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Liability insureds may sue for bad faith in the absence of coverage, but must prove actual harm

By Matthew J. Sekits

In *St. Paul Fire & Marine Insurance Co. v. Onvia, Inc.*, __ P.3d __, 2008 WL 5006458 (Wash., Nov. 26, 2008), the Washington Supreme Court held that an insured can maintain bad faith and Consumer Protection Act ("CPA") causes of action based on its liability insurer's procedural missteps in claim handling, even if the insurer has no duty to defend, indemnify, or settle. To prove bad faith, the insured must prove actual harm. Courts will not presume harm or find coverage by estoppel. To establish a CPA violation, the insured must prove all five elements of a CPA claim, including harm.

In *Onvia*, St. Paul filed a declaratory judgment action seeking a determination that St. Paul had no duty to defend or indemnify Onvia, Inc., or settle claims against Onvia made by Responsive Management Systems ("RMS"). RMS, as Onvia's assignee under a settlement agreement and covenant judgment, counterclaimed for breach of contract; bad faith failure to defend, indemnify, and settle; and bad faith and violation of the CPA based on St. Paul's claim handling. The trial court held that St. Paul had no duty to defend, indemnify, or settle and did not commit bad faith by refusing to defend Onvia. Then, the trial court certified the following questions to the Washington Supreme Court:

- Does an insured have a cause of action against its liability insurer for bad faith or violation of the CPA even though the trial court has held the insurer had no contractual duty to defend, settle, or indemnify the insured?
- If so, will harm be presumed, and what damages are recoverable?

In the Supreme Court, St. Paul argued that there can be no liability for violation of insurance claim handling regulations without a bad faith breach of contract. The Supreme Court disagreed, reasoning that because "the duty of good faith is broad and all-encompassing, and is not limited to an insurer's duty to pay, settle, or defend," bad faith and CPA claims exist even in the absence of coverage. The Supreme Court also held that no rebuttable presumption of harm can arise under these circumstances, and the insured may recover general tort damages and the damages incurred as a result of the insurer's bad faith claim handling. Specifically, a finding of bad faith would not result in a forfeiture of the insurer's coverage defenses. Damages could include recovery for emotional distress, but not in the case of a corporation. Under circumstances like those in *Onvia*, where the insured is not entitled to coverage, actual damages (if any) should be minimal.

Although *Onvia,* recognizes, for the first time, bad faith and CPA claims in the liability context in the absence of coverage, the decision does not change the elements of proof. The insured still must prove that the insurer's claim handling was unreasonable (*American Manufacturers Mutual Insurance Co. v. Osborn*, 104 Wn. App. 686, 699, 17 P.3d 1229 (2001)), and the alleged claim handling errors were not simply good faith mistakes (*Coventry Associates v. American States Insurance Co.*, 136 Wn.2d 269, 280, 961 P.2d 933 (1998)).