

Washington Supreme Court Holds Insurers May Be Bound By Results of Reasonableness Hearings

By Paul M. Rosner

In *Mutual of Enumclaw Ins. Co. v. T&G Constr., et al.*, ___ Wn.2d ___ (October 23, 2008), the Washington Supreme Court held that if a coverage question turns upon the same facts or law at issue in the underlying dispute between the claimant and the insured, the insurer will be bound by the results of a trial or settlement judicially approved as reasonable, absent a showing of collusion or fraud, even in the absence of a finding of bad faith against the insurer.

The case arises from alleged construction defects related to the installation of siding at a condominium, which allegedly led to mold and rot. Mutual of Enumclaw (“MOE”) insured T&G, the siding contractor, and defended its insured under a reservation of rights. There was no bad faith.

In addition, the Supreme Court also held:

- If a coverage question turns on the very same facts that are in dispute in the underlying litigation between its insured and the claimants, the insurer will be bound by the factual findings of a good faith settlement, which is judicially approved as reasonable.
- The presumptive damages are not necessarily the covered damages.¹ An insurance policy might provide coverage for only some -- or even none -- of that harm. Therefore, an insurer [not found in bad faith] may still contest which damages are covered and which are not.
- Although the coverage court may rely upon the factual findings of the liability court, where the issues presented to the liability court differ from the issues before coverage court, the coverage court must determine which damages are covered damages.
- Removal and reinstallation of the insured’s work to access damage to property other than the insured’s work is within the scope of “damages because of property damage.”
- With regard to the impaired property exclusion, the impaired property was not the siding installed by T&G but the damaged subsurface and interior walls beneath the siding.

¹ However, if an insurer is found in bad faith, the insured may be estopped from denying coverage for non-covered claims. See e.g. *Kirk v. Mt. Airy Ins. Co.*, 134 Wn.2d 558, 561, 951 P.2d 1124 (1998).

- The “your work” exclusion would not preclude coverage for costs of removal and replacement of the siding, required to access and repair damage to subsurface and interior walls underneath the siding.

Further, in dictum, the court discussed MOE’s argument raised at the Court of Appeals, but not before the Supreme Court, that it should not be liable for any portion of the settlement attributed to the association’s attorney fees. The court’s muddled discussion of this issue will likely result in further litigation regarding whether an insured can recover non-statutory based attorney fees.

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