

BAD FAITH BLOG

# Get the Denial Right or Pay the Price

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Burlington Insurance Company's denial of the tender to defend additional insured Tim Ryan Construction was deemed a breach of contract, found to be in bad faith, and in violation of Washington's Insurance Fair Conduct Act ("IFCA") entitling Tim Ryan Construction to recover attorney's fees plus an increase in the total award of damages to be determined after the underlying lawsuit had been finally resolved.

Burlington Insurance Company issued a policy of insurance to its named insured, Sound Glass Sales. There was an additional insured endorsement to that policy. It was "undisputed that Tim Ryan Construction is covered as an additional insured under Burlington's policies with Sound Glass." Tim Ryan Construction had tendered its defense to Burlington which was denied. The underlying litigation arose from the defective construction of a piece of property located in Washington.

The primary question raised on the motion for partial summary judgment was whether Burlington had a duty to defend Tim Ryan Construction as an additional insured. The court's rulings were based upon Washington law which provides that an insurance company has a duty to defend whenever the complaint filed against the insured alleges facts which could impose liability upon the insured within the policy's coverage. The court also noted that an insurance company is not relieved of that duty to defend unless the claim alleged in the complaint is "clearly not covered by the policy." *Woo v. Fireman's Fund Ins. Co.*, 116 Wash.2d 43, 52-53, 164 P.3d 454. Whenever the matter is tendered, the insurer has a duty to investigate the claim to determine and consider facts outside the complaint whenever coverage was not clear from the face of the complaint or if the allegations are in conflict with facts known or readily ascertainable by the insurance company. Although an insurance company could rely upon extrinsic facts to find coverage, it could not rely upon extrinsic facts to deny a duty to defend.

Burlington took the position that it had no duty to defend based upon the allegations of the complaint, its review of extrinsic evidence, and its interpretation of both the additional insured endorsement and temporal restrictions in the policy.

Burlington contended that the allegations in the complaint may have been sufficient to trigger a duty to defend by Tim Ryan Construction's own insurance carriers, but not its policy. Burlington argued that the complaint failed to allege that Burlington's named insured was responsible in any way for the deficiencies, let alone that it was solely responsible, a requirement under the additional insured endorsement. Each party relied upon extrinsic evidence to support their position. Relying upon Washington's rule that extrinsic evidence cannot be used to deny the duty to defend, the court concluded that Burlington had a duty to defend Tim Ryan Construction.

The opposing parties had different interpretations of the meaning of the additional insured endorsement. Although the district judge adopted the construction company's analysis and interpretation of the policy language, the judge also ruled that because its analysis and interpretation were reasonable, any other reasonable interpretation by Burlington was irrelevant. In those circumstances, Washington's law required the policy to be construed in favor of the insured. The court also rejected Burlington's position that temporal limitations in the policies precluded coverage. The court disposed of that position ruling that the applicability of those limitations was an issue to be determined by the trier of fact. Accordingly, the court ruled that on the issue of whether Burlington had a duty to defend, summary judgment imposing that duty had to be entered in favor of Tim Ryan Construction.

The court having ruled in Tim Ryan Construction's favor on the duty to defend issue, it disposed of the bad faith and Insurance Fair Conduct Act claims in short order. Citing multiple Washington state cases, the judge first ruled that in Washington an insurance company "acts in bad faith if its breach of the duty to defend was unreasonable, frivolous, or unfounded." The court found that Burlington had "acted in bad faith because it breached its duty to defend [and gave] as reason for doing so, its interpretation of its own policy, [which] was unreasonable."

Turning to the IFCA violations, the court quoted the IFCA statute noting that there is a violation if the insurance company fails to "disclose to first party claimants all pertinent benefits, coverages, or other provision of an insurance policy or insurance contract under which a claim is presented." The construction company argued that Burlington had not disclosed the new additional insured endorsement nor had it cited to the temporal limitation in the policy until it filed its opposition brief to the summary judgment motion, a point not disputed by Burlington. Burlington's only argument was that the IFCA statute applies only when an insurance company unreasonably denies coverage. Having already found that it had unreasonably denied coverage the court was consistent and also granted summary judgment on that ground, as well as the ground that it had failed to "promptly provide a reasonable explanation of the basis in the insurance policy... for denial of a claim... ." The judge ruled that the denial was prompt, but Burlington failed to provide a reasonable explanation for the denial making summary judgment proper on that issue as well.

The court also granted summary judgment in Tim Ryan Construction's favor for an award of attorney's fees because of the unreasonable denial of the duty to defend. Under a separate statute, the court also found that there had been other statutory violations which allowed the court to "increase the total award of damages to an amount not to exceed three times the actual damages." Since the actual damages would not be established until a judgment was entered in the underlying case, the court reserved its ruling on the amount until the underlying lawsuit had been resolved.

The apparent lesson to be learned in the State of Washington is that if there is anything close to an indication of a duty to defend, the insurance company should defend, likely under a reservation of rights, while the issue is determined in a declaratory judgment action. In addition, know the law. If the insurer cannot rely upon extrinsic facts to deny a duty to defend, do not do so. That seemed to be a key factor in the imposition of the extra-contractual damages. In addition, this was not the first time Burlington had been engaged in similar litigation with Tim Ryan Construction. Although those facts were not at issue, the court knew about them and referred to them in a footnote. Rather than proactively seeking a court declaration that it had no duty to defend, Burlington first raised that issue in a counterclaim seeking a declaratory judgment on the duty to defend months after the February 2012 tender of defense and months after Burlington's April 10, 2012 refusal to defend and claim denial. Proactive actions, although expensive, can in the long run reduce the possibility of extra-contractual exposure.

By Anthony Martin

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