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NORTHWEST INSURANCE LAW

QUARTERLY NEWSLETTER WINTER 2018

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WASHINGTON FEDERAL COURT FINDS THAT STATUTORY NOTICE OF INTENT TO SUE DOES NOT CONSTITUTE "CLAIM" UNDER CLAIMS-MADE POLICY

by: Eliot M. Harris

Liability insurance policies can provide coverage on a "claims-made" basis, meaning it generally only covers claims that are first made against the insured during the policy period. A common coverage issue that arises under these policies is when was the "claim" first made, and whether a pre-suit notice to the insured constitutes a "claim." Though a Washington court had previously held in *National Union Fire Insurance Co. v. Zillow, Inc.*, No. C16-1461JLR, 2017 WL 1354147 (W.D. Wash. Apr. 13, 2017) that a pre-suit demand to remove certain copyrighted images constituted a "claim" under a claims-made policy, no Washington court had previously decided whether a statutory pre-suit notice of an intent to file suit constituted a "claim."

In *Tree Top v. Starr Indem. & Liab. Co.*, 2017 U.S. Dist. LEXIS 197375 (Nov. 21, 2017), a Washington federal judge held that a statutory notice of intent to sue does not constitute a "claim" against the insured under a claims-made policy. In this case, Tree Top received a notice of intent to sue from the Earth Liberation Front (ELF) before the policy's inception date. The notice was brought under Prop. 65, a California law aimed at reducing the public's exposure to chemicals in consumer products. It stated that "ELF intends to bring suit in the public interest against (Tree Top) 60 days hereafter to correct the violation occasioned by the failure to warn all customers of the exposure to lead." The notice did not contain any settlement offers or other demands for relief. ELF later filed suit against Tree Top in California after the policy incepted.

Tree Top successfully defended the claim and submitted a claim for losses associated with ELF's suit to Starr under the claims-made policy. Starr denied coverage because the notice was a "claim" that was first made prior to the policy's inception. The policy defines "claim" as a "written demand for monetary, non-monetary or injunctive relief made against Tree Top" or a "judicial proceeding commenced against Tree Top which is commenced by…service of a complaint…"

The Court disagreed with Starr, and held that the Prop. 65 notice was not a "claim" under the policy, and that ELF's claim was not first made against Tree Top until it filed suit. The Court rejected the insurer's argument that the notice was a "demand" (an undefined term in the policy) because Washington courts require a "demand" to include an assertion of a right coupled with a request for compliance therewith. Because the notice did not request or require some action by Tree Top, but merely provided notice of ELF's allegations and its intent to bring a future suit for such violations, it was not a "demand" for relief.

The Court also rejected Starr's argument that the notice functioned as an "implicit" demand to comply with Prop. 65's labeling requirements. While noting that courts from other jurisdictions have held that a notice need not actually demand relief to constitute a "claim" under a claims-made policy, it distinguished this case because it involved substantially different policy language and/or communications. The Court also noted that the dispute in this case is not whether Tree Top had notice of a potential claim, but whether the Prop. 65 notice constituted a claim as defined under the policy.

The Court stated that the insurer's strongest argument was not in the language of the contract, but in the seemingly unintuitive result that where the insured had notice of a potential future claim for damages against it, "it would, indeed, be anomalous to hold that a claim is, nevertheless, not made until a suit is actually filed." However, given the specific language in the policy, the Court found coverage exists because the policy at issue does not contain clarifying language that any communication expressing an intent to hold the insured liable for an alleged wrongdoing would be considered a claim. The Court stated simply that the policy defines a "claim" as a demand for relief, and the notice in this case contains no such demand.

It is notable that the Court did not address either "known loss" or "fortuity" principles of insurance law, which apparently were (or will be) addressed separately in this case. Nevertheless, this case provides guidance on how Washington Court's will interpret the definition of "claim" when determining whether pre-suit communications with the insured constitute a "demand" under the policy.

OREGON COURT OF APPEALS RULES THAT INSURER OWES DUTY TO DEFEND GENERAL CONTRACTOR AS ADDITIONAL INSURED UNDER SUBCONTRACTOR'S LIABILITY POLICY

by: Reshvin P. Sidhu

In a recent decision by the Oregon Court of Appeals, the Court found that an insurer owed a duty to defend a general contractor as an additional insured to a subcontractor's insurance policy. While the result, by itself, is not entirely surprising, the Court's analysis of the certain issues provides some clarity as to the scope of additional-insured coverage owed to a general contractor under a subcontractor's liability policy in Oregon.

The case of *Security National Insurance Company v. Sunset Presbyterian Church*, 2017 Ore. App. LEXIS 1501 arises from a construction defect claim for water intrusion at a church owned by Sunset Presbyterian ("Sunset") against its general contractor ("Andersen"). Andersen hired a masonry subcontractor ("B&B"), which had a general liability policy with SNIC during the relevant time period. B&B was contractually required to add Andersen as an additional insured to the SNIC policy. After Sunset discovered the alleged defects, it sued Andersen and alleged that, among other things, the architectural stone was to blame for some of the damages. In turn, Andersen brought third-party claims against its sub-contractors, including B&B. Andersen tendered the defense of the Sunset litigation to SNIC, which denied defense coverage. Sunset and Andersen ultimately settled which included an assignment of rights by Andersen to Sunset of all claims against the sub-contractors. Sunset later settled Andersen's assigned claims with all sub-contractors, except B&B.

The trial court in the underlying case later determined that B&B had a contractual duty to defend Andersen but that the contract was partially void because the indemnity provision in the subcontract violated Oregon's anti-indemnity statute, ORS 30.140, because it was overly broad. Moreover, because Andersen failed to offer proof of B&B's portion of Andersen's defense costs, the trial court subsequently concluded that B&B owed zero dollars for Andersen's defense costs under the subcontract.

In the coverage case, SNIC sought a declaration that it had no duty to defend Andersen. The trial court concluded that while SNIC owed a duty to defend, it owed nothing to Sunset because the amount owed for defense had been determined to be zero dollars in the underlying case. On appeal, SNIC conceded that the trial court erred by deciding the insurer's duty to defend based on the court's underlying decision on a failure of proof in the contract claim between Andersen and B&B. However, SNIC argued that it was still entitled to a finding of no duty to defend for three reasons.

First, SNIC argued that the additional-insured provision was void under ORS 30.140 because it was overly broad. The Court disagreed, stating that it could still be enforced "to the extent it does not contravene ORS 30.140." The Court concluded that "the unlawful potential of such an insurance or indemnity provision can be excised, while the lawful portion can be enforced." As a result, even though the insurance provision was overly broad in violation of ORS 30.140, it could still be enforceable to the extent permitted by the statute.

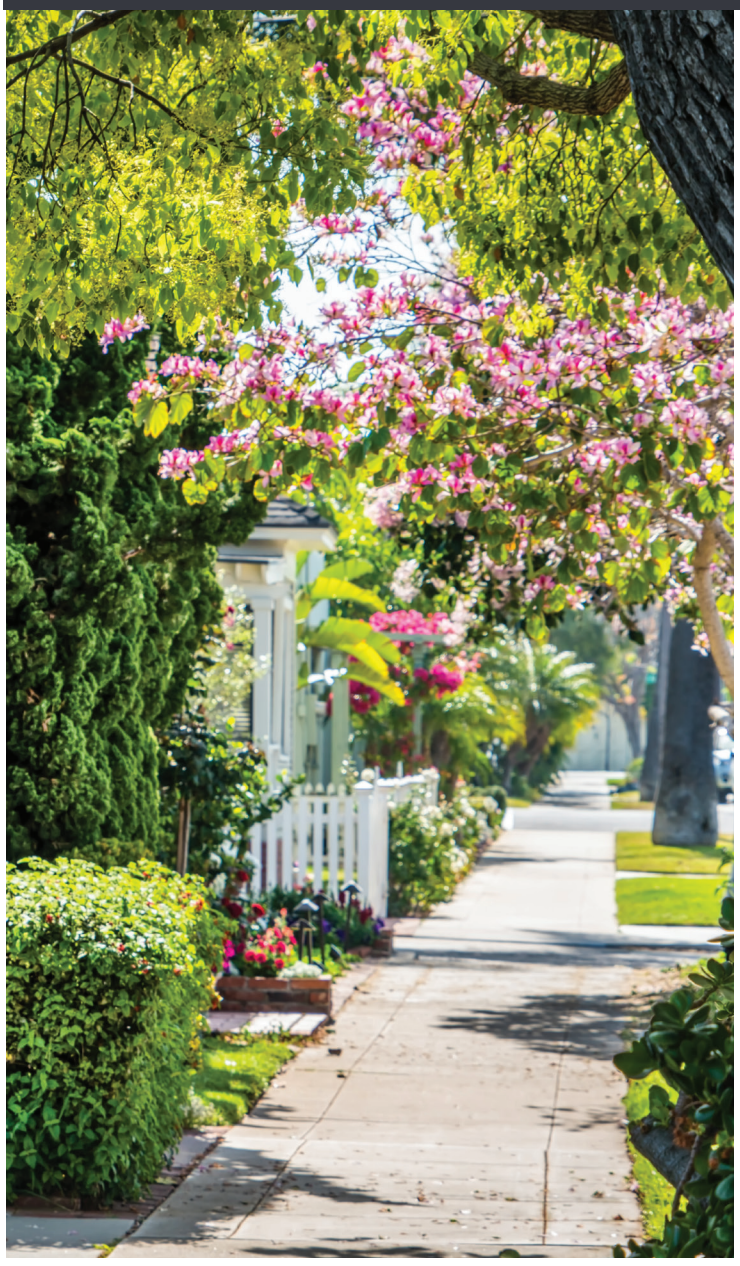
Secondly, SNIC argued that the additional-insured endorsement affords no duty to defend because the underlying complaint simply failed to allege Andersen's liability for B&B's work. SNIC noted that the complaint did not mention B&B and argued that it only alleged Andersen's liability for its own negligence. The Court rejected this argument by finding that "the sub-contractor need not be identified by name nor must the general contractor's liability be expressly attributed" to find that the complaint arises out of a subcontractor's work. Citing to Oregon case law on a broad duty to defend, the Court found the complaint sufficient to trigger a duty to defend because it mentioned problems with stone masonry, which B&B was responsible for.

Third, SNIC argued that Andersen's liability did not arise during B&B's "on-going operations." The Court held that it need not interpret the term because the issue is whether there is a duty to defend, not indemnify. Because the complaint alleged the possibility that Andersen could be liable for damage from defective work during B&B's "on-going operations," it was sufficient to trigger SNIC's duty to defend.

It is notable that the Court was also asked to rule on the scope of SNIC's duty to defend. Specifically, Sunset asked the Court to find that SNIC's duty to defend should not be limited to defense costs from Andersen's potential liability for B&B's negligence, but for all of Andersen's defense costs. On this issue, the Court held that because ORS 30.140 extended to insurance policies as it did to indemnity contracts, ORS 30.140 was the exception to the general rule that an insurer with coverage of one claim must defend all claims in a complaint against its insured. Therefore, B&B was obligated to provide a defense to Andersen arising from B&B's work, but its duty to defend did not extend to defend claims not arising from B&B's work.

Thus, the Court ruled that the underlying complaint triggered a duty by SNIC to defend Andersen; however, SNIC was not required to defend *all* claims against Andersen. The Court's ruling is extremely important because it provides clarity on the existence and scope of a subcontractor's insurer's duty to provide defense coverage to a general contractor as an additional-insured.

OREGON FEDERAL COURT FINDS HOA MEMBERS LACK STANDING TO BRING DIRECT ACTION AGAINST INSURER UNDER HOA'S INSURANCE POLICY BECAUSE THEY DO NOT QUALIFY AS INTENDED THIRD-PARTY BENEFICIARIES



by: Sean T. James

Recently, the U.S. Federal District Court for the District of Oregon had the opportunity to decide whether members of a Homeowners Association ("HOA") qualify as intended third-party beneficiaries of the HOA's insurance policy. In *Stanton v. QBE Ins. Corp.*, 2017 U.S. Dist. LEXIS 185988 (Nov. 9, 2017), the Court held that the owners of a townhome, who were members of the community's HOA, lacked standing to bring suit against the HOA's insurer because they were not named insureds and did not otherwise qualify as intended third-party beneficiaries of the policy.

This case arises from a fire loss at the Stanton's townhome. The fire allegedly started in the garage of an adjoining unit and damaged the Statons' unit. The HOA filed a claim under its homeowners association policy from QBE Insurance Corporation (the "Insurer"). The Insurer retained a third-party administrator ("TPA"), which made all payments directly to the HOA. In turn, the HOA choose the contractors to repair the damage. A dispute arose as to the cost of repairs and whether the work the contractors performed was sufficient to restore their townhome to its pre-loss condition. The Stantons subsequently filed a direct action against the Insurer alleging that they are third-party beneficiaries to the policy. The Insurer filed for summary judgment and argued that the Stantons lacked standing because they are merely incidental beneficiaries of the policy. The Insurer argued that it and the HOA never intended to confer a direct right to the individual owners to enforce the policy.

To support their argument that they are intended beneficiaries to the policy, the Stantons cited the "loss payment" provision of the policy, which provides that the Insurer "will not pay for more than your financial interest in the covered property" and that the Insurer "may adjust losses with the owners of lost or damaged property if other than you." The "loss payment" provision also provided that if the insurer paid "the owners, such payments will satisfy your claims against us for the owners' property" and that the Insurer "will not pay the owners more than their financial interest in the covered property." The

Stantons argued this language in the "loss payment" provision provided them with a right of enforcement.

The Court was unpersuaded by this argument for several reasons. First, the Court noted that the policy states that the HOA is the "Named Insured," and the terms "you" and "your" refer to the Named Insured. Second, Condition E of the policy states that "[n]o person…other than you [Named Insured]…will benefit from this insurance." Third, the policy also states that "[y]our rights and duties under this policy may not be transferred without [the Insurer's] written consent." Lastly, the Court stated that, although the "Loss Payment" provision allows the Insurer to negotiate directly with unit owners, it does not show an intent to provide the unit owners with the right to directly enforce the policy. The Court held that the "loss payment" provision simply gives the Insurer the right to choose to negotiate with the HOA or the unit owner, and does not give the unit owner the right to enforce the policy.

It is notable that the Stantons also cited the HOA Bylaws, which required the HOA to maintain insurance "[f]or the benefit of the Association and the Owners," and stated that "[s]uch policy or policies shall name the Association, for the use and benefit of the individual Lot Owners, as insured, and shall provide for loss payable in favor of the Association, as trustee for each Owner…" However, a separate section of the Bylaws provided that either the HOA or a named trustee "shall have exclusive authority to negotiate losses under any property…policy." The Court found that because the HOA had not appointed an insurance trustee, the HOA retained exclusive authority to negotiate loss under the policy according to the Bylaws.

This decision is important because it supports the proposition that Oregon Courts allow direct actions against an insurer only by an insured under the policy. Accordingly, purported third-party beneficiaries to a policy may not bring suit against an insurer absent a clearly stated intent in the policy to confer such rights. Even though the policy in this case was intended to benefit the HOA's individual members, the Court found that it does not automatically give them the right to enforce the policy.

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INSURANCE TEAM

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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

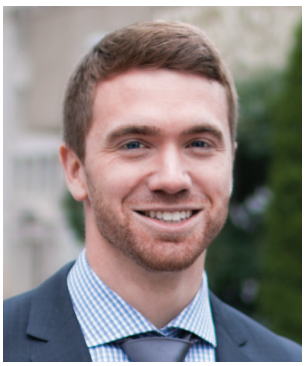
OFFICE
(206) 628-6658

EMAIL
mdishaw@williamskastner.com

RESHVIN SIDHU

OFFICE
(206) 233-2877

EMAIL
rsidhu@williamskastner.com



SEAN JAMES

OFFICE
(206) 233-2989

EMAIL
sjames@williamskastner.com