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Washington Court of Appeals Clarifies an Insurer's Subrogation Rights

By Daniel R. Bentson

The Washington Court of Appeals recently clarified that primary insurers cannot sue other primary insurers on equitable subrogation grounds to recover extra-contractual damages or reasonable attorney fees. *Trinity Universal Ins. Co. of Kan. v. Ohio Cas. Ins. Co.*, __ Wn. App. __, 2013 WL 4562718 (August 19, 2013).

Riley, an employee of subcontractor Cascade Construction (insured by Trinity Universal) was injured when he fell from scaffolding. He sued the general contractor, Millennium, but did not sue or allege negligence against Cascade. Millennium's liability insurer, Ohio Casualty, tendered Millennium's defense to Trinity, claiming Millennium was an additional insured on the Trinity policy. Trinity accepted the defense without reserving rights. Several months later, Trinity retendered the defense to Ohio Casualty, but Ohio Casualty declined. Trinity continued to defend Millennium and eventually settled Riley's claim.

Then, without receiving an assignment of rights from Millennium, Trinity sued Ohio Casualty. When Ohio Casualty did not answer, Trinity obtained a default judgment, including treble damages under the Consumer Protection Act (CPA) and the Insurance Fair Conduct Act (IFCA). Upon learning of the judgment, Ohio Casualty moved to vacate on grounds that it had not received actual notice of the suit and its failure to answer was excusable. The trial court denied Ohio Casualty's motion and awarded Trinity its attorney fees. Ohio Casualty appealed.

On appeal, the Washington Court of Appeals affirmed in part and reversed in part. The court affirmed the judgment insofar as it awarded Trinity recovery of its costs in defending and indemnifying Millennium. But the court agreed with Ohio Casualty that Trinity lacked standing to bring the CPA and IFCA claims. First, the court noted, because Millennium did not assign its rights to Trinity, only subrogation was at issue. Next, because there was no contract language granting Trinity a conventional subrogation right to pursue claims under the CPA and IFCA, only equitable subrogation—that is, subrogation arising by operation of law—applied. Equitable subrogation permits a subrogee (in this case, Trinity) to recover what it paid—i.e., to be reimbursed. Under its right of reimbursement, then, Trinity could recover only for losses it actually incurred. But Trinity paid only what its contract required. The extra-contractual damages did not reimburse Trinity for a loss it had incurred. Trinity, therefore, was not equitably subrogated to Millennium's CPA and IFCA claims.

Significantly, the court distinguished the cases relied upon by Trinity in which **excess** insurers were permitted to recover extra-contractual damages from primary insurers. According to the court, when an insured purchases excess insurance, the excess insurer assumes liability the insured would have had in the absence of the excess policy—that is, liability in excess of the primary policy. The excess insurer that exercises its equitable subrogation rights therefore steps into the shoes of the insured and assumes the insured's rights and obligations, including the insured's right to recover for any exposure in excess of the primary insurance. This rationale, however, does not apply to co-primary insurers and, thus, Trinity could not stand in Millennium's shoes to pursue CPA and IFCA claims.

The court also reversed the award of attorney fees. Under *Olympic S.S. v. Centennial Ins. Co.*, 117 Wn.2d 37, 811 P.2d 673 (1991), Washington common law permits a court to award reasonable attorney fees to an insured who sues its insurer in order to obtain benefits under an insurance policy. *Olympic Steamship* fees can be recovered by an insurer that sues as an assignee of the insured or through conventional subrogation. But *Olympic Steamship* fees are **not** available to a co-primary insurer that sues under its **own** equitable subrogation rights.