

WASHINGTON SUPREME COURT ADDRESS
THE SELECTIVE TENDER AND LATE TENDER RULES

By Paul M. Rosner

In *Mut. of Enumclaw Ins. Co. v. USF Ins. Co.*,¹ the Washington Supreme Court adopted the “selective tender” rule and clarified the “late tender” rule. The “selective tender” rule “states that where an insured has not tendered a claim to an insurer, that insurer is excused from its duty to perform under the policy or to contribute to a settlement of the claim”; whereas the “late tender” rule “provides that an insurer must perform under the insurance contract even where an insured breaches the timely notice provision of the contract unless the insurer can show actual and substantial prejudice due to the late notice.” The court held that the selective tender rule prevents settling insurers from seeking equitable contribution from another insurer to which the insured never tendered the claim, but did not preclude the settling insurer’s subrogation claims.

Mutual of Enumclaw and Commercial Underwriters Insurance Company funded the settlement of a construction defect suit and received an assignment of the insured’s rights to pursue non-settling insurers. They then sought equitable contribution and subrogation from USF.

The court then held that because the insured had not tendered to USF, the settling insurers could not maintain equitable contribution claims against USF. Nevertheless, the settling insurers could maintain subrogation claims against USF based on the insured’s assignment of its rights to them. The court held the “selective tender” rule, although applicable to equitable contribution claims, provided no defense to subrogation claims, as the rights assigned originally belonged to the insured.

The court then addressed whether the settling insurer’s claims were barred as a matter of law based upon the “late tender” rule. The court held that to show prejudice an insurer must prove an “identifiable and material detrimental effect on its ability to defend its interests.” Even though USF first received notice of the claim four years after the complaint was filed, two years after the settlement, and after the settling insurers completed litigation against other non-settling insurers, the court rejected USF’s argument that it was prejudiced as a matter of law.

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¹ 2008 Wash. LEXIS 817 (Wash. Sept. 4, 2008).