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Division I
State of Washington
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97083-1

No. 76490-0-I

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION I

ZURICH AMERICAN INSURANCE COMPANY,
a foreign insurance company,

Respondent/Cross-Appellant,

vs.

LEDCOR INDUSTRIES (USA) INC., a Washington corporation, ADMIRAL WAY, LLC, a Washington limited liability company, and SQI, INC., a Washington corporation,

Appellants/Cross-Respondents.

PETITION FOR REVIEW

Martens + Associates | P.S.

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I. IDENTITY OF PETITIONERS

Ledcor Industries (USA) Inc., Admiral Way LLC and SQI Inc., appellants in the Court of Appeals, file this petition for review[1].

II. COURT OF APPEALS DECISION

Petitioners seek review of the unpublished decision of the Court of Appeals, Division One, filed March 18, 2019, in *Zurich American Insurance Company v. Ledcor Industries (USA) Inc., Admiral Way, LLC, and SQI Inc.,* No. 76490-0-I. A copy of the slip opinion is attached as Appendix A. The Court of Appeals denied petitioners' timely motion for clarification and/or reconsideration on March 18, 2019 of the original unpublished decision filed on December 10, 2018, although it withdrew and substituted the current unpublished opinion. *See* Appendix B. Motions to publish the original decision filed by Zurich and First Mercury[2] were denied. Review is *de novo.*

III. ISSUES PRESENTED FOR REVIEW

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[1]If Admiral Way LLC files its own petition for review on its separate claims under the companion appeal in No. 76405-5-I, Ledcor joins in its arguments to the extent applicable.

[2]Respondents Zurich American Insurance Company, First Mercury Insurance Company, North Pacific Insurance Company and Virginia Surety Insurance Company are sometimes referenced by "Zurich", "First Mercury or FMIC", "North Pacific" or "NP", and "Virginia" or "VSC"

When insureds are sued in construction defect cases, they seek "security and peace of mind". Shortly before a mediation in the underlying Owners Association's suit against the developer and general contractor of a mixed-use commercial project – when the insureds were most vulnerable – Zurich informed Ledcor, its insured, and Admiral Way LLC, its additional insured, each of whom it was defending under a reservation of rights, that it would seek a recovery of hundreds of thousands of dollars of defense costs incurred when no provision of the policies or Washington law allowed that remedy. *Natl'l Sur. v. Immunex Corp.,* 176 Wn.2d 872, 297 P.3d 688 (2013). The declaratory judgment action filed by Zurich against Ledcor and Admiral Way LLC on 17 March 2009 sought that recovery ("That Zurich American may withdraw from the defense it has provided to Ledcor [Admiral Way, LLC], and recover the fees and expenses Zurich American has incurred in providing that defense"). CP 1-21, ¶¶ 5.2 and 5.4. Zurich quickly followed with a motion for summary judgment on 24 July 2009 seeking the same relief. CP 441-467. Both occurred shortly before the mediation in the Owner's construction defect suit. The Court of Appeals dismissed Zurich's admitted violation as "minor" notwithstanding RCW 48.30.030, *Natl'l*

Sur. Corp. v. Immunex Corp., supra, and notwithstanding that it was evidence of negligence. *Slip. Op.* 17, fn 7. This issue warrants review under RAP 13.4(b)(1) and (4).

Insureds expect timely responses from their carriers rather than years of delay when they submit claims. First Mercury defended its named insured SQI, Inc. for close to 3.5 years before issuing a reservation of rights to SQI's appointed counsel on 23 February 2012. The letter was written by its coverage counsel, not the insurance company. CP 7609-23. FMIC controlled SQI's defense for 42 months before disclaiming coverage in violation of the holding in *Transamerica Ins. v. Chubb and Sons, Inc.,* 16 Wn.App. 247, 554 P.2d 1080 (1976) (holding coverage by estoppel for 10 months without a reservation). Like Zurich, FMIC warned SQI that "FMIC reserves its rights to recover any attorneys' fees or costs and indemnity paid out to the extent allowed by Washington law, if it is determined that there is no coverage for the claims associated with this matter." *Id.* Neither FMIC's policy or the law allowed that threat. *Immunex, supra, and Sherry v. Financial Indem.,* 160 Wn.2d 611, 619, 160 P.3d 31 (2007) (An insurer has no "right of offset, setoff, or reimbursement [from its insured] without an authorizing contract provision.").

Ledcor tendered to FMIC on 24 October 2007. CP 7451-55. Ledcor sent a supplemental tender on 23 October 2008. CP 5102-04. Nothing in the record indicates that First Mercury ever responded to either tender under the same policy which it was defending SQI. Claiming that the Owner's damage did not arise out of "on-going" work performed by SQI, an undefined term, FMIC asserted that Ledcor was not an additional insured, despite a blanket endorsement adding Ledcor to the policy, and thus had no rights under the policy[3]. This decision was reached despite "completed operations" coverage under the policy and a large body of law holding that an additional insured has the same coverage as the named insured.

North Pacific never responded to the tender by either its named insured, The Painters, or its additional insured, Ledcor, on 10 March 2009 despite a return receipt showing it had been delivered three days later. CP 6019. As an excuse, it merely claimed it has "lost" the tenders and there was no reason to respond because there was no coverage. CP 6030 at fn. 13. This violates RCW 48.05.280 and WAC 284-30-340. This issue

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[3]SQI performed work on the roof in 2005. Ledcor was sued by Admiral Way LLC on 04 September 2007 during FMIC's second policy. CP 11929-32.

warrants review under RAP 13(b)(1) and (4).

Petitioners sued Zurich and First Mercury for negligence, CPA violations, breach of contract, as well as bad faith. All claims were dismissed by the trial court on summary judgment[4] and affirmed on appeal notwithstanding expert testimony that both carriers fell below the standard of care for insurance carriers and notwithstanding this Court decisions allowing negligence and CPA claims regardless of whether or not there is coverage under the policies. *Coventry Assoc. v. American States,* 136 Wn.2d 269, 279, 961 P.2d 933 (1998). The Court of Appeals decision is contrary to *Coventry* notwithstanding the fact that Ledcor was Zurich's named insured and SQI was FMIC's named insured. This issue warrants review under RAP 13(b)(1) and (4).

Long-standing rules of construction and interpretation of insurance policies in Washington require the insured to demonstrate coverage under the insuring provision and the carrier to prove the applicability of one or more exclusions which are strictly construed in favor of coverage. Here

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[4]Zurich had two policies insuring Ledcor. The "continuous and progressive" exclusion is different in each. The trial court initially found coverage under the first policy and then changed its mind when Zurich claimed a CR2A agreement coupled with the "fairness doctrine" precluded coverage . CP 3596-3634. There was no CR2A agreement and the "fairness doctrine" has not been adopted in Washington.

both FMIC and Zurich added exclusionary language to their coverage provisions requiring the insured to prove a negative and shifting the standard burden of proof. Zurich referenced that language in its declaratory judgment action. FMIC based its summary judgment on the same language. This is a matter of public importance and warrants review under RAP 13(b)(1) and (4).

When an insurance carrier undertakes the defense of its insured under a reservation of rights, it should not commingle the defense file with the coverage file and assign a single adjuster to supervise both. Both Zurich and FMIC did that in violation of Washington law. *See Safeco v. Butler,* 118 Wn.2d 383, 823 P.2d 499 (1992). This issue warrants review under RAP 13(b)(1) and (4).

IV. STATEMENT OF THE CASE

The Owners of The Admiral, a four story mixed use commercial project in West Seattle originally submitted a claim for construction defects to the developer, Admiral Way LLC, on 11 July 2007[5]. CP 10246-61. Thereafter, the Owners filed suit on 12 July 2007 listing six causes of action against Admiral Way LLC. CP 552-59. The complaint did not

[5] An amended notice of construction defects was filed on 03 June 2008. CP 408-422.

allege ***when*** property damage started or ***when*** the defective work that caused the damage was performed. In answering the complaint, the developer filed a third party complaint against Ledcor on 04 September 2007. CP 561-576. Ledcor's assigned defense counsel filed a separate action on 29 August 2008 against the subcontractors that actually performed the work, including SQI, Inc. [the roofer] and The Painters [installed a flexible waterproof coating under a roof top deck, balconies and courtyards]. CP 2803-14.

Tenders seeking defense and indemnity were timely submitted to each of the respondents. CP 7451-60 (FMIC & CNA), CP 6012, CP 6014-19, CP 6026 (NP). Zurich agreed to defend Ledcor under a reservation of rights and assigned one of its panel counsel. CP 795-6. During the representation of its insureds, Zurich filed a declaratory judgment action on 17 March 2009. CP 1-21. That action, followed four months later by a summary judgment, sought recovery of hundreds of thousands of dollars spent in the defense of Ledcor and Admiral Way LLC just days before a mediation held on 28 July 2009. Ledcor filed a counterclaim against Zurich and a third party action against various insurers who either insured Ledcor directly (Virginia Surety) or provided additional insured coverage through the responsible subcontractors (FMIC, North Pacific, and Transportation). CP 1643-1671.

The Owners' lawsuit was settled at mediation on 28 July 2009 for $4.7 million. Of that amount, Ledcor paid $2.7 million and Admiral Way LLC paid $2 million. After notice to all subcontractors and their insurance carriers, the trial court found that the settlement was reasonable in an order dated 05 March 2010. CP. 3749-51, CP 10889-91. Years of litigation ensued. During the course of the lawsuit, in exchange for an assignment of rights and a covenant not to execute, SQI settled with Ledcor by entering into a negotiated stipulated judgment for $747,785. The judgment was entered by the trial court on 09 April 2014. CP 10077-80.

The Court of Appeals correctly found that both Virginia Surety and Transportation breached their obligations under their policies. It erroneously affirmed the dismissal of all claims against Zurich, FMIC and North Pacific.

V. ARGUMENT WHY REVIEW SHOULD BE GRANTED

A. Washington law does not allow carriers to draft their policies to circumvent established principles of insurance law.

Washington recognizes the fundamental importance of the construction industry to this state's economy. This Court has cautioned against disrupting the bargained allocation of risk in the industry. *Berchauser/Phillips v. Seattle School Dist.,* 124 Wn.2d 816, 826, 881 P.2d 986 (1994). That has not stopped insurance companies from trying to avoid both insurance requirements and indemnity provisions in construction contracts. In *Xia v. ProBuilders Specialty Ins.*, 188 Wn.2d 171, 393 P.3d 748 (2017), this Court reaffirmed the "eight corners rule" on coverage disputes and applied the efficient proximate cause doctrine to a third-party personal injury suit. The builder negligently installed a boiler that released carbon monoxide into a home seriously injuring the occupant. The carrier relied upon the absolute pollution exclusion and a townhouse exclusion in refusing to defend or indemnify the builder. A covenant judgment was entered into and the plaintiff, as assignee, sued the carrier. The Court of Appeals reversed on the townhouse exclusion but affirmed on the absolute pollution exclusion. This Court reversed, finding that the carrier had committed bad faith as a matter of law. Just like the exclusions in Zurich's and FMIC's policies, the absolute pollution exclusion is fairly broad ("applies whether any other cause of bodily injury, property damage, or personal injury would otherwise be covered under this insurance") and disclaims any defense obligation where it applies. In rejecting the carrier's attempt to draft around the efficient proximate cause rule, the *Xia* court relied on a long line of Washington cases prohibiting attempts by carriers to draft exclusionary language circumventing established principles of insurance law, citing *Villella v. Pub. Emps. Mut. Ins.*, 106 Wn.2d 806, 815, 725 P.2d 957 (1986) and *Key Tronic Corp. v. Aetna (Cigna) Fire Underwriters Inc. Co.*, 124 Wn.2d 618, 626, 881 P.2d 201 (1994).

Here the situation was worse than *Xia*. Both Zurich and FMIC placed their exclusionary language in their insuring agreement so the insured would have to establish a lack of knowledge – a factual determination – of any existing problems before triggering coverage rather than have the carriers present evidence in support of their exclusionary language. This turned the burden of proof on its head. FMIC's insuring provision, paragraph b., states: "This insurance only applies to 'bodily injury' and 'property damage' only if: . . . (3) Prior to the policy period, no insured listed . . . and no 'employee' authorized by you to give or receive notice of an 'occurrence' or claim, knew that the . . . 'property damage' had occurred, in whole or in part." CP 10186-89; Zurich's, under paragraph b, is identical. CP 50. Similarly, Zurich admitted that its "continuous and progressive" exclusion (a version of which is in FMIC's policies) was drafted to get around the rule announced in *Gruol Const. Co. v. Ins. Co. of N. America,* 11 Wn.App. 632, 525 P.2d 427 (1974) and WAC 284-30-330(6), which require that carriers protect the insured claimant and resolve coverage questions among themselves when there are multiple carriers on the risk. *See* Zurich's brief, pp. 54-55. Review is appropriate under RAP 13.4(b)(2) and (4).

B. The Duty of Good Faith Requires All Persons to Abstain from Deception and Practice Honesty and Equity in All Insurance Matters including Respondents.

A breach of the obligation of good faith and fair dealing gives rise to a tort which derives from the common law, as well as statutory and regulatory provisions. *See St. Paul Fire & Marine v. Onvia, Inc.,* 165 Wn.2d 122, 128, 196 P.3d 664 (2008). Title 48 RCW governs the insurance industry as a whole. RCW 48.01.030, for example, provides:

> The business of insurance is one affected by the public interest, requiring that all persons be actuated by good faith, abstain from deception, and practice honesty and equity in all insurance matters. Upon the insurer, the insured, their providers, and their representative rest the duty of preserving inviolate the integrity of insurance.

See Indus. Indem. Co. v. Kallevig, 114 Wn.2d 907, 916, 792 P.2d 520 (1990) (recognizing "RCW 48.01.030 requires insurers to act in good faith in dealing with their insureds."). That holding is consistent with the principle that a violation of a statutory duty permits a trier of fact to infer negligence in a common law action. *See* RCW 5.40.050.

The Code's broad scope is declared in RCW 48.01.020: "All insurance and insurance transactions in this state . . . and all persons having to do therewith are governed by this code." "Person" is statutorily defined as "any individual, company, insurer, association, organization, reciprocal or interinsurance exchange, partnership, business trust, or corporation." RCW 48.01.070. Insurance transactions include "matters subsequent to execution of the contract and arising out of it." RCW 48.01.060. The duty to refrain from deception in the business of insurance, as practiced by Zurich and FMIC, is set forth in RCW 48.30.040: "No person shall knowingly make, publish, or disseminate any false, deceptive or misleading representation . . . in the conduct of the business of insurance, or relative to the business of insurance . . ." Multiple violations of those statutes occurred by each of the respondents.

In *Burnham v. Commercial Cas. Ins.,* 10 Wn.2d 624, 117 P.2d 644 (1941) this Court first recognized a common law cause of action for insurance bad faith. Eleven years later in *Evans v. Continental Cas. Co.,* 40 Wn.2d 614, 630, 245 P.2d 470 (1952), this Court recognized a bad faith action as one involving "bad faith in failing to perform a contractual obligation [that] sounds in tort." Subsequent opinions refer to the quasi-fiduciary relationship between an insurer and the insured as one bed-rock principle underlying bad faith actions. *See, e.g., Murray v. Mossman,* 56 Wn.2d 909, 912, 355 P.2d 983 (1960) ("the duty of the insurance company to use good faith in the handling of a claim against the insured springs from a fiduciary relationship"); and *Tank v. State Farm,* 105 Wn.2d 381, 385, 715 P.2d 1133 (1986) (referring to the fiduciary relationship as a source of the duty of good faith). In *Safeco v. Butler, supra* at 389, this Court recognized that the relationship between the insured and the insurer "is not a true fiduciary relationship," and "that something less than a true fiduciary relationship exists . . ."

In *Tank, supra,* while recognizing the relationship as a source of the duty of good faith and fair dealing, this Court also emphasized the public policy considerations warranting tort liability: "Such a relationship exists not only as a result of the contract . . . but because of the high stakes involved for both parties to an insurance contract and the elevated level of trust underlying insureds' dependence on their insurers." Indeed, case law has long recognized that the business of insurance is affected by the public interest and grounded in public policy. *See, e.g., Oregon Auto Ins. v. Salzberg,* 85 Wn.2d 372, 376, 535 P.2d 816 (1975) (noting that insurance policies "abound with public policy consideration"); and *Immunex, supra* at 878 (emphasizing an insured seeks "security and peace of mind" in obtaining insurance, and the "bargained-for peace of mind comes from the assurance that the insured will receive prompt payment of money in times of need"). Undeniably, the tort of bad faith is grounded in public policy, as reflected in Washington's comprehensive statutory, regulatory and case law governing insurance. Importantly, the duty is owed regardless of whether coverage exists under the insurance contract. *See St. Paul Fire & Marine Ins. Co. v. Onvia, Inc.,* 165 Wn.2d 122, 196 P.3d 664 (2008) (third party coverage) and *Coventry Associates v. Am. States Ins. Co.,* 136 Wn.2d 269, 279, 961 P.2d 933 (1998) (first party coverage).

C. The Court of Appeals Erroneously Conflated the Duty to Defend With the Narrower Duty to Indemnify As to FMIC & North Pacific.

The Court of Appeals erroneously held that respondents FMIC and North Pacific owed no duty to defend based on the court's conclusion that the known risk exclusion and the "on going operations" limitation meant that Ledcor was not insured. This Court should accept review under RAP 13.4(b)(1) because Division One's decision improperly conflates the duty to defend and the duty to indemnify, in conflict with this Court's decisions in *American Best Food, Inc. v. Alea London, Ltd.,* 168 Wn.2d 398, 229 P.3d 693 (2010) and *Woo v. Fireman's Fund Insurance Co.,* 161 Wn.2d 43, 164 P.3d 454 (2007). Additionally, the Court of Appeals relied on *Hartford v. Ohio Cas. Ins.,* 145 Wn. App. 765, 189 P.3d 195 (2008), a case contrary to a large body of Washington law, for the proposition that "ongoing operations" limits coverage in policies that specifically include completed operations while simultaneously ignoring this Court's decisions on the factual nature of known risks.

This Court has "long held that the duty to defend is different from and broader than the duty to indemnify." *Alea,* 168 Wn.2d at 404. The right to a defense is one of the "principal benefits" of liability insurance, often "of greater benefit" than the right to indemnity. *Id.* at 405; *Woo,* 161 Wn.2d at 54. An insurer may not deny a defense based "on an equivocal interpretation of case law." *Woo,* at 60. "[I]f there is any reasonable interpretation of the facts or the law that could result in coverage, the insurer must defend." *Alea* at 405.

In *Alea,* this Court held that the insurer improperly relied on an "assault" exclusion to deny a defense because "Washington courts have yet to consider the factual scenario before us today;" "[t]he lack of any Washington case directly on point and a recognized distinction between preassault and postassault negligence in other states presented a legal uncertainty with regard to [the insurer's] duty" to defend. *Alea* at 408. Similarly, the insurer breached its duty to defend under a dentist's "professional liability policy because the insertion of boar tusk flippers in Albert's mouth conceivably fell within the policy's broad definition of the practice of dentistry." *Woo* at 57. Division One misunderstood or misapplied these principles in holding that its interpretation of the known risk exclusionary language absolved FMIC and North Pacific from the obligation to provide a defense to Ledcor.

D. The "Ongoing Operations" Holding in *Hartford v. Ohio Casualty* Should be Confined to its Facts or Overruled as Contrary to Washington law.

The terms "ongoing operations" are not defined in any of the respondents' policies. If terms are not defined, they must be given their "plain, ordinary, and popular meaning." *Bordeaux, Inc. v. American Safety Ins. Co.,* 145 Wn.App. 687, 694, 186 P.3d 1188 (2008). One case, *Hartford v. Ohio Cas. Ins., supra*, an equitable subrogation case, has discussed its meaning, but the suit was between two insurance carriers – without any assignment from the insured – rather than between an insured and its carrier. Thus, the "ordinary meaning" rule did not apply. The "common and ordinary meaning of [ongoing operations] is simply those things that the company does," so that additional insured coverage for liability arising out of the named insured's "ongoing operations" includes coverage for all damages that arise out of the named insured's work, because the "alleged liability" by definition "occurred during those ongoing operations." *Valley Ins. v. Wellington Cheswick, LLC,* No. C05-1886 RSM, 2006 WL 3030282 (W.D. Wash. 2006) (not published). The Ninth Circuit concurred criticizing *Hartford* for improperly basing its ruling "on the [intent of the] insurance industry draftsmen." *Tri-Star Theme Builders, Inc. v. OneBeacon Ins. Co.,* 426 Fed. Appx. 506, 2011 WL 1361468 at *2-6 (9th Cir. 2011) (not published). *See Shotwell v. Transamerica Title Ins. Co.,* 91 Wn.2d 161, 167, 588 P.2d 208 (1978) (holding that where insurance policy provision is "capable of two meanings, or is fairly susceptible of two constructions, the meaning and construction most favorable to the insured must be employed, even though the insurer may have intended otherwise"). If *Hartford v. Ohio Casualty* is a correct statement of the law, it should be limited to equitable subrogation actions between carriers without an assignment from the insured. Otherwise it should be overruled as being out of step with Washington's long line of cases on the fundamental rules of insurance construction.

Similarly, the holding in *Hartford* is contrary to the proposition that insureds and additional insureds receive the same coverage under a liability policy because of the separation of insureds provision. Each of respondents' policies provided "completed operations". Separate limits and separate premiums were charged. The coverage should have protected the petitioners. *See Standard Fire Ins. v. Blakeslee,* 54 Wn.App. 1, 5, 771 P.2d 1172 (1989) (Additional insureds have separable contracts of insurance.). The proposition that the additional insured has the same coverage as the named insured is uniformly accepted by commentators and courts across the country. *Liberty Mut. Ins. v. Harco Nat'l Ins.,* 990 F.Supp.2d 194 (D.Conn. 2013) ("the term 'additional insured' is a recognized term of art in insurance contracts, 'with an understanding' that the additional insured is to receive the same coverage as the insured."); *In* *re Chinese Manf. Drywall Prods. Liab. Litigation,* 273 F.R.D. 380, 388 (E.D. La. 2011) ("[Additional] insureds are entitled to the same coverage as the named insured" quoting 3 Allan D. Windt, *Insurance Claims and Disputes § 11:30* (5th Ed. 2010)). Here both Ledcor and Admiral Way LLC were additional insureds, or first party claimants as defined by WAC 284-30-320, under one or more of the respondents' policies. In failing to find the same coverage afforded to the named insured, both the trial court and Court of Appeals committed error.

E. "Known Loss" and "Continuous and Progressive" Exclusions are Questions of Fact.

The "continuous and progressive" exclusions under the Zurich and FMIC policies is simply a contractual version of the "known loss" principle. The application of the "known loss" principle presents a question of fact. General knowledge is too broad. *Pub. Utility Dist. No. 1 v. International Ins. Co.,* 124 Wn.2d 789, 805, 808, 881 P.2d 1020 (1994). Similarly, the "insurer has the burden of proving the insured knew the particular loss would occur." *Aluminum Co. of Am. v. Aetna Cas. & Surety Co.,* 140 Wn.2d 517, 556, 562, 998 P.2d 856 (2000). Past problems are not determinative in finding the necessary knowledge to preclude coverage. *Underwriters Subscribing to Lloyd's Ins. v. Magi, Inc.,* 790 F.Supp. 1043 (E.D. Wash. 1991). Ledcor and SQI presented evidence that SQI's first notice of any problems with its 2005 roofing work was the receipt of the Trinity | ERD report in 2007, during FMIC's and Zurich's coverage. CP 11929-32. That should have been sufficient to defeat summary judgment by the carriers. And it should have required them to protect their insureds and litigate the coverage dispute between themselves. Instead, the trial court ignored the material issues of fact in dispute on summary judgment; and it was erroneously affirmed by the Court of Appeals which ignored this Court's holding in *Xia, supra.*

VI. CONCLUSION

For the reasons stated above, this Court should accept the petition for review.

RESPECTFULLY SUBMITTED this 16th day of April, 2019.

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By________________________
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Attorneys for Petitioners Ledcor Industries (USA) Inc., Admiral Way, LLC, and SQI, Inc.

CERTIFICATE OF SERVICE

I hereby certify that on the 16th day of April, 2019, I caused to be served true and correct copies of the foregoing on all parties as follows:

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I declare under the penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

SIGNED THIS 16th day of April, 2019, at Seattle, Washington.

By Matt Mgo

Matthew Morgan
Paralegal for Martens + Associates | P.S.

APPENDIX A

FILED
COURT OF APPEALS DIV I
STATE OF WASHINGTON

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

ZURICH AMERICAN INSURANCE COMPANY, a foreign insurance company, Respondent/Cross-Appellant, v. LEDCOR INDUSTRIES (USA) INC., a Washington corporation, ADMIRAL WAY, LLC, a Washington limited liability company, and SQI, INC., a Washington corporation, Appellants/Cross-Respondents.	No. 76490-0-I DIVISION ONE UNPUBLISHED OPINION FILED: December 10, 2018
LEDCOR INDUSTRIES (USA) INC., a Washington corporation, Appellants, v. AMERICAN INTERNATIONAL SPECIALTY LINES INSURANCE COMPANY, INC., a foreign insurance company; CAMBRIDGE INTEGRATED SERVICES GROUP, INC., a foreign corporation; LIBERTY INSURANCE UNDERWRITERS, INC., a foreign insurance company; AIU	

COMMERCIAL INSURANCE COMPANY OF CANADA, a foreign insurance company; LEXINGTON INSURANCE COMPANY, a foreign insurance company; LIBERTY SURPLUS INSURANCE CORPORATION, a foreign insurance company; HARTFORD PROPERTY AND CASUALTY COMPANY, a foreign insurance company; and CONTINENTAL WESTERN INSURANCE COMPANY, a foreign insurance company,

Third-Party Defendants,

VIRGINIA SURETY COMPANY, INC., a foreign insurance company; TRANSPORTATION INSURANCE COMPANY, a foreign insurance company; TRANSCONTINENTAL INSURANCE COMPANY, a foreign insurance company; NORTH PACIFIC INSURANCE COMPANY, a foreign insurance company; and FIRST MERCURY INSURANCE COMPANY, a foreign insurance company,

Respondents.

MANN, A.C.J. — This is one of two closely connected insurance coverage appeals arising out of the construction of "The Admiral," a mixed use condominium building in West Seattle.[1] The appellant in this case was the general contractor, Ledcor Industries (USA), Inc. (Ledcor). The building owner and developer, Admiral Way LLC (Admiral Way), contracted with Ledcor for construction of the building. Ledcor in turn contracted with several subcontractors, including The Painters, Inc. (The Painters) and SQI, Inc. (SQI).

[1] See Admiral Way, LLC v. Zurich American Ins. Co., No. 76405-5-I (Wash. Ct. App. Dec. 10, 2018) (unpublished).

After the Admiral Way Condominium Owners' Association (COA) sued Admiral Way and Ledcor in 2007 for construction defects, Ledcor tendered the claim to its insurers and its subcontractors' insurers. After responding and defending against the COA's claims under a reservation of rights, Zurich American Insurance Company (Zurich) filed a declaratory judgment action against Ledcor claiming it did not owe coverage under its policies. Ledcor responded by filing counterclaims and third-party causes against multiple insurers claiming bad faith and violations of the Consumer Protection Act (CPA)[2], and the Insurance Fair Conduct Act (IFCA)[3].

Ledcor appeals the trial court's decision granting summary judgment and dismissing Zurich, Virginia Surety Company (VSC), First Mercury Insurance Company (FMIC), North Pacific Insurance Company (North Pacific), and Transportation Insurance Company (Transportation). We reverse dismissal of Ledcor's claims against VSC and Transportation. We affirm dismissal of Zurich, FMIC, and North Pacific.

FACTS

Admiral Way is the owner and developer of "The Admiral" a mixed use, four-story building in West Seattle with street level retail, 60 condominiums and an underground parking garage. On April 3, 2001, Admiral Way and Ledcor entered into a construction contract for construction of the building. Ledcor was the general contractor. Ledcor in turn contracted with various specialty subcontractors. Relevant to this appeal, Ledcor subcontracted with SQI to install the original roof, and in 2005, Ledcor again subcontracted with SQI to conduct substantial roofing repair. Ledcor subcontracted with

[2] Ch. 19.86 RCW
[3] RCW 48.30.010-.015

The Painters to provide labor, materials, and equipment for a "Gacoflex" waterproofing system on the balconies and courtyards of The Admiral.

The contract between Ledcor and Admiral Way required Ledcor to obtain commercial general liability (CGL) insurance naming Admiral Way as an additional insured. The contract between Ledcor and its subcontractors required that the subcontractors each obtain CGL insurance naming Ledcor as an additional insured.

Ledcor purchased a CGL insurance policy from VSC for the policy period of December 1, 2003 through December 1, 2004. Ledcor also purchased two consecutive annual CGL policies from Zurich, for the policy periods from December 1, 2005 through December 1, 2007. SQI purchased three consecutive annual CGL policies from Transportation covering the period from May 1, 2000 through May 1, 2003. SQI also purchased CGL policies from FMIC for the policy period of May 1, 2006 to May 1, 2008. The Painters purchased CGL policies from North Pacific for the period of December 26, 2001 to December 26, 2002.

Construction of The Admiral began in 2001. The City of Seattle issued a certificate of occupancy in March 2003. The sale of condominiums began in April 2013. After a contract dispute, on February 10, 2004, Ledcor and Admiral Way executed a contract addendum that resolved their remaining disputes about payment and performance of Ledcor's work. The parties agreed in the addendum that the project was complete other than specific items in an attached punch list that were to be completed by February 20, 2004.

In 2001, Admiral Way retained Morrison Hershfield (Morrison) as a building envelope consultant to provide recommendations to the project architect on balcony and wall interface details. Ledcor also retained Morrison and received a report from the firm in December 2002. Morrison concluded there were significant areas where there was "inappropriate design, and to a lesser degree inappropriate construction that in our opinion makes the building high risk for premature building envelope failure." In March 2003, Morrison recommended substantial repairs to the building's brick veneer and pre-cast column caps. Morrison believed that if the recommended work was not done, the walls would "remain susceptible to water entry" that "would lead to deterioration of the sheathing and corrosion of the framing," and "result in a compromise of the structural integrity." Morrison further reported, "[w]e are of the opinion that if not address[ed] at this time, these as-built details will require remediation within the next five years." Morrison expressed similar concerns with other recommended work.

On February 28, 2007, the COA sent Admiral Way a notice of construction defect claim alleging that the building, or components of the building, were defectively designed and/or constructed, resulting in water intrusion that affected residential units, commercial spaces, and common areas throughout the project. This notice was followed by the filing of a complaint in the King County Superior Court. In its complaint, the COA alleged that damage to the building began after the completion of construction:

> As a result of Declarant's acts and omissions, property damage to the Condominium has occurred to that part of real property on which contractors or subcontractors working on Declarant's behalf have completed their operations. Such property damage has also occurred to that part of real property that must be restored, repaired or replaced because of the work of others performed on Declarant's behalf. The property damage is continuous and ongoing throughout the Condominium. Damage may have commenced at or shortly after the completion of each building or element of infrastructure, and may be continuing to the present.

In response to the COA complaint Admiral Way filed a third-party complaint against Ledcor alleging Ledcor and its subcontractors were responsible for the defective work.

Ledcor initially tendered defense of the action to its own insurers Zurich and VSC. Zurich accepted Ledcor's tender and assigned counsel. Zurich defended Ledcor in the underlying case, from 2007 through settlement in July 2009, while expressly reserving its right to contest coverage under a reservation of rights.

Ledcor also tendered the action to FMIC, Transportation, and North Pacific, for defense and indemnity for damages arising from SQI's and The Painters' work. FMIC accepted SQI's tender under a reservation of rights and contributed to SQI's defense. FMIC did not defend nor indemnify Ledcor. Transportation and North Pacific denied coverage. VSC originally denied coverage, then agreed to defend Ledcor under a reservation of rights just as the final settlement was being reached. VSC did not pay any defense costs and did not indemnify.

Zurich filed the underlying action in March 2009 seeking declaratory judgment of its obligations to defend and indemnify its named insured, Ledcor, and the additional insured Admiral Way. Ledcor filed counterclaims for declaratory relief, insurance bad faith, and violations of the CPA and the IFCA. Ledcor's counterclaims included third parties FMIC, Transportation, North Pacific, and VSC, as well as multiple other insurers.

Meanwhile, the COA, Admiral Way, and Ledcor settled their dispute over the condominium damage on July 28, 2009. The COA's claims against Admiral Way and Ledcor settled for $4,700,000. The settlement was contingent upon AIG, another of

Ledcor's insurers funding $2,550,000. Ledcor agreed to pay $150,000, and Marc Gartin on behalf of Admiral Way agreed to pay $2,000,000.

The underlying declaratory judgment action proceeded with discovery and motions. In June 2010, the trial court granted Zurich's motions for partial summary judgment on (1) coverage under the policy in effect between December 1, 2006 and December 1, 2007 and (2) dismissing Ledcor's counterclaims for insurance bad faith, CPA, and IFCA violations. The trial court also denied Ledcor's motion for partial summary judgment against Zurich for insurance bad faith and CPA violations. At the same time, the trial court granted VSC's motion for summary judgment and dismissed Ledcor's claims against VSC.

In March 2011, the trial court dismissed Ledcor's remaining counterclaims against Zurich, concluding that Zurich had no duty to defend or indemnify Ledcor with respect to the COA's construction defect claims.

In April 2011, the trial court granted FMIC's motion for summary judgment concluding Ledcor was not entitled to coverage under the policy issued by FMIC to SQI as a matter of law.

In July 2011, the trial court granted North Pacific's motion for summary judgment and dismissed Ledcor's third party claims related to its policy issued to The Painters.

In February 2014, the trial court granted Transportation's motion for partial summary judgment and dismissed Ledcor's breach of contract claims for policies issued to SQI.

In a separate action, Ledcor sued its subcontractors. Through a settlement between Ledcor and SQI, Ledcor took assignment of SQI's direct claims against FMIC.

On October 31, 2016, the trial court granted FMIC's motion for summary judgment agreeing that FMIC did not have an obligation to cover SQI's defense against Ledcor's claim and that the policy FMIC issued to SQI was not applicable, and even if it were, the continuous or progressive injury or damage exclusion barred recovery.

Ledcor appeals.

ANALYSIS

We review summary judgment orders de novo, engaging in the same inquiry as the trial court. Keck v. Collins, 184 Wn.2d 358, 370, 357 P.3d 1080 (2015). Summary judgment is proper if, after viewing all facts and reasonable inferences in the light most favorable to the nonmoving party, there are no genuine issues as to any material fact and the moving party is entitled to judgment as a matter of law. CR 56(c); Elcon Const. Inc. v. E. Wash. Univ., 174 Wn.2d 157, 164, 273 P.3d 965 (2012). "The moving party on summary judgment must produce factual evidence showing that it is entitled to judgment as a matter of law. The burden then shifts to the nonmoving party to set forth facts showing that there is a genuine issue of material fact in dispute." Hartford Ins. Co. v. Ohio Cas. Ins. Co., 145 Wn. App. 765, 779, 189 P.3d 195 (2008).

A party opposing a motion for summary judgment may not rely on speculation, argumentative assertions that unresolved factual issues remain, or its affidavits considered at face value. Rather, "the nonmoving party must set forth specific facts that sufficiently rebut the moving party's contentions and reveal that a genuine issue as to a material fact exists." Herman v. Safeco Ins. Co. of Am., 104 Wn. App. 783, 787-88, 17 P.3d 631 (2001). "'Ultimate facts, conclusions of fact, conclusory statements of fact or legal conclusions are insufficient to raise a question of fact.'" Ainsworth v. Progressive

Cas. Ins. Co., 180 Wn. App. 52, 61, 322 P.3d 6 (2014) (quoting Snohomish County v. Rugg, 115 Wn. App. 218, 224, 61 P.3d 1184 (2002)). "On summary judgment review, we may affirm the trial court's decision on any basis within the record." Davidson Serles & Assocs. v. City of Kirkland, 159 Wn. App. 616, 624, 246 P.3d 822 (2011).

The outcome of this case depends on a proper interpretation of the various insurance policies issued to Ledcor and its subcontractors. Interpretation of insurance policies is a question of law we review de novo. Overton v. Consol. Ins. Co., 145 Wn.2d 417, 424, 38 P.3d 322 (2002). We construe insurance policies as contracts. Weyerhaeuser Co. v. Commercial Union Ins. Co., 142 Wn.2d 654, 665, 15 P.3d 115 (2000). "Every insurance contract shall be construed according to the entirety of its terms and conditions as set forth in the policy, and as amplified, extended, or modified by any rider, endorsement, or application attached to and made a part of the policy." RCW 48.18.520. We consider the policy as a whole, giving it a "fair, reasonable, and sensible construction as would be given to the contract by the average person purchasing insurance." Am. Nat'l Fire Ins. Co. v. B & L Trucking & Constr. Co., 134 Wn.2d 413, 427-28, 951 P.2d 250 (1998). Where possible, we harmonize clauses that seem to conflict in order to give effect to all of the contract's provisions. Realm, Inc. v. City of Olympia, 168 Wn. App. 1, 5, 277 P.3d 679 (2012).

"If the policy language is clear and unambiguous, we must enforce it as written; we may not modify it or create ambiguity where none exists." Quadrant Corp. v. Am. States Ins. Co., 154 Wn.2d 165, 171, 110 P.3d 733 (2005). If a term is defined in a policy, "the term should be interpreted in accordance with that policy definition." Kitsap County v. Allstate Ins. Co., 136 Wn.2d 567, 576, 964 P.2d 1173 (1998). A clause is ambiguous only "when, on its face, it is fairly susceptible to two different interpretations, both of which are reasonable." Quadrant, 154 Wn.2d at 171. If a clause is ambiguous, we may rely on extrinsic evidence of the intent of the parties to resolve the ambiguity. Weyerhaeuser, 142 Wn.2d at 666 (citing B & L Trucking, 134 Wn.2d at 427-28). Any ambiguity remaining after examination of the applicable extrinsic evidence is resolved against the insurer and in favor of the insured. Weyerhaeuser, 142 Wn.2d at 666. However, while exclusions should be strictly construed against the drafter, a strict application should not trump the plain, clear language of an exclusion such that a strained or forced construction results. Weyerhaeuser Co., 142 Wn.2d at 666.

Zurich

Ledcor contends that the trial court erred in concluding that Zurich did not have a duty to defend under the CGL policies and in dismissing Ledcor's claims for insurance bad faith, and for violations of the CPA and the IFCA. We disagree.

A. Duty to Defend

The duty to defend is different from and broader than the duty to indemnify. Am. Best Food, Inc. v. Alea London, 168 Wn.2d 398, 404, 229 P.3d 693 (2010); Expedia, Inc. v. Steadfast Ins. Co., 180 Wn.2d 793, 802, 329 P.3d 59 (2014). The duty to defend is one of the main benefits of an insurance contract. Safeco Ins. Co. of Am. v. Butler, 118 Wn.2d 383, 392, 823 P.2d 499 (1992). "While the duty to indemnify exists only if the policy covers the insured's liability, the duty to defend is triggered if the insurance policy conceivably covers allegations in the complaint." Expedia, 180 Wn.2d at 802. "'The duty to defend arises when a complaint against the insured, construed liberally, alleges facts that could, if proven, impose liability upon the insured within the policy's coverage.'" Expedia, 180 Wn.2d at 803 (quoting Am Best Food, 168 Wn.2d at 404-05). Exclusionary clauses in the policy are "strictly construed against the insurer." Expedia, 180 Wn.2d at 803. "If the complaint is ambiguous, it will be liberally construed in favor of triggering the insurer's duty to defend." Truck Ins. Exch. v. Vanport Homes, 147 Wn.2d 751, 760, 5 P.3d 276 (2002).

The duty to defend is generally determined by looking at the "eight corners" of the insurance contract and the underlying complaint. The insurer is permitted to utilize the "'eight corners'" rule to determine whether, on the face of the complaint and the insurance policy, there is an issue of fact or law that could conceivably result in coverage under the policy. Expedia, 180 Wn.2d at 803. "There are two exceptions to this rule, and both favor the insured." Expedia, 180 Wn.2d at 803. First, "if it is not clear from the face of the complaint that the policy provides coverage, but coverage could exist, the insurer must investigate and give the insured the benefit of the doubt that the insurer has a duty to defend." Woo v. Fireman's Fund Ins. Co., 161 Wn.2d 43, 53, 164 P.3d 454 (2007). Second, "if the allegations in the complaint conflict with facts known to the insurer or if the allegations are ambiguous, facts outside the complaint may be considered." Expedia, 180 Wn.2d at 803-04 (citing Woo, 161 Wn.2d at 54).

Ledcor was directly insured by Zurich under two general liability insurance policies. The first was effective from December 1, 2005 to December 1, 2006. The second was effective from December 1, 2006 to November 30, 2007. Each Zurich policy contained two endorsements that Zurich argues barred coverage for the COA's claims: a residential building exclusion and an exclusion for continuing damage that began before the policy was issued. The burden is on the insurer to show that the loss is excluded under the policy. Diamaco, Inc. v. Aetna Cas. & Sur. Co., 97 Wn. App. 335, 337, 983 P.2d 707 (1999).

The policies issued by Zurich to Ledcor contain an exclusion for designated work on residential buildings. The first policy (December 1, 2005 through December 1, 2006) excluded coverage for property damage caused by "your work" and defined "your work" as:

> This exclusion only applies to "your work" in connection with the construction, reconstruction, remodeling, or repair of any "residential building". For the purpose of this endorsement, "residential building" means: 1. Any single-family dwelling, including town homes or townhouses, other than military base housing, and 2. Any multi-family dwelling, including condominiums or cooperatives, duplexes, triplexes or four-plexes; and 3. Any apartments, assisted living facilities or resort timeshares, if made of wood frame, or partially made of wood frame construction; and 4. Any other structure which is attached to any such "residential building." The determination as to the type of structure will be made at the time a claim is made or suit is brought.[4]

The endorsement in Zurich's second policy (December 1, 2006 through December 1, 2007) defined "your work" as follows:

> This exclusion only applies to "your work" in connection with the construction, reconstruction, remodeling, or repair of any "residential building". For the purpose of this endorsement, "residential building" means: . . .
>
> 1. Any single-family dwelling, including but not limited to houses, town homes or townhouses, or
> 2. Any multi-family dwelling, including but not limited to condominiums, cooperatives, duplexes, triplexes or fourplexes; or
> 3. Any structure that combines any other use with residential dwellings including but not limited to, those listed in 1. or 2. above, or
> 4. Any other structure or improvement which is attached to or ancillary to any structure identified in 1., 2., or 3. Above, constructed, reconstructed, remodeled, or repaired with the intent that title to each individual dwelling or dwelling unit will be transferred separately to each owner.

[4] (Emphasis added.)

> Notwithstanding the above, "residential building" does not include any structure that functions as apartments, time shares, a hotel, a motel, a nursing home, an assisted living senior housing care facility, a college campus dormitory, or government housing on military bases.[5]

Ledcor argues that The Admiral was not a residential building, but was instead a "mixed use" building that included street level retail and thus did not fall under the designated work exclusion. However, the plain language of the residential building exclusion includes "condominiums" and "[a]ny other structure which is attached to any such 'residential building.'" The Zurich policy language was broad enough to include residential buildings that incorporate other "structures." The Admiral, even with the attached commercial units at the base, qualifies as a residential building.

Ledcor also argues that because The Admiral includes apartment units, the residential building exclusion does not apply. While The Admiral does allow 25 percent of the owners to rent their units out as "apartments," the units are still within the legal definition of a condominium. The "intent that title to each individual dwelling or dwelling unit will be transferred separately to each owner" is still in place, even if some condominiums are later sublet out as apartments. Ledcor's argument fails. Because The Admiral is a defined residential building under both policies, Zurich did not have a duty to defend or indemnify.

B. Bad Faith

An insurer acts in bad faith if its breach of the duty to defend was unreasonable, frivolous, or unfounded. See St. Paul Fire & Marine Ins. Co. v. Onvia, Inc., 165 Wn.2d 122, 130, 196 P.3d 664 (2008). Whether an insurer acted in bad faith is generally a question of fact. Van Noy v. State Farm Mut. Auto. Ins. Co., 142 Wn.2d 784, 796, 16

[5] (Emphasis added.)

P.3d 574 (2001). Accordingly, an insurer is only entitled to dismissal on summary judgment of a policyholder's bad faith claim if there are no disputed material facts pertaining to the reasonableness of the insurer's conduct under the circumstances, or the insurance company is entitled to prevail as a matter of law on the facts construed most favorably to the nonmoving party. Smith v. Safeco Ins. Co., 150 Wn.2d 478, 484, 78 P.3d 1274 (2003).

"An action for bad faith handling of an insurance claim sounds in tort." Mut. of Enumclaw Ins. Co. v. Dan Paulson Constr., Inc., 161 Wn.2d 903, 915, 169 P.3d 1, (2007). Claims of insurer bad faith "are analyzed applying the same principles as any other tort: duty, breach of that duty, and damages proximately caused by any breach of duty." Smith, 150 Wn.2d at 485. "In order to establish bad faith, an insured is required to show the breach was unreasonable, frivolous, or unfounded." Kirk v. Mt. Airy Ins. Co., 134 Wn.2d 558, 560-61, 951 P.2d 1124 (1998).

Ledcor first contends Zurich committed bad faith by denying coverage and defending under a reservation of rights. Washington law has long favored defending under a reservation of rights "when the facts or the law affecting coverage is disputed," until coverage is settled in a declaratory action. Am. Best Food, 168 Wn.2d at 405. When defending under a reservation of rights, "the insured receives the defense promised and, if coverage is found not to exist, the insurer will not be obligated to pay." Mut. of Enumclaw, 161 Wn.2d at 914. However, an insurer defending its insured under a reservation of rights has "an enhanced obligation of fairness toward its insured." Tank v. State Farm Fire & Cas. Co., 105 Wn.2d 381, 388, 715 P.2d 1133 (1986). This enhanced obligation requires that the insurer must: (1) "thoroughly investigate" the claim against the insured, (2) "retain competent defense counsel for the insured," (3) fully inform the insured of "all developments relevant to his policy coverage and the progress of his lawsuit," and (4) "refrain from engaging in any action which would demonstrate a greater concern for the insurer's monetary interest than for the insured's financial risk." Tank, 105 Wn.2d at 388.

After Ledcor tendered the claim to Zurich, Zurich agreed to defend Ledcor in the underlying case under a reservation of rights. Zurich defended Ledcor from 2007 through the settlement in July of 2009. Zurich provided the attorney of Ledcor's own choosing for their defense. There is no evidence that Ledcor was unsatisfied with its defense during this period. The record further demonstrates that Zurich fully investigated the incident, retained separate counsel to represent both Ledcor and Admiral Way, and fully informed and participated in settlement activity.[6] The only criteria in dispute in this case is whether Zurich engaged "in any action which would demonstrate a greater concern for the insurer's monetary interest than for the insured's financial risk" during the course of its defense of Ledcor, and in making its later coverage decision. On this record, we hold they did not.

Ledcor argues next that Zurich acted in bad faith by filing its declaratory judgment action before the underlying case brought by the COA was fully resolved. Our Supreme Court has said, "'[t]he insurer 'may defend under a reservation of rights while seeking a declaratory judgment that it has no duty to defend,' . . . but it must avoid seeking adjudication of factual matters disputed in the underlying litigation because advocating a position adverse to its insured's interests would 'constitute bad faith on its

[6] Ledcor at one point argues that Zurich did not do an adequate investigation, however that was related to coverage and not related to its defense of Ledcor. Moreover, Ledcor's arguments only demonstrate it disagrees with Zurich's interpretation of its "residential" clause.

part.'" Mut. of Enumclaw, 161 Wn.2d at 914-15 (quoting 1 ALLAN D. WINDT, INSURANCE CLAIMS & DISPUTES: REPRESENTATION OF INSURANCE COMPANIES AND INSUREDS § 8:3, at 8-11 to -12 (5th ed. 2007)). The court did not go so far as to bar filing a motion for summary judgment during the course of representation.

In this case, Zurich did not file its summary judgment motion until discovery in the underlying litigation with the COA was complete and the parties had mediated. The summary judgment motion was not argued nor decided until long after the final settlement had been entered. There is no evidence that Zurich's action filing its motion for summary judgment interfered with, or sought to adjudicate a factual matter in dispute in the underlying action to the detriment of Ledcor. Ledcor remained independently represented by counsel of its choice, funded by Zurich, and Ledcor does not contend its defense counsel was ineffective.

Ledcor also argues that Zurich committed bad faith in reaching its coverage decision. Specifically, Ledcor contends that Zurich's insurance adjuster transferred information obtained in the underlying claim to coverage counsel, and utilized it to Ledcor's detriment. Ledcor has failed, however, to identify any case law that prohibits using the same adjuster for both claims. Ledcor has also failed to demonstrate any confidential or privileged evidence that was provided to Zurich. Zurich provided a detailed list showing that it was entitled to all of the evidence it received, most of which was obtainable through the public record. Even on appeal, Ledcor does not identify any confidential documents that were relied on by Zurich in reaching its coverage decision, citing the "Morrison Report" and depositions, which were all publically available and discoverable by Zurich.

Finally, Ledcor raises Zurich's pretrial failure to provide the complete defense file. Zurich argues that some of the evidence was privileged, however, the trial court eventually fined Zurich for failing to provide this evidence, and Zurich paid that fine. Failure to provide this evidence was a discovery violation, however Zurich provided good faith reasons for its failure to provide the documents in question, and the issue was resolved by the trial court. A single discovery violation does not rise to the level of bad faith.[7] The insured may not base a bad faith or CPA claim on an insurer's good faith mistake. Werlinger v. Clarendon Nat. Ins. Co., 129 Wn. App. 804, 808, 120 P.3d 593 (2005).

C. CPA and IFCA

Ledcor also asserts that Zurich violated the CPA and the IFCA. To successfully bring an action under the CPA, a private plaintiff must prove five elements: "(1) unfair or deceptive act or practice; (2) occurring in trade or commerce; (3) public interest impact; (4) injury to plaintiff in his or her business or property; and (5) causation." Ledcor Indus. (USA), Inc. v. Mut. of Enumclaw Ins. Co., 150 Wn. App. 1, 12, 206 P.3d 1255 (2009). A denial of coverage does not constitute an unfair or deceptive act or practice and does not violate the CPA as long as it is based on reasonable conduct of the insurer, even if the denial ultimately is proved incorrect. Overton, 145 Wn.2d at 417.

[7] Admiral Way and Ledcor make much of Zurich's attempt to recoup defense costs it paid in the COA lawsuit. In 2013, the Washington Supreme Court disallowed such reimbursement, holding "[d]isallowing reimbursement is most consistent with Washington cases regarding the duty to defend, which have squarely placed the risk of the defense decision on the insurer's shoulders." Nat'l Sur. Corp. v. Immunex Corp., 176 Wn.2d 872, 884, 297 P.3d 688 (2013). While reimbursement has been found to be unavailable, neither Admiral Way nor Ledcor make it clear how Zurich briefly requesting such reimbursement in 2009 contributes to a bad faith claim. There is no evidence that Zurich pursued these costs in an unreasonable or frivolous way, or that any damage arose out of this minor addition to Zurich's claim. Zurich also argues that Ledcor's counsel at one point offered to allow Zurich to cover defense costs.

The IFCA also does not create an independent cause of action for alleged regulatory violations in the absence of an unreasonable denial of coverage or benefits. Perez-Crisantos v. State Farm Fire & Cas. Co., 187 Wn.2d 669, 680, 389 P.3d 476 (2017). Since Ledcor did not demonstrate Zurich's actions were unreasonable or in bad faith, its extra-contractual claims against Zurich were properly dismissed.

VSC

Ledcor next contends that the trial court erred in granting summary judgment and dismissing its claims against VSC. We agree.

Ledcor's CGL policy from VSC was effective December 1, 2003 to December 1, 2004. Ledcor tendered the COA's notice of construction defect to VSC on March 23, 2007. Cambridge Integrated Services Group, Inc., a third-party administrator of VSC, acknowledged receipt of the claim on April 13, 2007 and indicated it was investigating the matter. On May 16, 2007, VSC responded denying coverage based on several policy exclusions. After the COA filed its complaint, Ledcor re-tendered the matter to VSC on September 21, 2007. On July 20, 2009, VSC notified Ledcor that it would be sending a follow up letter agreeing to participate in Ledcor's defense under a reservation of rights. The subsequent letter was never sent. The COA's claim was resolved on July 28, 2009.

VSC moved for summary judgment in May 2010 seeking a declaratory judgment that it had no duty to defend Ledcor. At the same time, Ledcor moved for summary judgment against VSC. The trial court granted VSC's motion for summary judgment as to Ledcor and denied Ledcor's motion.[8]

[8] Relying on RAP 9.12, VSC moved to strike references in Ledcor's brief to materials not specifically listed in the trial court's order on summary judgment. Generally, "evidence called to the

A. Duty to Defend

VSC maintains that it did not have a duty to defend nor indemnify under the "progressive, continuous or intermittent property damage exclusion" (progressive damage exclusion) and the "other insurance" clause of its policy. We disagree. We address each in turn, strictly construing the exclusion against VSC. Expedia, 180 Wn.2d at 803.

The progressive damage exclusion has three requirements. For the exclusion to apply, VSC was required to demonstrate that (1) the property damage "existed or commenced prior to the inception date of th[e] policy," or (2) "arose out of any damage, defect, deficiency, inadequacy or dangerous condition which existed prior to the inception date of th[e] policy," and (3) that the damage was included under the defined "Products—Completed Operations Hazard." Work under the Products—Completed Operations Hazard would be deemed completed: "When all of the work to be done at the job site has been completed" or "When that part of the work done at a job site has been put to its intended use by any person or organization other than another contractor or subcontractor working on the same project."

Ledcor's CGL policy with VSC was effective December 1, 2003 to December 1, 2004. Thus, the progressive damage exclusion would exclude damage that existed or commenced, or arose out of a condition that existed, prior to December 1, 2003. The

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attention of the trial court is properly before us, whether or not it was considered by the trial court." Goodwin v. Wright, 100 Wn. App. 631, 648, 6 P.3d 1 (2000). At the time the trial court considered VSC's motion it was also reviewing motions and cross motions related to Ledcor's claims against Zurich. Due to the complex nature of this case, we decline to apply RAP 9.12 in a manner that would assume that the trial court granted summary judgment for VSC in a vacuum without considering Ledcor's own summary judgment motion or any other evidence. The appellate "rules will be liberally interpreted to promote justice and facilitate the decision of cases on the merits. Cases and issues will not be determined on the basis of compliance or noncompliance with these rules except in compelling circumstances where justice demands." RAP 1.2. We deny VSC's motion to strike.

COA's complaint is vague about when the damage began. The complaint lists multiple claims of water intrusion damages and defects, and states "the property damage is continuous and ongoing throughout the Condominium. Damage may have commenced at or shortly after the completion of each building or element of infrastructure, and may be continuing to the present."[9] Thus, the relevant date is the "completion" of each building. It is undisputed that the certificate of occupancy for The Admiral was issued by the City of Seattle on March 14, 2003, and sale of the condominiums began in April 2003. It is also undisputed that Ledcor and Admiral Way contractually agreed that The Admiral was not substantially complete until February 2004.

Strictly construing the exception against VSC, because the date of completion falls within the term of VSC's policy, VSC had a duty to investigate and give Admiral Way the benefit of the doubt. Woo, 161 Wn.2d at 53. Because a reasonable interpretation of the facts could result in coverage, the progressive damage exclusion does not apply.

The other insured condition in Ledcor's policy from VSC provides that the insurance is excess over "[a]ny other primary insurance available to you covering liability for damages arising out of the premises or operations for which you have been added as an additional insured by attachment of an endorsement." And further,

> When this insurance is excess, we will have no duty under COVERAGES A or B to defend the insured against any "suit" if any other insurer has a duty to defend the insured against that "suit." If no other insurer defends, we will undertake to do so, but we will be entitled to the insured's rights against all those other insurers.

Ledcor was listed as an additional insured under multiple insurance policies, and was being represented by two insurance companies that undertook its defense at no

[9] (Emphasis added.)

cost to Ledcor. However, there is no evidence that VSC investigated whether other insurers were "available" for Ledcor at the time of its initial denial, or that VSC even believed this provision applied when it denied Ledcor's claim. VSC did not rely on this provision in its denial, and VSC did not rely on this provision when it later suggested it would join the defense alongside the other carriers. If it is not clear from the face of the complaint that the policy provides coverage, but if coverage could exist, the insurer must investigate and give the insured the benefit of the doubt that the insurer has a duty to defend. Woo, 161 Wn.2d at 53. A question of fact remains whether VSC did the requisite investigation into whether other insurance was available for Ledcor before it denied coverage. Because there is at least a question of fact whether the progressive loss exclusion and other insurance provision apply, summary judgment and dismissal of Ledcor's claims against VSC was not appropriate.

B. Extra Contractual Claims

Ledcor maintains that VSC acted in bad faith. At the outset, Washington courts have long held the "insured may maintain an action against its insurer for bad faith investigation of the insured's claim and violation of the CPA regardless of whether the insurer was ultimately correct in determining coverage did not exist." Coventry Associates v. Am. States Ins. Co., 136 Wn.2d 269, 279, 961 P.2d 933 (1998). Only if the alleged claim is clearly not covered by the policy is the insurer relieved of its duty to defend. Kirk, 134 Wn.2d at 561. The insured bears the burden of demonstrating the insurer acted in bad faith when it refused to defend its insured by demonstrating that refusal is "unreasonable, frivolous, or unfounded." Truck, 147 Wn.2d at 777; Smith, 150 Wn.2d at 486. The insurer is entitled to summary judgment "if reasonable minds could not differ that its denial of coverage was based upon reasonable grounds." Smith, 150 Wn.2d at 486.

Ledcor retained a policy with VSC for primary general liability effective from December 1, 2003 to December 1, 2004. The Admiral was substantially completed on either April 2003, or February 2004. The original claim provided to VSC did not state a specific date as to when damages began, or when the defects developed. It can hardly be said that the alleged claim was "clearly not covered" by policy. "If the insurer is unsure of its obligation to defend in a given instance, it may defend under a reservation of rights while seeking a declaratory judgment that it has no duty to defend." Truck, 147 Wn.2d at 761. VSC should have done so in this case.

As discussed above, it appears that Ledcor may have been covered under VSC's CGL policy, and there remains at least a question of fact as to whether VSC reasonably investigated whether the two exclusions it relies upon actual excluded coverage. Dismissal of Ledcor's bad faith and CPA claim on summary judgment was erroneous.

North Pacific

Ledcor next contends that the trial court erred in dismissing its claims against North Pacific for coverage under its policy with The Painters. We disagree.

A. Additional Facts

The subcontract between Ledcor and The Painters required Ledcor be named as an additional insured on The Painters' insurance:

> 11.1 SUBCONTRACTOR' S INSURANCE. Prior to the start of the Subcontract Work, the Subcontractor shall procure for the Subcontract Work and maintain in force Workers' Compensation Insurance, Employer's Liability Insurance, Comprehensive Automobile Liability Insurance, Comprehensive or Commercial General Liability Insurance on an

> occurrence basis, and any other insurance required of Subcontractor under the Subcontract.
>
> . . . [T]he Contractor, Owner and other parties as required shall be named as additional insureds on each of these policies except for Workers' Compensation.
>
> The Subcontractor's insurance shall include contractual liability insurance covering the Subcontractor's obligations under this Subcontract.

The Painters obtained a CGL policy from North Pacific for the policy period from December 26, 2001, through December 26, 2002. The declarations did not name Ledcor as an additional insured under the policy. The policy included an automatic additional insured endorsement that provided:

> AUTOMATIC ADDITIONAL INSUREDS
> INCLUDING COMPLETED OPERATIONS TO THE EXTENT
> REQUIRED BY AN INSURED CONTRACT
>
> This endorsement modifies insurance provided under the following:
>
> COMMERCIAL GENERAL LIABILITY
> COVERAGE PART
>
> The following is added to WHO IS INSURED (Section II):
>
> 1. To the extent it is required by the terms of an "insured contract" which requires you to add by endorsement as an additional insured or organization, WHO IS AN INSURED (Section II) is amended to include as an insured such person or organization ("additional insured") but only with respect to:
>
>   (a) Vicarious liability arising out of <u>your ongoing operations</u> performed for the additional insured; or
>
>   (b) Liability arising out of any act or omission of the additional insured for which you have entered into an enforceable "insured contract" which obligates you to indemnify the additional insured, or to furnish insurance coverage for the additional insured, and arising out of <u>your ongoing operations for that additional insured</u>.
>
> With respect to the insurance afforded these additional insureds, the following additional exclusions apply:

2. This insurance does not apply to "bodily injury," or "property damage" occurring after:

   (a) All work, including materials, parts or equipment furnished in connection with such work, on the project (other than service, maintenance or repairs), to be performed by or on behalf of the additional insured at the site of the coverage operations has been completed; or

   (b) That portion of "your work" out of which the injury or damage arises has been put to its intended use by any person or organization other than another contractor or subcontractor engaged in performing operations for a principal as a part of the same project.

This exclusion does not apply to the extent that an "insured contract" requires that you assume the tort liability of the additional insured arising out of a risk that would otherwise be excluded by this exclusion.[10]

Ledcor tendered the COA's claim to North Pacific on March 10, 2009. North Pacific did not respond. On May 24, 2010, Ledcor's counsel sent a 20-day notice letter under the IFCA, demanding that North Pacific defend and indemnify Ledcor for the underlying construction defect claims as an additional insured under The Painters' CGL policy. On May 28, 2010, North Pacific responded stating they had no record of the March 2009 tender, and that there was no coverage under The Painters' CGL policy because Ledcor was not identified as an additional named insured and the automatic additional insured endorsement only applied to "ongoing operations."

In June 2010, Ledcor amended its third-party complaint to name North Pacific as a third-party defendant, alleging claims for declaratory relief, breach of contract, breach of the obligation of good faith and fair dealing, bad faith refusal to defend, and IFCA and CPA violations.

[10] (Emphasis added.)

North Pacific subsequently moved for summary judgment and dismissal of Ledcor's third-party claims. On July 8, 2011, the trial court granted North Pacific's motion on each contractual and extra-contractual claim and dismissed North Pacific from the lawsuit.

B. Duty to Defend

North Pacific contends that their policy with The Painters only provided automatic additional insured coverage for "ongoing operations" and not "completed operations." Consequently, because Ledcor was not a named additional insured, North Pacific had no duty to provide a defense to Ledcor as an additional insured because the operations performed by The Painters were completed operations. We agree with North Pacific.

North Pacific relies on this court's decision in Hartford Ins. Co. v. Ohio Cas. Ins. Co., 145 Wn. App. 765, 778, 189 P.3d 195 (2008), where we concluded that the term "ongoing operations" was an express coverage limitation in the policy and endorsement language that was intended to avoid "broad coverage for an additional insured." Specifically, we held "ongoing operations" language excludes "completed operations" coverage and limits coverage to the "subcontractors' work in progress only." Hartford, 145 Wn. App. at 778. The plain language of the North Pacific policy contains this same limitation.

Section one of the "additional insured" endorsement in The Painters' policy limits additional insured coverage to when it "is required by the terms of an 'insured contract'" and includes as an insured such person or organization "only with respect to: (a) Vicarious liability arising out of your ongoing operations performed for the additional insured; or (b) Liability arising out of any act or omission of the additional insured . . .

arising out of <u>your ongoing operations for that additional insured</u>."[11] Thus, as in Hartford, the plain language of the first section explicitly limits coverage to "ongoing operations." <u>See</u> <u>Absher Const. Co. v. N. Pac. Ins. Co.</u>, 861 F. Supp. 2d 1236, 1244 (W.D. Wash. 2012) (considering a similar North Pacific policy).

The COA's complaint in the underlying action alleged damages occurring after completion of the buildings, long after the Painters ceased their "ongoing operations." Accordingly, we agree with the trial court that the policy did not cover those claims and North Pacific's denial of a defense and coverage based on this language was not "unreasonable, frivolous, or unfounded." We affirm summary judgment.

Transportation

Ledcor next contends that the trial court erred in dismissing its claims against Transportation[12] based on the policy Transportation provided subcontractor SQI. We agree.

Ledcor contracted with subcontractor SQI to install a roofing system. Transportation issued policies to SQI for the period from May 1, 2000 to May 1, 2003. It is undisputed that SQI was required to name Ledcor as an additional insured under those policies. Paragraph 11.1 of the subcontract between Ledcor and SQI is the same as the subcontract with The Painters, and describes the requirements that SQI name certain parties as additional insureds:

> 11.1 SUBCONTRACTOR'S INSURANCE. Prior to start of the Subcontract work, the Subcontractor shall procure for the Subcontract Work and maintain in force Workers' Compensation Insurance, Employer's Liability Insurance, Comprehensive Automobile Liability Insurance, Comprehensive or Commercial General Liability Insurance on an occurrence basis, and any other insurance required of Subcontractor

[11] (Emphasis added.)
[12] Ledcor refers to the Transportation Insurance Company as CNA.

> under the Subcontract. If required by the Subcontract Documents, the Contractor, Owner and other parties as required shall be named as additional insureds on each of these policies except for Workers' Compensation. The Subcontractor's insurance shall include contractual liability insurance covering the Subcontractor's obligations under this Subcontract.[13]

Paragraph 11.2 of the subcontract states the "Subcontractor's Comprehensive or Commercial General Liability Insurance and Comprehensive Automobile Liability Insurance, as required by Paragraph 11.1, shall be written with limits of liability not less than the following: . . .

> A. Comprehensive General Liability Insurance including completed operations:
>
> 1. Combined Single Limit Bodily Injury and Property Damage: $1,000,000 Each Occurrence $ 2,000,000 Aggregate
>
> or
>
> 2. Bodily Injury: $ 1.000,000 Each Occurrence $ 2,000,000 Aggregate
> 3. Property Damage: $ 1,000,000 Each Occurrence $ 2,000,000 Aggregate
>
> B. Commercial General Liability Insurance
> 1. Each Occurrence Limit: $ 1,000,000
> 2. General Aggregate: $2,000,000
> 3. Products/Completed Operations Aggregate: $2,000,000. . ."[14]

Paragraph 11.4 states the requirements for what insurance policies the subcontractors must obtain, and provisions for cancellation and renewal of those policies. This paragraph includes the requirement that "The Subcontractor shall maintain completed operations liability insurance for one year after acceptance of the Subcontract Work, substantial completion of the Project, or to the time required by the Subcontract Documents, whichever is longer." The Subcontractor shall furnish the

[13] (Emphasis added.)
[14] (Emphasis added.)

Contractor evidence of such insurance at the time of completion of the Subcontract Work.

The issue is whether Ledcor, as an additional insured under SQI's policy with Transportation, had completed operations coverage. Of the three annual policies that Transportation issued to SQI, only the third (May 1, 2002 through May 1, 2003) contains an endorsement addressing completed operations. The policy includes an endorsement that modifies the "commercial general liability coverage." The endorsement provides an additional-insured coverage for completed operations only if that coverage is required by written contract:

> The coverage provided to the additional insured by this endorsement and paragraph f. of the definition of "insured contract" under DEFINITIONS (section V) do not apply to "bodily injury" or "property damage" arising out of the "products-completed operations hazard" unless required by the written contract or written agreement.[15]

Under the policies, "products-completed operations hazard,"

> a. Includes all "bodily injury" and "property damage" occurring away from premises you own or rent and arising out of "your product" or "your work" except:
>
> (1) Products that are still in your physical possession; or
>
> (2) Work that has not yet been completed or abandoned. However, "your work" will be deemed completed at the earliest of the following times:
>
> (a) When all of the work called for in your contract has been completed.
>
> (b) When all of the work to be done at the job site has been completed if your contract calls for work at more than one job site.
>
> (c) When that part of the work done at a job site has been put to its intended use by any person or organization other than another contractor or subcontractor working on the same project.

[15] (Emphasis added).

> Work that may need service, maintenance, correction, repair or replacement, but which is otherwise complete, will be treated as completed.[16]

In construing a written contract, a court will not read an ambiguity into a contract that is otherwise clear and unambiguous. Mayer v. Pierce County Med. Bureau, Inc., 80 Wn. App. 416, 420, 909 P.2d 1323 (1995). When interpreting a contract, the contract will be given a practical and reasonable interpretation that fulfills the object and purpose of the contract rather than a strained or forced construction that leads to an absurd conclusion, or that renders the contract nonsensical or ineffective. Washington Pub. Util. Districts' Utilities Sys. v. Pub. Util. Dist. No. 1 of Clallam County, 112 Wn.2d 1, 11, 771 P.2d 701 (1989). Transportation's interpretation of the contract asks us to do just that.

Paragraph 11.1 of the subcontract required that SQI obtain several forms of insurance, including "Comprehensive or Commercial General Liability Insurance on an occurrence basis." The subcontractor was also to name "the Contractor, Owner and other parties . . . as additional insureds on each of these policies." It is undisputed this paragraph fulfills the requirement of requiring Ledcor to be named as an additional insured.

Paragraph 11.2 provided the minimum limits of liability for "The Subcontractor's Comprehensive or Commercial General Liability Insurance and Comprehensive Automobile Liability Insurance, as required by Paragraph 11.1." This reference back to 11.1 is not a limitation, but merely referencing that "Comprehensive or Commercial General Liability Insurance" had been required in 11.1. The minimums required under paragraph 11.2 for CGL insurance include a "product/completed operations aggregate

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[16] (Emphasis added.)

of $2 million. Because paragraph 11.1 required CGL insurance, paragraph 11.2 required the insurance include completed operations coverage.

In addition, paragraph 11.4 of the subcontract provided the coverage time limits required under the contract. 11.4 includes the requirement that the Subcontractor shall "maintain in effect all insurance coverage required under this Subcontract," and that the "Subcontractor shall maintain completed operations liability insurance for one year after acceptance of the Subcontract Work, substantial completion of the Project, or to the time required by the Subcontract Documents, whichever is longer."[17]

When read together, and giving effect to paragraphs 11.1, 11.2, and 11.4, SQL's subcontract required Ledcor to be named as an additional insured on the CGL policy, required the CGL policy to include completed project coverage, and required the coverage extend through the term of the CGL policies issued by Transportation. The trial court erred in granting summary judgment and dismissing Ledcor's claims against Transportation.

FMIC

Ledcor contends next that the trial court erred in dismissing its direct claims against third party FMIC, another insurer for subcontractor SQI. We disagree.

We first address whether Ledcor was covered under the policies issued by FMIC to SQI. FMIC issued a CGL policy from May 1, 2006 to May 1, 2007. That policy was subsequently renewed from May 1, 2007 to May 1, 2008. Both policies contained separate endorsements for ongoing operations and completed operations. Both policies also contain nearly identical "additional insured ongoing operations" endorsements. That endorsement provides as follows:

[17] (Emphasis added.)

A. Section II - Who Is An Insured is amended to include as an additional insured any person or organization for whom you are performing operations when you and such person or organization have agreed in writing in a contract or agreement that such person or organization be added as an additional insured on your policy. Such person or organization is an additional insured only with respect to liability for "bodily injury", "property damage" or "personal and advertising injury" caused, in whole or in part, by:

1. Your acts or omissions; or

2. The acts or omissions of those acting on your behalf; in the performance of your ongoing operations for the additional insured.

A person's or organization's status as an additional insured under this endorsement ends when your operations for that additional insured are completed.

. . .

B. With respect to the insurance afforded to these additional insureds, the following additional exclusions apply:
This insurance does not apply to:

. . .

2. "Bodily injury" or "property damage" occurring after:

a. All work, including materials, parts or equipment furnished in connection with such work, on the project (other than service, maintenance or repairs) to be performed by or on behalf of the additional insured(s) at the location of the covered operations has been completed; or

b. That portion of "your work" out of which the injury or damage arises has been put to its intended use by any person or organization other than another contractor or subcontractor engaged in performing operations for a principal as a part of the same project.[18]

Thus, the only question is whether SQI was engaged in any "ongoing operations" for the additionally insured—Ledcor—at the time the original policy began on May 1,

[18] (Emphasis added).

2006. It is undisputed that SQI's final maintenance at The Admiral concluded on May 10, 2005. Ledcor does not argue any other "ongoing operations" were continuing at that time, nor provide any evidence that further operations took place during that period. The contract unambiguously provides, "A person's or organization's status as an additional insured under this endorsement ends when your operations for that additional insured are completed." Consequently, Ledcor has not demonstrated that it qualifies as an additional insured for ongoing operations under either policy.

Turning to the completed operations endorsement, the 2006 to 2007 and 2007 to 2008 policies differ. The 2006 to 2007 policy specifically identifies each entity covered as an additional insured for completed operations. Ledcor was not identified as an additionally insured for completed operations on the 2006 to 2007 policy. Ledcor offered no evidence to the contrary.

The 2007 to 2008 policy, however, includes an additional listing for: "Any person or organization, . . .to whom or to which the Named Insured <u>is obligated</u>, by virtue of written contract to provide Insurance, such as is afforded by this policy."[19]

The same Ledcor and SQI subcontract is at issue here as in the claims brought against Transportation. As discussed above, when read together, paragraphs 11.1, 11.2, and 11.4 required SQI to maintain completed operations coverage and identify Ledcor as an additionally named. SQI's obligation, however, was limited in time. Paragraph 11.4 of the subcontract requires that: "The Subcontractor shall maintain completed operations liability insurance for one year after acceptance of the Subcontract Work, substantial completion of the Project, or to the time required by the Subcontract Documents, whichever is longer." Under this provision, the latest

[19] (Emphasis added.)

reasonable interpretation of this provision is May 2006, one year after SQI performed maintenance on The Admiral.

We hold that Ledcor was not an additionally insured under the policy issued to SQI by FMIC. In addition, because Ledcor was not covered as an additional insured under the policies, Ledcor has failed to demonstrate that FMIC's denial of coverage was "unreasonable, frivolous, or unfounded." Overton, 145 Wn.2d at 433.

Ledcor's Assigned Claims Against FMIC

SQI assigned its direct claim against FMIC to Ledcor. Ledcor asserts finally that the trial court erred in dismissing its assigned claims against FMIC. We disagree.

A. Additional Facts

On August 29, 2008, while the COA's construction defect action was pending, Ledcor filed a separate lawsuit against all subcontractors involved in The Admiral project (subcontractor action). SQI was named in the subcontractor action. The subcontractor action sought to recover against the subcontractors any amounts that Ledcor was ultimately obligated to pay to the COA.

SQI tendered that lawsuit to FMIC seeking defense and indemnity as a Named Insured under the FMIC Policies. FMIC agreed to defend SQI pursuant to a reservation of rights. One of SQI's other insurers, Cornhusker Insurance Company (Cornhusker), also agreed to participate in SQI's defense. Cornhusker and FMIC jointly provided SQI with a fully funded and complete defense. Ledcor sent a settlement demand letter in March 2014. Beginning in February 2014, FMIC participated in mediations and offered to contribute to settlement demands on behalf of SQI. No settlement was reached at this time. After the mediations failed to reach a settlement, FMIC sent letters requesting updates on the settlement negotiations.

On April 8, 2014, FMIC was informed by the assigned defense counsel that SQI, through its personal counsel, had reached a settlement agreement with Ledcor. On April 11, 2014, FMIC was provided with a copy of the consent judgment that was entered against SQI in the subcontractor action. The consent judgment indicated that it was filed in compliance with a March 21, 2014 settlement agreement between Ledcor and SQI. FMIC sent a follow up letter requesting information about the letter, and expressing concern that it had not been included in the settlements, or been asked to contribute to the settlement. After entering into the consent judgment settlement, Ledcor pursued all contractual and extra-contractual causes of action against FMIC as the assignee of SQI.

In November 2013, FMIC filed a declaratory judgment action in federal court seeking a judicial determination that it was not obligated to cover SQI in the subcontractor action. After the case was remanded to the King County Superior Court, FMIC was granted leave to file a third-party complaint in this action seeking declaratory judgment against SQI. SQI (through Ledcor) responded adding counter claims for breach of duty, bad faith, and violations of the CPA and the IFCA.

On October 28, 2016, the trial court granted FMIC's motion for summary judgment dismissing SQI/Ledcor's counter claims. On October 31, 2016, the court granted FMIC's motion for summary judgment agreeing that the policy FMIC issued to SQI was not applicable, and even if it were, the continuous or progressive injury or damage exclusion barred recover. The trial court subsequently denied Ledcor's motions for reconsideration.

B. Duty to Defend

The FMIC policy issued to SQI provides coverage for "property damage" caused by an "occurrence" during the FMIC policy period, so long as the insured does not know, in whole or in part, about the "property damage" or any continuation, change, or resumption of such "property damage" prior to the inception of the FMIC policy. Specifically, the policy states,

> a. We will pay those sums that the insured becomes legally obligated to pay as damages because of "bodily injury" or "property damage" to which this insurance applies. We will have the right and duty to defend the insured against any "suit" seeking those damages. However, we will have no duty to defend the insured against any "suit" seeking damages for "bodily injury" or "property damage" to which this insurance does not apply. . . .
>
> b. This insurance only applies to "bodily injury" and "property damage" only if:
>
>   1) The "bodily injury" or "property damage" is caused by an "occurrence" that takes place in the "coverage territory"; and
>   2) The "bodily injury" or "property damage" <u>occurs during the policy period</u>; and
>   3) Prior to the policy period, no insured listed under Paragraph 1 of Section II – Who Is An Insured and no "employee" authorized by you to give or receive notice of an "occurrence" or claim, <u>knew that the "bodily injury" or "property damage" had occurred, in whole or in part</u>. If such a listed insured or authorized "employee" knew, prior to the policy period, that the "bodily injury" or "property damage" occurred, then <u>any continuation, change or resumption of such "bodily injury" or "property damage" during or after the policy period will be deemed to have been known prior to the policy period.</u>
>
> . . .
>
> d. "Bodily injury" or "property damage" will be deemed to have been known to have occurred at the earliest time when any insured listed under Paragraph 1. of Section II - Who Is An Insured or any "employee" authorized by you to give or receive notice of an "occurrence" or claim:
>
>   1) Reports all, or any part, of the "bodily injury" or "property damage" to us or any other insurer;
>   2) Receives a written or verbal demand or claim for damages because of the "bodily injury" or "property damage"; or

> 3) Becomes aware by any other means that "bodily injury" or "property damage" has occurred or has begun to occur.[20]

As discussed above, in determining coverage, this court considers a two-step process. First, the insured must establish that the loss falls within the "scope of the policy's insured losses." Then, the burden shifts to the insurer to show that the loss is excluded by specific language in the policy. Diamaco, 97 Wn. App. at 337. Although this policy uses exclusionary language, the burden is still on SQI to demonstrate the damage took place during the coverage period, and that SQI did now know of the damage before the policy period.

FMIC provided substantial evidence that SQI knew, at least in part, that the damage to the roofing had occurred at The Admiral as of at least 2004. FMIC further provided evidence that SQI failed to repair the damage that it was asked to repair in 2005, and that some of the claims arose of that damage. SQI only presented evidence that SQI may have believed that they had fixed all of the damage when they returned to do further maintenance in 2005.[21] Moreover, the evidence showed the damage occurring after 2005 would have been a "continuation, change or resumption" of the original damages.[22] Because there is no reasonable dispute that SQI knew of the damages before it purchased the FMIC policies in 2006 and in 2007, summary judgment was appropriate concluding that SQI's damages were not covered under the FMIC policies.

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[20] (Emphasis added.)

[21] Ledcor cites several cases considering the common law "known loss" principal, however these cases do not support his argument. See Pub. Util. Dist. No. 1 of Klickitat County v. Int'l Ins. Co., 124 Wn.2d 789, 806, 881 P.2d 1020 (1994).

[22] (Emphasis added.)

C. Extra Contract Claims

Again, to succeed on a bad faith claim, the policyholder must show the insurer's breach of the insurance contract was unreasonable, frivolous, or unfounded. Overton, 145 Wn.2d at 433. "The insured may not base a bad faith or CPA claim on an insurer's good faith mistake, which occurs when the insurer acts honestly, bases its decision on adequate information, and does not overemphasize its own interest." Werlinger, 129 Wn. App. at 808.

Here, based on the allegations in the subcontractor action, FMIC accepted the defense of SQI under a reservation of rights. FMIC then assigned counsel, participated in settlement negotiations, and finally brought a declaratory relief action. SQI did not pay any defense fees or incur damages. FMIC did not act in bad faith in its defense of SQI. See Truck, 147 Wn.2d at 761.

SQI also raised various CPA violations, including that FMIC failed to investigate its claims, and again that FMIC "commingled" the coverage and defense claims. Even if these actions rise to the level of "(1) unfair or deceptive act or practice," under the CPA, there is no presumption of harm. SQI needed to prove it was harmed by FMIC's actions, and SQI did not present evidence of harm. SQI did not pay defense fees or incur any costs.

Finally, in the absence of an unreasonable denial of coverage or benefits, the IFCA does not create an independent cause of action for alleged regulatory violations. Perez-Crisantos, 187 Wn.2d at 680.

Summary judgment and dismissal of Ledcor's assigned claims against FMIC was appropriate.

We reverse the dismissal of Ledcor's claims against VSC and Transportation. We affirm in all other respects.

Mann, A.C.J.

WE CONCUR:

Trickey, J.P.T.

Verellen, J.

APPENDIX B

FILED
3/18/2019
Court of Appeals
Division I
State of Washington

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

ZURICH AMERICAN INSURANCE COMPANY, a foreign insurance company, Respondent/Cross-Appellant, v. LEDCOR INDUSTRIES (USA) INC., a Washington corporation, ADMIRAL WAY, LLC, a Washington limited liability company, and SQI, INC., a Washington corporation, Appellants/Cross-Respondents.	No. 76490-0-I DIVISION ONE UNPUBLISHED OPINION FILED: March 18, 2019
LEDCOR INDUSTRIES (USA) INC., a Washington corporation, Appellants, v. AMERICAN INTERNATIONAL SPECIALTY LINES INSURANCE COMPANY, INC., a foreign insurance company; CAMBRIDGE INTEGRATED SERVICES GROUP, INC., a foreign corporation; LIBERTY INSURANCE UNDERWRITERS, INC., a foreign insurance company; AIU	

COMMERCIAL INSURANCE COMPANY OF CANADA, a foreign insurance company; LEXINGTON INSURANCE COMPANY, a foreign insurance company; LIBERTY SURPLUS INSURANCE CORPORATION, a foreign insurance company; HARTFORD PROPERTY AND CASUALTY COMPANY, a foreign insurance company; and CONTINENTAL WESTERN INSURANCE COMPANY, a foreign insurance company,

Third-Party Defendants,

VIRGINIA SURETY COMPANY, INC., a foreign insurance company; TRANSPORTATION INSURANCE COMPANY, a foreign insurance company; TRANSCONTINENTAL INSURANCE COMPANY, a foreign insurance company; NORTH PACIFIC INSURANCE COMPANY, a foreign insurance company; and FIRST MERCURY INSURANCE COMPANY, a foreign insurance company,

Respondents.

MANN, A.C.J. — This is one of two closely connected insurance coverage appeals arising out of the construction of "The Admiral," a mixed use condominium building in West Seattle.[1] The appellant in this case was the general contractor, Ledcor Industries (USA), Inc. (Ledcor). The building owner and developer, Admiral Way LLC (Admiral Way), contracted with Ledcor for construction of the building. Ledcor in turn contracted with several subcontractors, including The Painters, Inc. (The Painters) and SQI, Inc. (SQI).

[1] See Admiral Way, LLC v. Zurich American Ins. Co., No. 76405-5-I (Wash. Ct. App. Dec. 10, 2018) (unpublished).

After the Admiral Way Condominium Owners' Association (COA) sued Admiral Way and Ledcor in 2007 for construction defects, Ledcor tendered the claim to its insurers and its subcontractors' insurers. After responding and defending against the COA's claims under a reservation of rights, Zurich American Insurance Company (Zurich) filed a declaratory judgment action against Ledcor claiming it did not owe coverage under its policies. Ledcor responded by filing counterclaims and third-party causes against multiple insurers claiming bad faith and violations of the Consumer Protection Act (CPA)[2], and the Insurance Fair Conduct Act (IFCA)[3].

Ledcor appeals the trial court's decision granting summary judgment and dismissing Zurich, Virginia Surety Company (VSC), First Mercury Insurance Company (FMIC), North Pacific Insurance Company (North Pacific), and Transportation Insurance Company (Transportation). We reverse dismissal of Ledcor's claims against VSC and Transportation. We affirm dismissal of Zurich, FMIC, and North Pacific.

FACTS

Admiral Way is the owner and developer of "The Admiral" a mixed use, four-story building in West Seattle with street level retail, 60 condominiums and an underground parking garage. On April 3, 2001, Admiral Way and Ledcor entered into a construction contract for construction of the building. Ledcor was the general contractor. Ledcor in turn contracted with various specialty subcontractors. Relevant to this appeal, Ledcor subcontracted with SQI to install the original roof, and in 2005, Ledcor again subcontracted with SQI to conduct substantial roofing repair. Ledcor subcontracted with

[2] Ch. 19.86 RCW
[3] RCW 48.30.010-.015

The Painters to provide labor, materials, and equipment for a "Gacoflex" waterproofing system on the balconies and courtyards of The Admiral.

The contract between Ledcor and Admiral Way required Ledcor to obtain commercial general liability (CGL) insurance naming Admiral Way as an additional insured. The contract between Ledcor and its subcontractors required that the subcontractors each obtain CGL insurance naming Ledcor as an additional insured.

Ledcor purchased a CGL insurance policy from VSC for the policy period of December 1, 2003 through December 1, 2004. Ledcor also purchased two consecutive annual CGL policies from Zurich, for the policy periods from December 1, 2005 through December 1, 2007. SQI purchased three consecutive annual CGL policies from Transportation covering the period from May 1, 2000 through May 1, 2003. SQI also purchased CGL policies from FMIC for the policy period of May 1, 2006 to May 1, 2008. The Painters purchased CGL policies from North Pacific for the period of December 26, 2001 to December 26, 2002.

Construction of The Admiral began in 2001. The City of Seattle issued a certificate of occupancy in March 2003. The sale of condominiums began soon thereafter. After a contract dispute, on February 10, 2004, Ledcor and Admiral Way executed a contract addendum that resolved their remaining disputes about payment and performance of Ledcor's work. The parties agreed in the addendum that the project was complete other than specific items in an attached punch list that were to be completed by February 20, 2004.

In 2001, Admiral Way retained Morrison Hershfield (Morrison) as a building envelope consultant to provide recommendations to the project architect on balcony and wall interface details. Ledcor also retained Morrison and received a report from the firm in December 2002. Morrison concluded there were significant areas where there was "inappropriate design, and to a lesser degree inappropriate construction that in our opinion makes the building high risk for premature building envelope failure." In March 2003, Morrison recommended substantial repairs to the building's brick veneer and pre-cast column caps. Morrison believed that if the recommended work was not done, the walls would "remain susceptible to water entry" that "would lead to deterioration of the sheathing and corrosion of the framing," and "result in a compromise of the structural integrity." Morrison further reported, "[w]e are of the opinion that if not address[ed] at this time, these as-built details will require remediation within the next five years." Morrison expressed similar concerns with other recommended work.

On February 28, 2007, the COA sent Admiral Way a notice of construction defect claim alleging that the building, or components of the building, were defectively designed and/or constructed, resulting in water intrusion that affected residential units, commercial spaces, and common areas throughout the project. This notice was followed by the filing of a complaint in the King County Superior Court. In its complaint, the COA alleged that damage to the building began after the completion of construction:

> As a result of Declarant's acts and omissions, property damage to the Condominium has occurred to that part of real property on which contractors or subcontractors working on Declarant's behalf have completed their operations. Such property damage has also occurred to that part of real property that must be restored, repaired or replaced because of the work of others performed on Declarant's behalf. The property damage is continuous and ongoing throughout the Condominium. Damage may have commenced at or shortly after the completion of each building or element of infrastructure, and may be continuing to the present.

In response to the COA complaint Admiral Way filed a third-party complaint against Ledcor alleging Ledcor and its subcontractors were responsible for the defective work.

Ledcor initially tendered defense of the action to its own insurers Zurich and VSC. Zurich accepted Ledcor's tender and assigned counsel. Zurich defended Ledcor in the underlying case, from 2007 through settlement in July 2009, while expressly reserving its right to contest coverage under a reservation of rights.

Ledcor also tendered the action to FMIC, Transportation, and North Pacific, for defense and indemnity for damages arising from SQI's and The Painters' work. FMIC accepted SQI's tender under a reservation of rights and contributed to SQI's defense. FMIC did not defend nor indemnify Ledcor. Transportation and North Pacific denied coverage. VSC originally denied coverage, then agreed to defend Ledcor under a reservation of rights just as the final settlement was being reached. VSC did not pay any defense costs and did not indemnify.

Zurich filed the underlying action in March 2009 seeking declaratory judgment of its obligations to defend and indemnify its named insured, Ledcor, and the additional insured Admiral Way. Ledcor filed counterclaims for declaratory relief, insurance bad faith, and violations of the CPA and the IFCA. Ledcor's counterclaims included third parties FMIC, Transportation, North Pacific, and VSC, as well as multiple other insurers.

Meanwhile, the COA, Admiral Way, and Ledcor settled their dispute over the condominium damage on July 28, 2009. The COA's claims against Admiral Way and Ledcor settled for $4,700,000. The settlement was contingent upon AIG, another of

Ledcor's insurers funding $2,550,000. Ledcor agreed to pay $150,000, and Marc Gartin on behalf of Admiral Way agreed to pay $2,000,000.

The underlying declaratory judgment action proceeded with discovery and motions. In June 2010, the trial court granted Zurich's motions for partial summary judgment on (1) coverage under the policy in effect between December 1, 2006 and December 1, 2007 and (2) dismissing Ledcor's counterclaims for insurance bad faith, CPA, and IFCA violations. The trial court also denied Ledcor's motion for partial summary judgment against Zurich for insurance bad faith and CPA violations. At the same time, the trial court granted VSC's motion for summary judgment and dismissed Ledcor's claims against VSC.

In March 2011, the trial court dismissed Ledcor's remaining counterclaims against Zurich, concluding that Zurich had no duty to defend or indemnify Ledcor with respect to the COA's construction defect claims.

In April 2011, the trial court granted FMIC's motion for summary judgment concluding Ledcor was not entitled to coverage under the policy issued by FMIC to SQI as a matter of law.

In July 2011, the trial court granted North Pacific's motion for summary judgment and dismissed Ledcor's third party claims related to its policy issued to The Painters.

In February 2014, the trial court granted Transportation's motion for partial summary judgment and dismissed Ledcor's breach of contract claims for policies issued to SQI.

In a separate action, Ledcor sued its subcontractors. Through a settlement between Ledcor and SQI, Ledcor took assignment of SQI's direct claims against FMIC.

On October 31, 2016, the trial court granted FMIC's motion for summary judgment agreeing that FMIC did not have an obligation to cover SQI's defense against Ledcor's claim and that the policy FMIC issued to SQI was not applicable, and even if it were, the continuous or progressive injury or damage exclusion barred recovery.

Ledcor appeals.

ANALYSIS

We review summary judgment orders de novo, engaging in the same inquiry as the trial court. Keck v. Collins, 184 Wn.2d 358, 370, 357 P.3d 1080 (2015). Summary judgment is proper if, after viewing all facts and reasonable inferences in the light most favorable to the nonmoving party, there are no genuine issues as to any material fact and the moving party is entitled to judgment as a matter of law. CR 56(c); Elcon Const. Inc. v. E. Wash. Univ., 174 Wn.2d 157, 164, 273 P.3d 965 (2012). "The moving party on summary judgment must produce factual evidence showing that it is entitled to judgment as a matter of law. The burden then shifts to the nonmoving party to set forth facts showing that there is a genuine issue of material fact in dispute." Hartford Ins. Co. v. Ohio Cas. Ins. Co., 145 Wn. App. 765, 779, 189 P.3d 195 (2008).

A party opposing a motion for summary judgment may not rely on speculation, argumentative assertions that unresolved factual issues remain, or its affidavits considered at face value. Rather, "the nonmoving party must set forth specific facts that sufficiently rebut the moving party's contentions and reveal that a genuine issue as to a material fact exists." Herman v. Safeco Ins. Co. of Am., 104 Wn. App. 783, 787-88, 17 P.3d 631 (2001). "'Ultimate facts, conclusions of fact, conclusory statements of fact or legal conclusions are insufficient to raise a question of fact.'" Ainsworth v. Progressive

Cas. Ins. Co., 180 Wn. App. 52, 61, 322 P.3d 6 (2014) (quoting Snohomish County v. Rugg, 115 Wn. App. 218, 224, 61 P.3d 1184 (2002)). "On summary judgment review, we may affirm the trial court's decision on any basis within the record." Davidson Serles & Assocs. v. City of Kirkland, 159 Wn. App. 616, 624, 246 P.3d 822 (2011).

The outcome of this case depends on a proper interpretation of the various insurance policies issued to Ledcor and its subcontractors. Interpretation of insurance policies is a question of law we review de novo. Overton v. Consol. Ins. Co., 145 Wn.2d 417, 424, 38 P.3d 322 (2002). We construe insurance policies as contracts. Weyerhaeuser Co. v. Commercial Union Ins. Co., 142 Wn.2d 654, 665, 15 P.3d 115 (2000). "Every insurance contract shall be construed according to the entirety of its terms and conditions as set forth in the policy, and as amplified, extended, or modified by any rider, endorsement, or application attached to and made a part of the policy." RCW 48.18.520. We consider the policy as a whole, giving it a "fair, reasonable, and sensible construction as would be given to the contract by the average person purchasing insurance." Am. Nat'l Fire Ins. Co. v. B & L Trucking & Constr. Co., 134 Wn.2d 413, 427-28, 951 P.2d 250 (1998). Where possible, we harmonize clauses that seem to conflict in order to give effect to all of the contract's provisions. Realm, Inc. v. City of Olympia, 168 Wn. App. 1, 5, 277 P.3d 679 (2012).

"If the policy language is clear and unambiguous, we must enforce it as written; we may not modify it or create ambiguity where none exists." Quadrant Corp. v. Am. States Ins. Co., 154 Wn.2d 165, 171, 110 P.3d 733 (2005). If a term is defined in a policy, "the term should be interpreted in accordance with that policy definition." Kitsap County v. Allstate Ins. Co., 136 Wn.2d 567, 576, 964 P.2d 1173 (1998). A clause is ambiguous only "when, on its face, it is fairly susceptible to two different interpretations, both of which are reasonable." Quadrant, 154 Wn.2d at 171. If a clause is ambiguous, we may rely on extrinsic evidence of the intent of the parties to resolve the ambiguity. Weyerhaeuser, 142 Wn.2d at 666 (citing B & L Trucking, 134 Wn.2d at 427-28). Any ambiguity remaining after examination of the applicable extrinsic evidence is resolved against the insurer and in favor of the insured. Weyerhaeuser, 142 Wn.2d at 666. However, while exclusions should be strictly construed against the drafter, a strict application should not trump the plain, clear language of an exclusion such that a strained or forced construction results. Weyerhaeuser Co., 142 Wn.2d at 666.

Zurich

Ledcor contends that the trial court erred in concluding that Zurich did not have a duty to defend under the CGL policies and in dismissing Ledcor's claims for insurance bad faith, and for violations of the CPA and the IFCA. We disagree.

A. Duty to Defend

The duty to defend is different from and broader than the duty to indemnify. Am. Best Food, Inc. v. Alea London, 168 Wn.2d 398, 404, 229 P.3d 693 (2010); Expedia, Inc. v. Steadfast Ins. Co., 180 Wn.2d 793, 802, 329 P.3d 59 (2014). The duty to defend is one of the main benefits of an insurance contract. Safeco Ins. Co. of Am. v. Butler, 118 Wn.2d 383, 392, 823 P.2d 499 (1992). "While the duty to indemnify exists only if the policy covers the insured's liability, the duty to defend is triggered if the insurance policy conceivably covers allegations in the complaint." Expedia, 180 Wn.2d at 802. "'The duty to defend arises when a complaint against the insured, construed liberally, alleges facts that could, if proven, impose liability upon the insured within the policy's coverage.'" Expedia, 180 Wn.2d at 803 (quoting Am Best Food, 168 Wn.2d at 404-05). Exclusionary clauses in the policy are "strictly construed against the insurer." Expedia, 180 Wn.2d at 803. "If the complaint is ambiguous, it will be liberally construed in favor of triggering the insurer's duty to defend." Truck Ins. Exch. v. Vanport Homes, 147 Wn.2d 751, 760, 5 P.3d 276 (2002).

The duty to defend is generally determined by looking at the "eight corners" of the insurance contract and the underlying complaint. The insurer is permitted to utilize the "'eight corners'" rule to determine whether, on the face of the complaint and the insurance policy, there is an issue of fact or law that could conceivably result in coverage under the policy. Expedia, 180 Wn.2d at 803. "There are two exceptions to this rule, and both favor the insured." Expedia, 180 Wn.2d at 803. First, "if it is not clear from the face of the complaint that the policy provides coverage, but coverage could exist, the insurer must investigate and give the insured the benefit of the doubt that the insurer has a duty to defend." Woo v. Fireman's Fund Ins. Co., 161 Wn.2d 43, 53, 164 P.3d 454 (2007). Second, "if the allegations in the complaint conflict with facts known to the insurer or if the allegations are ambiguous, facts outside the complaint may be considered." Expedia, 180 Wn.2d at 803-04 (citing Woo, 161 Wn.2d at 54).

Ledcor was directly insured by Zurich under two general liability insurance policies. The first was effective from December 1, 2005 to December 1, 2006. The second was effective from December 1, 2006 to November 30, 2007. Each Zurich policy contained two endorsements that Zurich argues barred coverage for the COA's claims: a residential building exclusion and an exclusion for continuing damage that began before the policy was issued. The burden is on the insurer to show that the loss is excluded under the policy. Diamaco, Inc. v. Aetna Cas. & Sur. Co., 97 Wn. App. 335, 337, 983 P.2d 707 (1999).

The policies issued by Zurich to Ledcor contain an exclusion for designated work on residential buildings. The first policy (December 1, 2005 through December 1, 2006) excluded coverage for property damage caused by "your work" and defined "your work" as:

> This exclusion only applies to "your work" in connection with the construction, reconstruction, remodeling, or repair of any "residential building". For the purpose of this endorsement, "residential building" means: 1. Any single-family dwelling, including town homes or townhouses, other than military base housing, and 2. Any multi-family dwelling, including condominiums or cooperatives, duplexes, triplexes or four-plexes; and 3. Any apartments, assisted living facilities or resort timeshares, if made of wood frame, or partially made of wood frame construction; and 4. Any other structure which is attached to any such "residential building." The determination as to the type of structure will be made at the time a claim is made or suit is brought.[4]

The endorsement in Zurich's second policy (December 1, 2006 through December 1, 2007) defined "your work" as follows:

> This exclusion only applies to "your work" in connection with the construction, reconstruction, remodeling, or repair of any "residential building". For the purpose of this endorsement, "residential building" means: . . .
>
> 1. Any single-family dwelling, including but not limited to houses, town homes or townhouses, or
> 2. Any multi-family dwelling, including but not limited to condominiums, cooperatives, duplexes, triplexes or fourplexes; or
> 3. Any structure that combines any other use with residential dwellings including but not limited to, those listed in 1. or 2. above, or
> 4. Any other structure or improvement which is attached to or ancillary to any structure identified in 1., 2., or 3. Above, constructed, reconstructed, remodeled, or repaired with the intent that title to each individual dwelling or dwelling unit will be transferred separately to each owner.

[4] (Emphasis added.)

> Notwithstanding the above, "residential building" does not include any structure that functions as apartments, time shares, a hotel, a motel, a nursing home, an assisted living senior housing care facility, a college campus dormitory, or government housing on military bases.[5]

Ledcor argues that The Admiral was not a residential building, but was instead a "mixed use" building that included street level retail and thus did not fall under the designated work exclusion. However, the plain language of the residential building exclusion includes "condominiums" and "[a]ny other structure which is attached to any such 'residential building.'" The Zurich policy language was broad enough to include residential buildings that incorporate other "structures." The Admiral, even with the attached commercial units at the base, qualifies as a residential building.

Ledcor also argues that because The Admiral includes apartment units, the residential building exclusion does not apply. While The Admiral does allow 25 percent of the owners to rent their units out as "apartments," the units are still within the legal definition of a condominium. The "intent that title to each individual dwelling or dwelling unit will be transferred separately to each owner" is still in place, even if some condominiums are later sublet out as apartments. Ledcor's argument fails. Because The Admiral is a defined residential building under both policies, Zurich did not have a duty to defend or indemnify.

B. Bad Faith

An insurer acts in bad faith if its breach of the duty to defend was unreasonable, frivolous, or unfounded. See St. Paul Fire & Marine Ins. Co. v. Onvia, Inc., 165 Wn.2d 122, 130, 196 P.3d 664 (2008). Whether an insurer acted in bad faith is generally a question of fact. Van Noy v. State Farm Mut. Auto. Ins. Co., 142 Wn.2d 784, 796, 16

[5] (Emphasis added.)

P.3d 574 (2001). Accordingly, an insurer is only entitled to dismissal on summary judgment of a policyholder's bad faith claim if there are no disputed material facts pertaining to the reasonableness of the insurer's conduct under the circumstances, or the insurance company is entitled to prevail as a matter of law on the facts construed most favorably to the nonmoving party. Smith v. Safeco Ins. Co., 150 Wn.2d 478, 484, 78 P.3d 1274 (2003).

"An action for bad faith handling of an insurance claim sounds in tort." Mut. of Enumclaw Ins. Co. v. Dan Paulson Constr., Inc., 161 Wn.2d 903, 915, 169 P.3d 1, (2007). Claims of insurer bad faith "are analyzed applying the same principles as any other tort: duty, breach of that duty, and damages proximately caused by any breach of duty." Smith, 150 Wn.2d at 485. "In order to establish bad faith, an insured is required to show the breach was unreasonable, frivolous, or unfounded." Kirk v. Mt. Airy Ins. Co., 134 Wn.2d 558, 560-61, 951 P.2d 1124 (1998).

Ledcor first contends Zurich committed bad faith by denying coverage and defending under a reservation of rights. Washington law has long favored defending under a reservation of rights "when the facts or the law affecting coverage is disputed," until coverage is settled in a declaratory action. Am. Best Food, 168 Wn.2d at 405. When defending under a reservation of rights, "the insured receives the defense promised and, if coverage is found not to exist, the insurer will not be obligated to pay." Mut. of Enumclaw, 161 Wn.2d at 914. However, an insurer defending its insured under a reservation of rights has "an enhanced obligation of fairness toward its insured." Tank v. State Farm Fire & Cas. Co., 105 Wn.2d 381, 388, 715 P.2d 1133 (1986). This enhanced obligation requires that the insurer must: (1) "thoroughly investigate" the claim against the insured, (2) "retain competent defense counsel for the insured," (3) fully inform the insured of "all developments relevant to his policy coverage and the progress of his lawsuit," and (4) "refrain from engaging in any action which would demonstrate a greater concern for the insurer's monetary interest than for the insured's financial risk." Tank, 105 Wn.2d at 388.

After Ledcor tendered the claim to Zurich, Zurich agreed to defend Ledcor in the underlying case under a reservation of rights. Zurich defended Ledcor from 2007 through the settlement in July of 2009. Zurich provided the attorney for Ledcor's defense. There is no evidence that Ledcor was unsatisfied with its defense during this period. The record further demonstrates that Zurich fully investigated the incident, retained separate counsel to represent both Ledcor and Admiral Way, and fully informed and participated in settlement activity.[6] The only criteria in dispute in this case is whether Zurich engaged "in any action which would demonstrate a greater concern for the insurer's monetary interest than for the insured's financial risk" during the course of its defense of Ledcor, and in making its later coverage decision. On this record, we hold they did not.

Ledcor argues next that Zurich acted in bad faith by filing its declaratory judgment action before the underlying case brought by the COA was fully resolved. Our Supreme Court has said, "'[t]he insurer 'may defend under a reservation of rights while seeking a declaratory judgment that it has no duty to defend,' . . . but it must avoid seeking adjudication of factual matters disputed in the underlying litigation because advocating a position adverse to its insured's interests would 'constitute bad faith on its

[6] Ledcor at one point argues that Zurich did not do an adequate investigation, however that was related to coverage and not related to its defense of Ledcor. Moreover, Ledcor's arguments only demonstrate it disagrees with Zurich's interpretation of its "residential" clause.

part.'" Mut. of Enumclaw, 161 Wn.2d at 914-15 (quoting 1 ALLAN D. WINDT, INSURANCE CLAIMS & DISPUTES: REPRESENTATION OF INSURANCE COMPANIES AND INSUREDS § 8:3, at 8-11 to -12 (5th ed. 2007)). The court did not go so far as to bar filing a motion for summary judgment during the course of representation.

In this case, Zurich did not file its summary judgment motion until discovery in the underlying litigation with the COA was complete and the parties had mediated. The summary judgment motion was not argued nor decided until long after the final settlement had been entered. There is no evidence that Zurich's action filing its motion for summary judgment interfered with, or sought to adjudicate a factual matter in dispute in the underlying action to the detriment of Ledcor. Ledcor remained independently represented by counsel funded by Zurich, and Ledcor did not contend at that time its defense counsel was ineffective.

Ledcor also argues that Zurich committed bad faith in reaching its coverage decision. Specifically, Ledcor contends that Zurich's insurance adjuster transferred information obtained in the underlying claim to coverage counsel, and utilized it to Ledcor's detriment. Ledcor has failed, however, to identify any case law that prohibits using the same adjuster for both claims. Ledcor has also failed to demonstrate any confidential or privileged evidence that was provided to Zurich. Zurich provided a detailed list showing that it was entitled to all of the evidence it received, most of which was obtainable through the public record. Even on appeal, Ledcor does not identify any confidential documents that were relied on by Zurich in reaching its coverage decision, citing the "Morrison Report" and depositions, which were all publically available and discoverable by Zurich.

Finally, Ledcor raises Zurich's pretrial failure to provide the complete defense file. Zurich argues that some of the evidence was privileged, however, the trial court eventually fined Zurich for failing to provide this evidence, and Zurich paid that fine. Failure to provide this evidence was a discovery violation, however Zurich provided good faith reasons for its failure to provide the documents in question, and the issue was resolved by the trial court. A single discovery violation does not rise to the level of bad faith.[7] The insured may not base a bad faith or CPA claim on an insurer's good faith mistake. Werlinger v. Clarendon Nat. Ins. Co., 129 Wn. App. 804, 808, 120 P.3d 593 (2005).

C. CPA and IFCA

Ledcor also asserts that Zurich violated the CPA and the IFCA. To successfully bring an action under the CPA, a private plaintiff must prove five elements: "(1) unfair or deceptive act or practice; (2) occurring in trade or commerce; (3) public interest impact; (4) injury to plaintiff in his or her business or property; and (5) causation." Ledcor Indus. (USA), Inc. v. Mut. of Enumclaw Ins. Co., 150 Wn. App. 1, 12, 206 P.3d 1255 (2009). A denial of coverage does not constitute an unfair or deceptive act or practice and does not violate the CPA as long as it is based on reasonable conduct of the insurer, even if the denial ultimately is proved incorrect. Overton, 145 Wn.2d at 417.

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[7] Admiral Way and Ledcor make much of Zurich's attempt to recoup defense costs it paid in the COA lawsuit. In 2013, the Washington Supreme Court disallowed such reimbursement, holding "[d]isallowing reimbursement is most consistent with Washington cases regarding the duty to defend, which have squarely placed the risk of the defense decision on the insurer's shoulders." Nat'l Sur. Corp. v. Immunex Corp., 176 Wn.2d 872, 884, 297 P.3d 688 (2013). While reimbursement has been found to be unavailable, neither Admiral Way nor Ledcor make it clear how Zurich briefly requesting such reimbursement in 2009 contributes to a bad faith claim. There is no evidence that Zurich pursued these costs in an unreasonable or frivolous way, or that any damage arose out of this minor addition to Zurich's claim. Zurich also argues that Ledcor's counsel at one point offered to allow Zurich to cover defense costs.

The IFCA also does not create an independent cause of action for alleged regulatory violations in the absence of an unreasonable denial of coverage or benefits. Perez-Crisantos v. State Farm Fire & Cas. Co., 187 Wn.2d 669, 680, 389 P.3d 476 (2017). Since Ledcor did not demonstrate Zurich's actions were unreasonable or in bad faith, its extra-contractual claims against Zurich were properly dismissed.

VSC

Ledcor next contends that the trial court erred in granting summary judgment and dismissing its claims against VSC. We agree.

Ledcor's CGL policy from VSC was effective December 1, 2003 to December 1, 2004. Ledcor tendered the COA's notice of construction defect to VSC on March 23, 2007. Cambridge Integrated Services Group, Inc., a third-party administrator of VSC, acknowledged receipt of the claim on April 13, 2007 and indicated it was investigating the matter. On May 16, 2007, VSC responded denying coverage based on several policy exclusions. After the COA filed its complaint, Ledcor re-tendered the matter to VSC on September 21, 2007. On July 20, 2009, VSC notified Ledcor that it would be sending a follow up letter agreeing to participate in Ledcor's defense under a reservation of rights. The subsequent letter was never sent. The COA's claim was resolved on July 28, 2009.

VSC moved for summary judgment in May 2010 seeking a declaratory judgment that it had no duty to defend Ledcor. At the same time, Ledcor moved for summary judgment against VSC. The trial court granted VSC's motion for summary judgment as to Ledcor and denied Ledcor's motion.[8]

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[8] Relying on RAP 9.12, VSC moved to strike references in Ledcor's brief to materials not specifically listed in the trial court's order on summary judgment. Generally, "evidence called to the

A. Duty to Defend

VSC maintains that it did not have a duty to defend nor indemnify under the "progressive, continuous or intermittent property damage exclusion" (progressive damage exclusion) and the "other insurance" clause of its policy. We disagree. We address each in turn, strictly construing the exclusion against VSC. Expedia, 180 Wn.2d at 803.

The progressive damage exclusion has three requirements. For the exclusion to apply, VSC was required to demonstrate that (1) the property damage "existed or commenced prior to the inception date of th[e] policy," or (2) "arose out of any damage, defect, deficiency, inadequacy or dangerous condition which existed prior to the inception date of th[e] policy," and (3) that the damage was included under the defined "Products—Completed Operations Hazard." Work under the Products—Completed Operations Hazard would be deemed completed: "When all of the work to be done at the job site has been completed" or "When that part of the work done at a job site has been put to its intended use by any person or organization other than another contractor or subcontractor working on the same project."

Ledcor's CGL policy with VSC was effective December 1, 2003 to December 1, 2004. Thus, the progressive damage exclusion would exclude damage that existed or commenced, or arose out of a condition that existed, prior to December 1, 2003. The

attention of the trial court is properly before us, whether or not it was considered by the trial court." Goodwin v. Wright, 100 Wn. App. 631, 648, 6 P.3d 1 (2000). At the time the trial court considered VSC's motion it was also reviewing motions and cross motions related to Ledcor's claims against Zurich. Due to the complex nature of this case, we decline to apply RAP 9.12 in a manner that would assume that the trial court granted summary judgment for VSC in a vacuum without considering Ledcor's own summary judgment motion or any other evidence. The appellate "rules will be liberally interpreted to promote justice and facilitate the decision of cases on the merits. Cases and issues will not be determined on the basis of compliance or noncompliance with these rules except in compelling circumstances where justice demands." RAP 1.2. We deny VSC's motion to strike.

COA's complaint is vague about when the damage began. The complaint lists multiple claims of water intrusion damages and defects, and states "the property damage is continuous and ongoing throughout the Condominium. Damage may have commenced at or shortly after the completion of each building or element of infrastructure, and may be continuing to the present."[9] Thus, the relevant date is the "completion" of each building. It is undisputed that the certificate of occupancy for The Admiral was issued by the City of Seattle on March 14, 2003, and sale of the condominiums began in April 2003. It is also undisputed that Ledcor and Admiral Way contractually agreed that The Admiral was not substantially complete until February 2004.

Strictly construing the exception against VSC, because the date of completion falls within the term of VSC's policy, VSC had a duty to investigate and give Ledcor the benefit of the doubt. Woo, 161 Wn.2d at 53. Because a reasonable interpretation of the facts could result in coverage, the progressive damage exclusion does not apply.

The other insured condition in Ledcor's policy from VSC provides that the insurance is excess over "[a]ny other primary insurance available to you covering liability for damages arising out of the premises or operations for which you have been added as an additional insured by attachment of an endorsement." And further,

> When this insurance is excess, we will have no duty under COVERAGES A or B to defend the insured against any "suit" if any other insurer has a duty to defend the insured against that "suit." If no other insurer defends, we will undertake to do so, but we will be entitled to the insured's rights against all those other insurers.

Ledcor was listed as an additional insured under multiple insurance policies, and was being represented by two insurance companies that undertook its defense at no cost to Ledcor. However, there is no evidence that VSC investigated whether other

[9] (Emphasis added.)

insurers were "available" for Ledcor at the time of its initial denial, or that VSC even believed this provision applied when it denied Ledcor's claim. VSC did not rely on this provision in its denial, and VSC did not rely on this provision when it later suggested it would join the defense alongside the other carriers. If it is not clear from the face of the complaint that the policy provides coverage, but if coverage could exist, the insurer must investigate and give the insured the benefit of the doubt that the insurer has a duty to defend. Woo, 161 Wn.2d at 53. A question of fact remains whether VSC did the requisite investigation into whether other insurance was available for Ledcor before it denied coverage. Because there is at least a question of fact whether the progressive loss exclusion and other insurance provision apply, summary judgment and dismissal of Ledcor's claims against VSC was not appropriate.

B. Extra Contractual Claims

Ledcor maintains that VSC acted in bad faith. At the outset, Washington courts have long held the "insured may maintain an action against its insurer for bad faith investigation of the insured's claim and violation of the CPA regardless of whether the insurer was ultimately correct in determining coverage did not exist." Coventry Associates v. Am. States Ins. Co., 136 Wn.2d 269, 279, 961 P.2d 933 (1998). Only if the alleged claim is clearly not covered by the policy is the insurer relieved of its duty to defend. Kirk, 134 Wn.2d at 561. The insured bears the burden of demonstrating the insurer acted in bad faith when it refused to defend its insured by demonstrating that refusal is "unreasonable, frivolous, or unfounded." Truck, 147 Wn.2d at 777; Smith, 150 Wn.2d at 486. The insurer is entitled to summary judgment "if reasonable minds could not differ that its denial of coverage was based upon reasonable grounds." Smith, 150 Wn.2d at 486.

Ledcor retained a policy with VSC for primary general liability effective from December 1, 2003 to December 1, 2004. The Admiral was substantially completed on either April 2003, or February 2004. The original claim provided to VSC did not state a specific date as to when damages began, or when the defects developed. It can hardly be said that the alleged claim was "clearly not covered" by policy. "If the insurer is unsure of its obligation to defend in a given instance, it may defend under a reservation of rights while seeking a declaratory judgment that it has no duty to defend." Truck, 147 Wn.2d at 761. VSC should have done so in this case.

As discussed above, it appears that Ledcor may have been covered under VSC's CGL policy, and there remains at least a question of fact as to whether VSC reasonably investigated whether the two exclusions it relies upon actual excluded coverage. Dismissal of Ledcor's bad faith and CPA claim on summary judgment was erroneous.

North Pacific

Ledcor next contends that the trial court erred in dismissing its claims against North Pacific for coverage under its policy with The Painters. We disagree.

A. Additional Facts

The subcontract between Ledcor and The Painters required Ledcor be named as an additional insured on The Painters' insurance:

> 11.1 SUBCONTRACTOR' S INSURANCE. Prior to the start of the Subcontract Work, the Subcontractor shall procure for the Subcontract Work and maintain in force Workers' Compensation Insurance, Employer's Liability Insurance, Comprehensive Automobile Liability Insurance, Comprehensive or Commercial General Liability Insurance on an

> occurrence basis, and any other insurance required of Subcontractor under the Subcontract.
>
> . . . [T]he Contractor, Owner and other parties as required shall be named as additional insureds on each of these policies except for Workers' Compensation.
>
> The Subcontractor's insurance shall include contractual liability insurance covering the Subcontractor's obligations under this Subcontract.

The Painters obtained a CGL policy from North Pacific for the policy period from December 26, 2001, through December 26, 2002. The declarations did not name Ledcor as an additional insured under the policy. The policy included an automatic additional insured endorsement that provided:

> AUTOMATIC ADDITIONAL INSUREDS
> INCLUDING COMPLETED OPERATIONS TO THE EXTENT
> REQUIRED BY AN INSURED CONTRACT
>
> This endorsement modifies insurance provided under the following:
>
> COMMERCIAL GENERAL LIABILITY
> COVERAGE PART
>
> The following is added to WHO IS INSURED (Section II):
>
> 1. To the extent it is required by the terms of an "insured contract" which requires you to add by endorsement as an additional insured or organization, WHO IS AN INSURED (Section II) is amended to include as an insured such person or organization ("additional insured") but only with respect to:
>
>   (a) Vicarious liability arising out of <u>your ongoing operations</u> performed for the additional insured; or
>
>   (b) Liability arising out of any act or omission of the additional insured for which you have entered into an enforceable "insured contract" which obligates you to indemnify the additional insured, or to furnish insurance coverage for the additional insured, and arising out of <u>your ongoing operations for that additional insured</u>.
>
> With respect to the insurance afforded these additional insureds, the following additional exclusions apply:

2. This insurance does not apply to "bodily injury," or "property damage" occurring after:

   (a) All work, including materials, parts or equipment furnished in connection with such work, on the project (other than service, maintenance or repairs), to be performed by or on behalf of the additional insured at the site of the coverage operations has been completed; or

   (b) That portion of "your work" out of which the injury or damage arises has been put to its intended use by any person or organization other than another contractor or subcontractor engaged in performing operations for a principal as a part of the same project.

This exclusion does not apply to the extent that an "insured contract" requires that you assume the tort liability of the additional insured arising out of a risk that would otherwise be excluded by this exclusion.[10]

Ledcor tendered the COA's claim to North Pacific on March 10, 2009. North Pacific did not respond. On May 24, 2010, Ledcor's counsel sent a 20-day notice letter under the IFCA, demanding that North Pacific defend and indemnify Ledcor for the underlying construction defect claims as an additional insured under The Painters' CGL policy. On May 28, 2010, North Pacific responded stating they had no record of the March 2009 tender, and that there was no coverage under The Painters' CGL policy because Ledcor was not identified as an additional named insured and the automatic additional insured endorsement only applied to "ongoing operations."

In June 2010, Ledcor amended its third-party complaint to name North Pacific as a third-party defendant, alleging claims for declaratory relief, breach of contract, breach of the obligation of good faith and fair dealing, bad faith refusal to defend, and IFCA and CPA violations.

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[10] (Emphasis added.)

North Pacific subsequently moved for summary judgment and dismissal of Ledcor's third-party claims. On July 8, 2011, the trial court granted North Pacific's motion on each contractual and extra-contractual claim and dismissed North Pacific from the lawsuit.

B. Duty to Defend

North Pacific contends that their policy with The Painters only provided automatic additional insured coverage for "ongoing operations" and not "completed operations." Consequently, because Ledcor was not a named additional insured, North Pacific had no duty to provide a defense to Ledcor as an additional insured because the operations performed by The Painters were completed operations. We agree with North Pacific.

North Pacific relies on this court's decision in Hartford Ins. Co. v. Ohio Cas. Ins. Co., 145 Wn. App. 765, 778, 189 P.3d 195 (2008), where we concluded that the term "ongoing operations" was an express coverage limitation in the policy and endorsement language that was intended to avoid "broad coverage for an additional insured." Specifically, we held "ongoing operations" language excludes "completed operations" coverage and limits coverage to the "subcontractors' work in progress only." Hartford, 145 Wn. App. at 778. The plain language of the North Pacific policy contains this same limitation.

Section one of the "additional insured" endorsement in The Painters' policy limits additional insured coverage to when it "is required by the terms of an 'insured contract'" and includes as an insured such person or organization "only with respect to: (a) Vicarious liability arising out of your ongoing operations performed for the additional insured; or (b) Liability arising out of any act or omission of the additional insured . . .

arising out of your ongoing operations for that additional insured."[11] Thus, as in Hartford, the plain language of the first section explicitly limits coverage to "ongoing operations." See Absher Const. Co. v. N. Pac. Ins. Co., 861 F. Supp. 2d 1236, 1244 (W.D. Wash. 2012) (considering a similar North Pacific policy).

The COA's complaint in the underlying action alleged damages occurring after completion of the buildings, long after the Painters ceased their "ongoing operations." Accordingly, we agree with the trial court that the policy did not cover those claims and North Pacific's denial of a defense and coverage based on this language was not "unreasonable, frivolous, or unfounded." We affirm summary judgment.

Transportation

Ledcor next contends that the trial court erred in dismissing its claims against Transportation[12] based on the policy Transportation provided subcontractor SQI. We agree.

Ledcor contracted with subcontractor SQI to install a roofing system. Transportation issued policies to SQI for the period from May 1, 2000 to May 1, 2003. It is undisputed that SQI was required to name Ledcor as an additional insured under those policies. Paragraph 11.1 of the subcontract between Ledcor and SQI is the same as the subcontract with The Painters, and describes the requirements that SQI name certain parties as additional insureds:

> 11.1 SUBCONTRACTOR'S INSURANCE. Prior to start of the Subcontract work, the Subcontractor shall procure for the Subcontract Work and maintain in force Workers' Compensation Insurance, Employer's Liability Insurance, Comprehensive Automobile Liability Insurance, Comprehensive or Commercial General Liability Insurance on an occurrence basis, and any other insurance required of Subcontractor

[11] (Emphasis added.)
[12] Ledcor refers to the Transportation Insurance Company as CNA.

> under the Subcontract. If required by the Subcontract Documents, the Contractor, Owner and other parties as required shall be named as additional insureds on each of these policies except for Workers' Compensation. The Subcontractor's insurance shall include contractual liability insurance covering the Subcontractor's obligations under this Subcontract.[13]

Paragraph 11.2 of the subcontract states the "Subcontractor's Comprehensive or Commercial General Liability Insurance and Comprehensive Automobile Liability Insurance, as required by Paragraph 11.1, shall be written with limits of liability not less than the following: . . .

> A. Comprehensive General Liability Insurance including completed operations:
>
> 1. Combined Single Limit Bodily Injury and Property Damage: $1,000,000 Each Occurrence $ 2,000,000 Aggregate
>
> or
>
> 2. Bodily Injury: $ 1.000,000 Each Occurrence $ 2,000,000 Aggregate
> 3. Property Damage: $ 1,000,000 Each Occurrence $ 2,000,000 Aggregate
>
> B. Commercial General Liability Insurance
> 1. Each Occurrence Limit: $ 1,000,000
> 2. General Aggregate: $2,000,000
> 3. Products/Completed Operations Aggregate: $2,000,000. . ."[14]

Paragraph 11.4 states the requirements for what insurance policies the subcontractors must obtain, and provisions for cancellation and renewal of those policies. This paragraph includes the requirement that "The Subcontractor shall maintain completed operations liability insurance for one year after acceptance of the Subcontract Work, substantial completion of the Project, or to the time required by the Subcontract Documents, whichever is longer." The Subcontractor shall furnish the

[13] (Emphasis added.)
[14] (Emphasis added.)

Contractor evidence of such insurance at the time of completion of the Subcontract Work.

The issue is whether Ledcor, as an additional insured under SQI's policy with Transportation, had completed operations coverage. Of the three annual policies that Transportation issued to SQI, only the third (May 1, 2002 through May 1, 2003) contains an endorsement addressing completed operations. The policy includes an endorsement that modifies the "commercial general liability coverage." The endorsement provides an additional-insured coverage for completed operations only if that coverage is required by written contract:

> The coverage provided to the additional insured by this endorsement and paragraph f. of the definition of "insured contract" under DEFINITIONS (section V) do not apply to "bodily injury" or "property damage" arising out of the "products-completed operations hazard" unless required by the written contract or written agreement.[15]

Under the policies, "products-completed operations hazard,"

> a. Includes all "bodily injury" and "property damage" occurring away from premises you own or rent and arising out of "your product" or "your work" except:
>
> (1) Products that are still in your physical possession; or
>
> (2) Work that has not yet been completed or abandoned. However, "your work" will be deemed completed at the earliest of the following times:
>
> (a) When all of the work called for in your contract has been completed.
>
> (b) When all of the work to be done at the job site has been completed if your contract calls for work at more than one job site.
>
> (c) When that part of the work done at a job site has been put to its intended use by any person or organization other than another contractor or subcontractor working on the same project.

[15] (Emphasis added).

> Work that may need service, maintenance, correction, repair or replacement, but which is otherwise complete, will be treated as completed.[16]

In construing a written contract, a court will not read an ambiguity into a contract that is otherwise clear and unambiguous. Mayer v. Pierce County Med. Bureau, Inc., 80 Wn. App. 416, 420, 909 P.2d 1323 (1995). When interpreting a contract, the contract will be given a practical and reasonable interpretation that fulfills the object and purpose of the contract rather than a strained or forced construction that leads to an absurd conclusion, or that renders the contract nonsensical or ineffective. Washington Pub. Util. Districts' Utilities Sys. v. Pub. Util. Dist. No. 1 of Clallam County, 112 Wn.2d 1, 11, 771 P.2d 701 (1989). Transportation's interpretation of the contract asks us to do just that.

Paragraph 11.1 of the subcontract required that SQI obtain several forms of insurance, including "Comprehensive or Commercial General Liability Insurance on an occurrence basis." The subcontractor was also to name "the Contractor, Owner and other parties . . . as additional insureds on each of these policies." It is undisputed this paragraph fulfills the requirement of requiring Ledcor to be named as an additional insured.

Paragraph 11.2 provided the minimum limits of liability for "The Subcontractor's Comprehensive or Commercial General Liability Insurance and Comprehensive Automobile Liability Insurance, as required by Paragraph 11.1." This reference back to 11.1 is not a limitation, but merely referencing that "Comprehensive or Commercial General Liability Insurance" had been required in 11.1. The minimums required under paragraph 11.2 for CGL insurance include a "product/completed operations aggregate

[16] (Emphasis added.)

of $2 million. Because paragraph 11.1 required CGL insurance, paragraph 11.2 required the insurance include completed operations coverage.

In addition, paragraph 11.4 of the subcontract provided the coverage time limits required under the contract. 11.4 includes the requirement that the Subcontractor shall "maintain in effect <u>all insurance coverage required under this Subcontract,</u>" and that the "Subcontractor shall maintain completed operations liability insurance for one year after acceptance of the Subcontract Work, substantial completion of the Project, or to the time required by the Subcontract Documents, whichever is longer."[17]

When read together, and giving effect to paragraphs 11.1, 11.2, and 11.4, SQL's subcontract required Ledcor to be named as an additional insured on the CGL policy, required the CGL policy to include completed project coverage, and required the coverage extend through the term of the CGL policies issued by Transportation. The trial court erred in granting summary judgment and dismissing Ledcor's claims against Transportation.

FMIC

Ledcor contends next that the trial court erred in dismissing its direct claims against third party FMIC, another insurer for subcontractor SQI. We disagree.

We first address whether Ledcor was covered under the policies issued by FMIC to SQI. FMIC issued a CGL policy from May 1, 2006 to May 1, 2007. That policy was subsequently renewed from May 1, 2007 to May 1, 2008. Both policies contained separate endorsements for ongoing operations and completed operations. Both policies also contain nearly identical "additional insured ongoing operations" endorsements. That endorsement provides as follows:

[17] (Emphasis added.)

> A. Section II - Who Is An Insured is amended to include as an additional insured any person or organization for whom you are performing operations when you and such person or organization have agreed in writing in a contract or agreement that such person or organization be added as an additional insured on your policy. Such person or organization is an additional insured only with respect to liability for "bodily injury", "property damage" or "personal and advertising injury" caused, in whole or in part, by:
>
> 1. Your acts or omissions; or
>
> 2. The acts or omissions of those acting on your behalf;
>
> in the performance of your <u>ongoing operations</u> for the additional insured.
>
> A person's or organization's status as an additional insured under this endorsement <u>ends when your operations for that additional insured are completed.</u>
>
> . . .
>
> B. With respect to the insurance afforded to these additional insureds, the following additional exclusions apply:
> This insurance does not apply to:
>
> . . .
>
> 2. "Bodily injury" or "property damage" occurring after:
>
> a. All work, including materials, parts or equipment furnished in connection with such work, on the project (other than service, maintenance or repairs) to be performed by or on behalf of the additional insured(s) at the location of the covered operations has been completed; or
>
> b. That portion of "your work" out of which the injury or damage arises has been put to its intended use by any person or organization other than another contractor or subcontractor engaged in performing operations for a principal as a part of the same project.[18]

Thus, the only question is whether SQI was engaged in any "ongoing operations" for the additionally insured—Ledcor—at the time the original policy began on May 1,

[18] (Emphasis added).

2006. It is undisputed that SQI's final maintenance at The Admiral concluded on May 10, 2005. Ledcor does not argue any other "ongoing operations" were continuing at that time, nor provide any evidence that further operations took place during that period. The contract unambiguously provides, "A person's or organization's status as an additional insured under this endorsement ends when your operations for that additional insured are completed." Consequently, Ledcor has not demonstrated that it qualifies as an additional insured for ongoing operations under either policy.

Turning to the completed operations endorsement, the 2006 to 2007 and 2007 to 2008 policies differ. The 2006 to 2007 policy specifically identifies each entity covered as an additional insured for completed operations. Ledcor was not identified as an additionally insured for completed operations on the 2006 to 2007 policy. Ledcor offered no evidence to the contrary.

The 2007 to 2008 policy, however, includes an additional listing for: "Any person or organization, . . .to whom or to which the Named Insured <u>is obligated</u>, by virtue of written contract to provide Insurance, such as is afforded by this policy."[19]

The same Ledcor and SQI subcontract is at issue here as in the claims brought against Transportation. As discussed above, when read together, paragraphs 11.1, 11.2, and 11.4 required SQI to maintain completed operations coverage and identify Ledcor as an additionally named. SQI's obligation, however, was limited in time. Paragraph 11.4 of the subcontract requires that: "The Subcontractor shall maintain completed operations liability insurance for one year after acceptance of the Subcontract Work, substantial completion of the Project, or to the time required by the Subcontract Documents, whichever is longer." Under this provision, the latest

[19] (Emphasis added.)

reasonable interpretation of this provision is May 2006, one year after SQI performed maintenance on The Admiral.

We hold that Ledcor was not an additionally insured under the policy issued to SQI by FMIC. In addition, because Ledcor was not covered as an additional insured under the policies, Ledcor has failed to demonstrate that FMIC's denial of coverage was "unreasonable, frivolous, or unfounded." Overton, 145 Wn.2d at 433.

Ledcor's Assigned Claims Against FMIC

SQI assigned its direct claim against FMIC to Ledcor. Ledcor asserts finally that the trial court erred in dismissing its assigned claims against FMIC. We disagree.

A. Additional Facts

On August 29, 2008, while the COA's construction defect action was pending, Ledcor filed a separate lawsuit against all subcontractors involved in The Admiral project (subcontractor action). SQI was named in the subcontractor action. The subcontractor action sought to recover against the subcontractors any amounts that Ledcor was ultimately obligated to pay to the COA.

SQI tendered that lawsuit to FMIC seeking defense and indemnity as a Named Insured under the FMIC Policies. FMIC agreed to defend SQI pursuant to a reservation of rights. One of SQI's other insurers, Cornhusker Insurance Company (Cornhusker), also agreed to participate in SQI's defense. Cornhusker and FMIC jointly provided SQI with a fully funded and complete defense. Ledcor sent a settlement demand letter in March 2014. Beginning in February 2014, FMIC participated in mediations and offered to contribute to settlement demands on behalf of SQI. No settlement was reached at this time. After the mediations failed to reach a settlement, FMIC sent letters requesting updates on the settlement negotiations.

On April 8, 2014, FMIC was informed by the assigned defense counsel that SQI, through its personal counsel, had reached a settlement agreement with Ledcor. On April 11, 2014, FMIC was provided with a copy of the consent judgment that was entered against SQI in the subcontractor action. The consent judgment indicated that it was filed in compliance with a March 21, 2014 settlement agreement between Ledcor and SQI. FMIC sent a follow up letter requesting information about the letter, and expressing concern that it had not been included in the settlements, or been asked to contribute to the settlement. After entering into the consent judgment settlement, Ledcor pursued all contractual and extra-contractual causes of action against FMIC as the assignee of SQI.

In November 2013, FMIC filed a declaratory judgment action in federal court seeking a judicial determination that it was not obligated to cover SQI in the subcontractor action. After the case was remanded to the King County Superior Court, FMIC was granted leave to file a third-party complaint in this action seeking declaratory judgment against SQI. SQI (through Ledcor) responded adding counter claims for breach of duty, bad faith, and violations of the CPA and the IFCA.

On October 28, 2016, the trial court granted FMIC's motion for summary judgment dismissing SQI/Ledcor's counter claims. On October 31, 2016, the court granted FMIC's motion for summary judgment agreeing that the policy FMIC issued to SQI was not applicable, and even if it were, the continuous or progressive injury or damage exclusion barred recover. The trial court subsequently denied Ledcor's motions for reconsideration.

B. Duty to Defend

The FMIC policy issued to SQI provides coverage for "property damage" caused by an "occurrence" during the FMIC policy period, so long as the insured does not know, in whole or in part, about the "property damage" or any continuation, change, or resumption of such "property damage" prior to the inception of the FMIC policy. Specifically, the policy states,

> a. We will pay those sums that the insured becomes legally obligated to pay as damages because of "bodily injury" or "property damage" to which this insurance applies. We will have the right and duty to defend the insured against any "suit" seeking those damages. However, we will have no duty to defend the insured against any "suit" seeking damages for "bodily injury" or "property damage" to which this insurance does not apply. . . .
>
> b. This insurance only applies to "bodily injury" and "property damage" only if:
>   1) The "bodily injury" or "property damage" is caused by an "occurrence" that takes place in the "coverage territory"; and
>   2) The "bodily injury" or "property damage" <u>occurs during the policy period</u>; and
>   3) Prior to the policy period, no insured listed under Paragraph 1 of Section II – Who Is An Insured and no "employee" authorized by you to give or receive notice of an "occurrence" or claim, <u>knew that the "bodily injury" or "property damage" had occurred, in whole or in part</u>. If such a listed insured or authorized "employee" knew, prior to the policy period, that the "bodily injury" or "property damage" occurred, then <u>any continuation, change or resumption of such "bodily injury" or "property damage" during or after the policy period will be deemed to have been known prior to the policy period.</u>
>
> . . .
>
> d. "Bodily injury" or "property damage" will be deemed to have been known to have occurred at the earliest time when any insured listed under Paragraph 1. of Section II - Who Is An Insured or any "employee" authorized by you to give or receive notice of an "occurrence" or claim:
>   1) Reports all, or any part, of the "bodily injury" or "property damage" to us or any other insurer;
>   2) Receives a written or verbal demand or claim for damages because of the "bodily injury" or "property damage"; or

3) Becomes aware by any other means that "bodily injury" or "property damage" has occurred or has begun to occur.[20]

As discussed above, in determining coverage, this court considers a two-step process. First, the insured must establish that the loss falls within the "scope of the policy's insured losses." Then, the burden shifts to the insurer to show that the loss is excluded by specific language in the policy. Diamaco, 97 Wn. App. at 337. Although this policy uses exclusionary language, the burden is still on SQI to demonstrate the damage took place during the coverage period, and that SQI did now know of the damage before the policy period.

FMIC provided substantial evidence that SQI knew, at least in part, that the damage to the roofing had occurred at The Admiral as of at least 2004. FMIC further provided evidence that SQI failed to repair the damage that it was asked to repair in 2005, and that some of the claims arose of that damage. SQI only presented evidence that SQI may have believed that they had fixed all of the damage when they returned to do further maintenance in 2005.[21] Moreover, the evidence showed the damage occurring after 2005 would have been a "continuation, change or resumption" of the original damages.[22] Because there is no reasonable dispute that SQI knew of the damages before it purchased the FMIC policies in 2006 and in 2007, summary judgment was appropriate concluding that SQI's damages were not covered under the FMIC policies.

[20] (Emphasis added.)

[21] Ledcor cites several cases considering the common law "known loss" principal, however these cases do not support his argument. See Pub. Util. Dist. No. 1 of Klickitat County v. Int'l Ins. Co., 124 Wn.2d 789, 806, 881 P.2d 1020 (1994).

[22] (Emphasis added.)

C. Extra Contract Claims

Again, to succeed on a bad faith claim, the policyholder must show the insurer's breach of the insurance contract was unreasonable, frivolous, or unfounded. Overton, 145 Wn.2d at 433. "The insured may not base a bad faith or CPA claim on an insurer's good faith mistake, which occurs when the insurer acts honestly, bases its decision on adequate information, and does not overemphasize its own interest." Werlinger, 129 Wn. App. at 808.

Here, based on the allegations in the subcontractor action, FMIC accepted the defense of SQI under a reservation of rights. FMIC then assigned counsel, participated in settlement negotiations, and finally brought a declaratory relief action. SQI did not pay any defense fees or incur damages. FMIC did not act in bad faith in its defense of SQI. See Truck, 147 Wn.2d at 761.

SQI also raised various CPA violations, including that FMIC failed to investigate its claims, and again that FMIC "commingled" the coverage and defense claims. Even if these actions rise to the level of "(1) unfair or deceptive act or practice," under the CPA, there is no presumption of harm. SQI needed to prove it was harmed by FMIC's actions, and SQI did not present evidence of harm. SQI did not pay defense fees or incur any costs.

Finally, in the absence of an unreasonable denial of coverage or benefits, the IFCA does not create an independent cause of action for alleged regulatory violations. Perez-Crisantos, 187 Wn.2d at 680.

Summary judgment and dismissal of Ledcor's assigned claims against FMIC was appropriate.

D. Attorney Fees on Appeal

Ledcor requests attorney fees under the Olympic Steamship doctrine. Olympic S.S. Co., Inc. v. Centennial Insur. Co., 117 Wn.2d 37, 53, 811 P.2d 673 (1991). Because several claims remain to be resolved on remand as to VSC and Transportation, we conclude that an award of fees on appeal is premature and should await the outcome of the proceedings on remand, to be determined by the trial court. See Mut. of Enumclaw v. T&G Constr. Inc., 165 Wn.2d 255, 274, 199 P.3d 376 (2008) ("Inasmuch as we are remanding two coverage issues to the coverage trial court, the award of Olympic Steamship attorney fees must abide by that court's ultimate rulings.")

We reverse the dismissal of Ledcor's claims against VSC and Transportation. We affirm in all other respects.

Mann, ACJ

WE CONCUR:

APPENDIX C

Statutes/Administrative Code

RCW 5.40.050

RCW 48.01.020

RCW 48.01.030

RCW 48.01.060

RCW 48.01.070

RCW 48.05.280

RCW 48.30.040

WAC 284-30-320

WAC 284-30-330(6)

WAC 284-30-340

RCW 5.40.050

Breach of duty—Evidence of negligence—Negligence per se.

A breach of a duty imposed by statute, ordinance, or administrative rule shall not be considered negligence per se, but may be considered by the trier of fact as evidence of negligence; however, any breach of duty as provided by statute, ordinance, or administrative rule relating to: (1) Electrical fire safety, (2) the use of smoke alarms, (3) sterilization of needles and instruments used by persons engaged in the practice of body art, body piercing, tattooing, or electrology, or other precaution against the spread of disease, as required under RCW **70.54.350**, or (4) driving while under the influence of intoxicating liquor or any drug, shall be considered negligence per se.

[**2009 c 412 § 20; 2001 c 194 § 5; 1986 c 305 § 901.**]

NOTES:

Effective date—2009 c 412 §§ 1-21: See RCW **18.300.901**.

Short title—Implementation—2009 c 412: See RCW **18.300.900** and **18.300.902**.

Preamble—Report to legislature—Applicability—Severability—1986 c 305: See notes following RCW **4.16.160**.

*Definition of body art, body piercing, and tattooing: RCW **18.300.010**.*

RCW 48.01.020

Scope of code.

All insurance and insurance transactions in this state, or affecting subjects located wholly or in part or to be performed within this state, and all persons having to do therewith are governed by this code.

[1947 c 79 § .01.02; Rem. Supp. 1947 § 45.01.02.]

RCW 48.01.030

Public interest.

The business of insurance is one affected by the public interest, requiring that all persons be actuated by good faith, abstain from deception, and practice honesty and equity in all insurance matters. Upon the insurer, the insured, their providers, and their representatives rests the duty of preserving inviolate the integrity of insurance.

[**1995 c 285 § 16;** 1947 c 79 § .01.03; Rem. Supp. 1947 § 45.01.03.]

NOTES:

Effective date—1995 c 285: See RCW **48.30A.900**.

RCW 48.01.060

"Insurance transaction" defined.

"Insurance transaction" includes any:

(1) Solicitation.

(2) Negotiations preliminary to execution.

(3) Execution of an insurance contract.

(4) Transaction of matters subsequent to execution of the contract and arising out of it.

(5) Insuring.

[1947 c 79 § .01.06; Rem. Supp. 1947 § 45.01.06.]

RCW 48.01.070

"Person" defined.

"Person" means any individual, company, insurer, association, organization, reciprocal or interinsurance exchange, partnership, business trust, or corporation.

[1947 c 79 § .01.07; Rem. Supp. 1947 § 45.01.07.]

RCW 48.05.280

Records and accounts of insurers.

Every insurer shall keep full and adequate accounts and records of its assets, obligations, transactions, and affairs.

[1947 c 79 § .05.28; Rem. Supp. 1947 § 45.05.28.]

RCW 48.30.040

False information and advertising.

No person shall knowingly make, publish, or disseminate any false, deceptive or misleading representation or advertising in the conduct of the business of insurance, or relative to the business of insurance or relative to any person engaged therein.

[1947 c 79 § .30.04; Rem. Supp. 1947 § 45.30.04.]

WAC 284-30-320

Definitions.

When used in this regulation, WAC **284-30-300** through **284-30-400**:

(1) "Actual cash value" means the fair market value of the loss vehicle immediately prior to the loss.

(2) "Claimant" means, depending upon the circumstance, either a first party claimant, a third party claimant, or both and includes a claimant's designated legal representative and a member of the claimant's immediate family designated by the claimant.

(3) "Comparable motor vehicle" means a vehicle that is the same make and model, of the same or newer model year, similar body style, with similar options and mileage as the loss vehicle and in similar overall condition, as established by current data. To achieve comparability, deductions or additions for options, mileage or condition may be made if they are itemized and appropriate in dollar amount.

(4) "Current data" means data within ninety days prior to or after the date of loss.

(5) "File" means a record in any retrievable format, and unless otherwise specified, includes paper and electronic formats.

(6) "First party claimant" means an individual, corporation, association, partnership or other legal entity asserting a right as a covered person to payment under an insurance policy or insurance contract arising out of the occurrence of the contingency or loss covered by a policy or contract.

(7) "Insurance policy" or "insurance contract" mean any contract of insurance, indemnity, suretyship, or annuity issued, proposed for issuance, or intended for issuance by any insurer.

(8) "Insurer" means any individual, corporation, association, partnership, reciprocal exchange, interinsurer, Lloyds insurer, fraternal mutual insurer, fraternal mutual life insurer, and any other legal entity engaged in the business of insurance, authorized or licensed to issue or who issues any insurance policy or insurance contract in this state. "Insurer" does not include health care service contractors, as defined in RCW **48.44.010**, and health maintenance organizations, as defined in RCW **48.46.020**.

(9) "Investigation" means all activities of the insurer directly or indirectly related to the determination of liabilities under coverages afforded by an insurance policy or insurance contract.

(10) "Loss vehicle" means the damaged motor vehicle or a motor vehicle that the insurer determines is a "total loss."

(11) "Motor vehicle" means any vehicle subject to registration under chapter **46.16** RCW.

(12) "Notification of claim" means any notification, whether in writing or other means acceptable under the terms of an insurance policy or insurance contract, to the insurer or its agent, by a claimant, which reasonably apprises the insurer of the facts pertinent to a claim.

(13) "Principally garaged area" means the place where the loss vehicle is normally kept, consistent with the applicable policy of insurance.

(14) "Third party claimant" means any individual, corporation, association, partnership or other legal entity asserting a claim against any individual, corporation, association, partnership or other legal entity insured under an insurance policy or insurance contract of the insurer.

(15) "Total loss" means that the insurer has determined that the cost of parts and labor, plus the salvage value, meets or exceeds, or is likely to meet or exceed, the "actual cash value" of the loss vehicle. Other factors may be considered in reaching the total loss determination, such as the existence of a biohazard or a death in the vehicle resulting from the loss.

(16) "Written" or "in writing" means any retrievable method of recording an agreement or document, and, unless otherwise specified, includes paper and electronic formats.

[Statutory Authority: RCW **48.02.060** and **48.30.010**. WSR 09-11-129 (Matter No. R 2007-08), § 284-30-320, filed 5/20/09, effective 8/21/09; WSR 78-08-082 (Order R 78-3), § 284-30-320, filed 7/27/78, effective 9/1/78.]

WAC 284-30-330

Specific unfair claims settlement practices defined.

The following are hereby defined as unfair methods of competition and unfair or deceptive acts or practices of the insurer in the business of insurance, specifically applicable to the settlement of claims:

(1) Misrepresenting pertinent facts or insurance policy provisions.

(2) Failing to acknowledge and act reasonably promptly upon communications with respect to claims arising under insurance policies.

(3) Failing to adopt and implement reasonable standards for the prompt investigation of claims arising under insurance policies.

(4) Refusing to pay claims without conducting a reasonable investigation.

(5) Failing to affirm or deny coverage of claims within a reasonable time after fully completed proof of loss documentation has been submitted.

(6) Not attempting in good faith to effectuate prompt, fair and equitable settlements of claims in which liability has become reasonably clear. In particular, this includes an obligation to promptly pay property damage claims to innocent third parties in clear liability situations. If two or more insurers share liability, they should arrange to make appropriate payment, leaving to themselves the burden of apportioning liability.

(7) Compelling a first party claimant to initiate or submit to litigation, arbitration, or appraisal to recover amounts due under an insurance policy by offering substantially less than the amounts ultimately recovered in such actions or proceedings.

(8) Attempting to settle a claim for less than the amount to which a reasonable person would have believed he or she was entitled by reference to written or printed advertising material accompanying or made part of an application.

(9) Making a claim payment to a first party claimant or beneficiary not accompanied by a statement setting forth the coverage under which the payment is made.

(10) Asserting to a first party claimant a policy of appealing arbitration awards in favor of insureds or first party claimants for the purpose of compelling them to accept settlements or compromises less than the amount awarded in arbitration.

(11) Delaying the investigation or payment of claims by requiring a first party claimant or his or her physician to submit a preliminary claim report and then requiring subsequent submissions which contain substantially the same information.

(12) Failing to promptly settle claims, where liability has become reasonably clear, under one portion of the insurance policy coverage in order to influence settlements under other portions of the insurance policy coverage.

(13) Failing to promptly provide a reasonable explanation of the basis in the insurance policy in relation to the facts or applicable law for denial of a claim or for the offer of a compromise settlement.

(14) Unfairly discriminating against claimants because they are represented by a public adjuster.

(15) Failing to expeditiously honor drafts given in settlement of claims. A failure to honor a draft within three working days after notice of receipt by the payor bank will constitute a violation of this provision. Dishonor of a draft for valid reasons related to the settlement of the claim will not constitute a violation of this provision.

(16) Failing to adopt and implement reasonable standards for the processing and payment of claims after the obligation to pay has been established. Except as to those instances

where the time for payment is governed by statute or rule or is set forth in an applicable contract, procedures which are not designed to deliver payment, whether by check, draft, electronic funds transfer, prepaid card, or other method of electronic payment to the payee in payment of a settled claim within fifteen business days after receipt by the insurer or its attorney of properly executed releases or other settlement documents are not acceptable. Where the insurer is obligated to furnish an appropriate release or settlement document to a claimant, it must do so within twenty working days after a settlement has been reached.

(17) Delaying appraisals or adding to their cost under insurance policy appraisal provisions through the use of appraisers from outside of the loss area. The use of appraisers from outside the loss area is appropriate only where the unique nature of the loss or a lack of competent local appraisers make the use of out-of-area appraisers necessary.

(18) Failing to make a good faith effort to settle a claim before exercising a contract right to an appraisal.

(19) Negotiating or settling a claim directly with any claimant known to be represented by an attorney without the attorney's knowledge and consent. This does not prohibit routine inquiries to a first party claimant to identify the claimant or to obtain details concerning the claim.

[Statutory Authority: RCW **48.02.060** and **48.30.010**. WSR 16-20-050 (Matter No. R 2016-12), § 284-30-330, filed 9/29/16, effective 10/30/16; WSR 09-11-129 (Matter No. R 2007-08), § 284-30-330, filed 5/20/09, effective 8/21/09. Statutory Authority: RCW **48.02.060**, **48.44.050** and **48.46.200**. WSR 87-09-071 (Order R 87-5), § 284-30-330, filed 4/21/87. Statutory Authority: RCW **48.02.060** and **48.30.010**. WSR 78-08-082 (Order R 78-3), § 284-30-330, filed 7/27/78, effective 9/1/78.]

WAC 284-30-340

File and record documentation.

The insurer's claim files are subject to examination by the commissioner or by duly appointed designees. The files must contain all notes and work papers pertaining to the claim in enough detail that pertinent events and dates of the events can be reconstructed.

[Statutory Authority: RCW **48.02.060** and **48.30.010**. WSR 09-11-129 (Matter No. R 2007-08), § 284-30-340, filed 5/20/09, effective 8/21/09; WSR 78-08-082 (Order R 78-3), § 284-30-340, filed 7/27/78, effective 9/1/78.]

MARTENS + ASSOCIATES P.S.

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