WILLIAMS KASTNER

NORTHWEST INSURANCE LAW

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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 and affiliated offices in 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

BRIEF OVERVIEW OF POTENTIAL COVERAGE ISSUES IN CLAIM RELATED TO THE CORONAVIRUS PANDEMIC

The rapid spread of coronavirus in the United States is causing businesses to shut their doors and people to remain at home as much as possible. In the midst of this truly unprecedented event in recent history, insurers should be prepared for a dramatic increase in claims across virtually every line of coverage. While the specific nature of these claims will take months, if not years, to materialize, Williams Kastner is analyzing the potential breath of claims that will likely arise. Below are some areas that we can expect to see claims in the not-too-distant future related to the coronavirus outbreak.

Commercial General Liability

Liability claims against businesses related to personal exposure to the coronavirus are already beginning to emerge. Princess Cruise Lines Ltd. was sued for gross negligence by passengers claiming it failed to take precautions to prevent a coronavirus outbreak on one of its ships. In claims made by customers, a number of issues could arise under "Coverage A," such as whether the claim arises from an "accident" or whether the insured deliberately failed to implement safety measures to limit the spread of the virus.

There is a potential for Coverage B claims for alleged false detention and imprisonment if a person alleges they were improperly detained and quarantined. We may also see a rise of slander or libel claims for alleged false publication (oral or written) of information about another person/business regarding exposure or spread of the coronavirus.

There are also a variety of exclusions that could apply, such as those that exclude bodily injury claims from exposure to a "virus," "contaminants," communicable disease," "hazardous qualities or characteristics of indoor air," or "other harmful materials." Like all claims, the applicability of certain exclusions depends on the circumstances of the individual claim. However, the unique nature of this situation could present a variety of scenarios that implicate coverage issues not seen before in CGL litigation.

For claims brought by employees for exposure to coronavirus at their jobsite, coverage may depend on whether the employee would be covered by worker compensation laws, which are in state of uncertainty depending on individual jurisdictions and the ongoing federal response to the pandemic.

Commercial Property Insurance - Business Income (Interruption)

Almost every business will be negatively impacted by the coronavirus outbreak in the short term. While some businesses may eventually recover lost profits, many will not. Many commercial property policies provide coverage for an insured's losses when it is forced to shut down abruptly either directly or because of supplier interruption. Most policies provide that this coverage applies when there is a "direct physical loss" to a property, either the insured's or their supplier's depending on the situation.

If a business is forced to close because of fear of the coronavirus, but there has been no documented cases of an infected employee or customer inside the business, and the business has not been mandated to close by some governmental authority (such as restaurants and bars in some areas), the direct physical loss requirement will likely not be met because the insured's building remains habitable. Whether a property is impaired if there is a documented cases of an infected employee or customer, or the business is forced to close by the government, it is more likely that a direct physical loss can be shown.

Many of the same exclusions mentioned above, such as property damage from viruses and other diseases, may apply as well. Again, the applicability of such policy language depends heavily on the individual circumstances of the claim.

One overlying issue for many of the claims related to the coronavirus will be whether a person was actually infected or not, and even if so, how that person became infected. If a claim arises from a fear of coronavirus, but it cannot be confirmed if the person actually had the coronavirus, it is possible that other policy language may apply, such as "bodily injury." What if a person contracted the coronavirus, yet never developed any symptoms? These are issues that will need to be addressed on a claim-by-claim basis.

Another factor that will arise in many coronavirus-related claims will be causation. For example, even if it can be shown that a person was infected at some point in time, how can we establish when and how the infection occurred? Given the causation issues that arise in mass tort litigation, we may see courts apply novel theories of causation to such claims, which could trigger both coverage and exclusionary language.

WASHINGTON COURT OF APPEALS FINDS INSURER BREACHED DUTY TO DEFEND INSURED IN LAWSUIT FILED BY NEIGHBOR FOR USE OF FIREARMS

It is widely believed that Washington Courts have adopted a broad standard for deciding when an insurer owes a duty to defend an insured under a liability policy. The latest decision in Washington on this issue came on February 19, 2020, when Division II of the Washington Court of Appeals reversed a lower court finding of no coverage in favor of homeowners insurer, USAA Casualty Insurance Company (USAA). On appeal, the Court found a duty to defend existed and found that USAA committed bad faith by refusing to defend.

The case of *Webb v. USAA*, 2020 WL 812137 (Wash. Ct. App., Div. 2, February 19, 2020), arose from a dispute between neighbors. The plaintiffs in the underlying lawsuit alleged that his neighbor (Webbs) carelessly and recklessly caused bullets, bullet fragments, and/or ricocheted projectiles to enter his property, which cut through the plaintiffs' trees and landed in the bed of his truck. The plaintiffs alleged that the Webbs refused to install a back stop and/or other safety measures after they were advised to do so by sheriff deputies, and that the Webbs continued to prevent gun fire and related particles from entering onto the plaintiffs' property. The plaintiffs sued the Webbs for: (1) trespass, (2) assault, (3) violation of Kitsap County Code (KCC) 10.25.020, (4) intentional infliction of emotional distress, (5) negligent infliction of emotional distress, (6) nuisance, and (7) injunction. Notably, the plaintiffs sought a decree requiring the Webbs to "compensate Plaintiffs for their actual damage" and requested punitive damages and temporary and permanent injunctions.

The USAA homeowners policy issued to the Webbs defined "personal injury" to mean several listed offenses, including "wrongful entry" and "[i]nvasion of rights of privacy," and noted that "'personal injury' only applies when the conduct is not malicious or criminal in nature." The policy also defined "occurrence" as an "accident, including continuous or repeated exposure to substantially the same generally harmful conditions," and "an event or series of events, including injurious exposure to conditions, proximately caused by an act or omission of any "insured", which results, during the policy period, in "personal injury", neither expected nor intended from the standpoint of the "insured." The policy excluded personal injury "which is expected or intended by the 'insured'" and caused by criminal conduct.

USAA denied defense coverage "because some of the allegations in the complaint do not meet the definition of an occurrence," and because "intentional acts and Punitive damages are excluded from the policy." After the Webbs claimed that USAA had wrongfully denied coverage, and indicated that they would be filing a lawsuit against USAA for coverage, USAA sent a revised denial letter that provided further explanation of the basis for the denial of coverage. The Webbs subsequently filed suit against USAA for coverage and various extracontractual claims.

The trial court granted summary judgment to USAA on coverage and dismissed the extracontractual claims. However, the Court of Appeals reversed and held that: (1) the trespass and nuisance claims conceivably constituted "personal injury" under the policy; (2) the complaint conceivably requested damages for all claims, including nuisance; (3) the complaint alleged conduct that conceivably constituted an "occurrence" as defined in the policy; (4) the policy exclusion for personal injury "intended or expected by the insured" conceivably did not preclude the duty to defend; and (5) the policy's criminal conduct provision conceivably did not preclude the duty to defend because the complaint did not clearly allege conduct that was criminal in nature. The Court of Appeals also reversed the dismissal of the extracontractual claims, and found that USAA had committed bad faith, and violated Washington's Consumer Protection Act (CPA) and Insurance Fair Conduct Act (IFCA).

The *Webb* Court found that the claims for trespass and nuisance were conceivably covered under the policy's definition of "personal injury" because the policy's definition of "personal injury" included wrongful entry. The Court found that because trespass and nuisance were "analogous" to wrongful entry, trespass and nuisance satisfied the definition of "personal injury." The Court rejected USAA's argument that the phrase "means" before the list of enumerated offenses that included wrongful entry limits the definition of "personal injury" to the specifically enumerated offenses, and does not include offenses that are merely equivalent to one of those enumerated offenses.

The *Webb* Court also found that the complaint alleged that the personal injury was caused by an "occurrence" and rejected USAA's argument that it was not covered because it was caused by the Webbs' deliberate, nonaccidental shooting of guns. The Court relied on the second part of the "occurrence" definition—"An event or series of events, including injurious exposure to conditions, proximately caused by an act or omission of any 'insured', which results, during the policy period, in 'personal injury', neither expected nor intended from the standpoint of the 'insured'"—to find that no "accident" was required.

The *Webb* Court also rejected the application of the expected/intended exclusion by finding that the trespass and nuisance was not "expected or intended" from the Webbs' standpoint because the analysis is whether the insured expected or intended personal injury, not whether the insured expected or intended the conduct giving rise to the persona injury. The Court found that a subjective analysis was required based on language from "the standpoint of the 'insured'." Because the complaint did not clearly allege that the Webbs expected or intended that their target shooting would cause a trespass or a nuisance, and that the "bullets were either directed at Plaintiffs' property or were the result of ricochet," these allegations did not state that the Webbs subjectively expected or intended that their shooting would cause personal injury to the plaintiffs.

The *Webb* Court also found that the criminal act exclusion did not apply because the conduct did not fall under the local code that prohibits the discharge of firearms in the unincorporated areas of the county "[t]owards any building occupied by people or domestic animals...where the point of discharge is within five hundred yards of such building." While the complaint alleged that the plaintiff's property was within 500 yards of the Webbs' property, it did contain any allegations about the distance between the point of discharge and an occupied building. Therefore, the Court held that it was not clear from the face of the complaint that the criminal conduct provision precluded coverage. The Court also noted that the complaint did not specifically allege violation of a criminal statute, nor allege facts sufficient to establish a violation.

Lastly, the *Webb* Court found that USAA acted in bad faith and violated the CPA and IFCA by denying a defense to the Webbs. While noting well-settled case law that an insurer is not automatically liable for bad faith if it wrongfully denies a duty to defend, the Court found that USAA did not have a legitimate basis for denying coverage to the Webbs. The Court found that USAA had no reasonable basis to believe that the nuisance and trespass claims did not fall within the definition of wrongful entry under the definition of "personal injury." The Court also found that USAA relied on the wrong definition of "occurrence" by denying defense coverage because no accident was alleged. The Court further found that, despite the debatable question of whether the intention/expected or criminal conduct exclusions applied, denying a duty to defend based on a questionable interpretation of case law can constitute bad faith as a matter of law.

It is unclear at this time if USAA will appeal to the Washington Supreme Court. While the *Webb* decision reinforced Washington Courts' broad interpretation of the duty to defend, it is another example of the potential risk associated with denying defense coverage. When in doubt about the existence of a duty to defend, insurers could seek advice from coverage counsel about defending under a reservation of rights and seeking a ruling on coverage in a separate declaratory judgment action.

WASHINGTON STATE COURT OF APPEALS FINDS THAT ONE-YEAR SUIT LIMITATION PROVISION DOES NOT APPLY TO CONDO ASSOCIATION'S CLAIM FOR PROPERTY DAMAGE FROM WATER INTRUSION

Over the past decade, Washington has seen a wave of first-party property damage claims for water intrusion by owners of residential multi-family buildings, both condo associations and apartment owners. These claims can take many forms, but typically involve a damage claim involving the building's exterior components from "wind-driven rain" that enters through the building's roof or exterior siding. Oftentimes, the insured will file a claim against multiple insurers that issued policies going back many, many years. One issue that often arises in these cases is whether the insured filed suit within the period provided in a policy's suit limitation provision. Another issue is whether any extracontractual claims for bad faith, and statutory violations of Washington's Consumer Protection Act (CPA) and Insurance Fair Conduct Act (IFCA) are also barred when an insured fails to satisfy the suit limitation provision.

The most recent case on these issues is *West Beach Condominium v. Commonwealth Ins. Co. of Am., 455 P.3d 1193* (Wash. Ct. App., 2020), in which the Court found that the insured's breach of the one-year suit limitation clause precluded a coverage claim for breach of contract, but did not bar the insured from maintaining CPA or IFCA claims. In *West Beach,* the insured was a condo association in Seattle with 84 residential units in 3 buildings that were constructed in the mid to late 1960s or early 1970s. In June 2015, the insured hired a consultant to evaluate the buildings' condition and perform an intrusive investigation. By September 2015, the consultant had reported water damage behind the exterior cladding and building envelope. The insured submitted a claim for insurance coverage shortly thereafter and provided a copy of the consultant's report. The insured also notified the insurers that it had filed a lawsuit to preserve claims that may become time barred.

Less than one year after receiving notice of the claim, the insurer agreed to enter into a tolling agreement with the insured, who dismissed its complaint without prejudice to allow the insurer to conduct an investigation. The insurer retained an engineering consultant to perform a visual inspection of the property. Afterwards, the insurer denied coverage on the basis that the insured had been experiencing water intrusion issues for at least 10 years prior to the claim and that the policies at issue contained a suit limitation provision, which required suit to be commenced at least 12 months after the "occurrence" giving rise to the claim.

The insurer contended that there was no coverage because the insured breached the suit limitation provision. The insurer also contended that the policies covered only direct physical loss or damage "commencing" or "occurring" during the policy periods, and that the alleged losses neither commenced nor occurred during the applicable policy periods. The insurer also alleged that the loss was not "fortuitous" and was caused by faulty construction or inadequate repairs, rust, corrosion, wear and tear, or gradual deterioration, among other reasons.

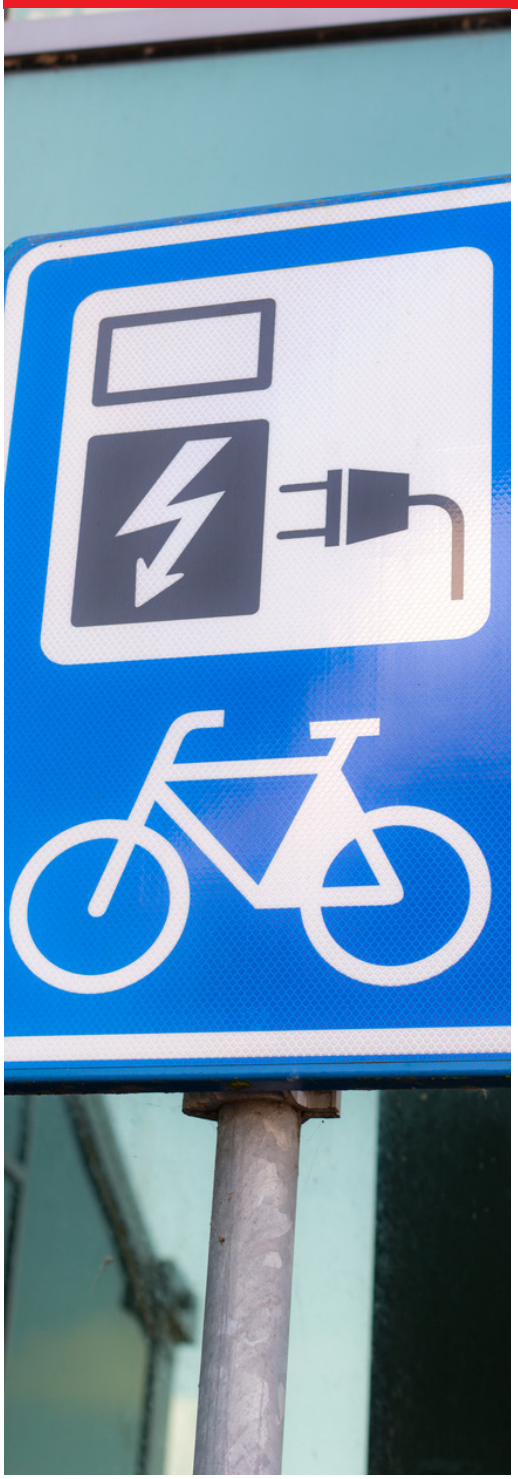
The insured refiled its complaint, alleging breach of contract, bad faith investigation, and violations of the CPA and IFCA. While the trial court concluded that the damage was potentially covered under the policies, the trial court dismissed the breach of contract claim under the suit limitation provision. In a separate ruling, the trial court found that the insured could not establish that the insurer's coverage denial was unreasonable given the breach of the suit limitation provision, and dismissed the bad faith, CPA, and IFCA claims. The insured appealed.

The Court of Appeals affirmed that the suit limitation provision barred the breach of contract claim. However, the Court disagreed that the suit limitation provision extinguishes coverage obligations if a lawsuit is not filed within a year of the loss. The *West Beach* Court made a distinction between a limitation of an insured's rights to recover under the insurance contract from an insurer's obligations to perform certain actions, such as analyze and investigate coverage. While conceding that the suit limitation provision does not bar extra-contractual claims, the insurer argued that its denial of coverage was reasonable as a matter of law because the insured's non-compliance with the suit limitation provision nullified all underlying insurance coverage.

The *West Beach* Court disagreed. Citing to Washington federal district courts' decisions on this issue, the Court found that the suit limitation provision is merely a contractual modification to the statute of limitations otherwise applicable to the insured's breach of contract claim. However, the *West Beach* Court found that the suit limitation provision does not negate coverage or extinguish the insurer's other obligations. The Court found that the trial court erred in concluding that the denial of coverage was reasonable as a matter of law, and reversed the dismissal of the CPA and IFCA claims because the insured has an independent statutory claim for failure to provide coverage. The *West Beach* Court also held that the insured could recover actual damages under the CPA and IFCA, which could include policy benefits that were unreasonably denied, subject to the policy's limits and other applicable terms and conditions. Thus, the Court found that a jury should decide whether the damage at the insured's property was caused by covered perils and, if so, whether the insurer unreasonably denied coverage and violated IFCA and the CPA by failing to pay for that covered damage.

While the underpinnings of this decision have existed in non-binding federal court decisions for a few years, the *West Beach* decision is the first time that a Washington appellate court has rendered a decision on this issue. This decision creates confusion for insurers about the application of a suit limitation provision for similar claims given its finding that this provision applied, but that the insured could potentially still recover under the policy. At this time, it is unclear if this decision will be appealed, and it will take some time before we understand the scope of its impact on the application of suit limitation provisions in future cases.

WASHINGTON FEDERAL COURT FINDS ELECTRONIC BICYCLE IS NOT A "MOTORIZED LAND VEHICLE" UNDER HOMEOWNERS AND LANDLORD DWELLING POLICIES



While the use of electronic bicycles and scooters has steadily grown over the past few years, the potential coverage issues raised by these new modes of transportation are still being evaluated. One issue that often arises in these cases is whether electronic bicycles and scooters should be considered a "vehicle," an "auto," or something else entirely. A Washington Federal District Court recently weighed on this issue.

In *Metropolitan Prop. and Cas. Ins. Co. v. Herrera*, 2019 WL 6035416 (W.D. Wash. Nov. 14, 2019), the Court was asked to decide if an electronic bicycle qualified as a "motorized land vehicle" under separate Homeowners and Landlord Dwelling Policies. Both policies excluded coverage for "bodily injury or property damage arising out of...the ownership...operation, or use...of a motorized land vehicle...operated by [the insured]," but neither policy defined the term "motorized land vehicle."

On October 30, 2018, the insured was riding an electronic bicycle when he collided with another cyclist, who was riding a traditional bicycle. The electronic bicycle at issue had pedals, a battery, and an electric motor. It had a twist throttle that sends power from the battery to the motor. The motor is attached to the front wheel and propels the bicycle forward. A rider could use the electronic bicycle in three ways: (1) with its battery power alone; (2) like a traditional bicycle with pedal power alone; (3) or with some battery power and some pedal power simultaneously. At the time of the accident, the insured was riding the electronic bicycle like a traditional bicycle, i.e., moving it exclusively by manually manipulating the pedals.

After the other cyclist brought a personal injury lawsuit against the insured, the insurer filed suit for declaratory judgment that the accident was not covered. On the parties' cross-motions for summary judgment, the *Herrera* Court noted that "motorized land vehicle" is not defined in the policies, and looked to a dictionary, which defined this term as "equipped with a motor" or "powered by a motor." Based on these definitions, the insurer argued that the electronic bicycle should be considered a motorized land vehicle because it had a motor. On the other hand, the insured argued that the Court should adopt the definition of "powered by a motor" to find coverage because the bicycle was not being "powered by" a motor at the time of the accident. The insured also argued that "motorized land vehicle" is ambiguous because it has more than one reasonable meaning.

The *Herrera* Court began by looking at Washington state law, which consistently treats electronic bicycles as traditional bicycles rather than other forms of motorized transit. The Court noted that state law explicitly excludes electronic bicycles from the definitions of both "motorcycle" and "motorized foot scooter." It also noted how, like traditional bicycles, and unlike motorcycles, electronic bicycles are exempt from the State's registration requirement, and do not require a driver's license to operate.

State law also consistently holds electronic bicycles to the same standards and regulations as traditional bicycles, rather than those of other forms of motorized vehicles. The Court found a "clear implication" from a review of state law that electronic bicycles are not motorized land vehicles, but instead are more akin to traditional bicycles.

As such, the Court found that the term "motorized land vehicle" was subject to two possible interpretations and is, therefore, ambiguous as the policy language could reasonably mean either a vehicle that simply has a motor or a vehicle that is powered by a motor. As such, the ambiguous policy language was construed in favor of the insured, and the Court found that the claim was covered.

Insurers should note this decision if its policy forms contain an exclusion for "motorized land vehicles" or similar language that is undefined. If the scope of coverage is not intended to cover electronic bicycles or scooters, insurers should consider amendments to define this term or add additional exclusions to clarify the coverage afforded.

WASHINGTON STATE INSURANCE COMMISSIONER ADOPTS NEW ADMINISTRATIVE RULE FOR INSURERS IN "ADVERSE NOTIFICATION" CORRESPONDENCE WITH INSUREDS

On January 16, 2020, the Washington State Office of the Insurance Commissioner adopted a new administrative rule, Washington Administrative Code 284-30-770. The full text of the rule is below. In summary, it applies to an "adverse notification" by "all insurers" to an insured under "all insurance policies" and requires an insurer to include information contained in section (3) for all such adverse notifications. The stated purpose of the rule is "[t]o increase consumer awareness of available agency assistance and to help consumers with their insurance questions by requiring contact information for the Office of the Insurance Commissioner on adverse notifications."

WAC 284-30-770
Adverse notification requirements.

(1) This section applies to all insurers, fraternal benefit societies, health carriers including disability, health maintenance organizations (HMOs), health care service contractors (HCSCs), and limited licensed carriers, and to all insurance policies, health plans, and insurance contracts.

(2) For the purpose of this section only the term "Adverse notification" means a notice, statement, or document from an insurer, fraternal benefit societies, health carriers including disability, HMOs, HCSCs, and limited licensed carriers to their insured, or enrollee, or both, describing one or more of the following:

(a) A claim denial;

(b) A final claim payment for less than the amount of the claim submitted. This does not include a claim that is paid less than the original amount to reflect the contracted health care provider's rate;

(c) An adverse benefit determination as defined in RCW 48.43.005(2); and

(d) Rescission, cancellation, termination or nonrenewal of a policy unless initiated by an insured. This does not apply to the end of a scheduled policy term or cancellation due to nonpayment of premium.

(3) On each adverse notification provided, the notice must include the following information:

> **"If you have questions or concerns about the actions of your insurance company or agent, or would like information on your rights to file an appeal, contact the Washington state Office of the Insurance Commissioner's consumer protection hotline at 1-800-562-6900 or visit www.insurance.wa.gov. The insurance commissioner protects and educates insurance consumers, advances the public interest, and provides fair and efficient regulation of the insurance industry."**

(4) The notice specified in subsection (3) of this section must be in the same font type and not less than the font size of the majority of the notification. This notice must appear on the first page, at the end of the adverse notification, or where this notice currently exists if adverse notices are already provided to insureds.

A few items to consider. First, the rule does not take effect until August 1, 2020, so insurers have some time to prepare. Second, insurers should consider in what contexts this rule will apply given the prescribed definition of "adverse notification." It appears potentially applicable to claims and underwriting practices depending on the particular circumstances. Third, insurers should consult with advisers about potential situations that this rule may apply to ensure compliance.

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 and Oregon.

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