Published on *The National Law Review* https://natlawreview.com

Insurers Have No Duty to Defend Additional Insured General Contractor for Post-Construction Defect Claims Because Policies Limited Coverage to Insured Subcontractor's "Ongoing Operations"

Article By:

Darren A. Feider

Construction defect lawsuits continue to present coverage disputes not only between contractors and their insurers, but also insurers for general contractors and their subcontractors. In ***Absher Constr. Co. v. N. Pac. Ins. Co.*****,** 2012 U.S. Dist. LEXIS 38555 (March 12, 2012, W.D. Wash.), general contractor Absher Pacific and its insurer settled a homeowner's association lawsuit, based upon alleged plumbing defects, for $2.5 million. Absher's insurer then filed suit against the plumbing subcontractor's insurers, all of whom had previously denied Absher's tenders.

Absher was an additional insured under these insurers' policies. But t**he additional insured endorsement in each policy also included language that limited coverage to liability arising out of the plumbing subcontractor's "ongoing operations".** Absher's insurer moved for summary judgment, arguing that the plumbing subcontractor's had improperly refused to defend the claim and had acted in bad faith by failing to properly investigate and, in one instance, by failing to respond for a period of 15 months.

After a detailed discussion of Washington's duty to defend standard, Judge James L. Robart ruled that there was no duty to defend because the complaint against Absher indicated that the damage had occurred after the underlying construction was complete. Citing ***Hartford Insurance Co. v. Ohio Casualty Insurance Co*****.,** 145 Wn. App. 765, 189 P.3d 195 (Div. I 2008) and other recent Washington decisions on this issue, Judge Robart stated that the "ongoing operations" language limits coverage to liability that arises while the named insured's work is still in progress. Judge Robart went on to find that the subcontractor's insurers had each properly refused to defend because the complaint against Absher included an allegation that the plumbing improvements had begun to prematurely fail after completion of the project.

With regard to the bad faith claims, Judge Robart acknowledged that, under ***St. Paul Fire and Marine Ins. v. Onvia, Inc.*****,** 165 Wn.2d 122, 196 P.3d 664, 669 (Wash. 2008), an insurer's mishandling of a claim may give rise to bad faith liability even in the absence of any coverage. But Judge Robart went on to find that, as a matter of law, the only potential liability here was based upon one of the insurer's extended delay in responding to Absher's original tender.

National Law Review, Volume II, Number 89