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PROFESSIONAL LIABILITY BLOG

# Whose Side Are You On? Washington Supreme Court Finds Firm That Previously Defended Insurer Can Represent Policyholder in Bad Faith Suit Against Insurer

AUTHOR: AARON FRENCH

Plaintiffs were insured under a homeowners' policy issued by the insurer. The Plaintiffs' home was damaged in a fire and the insurer agreed to provide coverage and recommended a contractor to perform repairs. Plaintiffs contended the contractor failed to perform the repairs properly. When the insurer refused to pay for the costs of additional repairs, the Plaintiffs decided to file a bad faith lawsuit.

The Plaintiffs hired a law firm which previously, but no longer, represented the insurer. In fact, for over ten years the law firm had represented the insurer in at least 165 cases, including bad faith cases, as well as at least one case involving smoke damage that was inadequately repaired by a contractor recommended by the insurer.

After the trial court ruled the law firm did not have a conflict of interest, the intermediate appellate court reversed ruling the law firm was disqualified because its representation of the Plaintiffs was substantially related to its prior representation of the Defendant insurer.

However, the Washington Supreme Court reversed based upon Rule 1.9 of the Washington Rules of Professional Conduct. The Washington Supreme Court found the insurer must prove a substantial relationship and the insurer failed to meet the burden. Pursuant to the comments to Rule 1.9, the analysis is fact specific and depends on the particular situation because the lawyer who previously handled a type of problem for a former client is not precluded from later representing another client in a factually distinct problem of the same type even though the subsequent representation involves a position adverse to the prior client. The Court found the law firm's prior representation of the insurer, even though it involved the same type of representation, was factually distinct. The Court found general knowledge of a company's business policies and practices does not require disqualification. Even though the Court acknowledged at least one of the bad faith cases handled by the law firm previously for the insurer was factually similar it nonetheless found no indication the law firm obtained confidential information that would materially advance the Plaintiffs' current case.

The Washington Supreme Court also held the rule prohibiting use of confidential information against the former client did not foreclose representation against the former client whose confidential information has been obtained.

While on its face it may seem obvious a law firm should be disqualified from representing a current client versus a former client, the actual analysis is much more complex. The Washington Supreme Court, which has a reputation for being policyholder-friendly, found a law firm's knowledge of confidential claims-handling materials, settlement strategies, and litigation philosophies was not enough to warrant disqualification. The question is would the result have been different in another state and does this decision open the door for other firms who have traditionally represented insurers to branch out into more policyholder work.

Case Citation: *Plein v. USAA Casualty Insurance Co*,. 463 P3d.728 (Wash. 2020)