WILLIAMS KASTNER

NORTHWEST INSURANCE LAW

QUARTERLY NEWSLETTER SUMMER 2022

Williams Kastner has been delivering legal and business advice to a broad mix of clients since our Seattle office opened in 1929. With more than 65 lawyers in Washington and Oregon, the firm provides national and regional capabilities that offer a client first approach with a practical sensibility only a local firm can provide. We are dedicated to advancing the strategic objectives of our clients by combining knowledge and experience with creativity both in and out of the courtroom. The firm culture is characterized by quality legal work, high-performance teamwork, diversity and the trusted relationships we form with our clients and the local community.

TABLE OF CONTENTS

2 WASHINGTON FEDERAL COURT FINDS NO LIABILITY COVERAGE UNDER HOMEOWNERS POLICY FOR CLAIMS AGAINST DOCTOR FOR ALLEGED INAPPROPRIATE CONDUCT DURING MEDICAL TREATMENT

3 WASHINGTON FEDERAL COURT FINDS INSURED'S DUTY TO "WORK IN CONJUNCTION" WITH INSURER IS UNAMBIGUOUS AND PROVIDES DUTY TO COOPERATE

5 OREGON FEDERAL COURT FINDS NO COVERAGE FOR WATER INTRUSION CLAIM BY CONDOMINIUM ASSOCIATION

7 INSURANCE TEAM

WASHINGTON FEDERAL COURT FINDS NO LIABILITY COVERAGE UNDER HOMEOWNERS POLICY FOR CLAIMS AGAINST DOCTOR FOR ALLEGED INAPPROPRIATE CONDUCT DURING MEDICAL TREATMENT

Insurance policies for homeowners typically contain personal liability coverage that is often not limited to acts occurring at the insured residence. This can lead to claims for liability arising well outside the normal confines of homeownership activities. However, as with most liability insurance policies, coverage is limited to accidents, and does not cover intentional acts. With the rise of sexual molestation claims over the past few decades, many insurers have specifically excluded coverage for such claims in homeowners insurance policies to make it explicit that coverage for such claims is not covered by such policies.

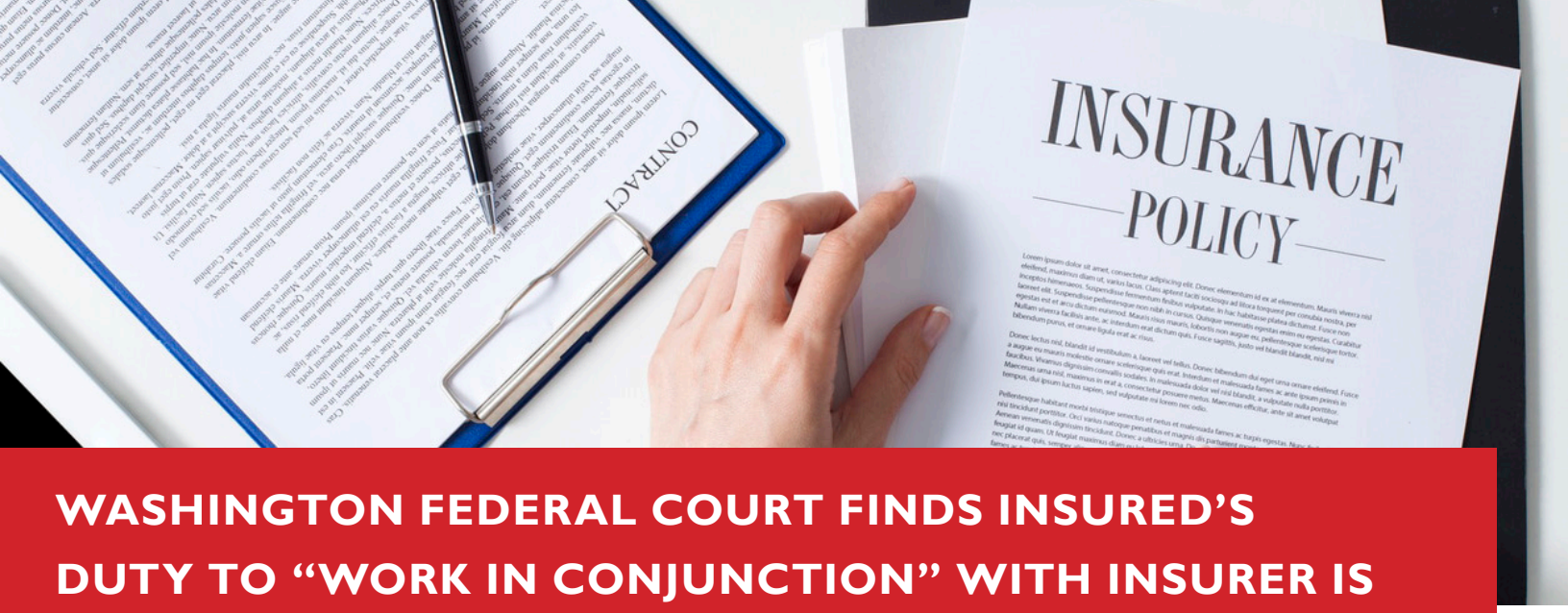
Generally, courts have enforced sexual molestation exclusions. A recent example came in *Commerce West Ins. Co. v. George S. Allen and Mary Roe,* No. 3:18-CV-05828-RJB, 2022 WL 766928 (W.D. Wash. Mar. 14, 2022), where a federal court in the Western District of Washington held that there was no coverage under an insured doctor's homeowner's policy for allegations of inappropriate conduct involving a patient. In *Allen*, a doctor's patent brought claims against the insured doctor for alleged inappropriate touching during an examination. The claimant filed a civil lawsuit against the doctor for sexual assault and battery, medical battery, negligence, and medical negligence. Significantly, the claimant alleged that the doctor "was acting in his individual and/or personal capacity and not as a medical professional" in an apparent effort to avoid any professional liability exclusion.

The doctor tendered the lawsuit to Commerce West, which was his homeowners insurer. The applicable policy provided both personal liability coverage and a personal umbrella liability endorsement, and contained exclusions for "bodily injury" that arises out of "actual, alleged, or threatened sexual molestation." The policy also excluded claims that results from the rendering or the failure to render a professional service, and activities related to the "business" of an "insured," as well as standard intentional acts exclusions. Commerce West filed a declaratory judgment action on the coverage issues, and later filed for summary judgment.

The Court granted Commerce West's motion for summary judgment based on the molestation exclusion, and found no possibility of liability coverage under the policy. In reaching its ruling, the Court noted that while the policy did not define "sexual molestation," this term is unambiguous. The Court found that Black's Law Dictionary defines "molestation" as "the act of making unwanted and indecent advances to or on someone, esp. for sexual gratification." The Court found that the allegations in the underlying lawsuit fell within this definition. The Court also rejected the claimant's argument that the sexual molestation exclusion required a finding of the doctor's intent. Instead, the Court held that the definition of sexual molestation does not depend on intent, but rather whether the advances are "unwanted" or "indecent."

The Court further found that the negligence claim against the doctor personally, and not in his capacity as a medical professional, did not survive the "business" and/or intentional acts exclusions. The Court held that the policy could not apply because the doctor "either intentionally deviated" from his standard medical practice by engaging in the inappropriate conduct "or acted negligently in rendering his professional service." Either way, the Policy does not provide coverage.

This case is another example of Washington Courts generally enforcing molestation exclusionary language, which supports the policy argument of not rewarding abusers with coverage for such wrongful acts. While advocates for victims argue that this also can remove of source of recovery for plaintiffs in such cases, various courts, including many of those in Washington, have tended to find that the best means of deterring such conduct in the future is enforcing such clear and unambiguous exclusions in liability policies to place the risk of personal liability on those that commit such acts.



WASHINGTON FEDERAL COURT FINDS INSURED'S DUTY TO "WORK IN CONJUNCTION" WITH INSURER IS UNAMBIGUOUS AND PROVIDES DUTY TO COOPERATE

Most, if not all, insurance policies contain one or more provisions that require an insured to cooperate with the insurer in various aspect of the investigation, defense, and settlement of a claim. Courts have generally found that the insured's level of participation primarily depends on the specific language of the policy. In this regard, one insured may be required to perform certain tasks that another insured may not be required to perform depending on the specifics of the policy.

This issue came up recently in the case of *United States Fire Ins. Co. v. Icicle Seafoods, Inc.*, 2021 WL 5415306 (W.D. Wash. Nov. 19, 2021), where the Court was asked to determine the scope of the insured's duty to cooperate under a policy that required the insured to "to work in conjunction with the insurer in determining timing, preparation and man power capabilities of using other available insured vessels to help mitigate the overall loss." In *Icicle Seafoods*, the insured made a claim for Loss of Hire ("LOH") damages as a result of engine damage on a fishing vessel. The insurer offered approximately $997,000 while the insured claimed approximately $4 million in damages. The insurer filed for declaratory judgment on the amount of actual loss of net earnings based on the language of the policy.

The insurer moved for summary judgment on the insured's counterclaims for extra-contractual liability for bad faith among other causes of action. The insurer argued that the insured failed to provide information in response to several requests, such as financial information, purchasing and sale records, operations schedules, and mitigation of damages. The insured argued that the policy's clause that required it to "work in conjunction" with the insurer to "help mitigate the "overall loss" was not a cooperation clause but a mitigation of damages clause. The Court found that the insured owed a duty to cooperate with the insurer in determining the capacity of other vessels to mitigate the overall loss, which necessitated a duty to communicate certain information. The Court found that such a duty to communicate amounted to a duty to cooperate.

Having determined that the policy contained an express corporation clause requiring the insured to cooperate with the insurer, the court addressed whether the insured had breached this clause. The insured first argued that there were factual disputes as to whether it substantially complied with the insurer's requests for information and documents. The Court rejected this argument and held that whether the documents the insured provided were "sufficient to opine" upon was not the inquiry; rather, the question was whether the insured responded to the insurer's requests. The Court found the insured's argument irrelevant in this regard.

The insured next argued that it had produced "troves of documents" and "access to the same financial data that its forensic accountant relied on" prior to the litigation. However, the Court found that the insured did not cite to any evidence in support of this assertion, nor did this statement indicate which documents were produced and how they substantially complied with insurer's requests.

Lastly, the insured argued that its duty to cooperate was discharged by the insurer's attempt to conceal an expert report drafted by an independent fishing expert. However, the Court found that any such failure could not relieve the insured of its duty to cooperate because it occurred after the insured had already failed to respond to the insurer's requests for information and documents.

This case is a positive development for insurers as it interprets specifically-worded clauses that require an insured to "work in conjunction" with their insurer to "help mitigate the overall loss" as cooperation clauses, which, if breached, potentially alleviate the insurer of its obligation to provide coverage. It also serves as a reminder to insureds that they should carefully read the conditions section of their policy in order to have a full and complete understanding of their duties in the event of a loss.

OREGON FEDERAL COURT FINDS NO COVERAGE FOR WATER INTRUSION CLAIM BY CONDOMINIUM ASSOCIATION

For many years, owners of multi-family residential properties have filed claims for property damage purportedly caused by water intrusion in the building's exterior walls and underlying structural components. Oftentimes, the policyholder will make a claim under policies stretching back many decades sometimes to the date of original construction under the theory that water intrusion occurred every year and caused damage to the property. Insurers, hesitant to transform property insurance into some sort of guarantee or performance bond, have largely pushed back on the viability of such claims. Such disputes have generated numerous lawsuit in many jurisdictions regarding interpretation of the policy language and state law regarding theories of causation for such claims.

One such case arose recently in *Oregon, Silver Ridge Homeowners' Ass'n, Inc. v. State Farm Fire & Cas. Co.*, No. 3:19-CV-01218-YY, 2022 WL 787937 (D. Or. Mar. 15, 2022), where the Federal District Court was asked to decide the limitations of such coverage under Oregon's rules regarding proximate cause of loss. In *Silver Ridge,* the insured was a condominium association at a sixty-four unit building in Portland, OR. The insured retained a consultant to perform a building envelope inspection in 2012. The resulting report detailed numerous problems with the exterior wall assemblies, the windows, and roof. In response to the report, the insured hired a contractor to remove and replace the wood shingle paneling at all of the townhomes, and repair decay as it was discovered at a cost of nearly $500,000 to plaintiff. In 2018, the insured had another building envelope report prepared after the contractor had completed its work. This second report found continuing issues with the exterior walls and roof, and that when the siding had been replaced in 2012, the original building paper and foam backer board were not removed or replaced, but rather new siding was placed over the top of existing building paper and foam board.

The insured filed suit against the insurer for failure to pay for the alleged "property damage." At issue were two exclusions in the policy: (1) loss caused by defective construction and/or maintenance; and (2) loss caused by continuous or repeated seepage or leakage of water that occurs over a period of time. The Court was asked to render a decision about the "efficient proximate cause" of the loss under the "all risk" insurance policy.

In its motion for summary judgment, the insurer provided evidence suggesting that the efficient proximate cause of the damage was defective construction. Its expert explained that at the time the property was built, "the buildings originally were clad in defective LP siding ... as originally constructed, the windows were installed without proper flashing or other waterproofing measures." The expert also noted issues with improperly installed roofing tiles and faulty repairs, both of which led to repeated penetration of water during Portland's frequent rainfall.

The insured did not dispute the existence of construction-related defects at the property. Instead, it contended that the efficient proximate cause was "weather conditions," and argued that as a matter of law, construction defects can never serve as the efficient proximate cause of damage. The insured's argument rested on three points, all related to text from the Oregon Supreme Court's decision in *Gowans v. Nw. Pac. Indem. Co.*, 260 Or. 618, 621 (1971), that construction defects:

(1) do not "set in motion" rain; (2) did not independently cause damage at the townhomes; and (3) cannot cause damage without rain.

However, as the insured conceded, its position was contrary to that of "courts in Oregon and Washington." The court noted that at least one case in the District of Oregon holds that construction defects can serve as the efficient proximate cause of building damage. *Point Triumph Condo. Ass'n v. Amer. Guar. and Liab. Ins. Co.*, No. 99-1504-JE, 2000 WL 34474454, at *1 (D. Or. Dec. 29, 2000).

The *Silver Ridge* Court concluded that even if the insured was correct in arguing that the efficient proximate cause of the damage was water-related weather conditions, the insured's own expert concluded that water damage at the property "has been affecting the community for over ten years." As such, coverage would be precluded under the "continuous or repeated seepage or leakage of water" policy language. The insurer's motion for summary judgment was thus granted.

Considering the deluge of "wind-driven rain" insurance claims against all-risk insurers for properties in the Pacific Northwest, some insurers are now including specifically-worded weather exclusions that preclude such coverage. However, most older policies do not include such exclusionary language, raising questions of fact regarding the efficient proximate cause of the loss. This can complicate seeking summary judgment on such claims. This case shows that Oregon Courts may find no coverage for such claims despite the absence of specifically-worded policy language when facts show a clear cause of loss that is excluded under the policy.

INSURANCE TEAM

For over 90 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.

ELIOT HARRIS

SEATTLE
(206) 233-2977
eharris@williamskastner.com

JERRY EDMONDS

SEATTLE
(206) 628-6639
jedmonds@williamskastner.com

THOMAS PED

PORTLAND
(503) 944-6988
tped@williamskastner.com

MILES STEWART

SEATTLE
(206) 628-5990
mstewart@williamskastner.com