Angeles, CA 90067
310/203-4800
Fax 310/203-4850

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