

April 3, 2008 Coverage Alert Blast

FEDERAL COURT RULES
WASHINGTON'S INSURANCE FAIR CONDUCT ACT
DOES NOT APPLY RETROACTIVELY

By Paul M. Rosner

On March 28, 2008, in a case handled by Soha & Lang, P.S., Judge Marsha J. Pechman of the U.S. District Court for the Western District of Washington ruled that the Insurance Fair Conduct Act ("IFCA") does not apply retroactively.¹

Although not binding precedent on Washington State courts, decisions of the Western District Court of Washington are usually considered persuasive authority. Judge Pechman's ruling follows similar rulings by a Magistrate judge in the same district and by the Chief District Judge in the Eastern District of Washington.² Together, these decisions suggest that Washington state courts will likewise hold that IFCA only applies prospectively, i.e. only to conduct after IFCA became effective on December 6, 2007.

The highly controversial Insurance Fair Conduct Act creates a new cause of action against insurance companies for unreasonably denying first party insureds' claims for coverage or benefits, and, among other things, authorizes the award of uncapped treble damages. Since IFCA's enactment, plaintiffs have been attempting to add IFCA claims for conduct occurring prior to the Act's effective date. In the *Aecon* case, a general contractor sought coverage as a putative additional insured under one of its subcontractors' insurance policies for alleged construction defects at a hotel and casino project. The insurer denied the general contractor's tender in 2006.

In February 2008, the general contractor sought leave to amend its complaint to add a cause of action under IFCA. Representing Zurich, Soha & Lang opposed the motion on the ground that IFCA did not apply to conduct occurring prior to its effective date.

Judge Pechman agreed, and denied the general contractor's proposed amendment, reasoning that Washington courts presume that statutes operate prospectively unless contrary legislative intent is expressed or implied. However, a statute may apply retroactively if it is merely remedial and concerns procedures or forms of remedies. Judge Pechman held that although IFCA provides remedies, it also "provides plaintiff

¹ *Aecon Buildings, Inc. v. Zurich N. Am.*, Order Denying Motion for Leave to Amend Complaint (W.D. Wash. C07-832MJP).

² February 1, 2008, ruling by Magistrate Judge James P. Donohue in *HSS Enterprises LLC v. Amco Insurance Company*, Order Denying Plaintiff's Motion to File Amended Complaint (W.D. Wash. No. 06-1485-JPD); February 19, 2008, ruling by Chief Judge Robert H. Whaley in *Malbco Holdings, LLC v. AMCO Insurance Company et al*, Order Denying Motion to Amend (E.D. Wash. NO. CV-07-389-RHW).

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with the right to proceed against the defendant for unreasonable conduct falling outside the scope of the other statutory causes of action.” Further, “[b]ecause it affects substantive rights, imposes a penalty, and is couched in forward-looking language, the IFCA only applies prospectively.”

Aecon and the other federal decisions indicate that Washington state courts will probably also hold that IFCA only applies prospectively. However, many other issues regarding IFCA remain to be resolved.

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