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COVERAGE EDITION

Where the Insured Alleges only “Procedural” Claims-Handling Violations Proof of “Actual Harm” Required, and Remedies Limited

Breaking Developments In London Market Law
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Synopsis

On 26 November 2008, the Washington Supreme Court issued its decision in *St. Paul Fire and Marine Ins. Co. v. Onvia, Inc.*, concerning an insured’s standing to sue for bad faith and violations of the Washington Consumer Protection Act (“CPA”) where the insurer properly denied defense and indemnity, but violated Washington claims-handling regulations concerning the timing of communications with the insured. The Court held that the insured could maintain a claim for improper claims-handling in the absence of a duty to defend or indemnity, but refused to apply a presumption of harm, and limited the remedies available.

The Facts

Responsive Management Systems (“RMS”) sued the insured, Onvia, as the representative of irritated recipients of Onvia’s alleged “fax-blasting” – the mass sending of unsolicited faxes. Onvia tendered the lawsuit to St. Paul in February 2005. When St. Paul did not respond, Onvia re-tendered in August 2005. St. Paul eventually sent a letter denying coverage in November 2005. Onvia defended itself, eventually confessing judgment and assigning its rights against St. Paul in exchange for RMS’s covenant to execute only against St. Paul.

In the subsequent bad faith and coverage action, the federal District Court held that there was no duty to defend or indemnify, and that St. Paul did not commit bad faith when it denied Onvia’s tender. The sole remaining claim was RMS’s so-called “procedural” bad faith claim, based on St. Paul’s failure to acknowledge and act upon Onvia’s tender within the timeline set out by the Washington Administrative Code. The Washington Insurance Commissioner has issued a set of regulations imposing detailed requirements on insurers for providing timely responses to communications from the insured, as well as investigating claims. *See* Washington Administrative Code 284-30-300 *et seq.* A single violation of these regulations potentially may support a cause of action.* The District Court asked the Washington Supreme Court to determine whether such an action could be maintained, and to identify the appropriate remedy.

Discussion

The Washington Supreme Court first held that RMS's "procedural" claim for violations of Washington claims-handling regulations could proceed even where no coverage existed under the policy. These "procedural" claims may proceed as traditional "bad faith" claims, and "a single violation of a claims-handling statute may violate the CPA."

The Court, however, refused to impose a "presumption of harm" for "procedural" bad faith and CPA claims. Under Washington law, when an insurer refuses to defend in bad faith, the court will presume that the insured was harmed, and shift the burden to the insurer to prove otherwise. However, the Onvia Court held that the presumption of harm is inappropriate where only "procedural" violations – for example, failure to acknowledge notification of a claim or acknowledge a communication within the proscribed period – exist. Insureds asserting purely "procedural" claims must therefore prove "actual harm" caused by the insurer's procedural misstep.

Finally, the Court rejected coverage by estoppel as a remedy for "procedural" claims. Instead, the insured's damages are limited to (1) "the amounts it has incurred as a result of the [procedural misstep]," (2) "general tort damages," and (3) statutory remedies under the CPA, which include treble damages up to a maximum of \$10,000.

** If you wish to discuss claims-handling regulations or any other aspect of Washington insurance law, please contact our attorneys via e-mail or telephone, 011-206-223-7000 or 44-20-7645-8240, to arrange a mutually convenient time. Our attorneys are experienced in handling construction and insurance issues.*

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