WILLIAMS KASTNER™

NORTHWEST INSURANCE LAW

QUARTERLY NEWSLETTER FALL 2018

Williams Kastner has been serving clients in the Pacific Northwest since our Seattle office opened in 1929. With more than 65 attorneys in offices in Washington, Oregon, Alaska and affiliated offices China, we offer global capabilities and vision with a local sensibility. We are attorneys, paralegals, litigation assistants and support staff dedicated to advancing the business and personal objectives of our clients. We are focused on building bridges—combining wisdom and creativity—both in and out of the courtroom and boardroom.

TABLE OF CONTENTS

2 OREGON COURT HOLDS THAT INSURED MUST ATTEND EUO AS CONDITION PRECEDENT TO COVERAGE DESPITE OREGON STATUTE REQUIRING PROMPT PAYMENT OF PIP BENEFITS

4 IN ISSUE OF FIRST IMPRESSION, WASHINGTON COURT HOLDS THAT ACTIONS OF PUBLIC ADJUSTER ARE IMPUTED TO INSURED

6 WASHINGTON FEDERAL COURT FINDS THAT SEXUAL ABUSE CLAIM NOT COVERED EVEN WHEN "NEGLIGENCE" CLAIM WAS ALLEGED

OREGON COURT HOLDS THAT INSURED MUST ATTEND EUO AS CONDITION PRECEDENT TO COVERAGE DESPITE OREGON STATUTE REQUIRING PROMPT PAYMENT OF PIP BENEFITS

The majority of automobile insurance policies contain a clause providing that the insurer may require the insured to submit to an examination under oath ("EUO") to assist with the insurer's investigation of the claim. Many policies include the EUO provision in the conditions section of the policy and expressly make the insured's attendance at the EUO a condition of coverage. An insured's decision to not attend the EUO may be sufficient, by itself, to cause denial of a claim for failure to satisfy a condition precedent to coverage. Oregon is the most recent jurisdiction to weigh in on a related issue, which occurs when a statute requires an insurer take some action within a certain time period, yet the insured has failed to attend the EUO at the request of the insurer.

In *Moore v. Allstate Ins. Co.,* 293 Or. App. 690 (2018), the plaintiff was a motorist that filed an action to recover personal injury protection ("PIP") benefits after she was injured in a motor vehicle accident. The plaintiff told Allstate (PIP insurer) that there was someone else inside the car at the time of the accident that was also injured, but Allstate suspected that she was alone and requested an EUO to further investigate. Plaintiff refused and contended that Allstate breached its duty to pay the PIP benefits promptly as required by Oregon statute. She further contended that, as a result of Allstate's breach, she was not obligated to submit to the EUO. She then sued Allstate for breach of the insurance contract. Allstate moved for summary judgment, arguing that it was not required to pay PIP benefits until she submitted to the EUO. Plaintiff argued that, under Oregon statute ORS 742.524(1)(a), Allstate was required to pay her PIP benefits within 60 days of receiving her medical bills, regardless of whether she attended the EUO. The trial court granted Allstate's motion on the grounds that plaintiff's refusal to submit to the EUO was not excused because Allstate did not materially breach the insurance policy by failing to pay PIP benefits within 60 days.

On the insured's appeal, the Oregon Court of Appeals affirmed. While the plaintiff did not dispute that attending the EUO is a condition precedent to filing a PIP action under Oregon law, she sought a ruling that Allstate breached its promise to pay or deny her medical bills within 60 days of receiving them under ORS 742.524(1)(a), which would implicitly require the Court to find that Allstate's breach of the policy waived its ability to enforce the EUO provision as a condition precedent to coverage. The Court

rejected the plaintiff's argument that Allstate was statutorily required to pay or deny the PIP benefits within 60 days. Therefore, it held that Allstate did not breach its duty under the policy under the circumstances, and was entitled to seek the EUO as part of its investigation.

The *Moore* decision supports the general proposition in Oregon that attendance at the EUO is a condition precedent to coverage under an insurance policy. While the Court's decision was largely driven by its finding that the Oregon statute did not mandate PIP payment, no matter the circumstances, within 60 days of receipt of the medical records, the Court recognized the importance of allowing insurer to take EUOs to investigate claims that are suspicious and potentially fraudulent. This decision serves to reinforce insurer's rights to withhold coverage unless an insured cooperates and participates in the insurer's claim and coverage investigation.

IN ISSUE OF FIRST IMPRESSION, WASHINGTON COURT HOLDS THAT ACTIONS OF PUBLIC ADJUSTER ARE IMPUTED TO INSURED

A public adjuster ("PA") is a person who investigates or reports insurance claims and acts on behalf of the insured during the claim process. Similar to many states, a PA must be licensed in Washington. When acting on behalf of the insured, a PA may make representations to the insurer that may be relied upon during a claim and coverage investigation. The issue of whether an insured is bound by the PA's representations acting on the insured's behalf is an unresolved issue in Washington. However, in *Reverse Now VII, LLC v. Oregon Mut. Ins. Co.*, 2018 WL 3373977, C16-209-MJP (W.D. Wash. July 11, 2018), Judge Pechman in the United States District Court for the Western District of Washington held, as a matter of first impression, that a PA's material misrepresentations could be imputed to the insured.

The case arises out of an insurance claim for fire loss at an apartment complex owned by the plaintiff and insured by Oregon Mutual. Oregon Mutual accepted coverage and retained an independent adjuster ("IA") to investigate the scope of repairs and adjust the loss. The insured retained a PA. The IA and PA worked on a scope of repair, but got into a disagreement about certain issues, in particular, whether the exterior siding could be repaired or whether it required complete replacement. The insured decided to enter the appraisal process to resolve the dispute. The PA selected Randy Gower as its impartial appraiser. Oregon Mutual selected Gary Halpin as its impartial appraiser. The appraisal process

concluded with a panel finding that Oregon Mutual owed an additional $188,544.23 for repairs. Oregon Mutual paid the balance shortly thereafter.

However, while the appraisal was ongoing, the insured filed suit against Oregon Mutual for breach of contract; bad faith; and violations of the Insurance Fair Conduct Act ("IFCA") and the Washington Administrative Code. It later amended its complaint to include claims for fraud in the appraisal process and violation of the Consumer Protection Act ("CPA").

Shortly thereafter, Oregon Mutual learned that the PA was not licensed in the State of Washington because he failed to supply a bond. Nevertheless, he held himself out as a public adjuster and performed the responsibilities of a public adjuster for more than two and a half years in violation of RCW 48.17.060. A knowing violation of RCW 48.17.060 constitutes a Class B felony under RCW 48.17.063. Oregon Mutual also learned that Mr. Gower was not impartial, but instead had been "best friends" with the PA for decades: they were former business partners and often "worked the same claims together." These facts were never disclosed by the insured or the PA, but were instead discovered by Oregon Mutual in its review of deposition transcripts in another case.

The Court subsequently granted Oregon Mutual's motion to amend its answer to include affirmative defenses of misrepresentation and concealment, which could void the policy. Oregon Mutual moved for summary judgment and argued that the insured misrepresented and concealed material facts concerning the PA's lack of a valid public adjusters' license and the appraiser's lack of impartiality.

The Court concluded that summary judgment was appropriate on these claims because there is no reasonable dispute that the PA materially and knowingly misrepresented and concealed facts concerning his licensure and his pre-existing relationship with the appraiser, and that these misrepresentations can be imputed to the insured. First, the Court found the misrepresentations were material because "Oregon Mutual would not have communicated with [the PA] concerning the claim had it known that he was unlicensed, let alone relied upon his statements concerning the extent of repairs required." It further found that the undisclosed relationship between the PA and appraiser was material because the appraiser was not "impartial" as required by the policy.

Second, the Court found that the insured had knowledge of the PA's misrepresentations and concealment. The insured knew that the PA was not licensed, yet failed to disclose this information to Oregon Mutual. However, the court went further by finding that even to the extent the insured believed that such disclosure was not required, the PA's knowledge of the misrepresentation and concealment—and his awareness of its materiality—may be imputed to the insured.

The Court analyzed imputed knowledge under general agency principles to find that when an agent is aware of a fact at the time of taking authorized action on behalf of a principal and the fact is material to the agent's duties to the principal, notice of the fact is imputed to the principal even though the agent learned the fact prior to the agent's relationship with the principal. The Court was persuaded that the opposite result could allow the insured to evade the policy's requirement that it appoint a "competent and impartial appraiser" to the detriment of Oregon Mutual. It also found that, as a matter of public policy, an insured cannot be permitted to adopt a public adjuster's acts when they benefit him, and disclaim them where they do not. The Court further noted that, while the insured may have a claim against the PA, that is insufficient to justify not imputing the PA's knowledge to the insured. As a result, the Court found the policy void as a matter of law.

The *Reverse Now* decision answered an important question of whether an insured is bound by the representations made by its PA during the course of an insurance claim. This ruling not only offers guidance in this previously gray area of insurance claim handling, it allows insurers to more easily rely on the statements made by the PA during the claim process due to the potential consequences of misrepresenting or concealing information. This decision may also give rise to future cases involving PA's breach of other provisions of an insurance policy, such as the cooperation clause. At the very least, this decision further supports such coverage defenses in the future.

WASHINGTON FEDERAL COURT FINDS THAT SEXUAL ABUSE CLAIM NOT COVERED EVEN WHEN "NEGLIGENCE" CLAIM WAS ALLEGED

In the wake of the clergy abuse scandals and the "me too" movement, Washington has seen an uptick in sexual abuse claims. These claims raise coverage issues if the policy provides "occurrence" coverage and/or contains intentional act and/or sexual abuse exclusions. Recently, a Washington federal district court judge weighed on this issue and found that an insurer owed no duty to defend a sexual abuse claim that failed to alleged an "occurrence" and that was excluded under the policy even when the underlying complaint alleged a negligence-based claim against the insureds.

Safeco Ins. Co. of Amer. V. Wolk, 2018 WL 5295250, C18-5368 RBL (W.D. Wash., Oct. 25, 2018), arises from a liability claim under two Safeco Homeowners insurance policies. The claim against the homeowners (Mr. and Mrs. Wolk) was based on a minor, female guest in the Wolk home, who claimed that she was sexually assaulted by Mr. Wolk. Her complaint, filed in state court, specifically alleged that Mr. Wolk sexually abused the plaintiff on multiple occasions, between the years 2014 and 2016, and that Mrs. Wolk knew or should have known of the behavior of Mr. Wolk and failed to satisfy her duty to protect plaintiff from harm. Plaintiff further alleged that Mrs. Wolk, by her actions and inactions, made it more difficult for plaintiff to make any complaint about the sexual abuse or to protect herself from said abuse, and further, by her actions and inactions, contributed to the occurrence of the sexual abuse. In addition to the torts of battery, assault, and outrage, the plaintiff alleged "negligent supervision and care" against Mrs. Wolk. The Wolks tendered defense of the case to Safeco, which denied coverage for Mr. Wolk, and defended Mrs. Wolk under a reservation of rights. Safeco subsequently filed a declaratory judgment action regarding its coverage obligations under the policy.

The Court rejected the insured's initial argument that the motion was premature because no discovery had occurred. The Court found that discovery regarding Safeco's "historic interpretation of its homeowner's policies" and the exclusions at issue was unnecessary because the duty to defend was based on the "eight corners" of the policy and the underlying complaint and there was nothing unique about this case that required discovery outside these documents. The Court noted that the policy is a form policy and there is no evidence that the insured had some unique intent with respect to the form policy's language.

The Court next held that the underlying complaint did not allege an "occurrence" which is defined by the policy as an "accident"—an unusual, unexpected, and unforeseen happening. The Court rejected the insureds' argument that the negligence-based claim is conceivably covered under the policy because the negligence claim arose from the abuse. The Court also rejected the insureds' argument that the efficient proximate cause rule applied under the recent case of *Xia v. ProBuilders Specialty Ins. Co. RRG*, 188 Wn.2d 171, 182, 400 P.3d 1234, 1240 (2017). The Court noted as follows:

> While *Xia* may have suggested that the efficient proximate cause rule can theoretically apply in a broader-than-previously-thought range of insurance coverage cases, its actual holding was not remarkable: a homeowner's claim that a negligently installed water heater unexpectedly poisoned her was not excluded by the 'absolute pollution exclusion' in the homebuilder's CGL policy…*Xia* does not hold or suggest that the efficient proximate cause of an excluded intentional act can be negligence, or the negligent supervision of the intentional actor. Nor does any other case discussing the efficient proximate cause rule suggest that it can or should be applied in such a manner.

In addition to the finding that the law did not support the claim for coverage under *Xia*, the Court noted that the Complaint does not allege that Mrs. Wolk's negligence caused the sexual abuse or that she knew or should have known that it would occur in the future. The Court also rejected the allegation that the negligent conduct caused an injury separate from sexual abuse. Thus, the case was distinguishable from prior cases finding potential coverage for separate injuries caused by negligent acts versus intentional acts.

The *Wolk* case is significant for its rejection of the application of the efficient proximate cause rule under *Xia* to a negligence-based claim that was pled with intentional tort claims for sexual abuse. The holding is also significant that the Court found no coverage because no "occurrence" was alleged and did not need to rely on the intentional act and sexual abuse exclusions, though it found that those exclusions applied as well. This decision provides important guidance on coverage issues regarding sexual abuse claims that have become increasingly common in recent years.

WILLIAMS KASTNER
INSURANCE TEAM

For over eighty years Williams Kastner attorneys have represented clients in the insurance industry, including primary and excess insurers, reinsurers, self-insurers, agents, brokers, and insurance pools. Our attorneys have advised clients on regulatory and claim handling issues, and have assisted insurers in countless claims from the claim investigation through trial on cases involving coverage and bad faith claims. Please feel free to contact us if you have any questions regarding insurance law in Washington, Oregon or Alaska.

ELIOT HARRIS

OFFICE
(206) 233-2977

EMAIL
eharris@williamskastner.com

JERRY EDMONDS

OFFICE
(206) 628-6639

EMAIL
jedmonds@williamskastner.com

THOMAS PED

OFFICE
(503) 944-6988

EMAIL
tped@williamskastner.com

MEREDITH DISHAW

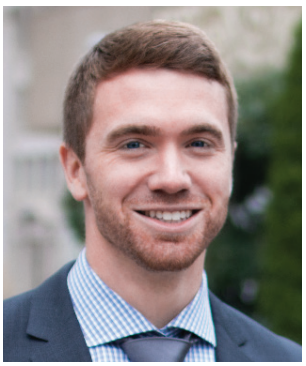
OFFICE
(206) 628-6658

EMAIL
mdishaw@williamskastner.com

THERESA RAVA

OFFICE
(206) 628-2418

EMAIL
trava@williamskastner.com



SEAN JAMES

OFFICE
(206) 233-2989

EMAIL
sjames@williamskastner.com