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NORTHWEST INSURANCE LAW

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TABLE OF CONTENTS

2 ALASKA SUPREME COURT FINDS MOTOR VEHICLE ACCIDENT CLAIMANT WAS NOT "OCCUPYING" INSURED'S VEHICLE TO SEEK UIM COVERAGE UNDER INSURED'S POLICY

4 WASHINGTON FEDERAL COURT REJECTS INSURANCE FAIR CONDUCT ACT CLAIM ABSENT EVIDENCE OF UNREASONABLE DENIAL OF COVERAGE

6 WASHINGTON FEDERAL COURT FINDS NO BAD FAITH FOR INSURER'S FAILURE TO RESPOND TO ROOFER'S TENDER WHEN INSURED CANNOT SHOW HARM

ALASKA SUPREME COURT FINDS MOTOR VEHICLE ACCIDENT CLAIMANT WAS NOT "OCCUPYING" INSURED'S VEHICLE TO SEEK UIM COVERAGE UNDER INSURED'S POLICY

Many automobile insurance policies provide underinsured motorist (UIM) coverage to the named insured, as well as others that are "occupying" an insured automobile during an accident. The interpretation of what circumstances constitute occupancy of an insured automobile by a person that is not otherwise an insured under the policy is an issue regularly debated between claimants and insurers throughout the country. In *Hahn v. Geico Choice Ins. Co.*, 2018 Alas. Lexis 62 (2018), the Alaska Supreme Court weighed in on this issue and held that a person hit by an insured automobile, who landed momentarily on the hood, windshield, and roof of the insured automobile before coming to rest on the street was not "occupying" the insured vehicle for purposes of UIM coverage.

In *Hahn,* the claimant was allegedly sitting on his motorcycle at a stop light when he was struck from behind by the insured driving an insured automobile. The claimant was thrown backwards and landed on the insured automobile before landing on the street. He argued that he was entitled to UIM coverage from the insured's insurer (GEICO) because the insured did not have sufficient liability limits to cover his injuries and he was an occupant of the insured automobile because he landed on the car after the impact.

The policy provided UIM coverage up to $50,000 for "damages for bodily injury [and property damage], caused by an accident, which the insured is legally entitled to recover from the owner or operator of an uninsured motor vehicle, an underinsured motor vehicle, or a hit and run motor vehicle arising out of the ownership, maintenance or use of that vehicle." The UIM coverage is not available "until the limits of liability of all bodily injury and property damage liability bonds and policies that apply have been used up by payments, judgments or settlements." It defines "insured" as follows: "(a) you; (b) your relatives if residents of your household; (c) *any other person while occupying an insured auto*; (d) any person who is entitled to recover damages because of bodily injury sustained by an insured under (a), (b), and (c) above." [Emphasis added.] The GEICO policy then defines "occupying" to mean "in, upon, getting into or getting out of."

GEICO sued for a declaratory judgment that no UIM coverage was available. Hahn filed a counterclaim for a declaratory judgment that UIM coverage was available to him, and asserted third-party claims against the insured, seeking to join him as a necessary party and a real party in interest. The superior court concluded that it had subject matter jurisdiction, granted summary judgment and a declaratory judgment in GEICO's favor, and dismissed the third-party claims against the insured.

On appeal by the claimant, the Alaska Supreme Court affirmed and held that it had subject matter jurisdiction, the insured was not a proper party because the contractual relationship at issue in the declaratory judgment action was

insured, and GEICO, and that no UIM coverage was owed because the claimant was not "occupying" the insured automobile by landing on top of it after being struck from behind. On this last issue, the *Hahn* Court found that the claimant was not "upon" the insured automobile. Though the Court acknowledged that "the term "upon" read in isolation could describe [the claimant's] position during the crash... it would be error to 'consider a single term in isolation'" and that other policy provisions must be considered when interpreting the scope of coverage. The *Hahn* Court noted that "[t]he word 'occupying' must have some bearing on the meaning of the word that partially defines it ("upon") and that this word when used with "getting in" and "getting out of," implied a "prior relationship with the insured vehicle, thereby limiting the meaning of 'upon.'" Moreover, the Court concluded that a "reasonable insured would read all the terms of the policy in context, and [would] not assign undue weight to a single term."

The *Hahn* decision is indicative of the approach traditionally applied by Alaska Courts towards policy interpretation issues. By looking beyond the meaning of a single term in isolation, the *Hahn* Court decided the case by interpreting how the average insured would read the policy, and refused to adopt a hyper-technical interpretation as suggested by the claimant. This decision also offers helpful guidance for other jurisdictions when interpreting the scope of similar policy language in UIM disputes given the purpose for UIM coverage and why it is sometimes offered for non-named insureds that are riding in an insured automobile.

WASHINGTON FEDERAL COURT REJECTS INSURANCE FAIR CONDUCT ACT CLAIM ABSENT EVIDENCE OF UNREASONABLE DENIAL OF COVERAGE

In 2007, Washington voters passed Referendum 67, which gave rise to Washington's Insurance Fair Conduct Act ("IFCA"), codified in RCW 48.30 *et. seq*. Generally speaking, IFCA provides for a cause of action by a "first party claimant to a policy of insurance who is unreasonably denied a claim for coverage or payment of benefits by an insurer." RCW 48.30.015(1). The statute provides for an award of up to three times the actual damages caused by the unreasonable denial of coverage of payment, as well as attorney's fees. In the 11 years since IFCA was enacted, it has spawned a large amount of coverage litigation about what conduct is actionable.

One of the most significant decisions over the past 11 years came in *Perez-Crisantos v. State Farm Fire & Cas. Co.*, 187 Wn.2d 669, 389 P.3d 476, 482 (2017), where the Washington Supreme Court affirmed the general belief that no claim under IFCA is actionable without an unreasonable denial of coverage or benefits and that a mere regulatory violation of the applicable Washington Administrative Codes ("WACs") does not create an independent cause of action under IFCA. Though *Perez-Crisantos* weakened the ability of policyholders to prevai in IFCA claims, the boundaries of this decision are still being tested.

In *Clear Creek Ret. Plan II LLC v. Foremost Ins. Co. Grand Rapids Mich.*, 2018 U.S. Dist. LEXIS 131737 (Aug. 6, 2018), Judge Leighton in the United States District Court for the Western District of Washington held that the insurer did not unreasonably deny coverage, as a matter of law, and because of that, the insured's IFCA claim was subject to dismissal under the *Perez-Crisantos* rule. The *Clear Creek* case involved five mobile homes

that were owned by a company that was jointly owned by two individuals. Their relationship deteriorated and the two owners fought over disposition of the mobile homes. After one of the owners sold the mobile homes to a third party, the other owner filed a theft claim with the company's insurer under the theory that the selling owner has stolen the mobile homes because the company owned them, *i.e.* the selling owner did not own them personally when he sold them. The insurer denied coverage after determining that the loss was part of a business dispute and was not the result of theft. After the company subsequently provided the insurer with a letter it had sent to the mobile homes' purchaser, claiming that the mobile homes were stolen, the insurer stood by its coverage denial.

Two years later, the company sued for IFCA violations. Specifically, the company claimed that the insurer violated IFCA by not making a coverage determination within fifteen days, but taking five months to make a coverage decision. The company also alleged that the insurer failed to respond to its request for reconsideration of the coverage denial and failed to conduct a reasonable investigation before denying coverage. It argued that the coverage denial forced the company to declare bankruptcy, which caused damages beyond its policy limits.

The Court held that, even though the reasonableness of an insurer's denial is a question of fact, the denial in this case was reasonable as a matter of law. The Court noted that the selling owner had a 50% ownership of the company and a history of negotiating purchases on behalf of the company so that he had at least had an arguable claim to the mobile homes. It was also noted that the police report characterized the matter as a civil dispute, and not a crime. Additionally, the two owners had resolved all their claims against each other through subsequent civil litigation, and the homes' purchaser paid $100,000 to the company for the mobile homes, which as the Court noted, would be "unusual, to say the least, if they were stolen." The Court noted that because there was no unreasonable denial of coverage, the so-called technical violations of the WACs could not serve as a basis to support an IFCA claim under the *Perez-Crisantos* rule. Thus, the Court granted summary judgment to the insurer on the IFCA claim.

The *Clear Creek* decision is yet another decision showing that insurers can obtain summary judgment on IFCA and other extra-contractual claims in Washington upon a showing of reasonable conduct. While there have been many noteworthy decisions published in recent months about Washington Courts finding bad faith as a matter of law under certain circumstances, it bears noting that Washington courts will also adjudicate bad faith cases in favor of insurers given the right set of facts.

WASHINGTON FEDERAL COURT FINDS NO BAD FAITH FOR INSURER'S FAILURE TO RESPOND TO ROOFER'S TENDER WHEN INSURED CANNOT SHOW HARM

The United States District Court for the Western District of Washington recently held in *Diamond Constr., LLC v. Atl. Cas. Ins. Co.*, 2018 U.S. Dist. LEXIS 136335 (W.D. Wash., Aug. 14, 2018) that an insurance company's failure to respond to its insured's tender of defense did not constitute bad faith because the insured could not prove it was harmed.

In 2016, Bellevue Park Homeowners Association hired Diamond Construction, LLC to replace the roof on Bellevue Park Condominiums. The new roof assembly consisted of two layers—a base sheet followed by a torch-down membrane. By the end of the second day of work, the top membrane was not completed and rain was expected overnight. To prepare for the rain, the crew went over the seams with a roller and applied heat in some places. Despite these efforts, water leaked through the roof, damaging several units. During its inspection, Diamond found small tears in the base sheet that were created by the crew when they moved equipment and supplies over the roof the night before.

Diamond filed a claim for water damage with its insurer, Atlantic Casualty Insurance Company. Atlantic denied the claim under the policy's roofing endorsement because Diamond had not used a suitable rain cover and because the project used a membrane requiring heat for installation. Soon after Atlantic's denial, Bellevue Park filed a lawsuit against Diamond for damages caused by the rain.

Diamond tendered its defense of the Bellevue Park lawsuit to Atlantic. When Atlantic did not respond, Diamond filed this action, *Diamond Construction, LLC v. Atlantic Cas. Ins. Co.* It alleged Atlantic breached the terms of the policy, acted in bad faith, and violated the Consumer Protection Act (CPA). Atlantic filed a motion for summary judgment, asserting three policy exclusions—the rain cover exclusion, the heat application exclusion, and the ongoing operations exclusion—excluded coverage. Atlantic also sought dismissal of the bad faith

and consumer protection claims if the court found Atlantic's denial was reasonable.

Despite Diamond's argument that the ongoing operations exclusion only excluded damage for work that is actively being performed, the Court held there was no coverage under the exclusion because the installation of the roof was not complete when water leaked into the building. Therefore, the damage arose directly from Diamond's operations.

Under Washington law, claims of bad faith and violation of the CPA are independent of an insurer's duty to defend. *St. Paul Fire & Marine Ins. Co. v. Onvia, Inc.,* 165 Wn.2d 122, 196 P.3d 664 (2008). Therefore, an insurer can be liable for bad faith handling of a claim regardless of whether its coverage decision is ultimately correct. *Coventry Assoc. v. Am. States Ins. Co.*, 136 Wn.2d 269, 961 P.2d 933 (1998). Thus, Diamond argued that Atlantic acted in bad faith when it failed to respond to Diamond's tender because insurers have a statutory duty to "acknowledge and act reasonably promptly upon communications with respect to claims arising under insurance policies." WAC 284-30-330(2). Atlantic argued it did not act in bad faith because it had no record of receiving Diamond's tender. Atlantic also argued Diamond could not prove bad faith or violation of the CPA because it was not harmed.

The court agreed. According to the court, although Diamond had to hire an attorney, it did so to defend it against the Bellevue Park lawsuit because Atlantic denied coverage, not because Atlantic failed to respond to the tender. Even if Atlantic had responded, Diamond would have been required to hire an attorney because the court found Atlantic's denial was reasonable. Since Diamond could not prove it was harmed, there was no bad faith.

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.

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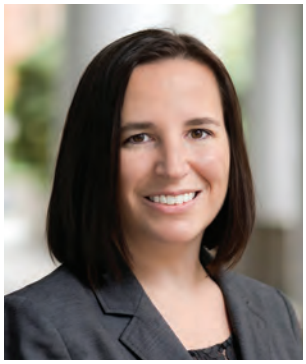

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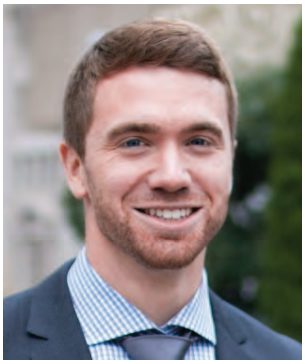

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