Matthew J. Sekits
Seattle,
Shareholder-in-Charge

Direct Dial: 206.521.6452
Fax: 206.386.5130
Email Attorney

The Washington Supreme Court adopts the "selective tender" defense and raises the bar for late notice prejudice

By Matthew J. Sekits

Selective tender defense: applicable to equitable contribution, not subrogation

In *Mutual of Enumclaw Ins. Co. v. USF Ins. Co.*, the Washington Supreme Court held for the first time that the "selective tender" rule prevents settling insurers from seeking equitable contribution from another insurer to which the insured never tendered the claim. --- P.3d ---, 2008 WL 4070270 (2008). The settling insurers in the case, Mutual of Enumclaw (MOE) and Commercial Underwriters Insurance Co. (CUIC), funded a construction defect settlement on behalf of their insured and received an assignment of the insured's rights to pursue non-settling insurers. They then went after USF for equitable contribution and subrogation, although the insured never tendered to USF.

The court characterized equitable contribution as "a right of the insurer and . . . independent of the rights of the insured." This right permits recovery against a non-contributing insurer, but only where the other insurer had a legal obligation to provide defense or indemnity coverage before the claim was resolved. In this case, since the insured had not tendered to USF, the settling insurers could not maintain equitable subrogation claims against USF.

Nevertheless, MOE and CUIC could maintain subrogation claims against USF based on the insured's assignment of its rights to those settling insurers. The court held the "selective tender" rule, although applicable to equitable contribution claims, provided no defense to subrogation claims, as the rights assigned originally belonged to the insured and, upon assignment, the settling insurers could assert them as they wished.

Criteria for late notice prejudice

The court then addressed USF's argument that, even if the settling insurers could maintain a subrogation claim, that claim was barred as a matter of law because USF was prejudiced by the late notice. The court first analyzed its seminal late notice ruling in *Sears, Roebuck & Co. v. Hartford Acc. & Indem. Co.*, 50 Wn.2d 443, 313 P.2d 347 (1957). There, prejudice as a matter of law was found where an insured did not inform its insurer of a lawsuit until less than a week before trial. The court minimized its *Sears* holding saying it was mere dicta and not aligned with later authority suggesting prejudice as a matter of law might not exist where an insurer is first notified of a claim after litigation ends. *Citing Pub. Util. Dist. No. 1 of Klickitat County v. Int'l Ins. Co.,* 124 Wn.2d 789, 805, 881 P.2d 1020 (1994).

Instead of following *Sears*, the court noted it "largely agreed" with a "more flexible" prejudice rule in *Canron, Inc. v. Fed. Ins. Co.,* 82 Wn. App. 480, 485, 918 P.2d 937 (1996). In *Canron*, the Washington Court of Appeals (Div. 1) held: "an insured must adduce affirmative proof of an advantage lost or a disadvantage suffered as a result of the delay, which has an identifiable detrimental effect on the insurer's ability to evaluate or present its defenses to coverage or liability."

The court then articulated its own version of this standard, requiring the insurer to prove an "*identifiable and material detrimental effect on its ability to defend its interests*." Based on this rule, the court rejected USF's contention it was prejudiced as a matter of law, even though the

company first received notice of the claim four years after the complaint was filed, two years after the settlement, and after MOE and CUIC completed litigation against other non-settling insurers.