

November 26, 2008 Coverage Alert

**Washington Supreme Court:  
No Presumption of Harm and No Coverage By Estoppel  
for Procedural Errors in Handling Liability Claims**

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On November 26, 2008, the Washington Supreme Court recognized both tort and statutory causes of action for an insurer's *procedural* errors in responding to tender of a third-party liability claim, even though there was neither coverage nor a duty to defend. *St. Paul Fire & Marine Ins. Co. v. Onvia, Inc.*, \_\_Wn.2d\_\_ (November 26, 2008). However, extending the rationale of *Coventry Associates v. Amer. States Ins. Co.*, 136 Wn.2d 269 (1998), the court *declined to apply either a presumption of harm or coverage by estoppel*. Rather, in order to recover damages, the insured must prove that the procedural violations proximately caused actual harm to the insured. While still imposing a high standard of conduct on Washington insurers, this case rebuffed attempts to extend the punitive remedy of coverage by estoppel to procedural errors in handling third-party liability claims where there is no coverage or duty to defend.

St. Paul's insured, Onvia, Inc., was sued in a class action for "fax blasting". Onvia's broker claimed to have tendered defense of the suit to St. Paul via fax (and had a fax transmission report), but St. Paul had no record of receiving the tender and did not respond. Months later St. Paul became aware of the claim and, over eight months after the alleged original tender, denied defense and indemnity. Onvia entered into a covenant judgment for over \$17 million and assigned its rights against St. Paul to the plaintiff.

St. Paul sued for declaratory relief in federal court. The trial court granted summary judgment that St. Paul had no duty to defend, indemnify, or settle the underlying action and further held that St. Paul's refusal to defend did not constitute bad faith. However, the court declined to rule on whether the eight-month delay in responding to the tender would support a claim for *procedural* bad faith. The federal court certified two questions to the Washington Supreme Court: first, whether there is a cause of action for *procedural* bad faith when an insurer has correctly denied defense and coverage, and second, if there is such an action, what is the remedy. The class action plaintiff, in its role as assignee, sought a presumption of harm and coverage by estoppel.

The Washington Supreme Court held that there is both a tort cause of action for procedural bad faith and a potential statutory remedy through the Washington Consumer Protection Act (CPA) when claim handling regulations are violated, even in the absence of coverage. However, consistent with *Coventry*, the Court *refused to presume harm or impose coverage by estoppel*: "the insured in this circumstance is not entitled to a presumption of harm or coverage by estoppel, but *must prove all elements of the claim, including actual damages.*"

This case affirms that insurers must comply with the stringent procedural regulatory requirements set forth in the Washington Administrative Code, chapter WAC 284-30. However, an insured who seeks damages for procedural errors must prove what actual harm those errors caused before either tort or statutory remedies will apply.

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