NO. 98274-1

SUPREME COURT
OF THE STATE OF WASHINGTON

WEST BEACH CONDOMINIUM, a Washington non-profit corporation,

Respondent,

v.

COMMONWEALTH INSURANCE COMPANY OF AMERICA, a foreign insurance company,

Petitioner.

WEST BEACH CONDOMINIUM'S ADDITIONAL AUTHORITIES

Todd C. Hayes, WSBA No. 26361
Charles K. Davis, WSBA No. 38231

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Todd C. Hayes, attorney for Respondent, in compliance with RAP 10.4 and GR 14.1(b), submits this Appendix of unpublished federal judicial opinions cited in West Beach Condominium's Answer to Commonwealth Insurance Company of America's Petition for Review:

1. Farnes v. Metro. Grp. Prop. and Cas. Ins. Co., 2:18-CV-1882-BJR, 2019 WL 3501447 (W.D. Wash. Jul. 31, 2019)

2. Hampton v. Allstate Corp., C13-0541-JLR, 2014 WL 1569239 (W.D. Wash. Apr. 18, 2014)

3. Keith v. CUNA Mut. Ins. Agency, Inc., 08-01368-RAJ, 2009 WL 1793675 (W.D. Wash. June 23, 2009).

4. Lakewood Shores Homeowners Ass'n v. Continental Cas. Co., C18-1353-MJP, 2018 WL 9439866, (W.D. Wash. Dec. 14, 2018)

5. Smyth v. State Farm Fire & Cas. Co., C05-838-JLR, 2005 WL 2656993 (W.D. Wash. Oct. 18, 2005)

6. Yancey v. Auto. Ins. Co. of Hartford, C11-1329-RAJ, 2012 WL 12878687 (W.D. Wash. Oct. 23, 2012).

DATED this 13th day of April, 2020.

HARPER | HAYES PLLC

By: _____

Todd C. Hayes, WSBA No. 26361
Charles K. Davis, WSBA No. 38231
Attorneys for Respondent

CERTIFICATE OF SERVICE

The undersigned certifies that on *Monday, April 13, 2020*, I caused a true and correct copy of this document to be delivered in the manner indicated to the following parties:

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☒ Via Washington State Appellate Courts' Secure Portal
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DATED this 13th day of April, 2020.

Nicole Johnsen

Nicole Johnsen

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APPENDIX OF UNPUBLISHED FEDERAL JUDICIAL OPINIONS CITED IN WEST BEACH CONDOMINIUM'S ANSWER TO COMMONWEALTH INSURANCE COMPANY OF AMERICA'S PETITION FOR REVIEW

NO. 98274-1

2019 WL 3501447
Only the Westlaw citation is currently available.
United States District Court, W.D. Washington, at Seattle.

Annelise FARNES, Plaintiff,
v.
METROPOLITAN GROUP PROPERTY AND CASUALTY INSURANCE COMPANY, Defendant.

CASE NO. 2:18-cv-1882-BJR
|
Signed 07/31/2019

Attorneys and Law Firms

Joel B. Hanson, Seattle, WA, for Plaintiff.

Joseph D. Hampton, Michelle Elizabeth Kierce, Betts Patterson & Mines, Seattle, WA, for Defendant.

ORDER GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT AND DENYING PLAINTIFF'S RENEWED FEDERAL RULE 56(d) MOTION

Barbara Jacobs Rothstein, U.S. District Court Judge

I. INTRODUCTION

***1** Plaintiff Annelise Farnes ("Plaintiff") instituted this action against Defendant Metropolitan Group Property and Casualty Insurance Company ("MetLife"), alleging that MetLife wrongfully denied payment under her insurance policy. Plaintiff brings claims for breach of contract, bad faith, and violation of Washington's Consumer Protection and Insurance Fair Conduct Acts. Dkt. No. 1, Ex. 3. MetLife moves this Court for summary judgment on Plaintiff's claims. Dkt. No. 15. Plaintiff opposes the motion. Dkt. No. 24. Having reviewed the motion, the opposition thereto, the record of the case, and the relevant legal authorities, the Court will grant the motion. The reasoning for the Court's decision follows.[1]

II. BACKGROUND

Plaintiff purchased a homeowner's insurance policy from MetLife with a policy term of October 9, 2016 to October 9, 2017. Dkt. No. 16, Ex. 1 at 2. The policy insured against losses to Plaintiff's dwelling as well as personal property. In addition, the policy provided for alternative living expenses should such an arrangement become necessary due to an insured loss. Relevant here, the policy also contained a twelve-month suit limitation clause, which contractually limits the time within which Plaintiff can bring a lawsuit against MetLife seeking coverage. Specifically, the policy provides that "any suit or action seeking coverage must be brought within twelve months of the loss." *Id.* at Ex. 2.

Plaintiff's home was burglarized on October 10, 2016, one day after the insurance policy went into effect. Plaintiff reported the break-in to the police and subsequently completed a Theft Inventory List in conjunction with the police report she filed with the Puyallup Police Department. Dkt. No. 16, Ex. 4. Plaintiff also reported the break-in to MetLife and the company opened a claim. *Id.* at Ex. 10. It paid for Plaintiff to stay in a hotel that night and she continued to stay at the hotel until February 22, 2017 when Plaintiff was finally able to return to her house. *Id.* at Ex 5. As of March 7, 2017, MetLife had paid Plaintiff a total of $142,936.69 for losses she suffered due to the break-in ($24,222.05 (dwelling coverage), $80,236.41 (personal property), and $38,478.23 (loss of use)). *Id.* MetLife paid the full amount claimed by Plaintiff as of March 7, 2017 and did not deduct for depreciation. *Id.* at Exs. 5-6, 8, and 10. MetLife "considered the claim closed by mid-March, 2017." *Id.* at Exs. 5 and 10.

However, on December 1, 2017, MetLife received an email from Choice Carpentry, which enclosed a $45,531.56 estimate for a kitchen remodel at Plaintiff's house. *Id.* at Ex. 9. The estimate included replacement of all kitchen cabinets, nine interior oak doors, a screen door, quartz countertops, kitchen backsplash, carpentry hardware, and other miscellaneous items. *Id.* MetLife did not believe that the foregoing work was related to the break-in and thus requested an opportunity to reinspect Plaintiff's home. During this inspection, Plaintiff pointed out various items

that she felt still needed to be repaired from the break-in and MetLife issued a supplemental check in the amount of $3,133.97 on January 1, 2018. *Id.* at Ex. 10 at 2.

***2** On January 3, 2018, MetLife received another estimate from Choice Carpentry in the amount of $9,826.96, which related to replacing the tile flooring in the kitchen and the vinyl flooring in the bathroom with engineered wood flooring. *Id.* On February 21, 2018, MetLife informed Plaintiff it would not make additional payments for the work outlined in the Choice Carpentry estimates because there was no evidence that the damage caused by the October 2016 break-in necessitated the work outlined in the estimates. *Id.* at 1-3. MetLife also pointed out that it had already paid for repairs to Plaintiff's kitchen following the break-in and it was not required to pay twice for the same repairs. *Id.* at 3. Lastly, MetLife informed Plaintiff that its policy does not require it to pay for "upgrades" such as those contemplated by the Choice Carpentry estimates. *Id.* For instance, MetLife pointed out, at the time of the break-in Plaintiff's kitchen cabinets were made of plywood with a wood-grain plastic veneer, but the Choice Carpentry estimate called for solid oak cabinets. Likewise, at the time of the break-in, Plaintiff's countertops were laminate-surfaced wood, but the estimate was for quartz countertops. *Id.*

MetLife invited Plaintiff to submit a Sworn Statement in Proof of Loss ("Proof of Loss") or utilize the appraisal process outlined in the policy if Plaintiff disputed MetLife's denial. *Id.* Thereafter, on March 18, 2018, Plaintiff emailed MetLife requesting that it extend the twelve-month suit-limitation period that had expired on October 10, 2017. Plaintiff also requested that MetLife extend the deadline to file the Proof of Loss by another sixty days. Dkt. No. 16, Ex. 11. MetLife declined to do either. *Id.*

On April 19, 2018, Plaintiff submitted a Proof of Loss form; the only losses listed on the form related to alleged personal property damages, not damage to her dwelling. Dkt. No. 16, Ex. 12. Plaintiff claims that the total cost to repair or replace the items on her Proof of Loss form is $165,905.23. *Id.* MetLife alleges that it had already paid for most of the items listed on the Proof of Loss form as part of the $142,936.69 payments it made by March 7, 2017. It also claims that there are duplicate items on the form. On May 25, 2018, MetLife informed Plaintiff that it rejected her Proof of Loss claims and would deny further payment for claims based on the October 10, 2016 break-in due to the one-year suit limitation clause in its policy. *Id.* Thereafter, Plaintiff instituted this action.[2]

III. STANDARD OF REVIEW

Summary judgment is appropriate when there is "no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). Summary judgment avoids unnecessary trials in cases in which the parties do not dispute the facts relevant to the determination of the issues in the case, or in which there is insufficient evidence for a jury to determine those facts in favor of the nonmovant. *See Crawford–El v. Britton*, 523 U.S. 574, 600 (1998); *Northwest Motorcycle Ass'n v. U.S. Dep't of Agric.*, 18 F.3d 1468, 1471 (9th Cir. 1994). Simply put, a summary judgment motion asks whether the evidence presents a sufficient disagreement to require submission to a jury. *Bradley v. Rohlfing*, 2015 WL 6502450, *2 (E.D. Cal. October 27, 2015).

IV. DISCUSSION

Plaintiff instituted this lawsuit against MetLife on November 29, 2018 with a sparse, three-page complaint that contained three counts: (1) breach of contract, (2) bad faith, and (3) violation of Washington's Consumer Protection Act. Dkt. No. 1, Ex. 2. Plaintiff filed an amended complaint on December 20, 2018. *Id*. at Ex. 3. The amended complaint is equally sparse but adds a fourth count: violation of Washington's Insurance Fair Conduct Act. MetLife claims that it is entitled to summary judgment on all four of these counts; Plaintiff disagrees. The Court will address each in turn.

A. The Breach of Contract Claim is Barred by the Policy's Twelve-Month Suit Limitation Clause

As stated above, the insurance policy at issue in this lawsuit contains a twelve-month suit limitation clause, which provides that: "any suit or action seeking coverage must be brought within twelve months of the loss." Dkt. No. 16, Ex. 2. The parties agree that the date of the loss as it applies to the twelve-month suit limitation clause is the date of the break-in: October 10, 2016. Thus, Plaintiff was contractually required to bring her lawsuit no later than October 10, 2017. Plaintiff initiated this lawsuit on November 29, 2018, over a year after the twelve-month

suit limitation clause expired. Therefore, MetLife argues, Plaintiff's lawsuit is time-barred.

***3** Plaintiff counters that her breach of contract claim is not time-barred because the twelve-month suit limitation clause only applies to coverage disputes. According to Plaintiff, here, there is no dispute that the insurance policy *covers* the losses caused by the break-in; the only dispute is whether Plaintiff is entitled to a supplemental *payment* for the itemized losses she included in the April 19, 2018 Proof of Loss form. Stated differently, Plaintiff contends that the twelve-month suit limitation clause is not applicable to her lawsuit because this is not a lawsuit for coverage; it is a lawsuit for additional payment for losses that the parties already agree are covered losses.

Plaintiff is mistaken. As an initial matter, this Court notes that suit limitation provisions in insurance policies have been enforced by Washington courts since at least 1923. *See, e.g.*, *Hefner v. Great Am. Ins. Co.*, 126 Wn. 390, 391 (1923) ("We have uniformly held that a clause in such a contract fixing a limitation of the time in which suit is sustainable is a valid one."). The Ninth Circuit has noted that the purpose of suit limitation clauses is to "preclude stale claims, require the insured's diligence, and prevent fraud." *Keller v. Federal Insurance Company*, 765 Fed. Appx. 271, 272 (9th Cir. 2019).

Here, contrary to what Plaintiff suggests, MetLife does dispute that the supplemental claims Plaintiff filed after the expiration of the twelve-month suit limitations clause are covered losses. With respect to the estimates from Choice Carpentry, in a letter to Plaintiff dated February 21, 2018, MetLife denied the claim because there is "no evidence that the damage caused by the October 2016 break in would require replacement of all of [Plaintiff's] kitchen cabinets and countertops, or flooring." Dkt. No. 16, Ex. 10. MetLife also noted that the "policy does not require repeated payments for the same damage," nor does it require MetLife to "pay for upgrades, such as the remodeling and re-flooring contemplated by the Choice Carpentry bids." *Id.* As for the personal property listed in the April 19, 2018 Proof of Loss form submitted by Plaintiff, MetLife alleges that it declined coverage for the items listed on the form because it included duplicate items, items for which MetLife had already compensated Plaintiff, and items that Plaintiff had never reported as damaged or stolen despite preparing a detailed inventory for the police department and despite meeting with MetLife representatives multiple times in the months after the break-in.[3]

Thus, MetLife unquestionably disputes that the work contemplated by the Choice Carpentry estimates as well as the items included on the April 19, 2018 Proof of Loss form are covered losses to which Plaintiff is entitled to additional payment. Per the policy's twelve-month suit limitation clause, any lawsuit seeking coverage of the disputed losses must have been filed on or before October 10, 2017. Because Plaintiff did not file this lawsuit until well-beyond the expiration of the twelve-month suit limitation period, her breach of contract claim is barred as a matter of law.

B. There Is No Dispute of Material Fact as to Whether MetLife Acted in Bad Faith

***4** Next Plaintiff charges that MetLife acted in bad faith with respect to processing her insurance claim. Under Washington law, "an insurer has a duty of good faith to its policyholder and violation of that duty may give rise to a tort action for bad faith." *HB Development, LLC v. Western Pacific Mut. Ins.*, 86 F. Supp. 3d 1164, 1182 (E.D.W.A. 2015) (quoting *Smith v. Safeco Ins. Co.*, 78 P.3d 1274 (Wash. 2003) (en banc)). "Claims of bad faith are not easy to establish and an insured has a heavy burden to meet." *Overton v. Consolidated Ins. Co.*, 38 P.3d 322, 329 (Wash. 2002). "To succeed on a bad faith claim, the policyholder must show the insurer's breach of the insurance contract was 'unreasonable, frivolous, or unfounded.' " *HB Development*, 86 F. Supp. 3d at 1183 (quoting *Kirk v. Mt. Airy Ins. Co.*, 951 P.2d 1124 (Wash. 1998)).

"Whether an insurer acted in bad faith is generally a question of fact." *Sharbono v. Universal Underwriters Ins. Co.*, 161 P.3d 406, 410 (Wash. Ct. App. 2007). Thus, "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 ...." *HB Development*, 86 F. Supp. 3d at 1183 (quoting *Sharbono*, 161 P.3d at 410) "The insured does not establish bad faith when the insurer denies coverage ... based upon a reasonable interpretation of the insurance policy." *Wellman & Zuck, Inc. v. Hartford Fire Ins. Co.*, 285 P.3d 892, 899 (Wash. Ct. App. 2012). The insurer is entitled to summary judgment if reasonable minds could not differ that its denial of coverage was based upon reasonable grounds. *Smith*, 78 P.3d at 1277.

Plaintiff alleges that MetLife acted in bad faith by: (1) repeatedly pressuring Plaintiff to move back into her home before "it was completely repaired 100%" [Dkt. No. 24, Ex. 1 at ¶ 6]; (2) refusing to help Plaintiff list the damaged and stolen items, including determining a fair price for the items [*Id.*]; and (3) evoking the twelve-month suit limitation clause to deny coverage for the items listed on

the April 19, 2108 Proof of Loss form and for the work contemplated by the two estimates from Choice Carpentry.

The Court will address Plaintiff's third allegation first. With respect to the third allegation, Plaintiff argues: "MetLife's denial of payment based on the 12-month lawsuit limitation clause was unreasonable on its face. The lawsuit limitation clause did not bar payments after 12 months, it barred lawsuits concerning coverage disputes." Dkt. No. 24 at 22. This argument fails for the reasons discussed *supra.* MetLife disputes that the losses for which Plaintiff seeks additional payment are covered losses. Thus, any lawsuit seeking coverage for those losses must have been brought within twelve-months of the loss. Plaintiff failed to do so; therefore, MetLife's denial based on the twelve-month suit limitation clause was reasonable. Thus, MetLife's invocation of the suit limitation clause cannot be the basis for Plaintiff's bad faith claim. *See Overton*, 38 P.3d at 329 ("If the insurer's denial of coverage is based on a reasonable interpretation of the insurance policy, there is no action for bad faith.").

Nor can Plaintiff's remaining two allegations be a basis for Plaintiff's bad faith claim. First, while Plaintiff alleges that MetLife "harassed" her to return to her home before the house was completely repaired, Plaintiff does not allege that she actually returned to her home earlier than she wanted to. In fact, the record establishes that Plaintiff stayed in a hotel the night of the break-in and remained in the hotel for 135 nights until February 22, 2017 when she moved back into her house. Dkt. No. 16, Ex. 5 at METCLAIM_002684. Plaintiff also concedes that MetLife compensated her for the expenses associated with her hotel stay. Dkt. No. 24, Ex. 1 at ¶ 6. Thus, this allegation cannot be a basis for Plaintiff's bad faith claim. *See*, *e.g.*, *Newmont USA Ltd. v. American Home Assur. Co.*, 676 F. Supp. 2d 1146, 1164 (W.D. Wash. 2009) (noting that harm is an "essential element of an action for bad faith handling of insurance claim").

***5** Plaintiff's final allegation is that MetLife's "mistreatment of [Plaintiff] during the insurance claim caused the delay in [Plaintiff's] submission of the inventory list." Dkt. No. 24 at 15. Plaintiff asserts that if MetLife had assisted her in completing the inventory list, she would have "been able to submit her inventory list within the first 12-months after the robbery." Dkt. No. 24, Ex. 1 at ¶ 9. Plaintiff alleges that MetLife's failure to assist her with completing the inventory list runs afoul of WAC insurance regulation 284-30-360(4), which provides "[u]pon receiving notification of a claim, every insurer must promptly provide necessary claim forms, instructions, and reasonable assistance so that first party claimants can comply with the policy conditions and the insurer's reasonable requirements."

The record evidence with respect to this allegation is as follows:

(1) the insurance policy requires Plaintiff to "prepare an inventory of damaged or stolen personal property showing, in detail, the quantity, age, description, **actual cash value** and amount of loss claimed for each item" [Dkt. No. 29, Ex. 1(emphasis in original)];

(2) MetLife sent Plaintiff a spreadsheet on which to itemize the items that she claims were stolen and/or damaged during the break-in, but Plaintiff felt "it was not clear what information [she] needed to put in it for each item" on the spreadsheet [Dkt. No. 24, Ex. 1 at ¶ 7];

(3) Plaintiff compiled a list of stolen and/or damaged items for the police department, which included the quantity, description, brand name, color, and value of each item [Dkt. No. 16, Ex. 4];

(4) MetLife informed Plaintiff that the inventory she prepared for the police was "all tha [*sic*] [MetLife] need[s] to handle [Plaintiff's] claim" [Dkt. No. 29, Ex. 2];

(5) on December 9, 2016, MetLife sent Plaintiff a letter requesting that she complete a Proof of Loss form related to the break-in—the letter included a blank Proof of Loss form as well as detailed written instructions on how to complete the form [Dkt. No. 29, Ex. 4];

(6) MetLife alleges that upon receiving the Proof of Loss form, Plaintiff expressed confusion on how to complete the form, so she requested that a MetLife agent meet with her at her house to discuss the form, which MetLife agreed to do[4];

(7) on January 17, 2017 an agent from MetLife met with Plaintiff (as well as Plaintiff's son and wife) to reinspect Plaintiff's home. The agent "[w]ent through entire inventory line by line with [Plaintiff] ... Clarifi[ng] ages, condition, and values." [Dkt. No. 29, Ex. 3];

(8) Plaintiff met with a MetLife agent on February 18, 2017 and based on that meeting, MetLife updated Plaintiff's "contents/personal property evaluation" [Dkt. No. 16, Ex. 6];

(9) on April 11, 2017 Plaintiff emailed MetLife and asked for "a detailed description of each item met life [*sic*] paid and how much" [Dkt. No. 16, Ex. 7];

(10) on April 17, 2017 MetLife responded to Plaintiff's

April 11, 2017 email, attaching "the last payment letter, estimate, and contents evaluation", which "provide the detailed description of the damages that were paid for" [*Id.*]; and

(11) per Plaintiff's request, on July 19, 2017 MetLife provided Plaintiff with a "Statement of Loss" that summarized the "claim amount, payment amount, date of payment, [and] check number, listed by coverage" [Dkt. No. 16, Ex. 8].

The record evidence demonstrates that MetLife satisfied its first two obligations under WAC 284-30-360(4)—it provided Plaintiff with the requisite forms and instructions. The only question is whether MetLife also provided Plaintiff with "reasonable assistance" as required by the insurance regulation. The parties do not cite to any caselaw on this issue. Nevertheless, taking the record evidence in this case and construing it in Plaintiff's favor, this Court concludes that a reasonable jury could not find that MetLife's actions were unfair or deceptive. To the contrary, MetLife sent Plaintiff the required forms with accompanying instructions, responded to Plaintiff's many phone calls and emails, agreed to meet with Plaintiff at her house when she requested, began making payments on the damaged personal property inventoried in the police report, reviewed the inventoried property with Plaintiff and her son, and repeatedly provided Plaintiff detailed summaries of amount and items for which MetLife had paid. Indeed, after receiving the first invoice from Choice Carpentry on December 1, 2017, and even though MetLife did not believe the items called for in the estimate related to the break-in, MetLife agreed to reinspect Plaintiff's home on December 15, 2017. Based on that inspection, it issued a supplemental payment in the amount of $3,133.97 for items Plaintiff believed she had not been compensated for by MetLife's previous payments. Dkt. No. 16, Ex. 10. Simply put, Plaintiff has not presented any evidence that would lead a reasonable jury to conclude that MetLife acted in bad faith towards Plaintiff. *See Taylor v. Sentry Grp. Of Companies*, 331 Fed. Appx. 457, 459 (9th Cir. 2009) (stating that a "claim of bad faith must be supported by evidence of deception, dishonestly, or intentional disregard for the insured's interest"). MetLife is entitled to summary judgment on Plaintiff's bad faith claim.

C. Plaintiff's Consumer Protection Act and Insurance Fair Conduct Act Claims

***6** Plaintiff alleges that MetLife violated Washington's Consumer Protection Act by breaching its duty of good faith to her. Because this Court has already concluded that MetLife is entitled to summary judgment on Plaintiff's bad faith claim, Plaintiff's claim based on the Consumer Protection Act must also be dismissed.

Plaintiff also asserts that MetLife violated the Insurance Fair Conduct Act ("IFCA") by unreasonably denying Plaintiff's claim. Specifically, Plaintiff charges that "MetLife's use of the 12-month lawsuit provision to deny payment for an indisputably covered claim was an unreasonable denial of a benefit." Dkt. No. 24. This is the only basis for Plaintiff's IFCA claim. Because this Court has already concluded that MetLife's reliance on the twelve-month suit limitation clause was a reasonable basis for denying Plaintiff's claim, the IFCA claim must also be dismissed.

D. Plaintiff's Renewed Motion under Federal Rule 56(d)

The same day that MetLife filed its motion for summary judgment, Plaintiff filed a motion for additional time to respond to the motion, pursuant to Federal Rule of Civil Procedure 56(d). Dkt. No. 17. This Court ordered briefing on the motion, and after reviewing the briefs, denied the motion because Plaintiff failed to make the requisite showing for relief under Federal Rule 56(d). Plaintiff now renews her Federal Rule 56(d) motion in her opposition to MetLife's summary judgment motion. In support of her motion, Plaintiff claims that she has not yet taken any depositions in this case nor has her attorney had an opportunity to review the "6,000 pages of documents relating to the insurance claim", which MetLife produced during discovery. Dkt. No. 24 at 19.

Federal Rule 56(d) provides a device for litigants to avoid summary judgment when the non-movant needs to discover affirmative evidence necessary to oppose the motion. *See Garrett v. San Francisco*, 818 F.2d 1515, 1518 (9th Cir. 1987). If a party opposing summary judgment demonstrates a need for further discovery in order to obtain facts essential to justify the party's opposition, the trial court may deny the motion for summary judgment or continue the hearing to allow for such discovery. *See* Fed.R.Civ.P. 56(d); *Margolis v. Ryan*, 140 F.3d 850, 853 (9th Cir. 1998). In making a Rule 56(d) motion, a party opposing summary judgment must make clear "what information is sought and how it would preclude summary judgment." *Id.* at 853.

A Federal Rule 56(d) motion may be properly denied where the moving party has been dilatory in her actions. *Slama v. City of Madera*, 2012 WL 1067198, *2 (E.D.C.A. March 28, 2012). This Court concludes that Plaintiff's

counsel has been less than diligent in this action. Plaintiff's counsel complains that he has not had an opportunity to review the large number of documents MetLife served during discovery. This is not a reason to grant a Rule 56(d) motion. A Rule 56(d) motion is meant to give the non-moving party the opportunity to elicit discovery, not to review the discovery already in its possession. What is more, while Plaintiff's counsel complains about the volume of documents, he admits that many are duplicates, which, of course, shortens the amount of time needed to review the documents. Lastly, Plaintiff's counsel concedes that he had the documents in his possession for a month at the time of filing the original Rule 56(d) motion. *See* Dkt. No. 22 at 2.

***7** Further, the Court notes that Plaintiff's original Rule 56(d) motion sought a four-week extension within which to conduct additional discovery. Dkt. No. 17. As of the date of this order, the summary judgment motion has been ripe for over two months, well beyond the four weeks Plaintiff's counsel originally requested, and plenty of time within which Plaintiff could have conducted further discovery, including depositions, and seek leave to file a supplemental response to the summary judgment motion if necessary. No such pleading was filed.[5] Accordingly, the Court denies Plaintiff's renewed Rule 56(d) motion.

V. CONCLUSION

Based on the foregoing, the Court HEREBY GRANTS MetLife's motion for summary judgment and DENIES Plaintiff's renewed Federal Rule 56(d) motion. The case is HEREBY DISMISSED.

All Citations

Slip Copy, 2019 WL 3501447

Footnotes

1 In her opposition to the summary judgment motion, Plaintiff renews her Federal Rule 56(d) motion that this Court previously denied. For the reasons discussed *infra*, the Court will deny Plaintiff's renewed motion.

2 Plaintiff originally filed this action in King County Superior Court; MetLife removed the action to this Court on December 28, 2018. *See* Dkt. No. 1.

3 MetLife also claims that Plaintiff has reached the coverage limit on several categories for personal property. Therefore, MetLife alleges, even if Plaintiff had presented a valid new claim for a piece of jewelry, memorabilia, or collectible, it would not have resulted in an additional payment because MetLife had already paid the coverage limits for these categories. However, in making this claim, MetLife simply refers the Court to a spreadsheet with 79 items personal property items listed for which it presumable compensated Plaintiff. *See* Dkt. No. 16, Ex. 13. There is no way for the Court to ascertain from this list whether MetLife "already paid the coverage limits" on certain categories of personal property as MetLife alleges. Therefore, the Court disregards this allegation.

4 MetLife does not cite to evidence in the record that supports this allegation. However, the Court notes that MetLife's internal emails [Dkt. No. 29, Ex. 2] indicate that someone from MetLife identified only as "Zook, T" claimed to have received a phone call from Plaintiff on December 30, 2016 in which Plaintiff allegedly requested a meeting on "Friday at 11:00AM" to which "Zook, T" agreed.

5 Indeed, this Court previously denied Plaintiff's motion to compel a 30(b)(6) deposition of MetLife, noting that Plaintiff's proposed areas of examination were so "overbroad and over-generalized" that it was "difficult to see how [MetLife] could possibly prepare for the deposition." Dkt. No. 32 at 1. In denying the motion to compel, the Court invited Plaintiff to re-note the 30(b)(6) deposition no later than May 31, 2019. *Id.* at 2. Given this timeframe, Plaintiff had ample opportunity to depose MetLife and file a supplemental opposition to the summary judgment motion if warranted by the deposition testimony.

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APPENDIX OF UNPUBLISHED FEDERAL JUDICIAL OPINIONS CITED IN WEST BEACH CONDOMINIUM'S ANSWER TO COMMONWEALTH INSURANCE COMPANY OF AMERICA'S PETITION FOR REVIEW

NO. 98274-1

2014 WL 1569239
Only the Westlaw citation is currently available.
United States District Court, W.D. Washington, at Seattle.

Shawn HAMPTON, et al., Plaintiffs,
v.
ALLSTATE CORPORATION, et al., Defendants.

No. C13–0541JLR.
|
Signed April 18, 2014.

Attorneys and Law Firms

David A. Bricklin, Bricklin Newman LLP, Seattle, WA, for Plaintiffs.

Jennifer Elizabeth Aragon, Rick J. Wathen, Cole, Wathen, Leid & Hall, P.C., Seattle, WA, for Defendants.

ORDER

JAMES L. ROBART, District Judge.

I. INTRODUCTION

***1** Before the court are: (1) Defendants Allstate Indemnity Company and Allstate Insurance Company's (collectively "Allstate") motion for summary judgment (Allstate Mot. (Dkt.# 55), and (2) Plaintiffs Shawn and Charity Hampton, Wesley Stancil, and Martin and Linda Sprinkle's motion for partial summary judgment (Plfs.Mot.(Dkt.# 52).) The court previously entered summary judgment dismissing Plaintiffs' claims for bad faith and breach of contract as time-barred based on Plaintiffs' concessions with respect to these claims. (11/12/13 Order (Dkt.# 26) at 5 (citing JSR (Dkt.# 8) at 2; 9/16/13 Resp. (Dkt. # 15) at 3).) The parties present dueling motions relating to Plaintiffs' sole remaining claim for violation of Washington State's Consumer Protection Act ("WCPA"), RCW § § 19 .86.010, *et seq.* The court has considered the motions, all submissions filed in support of and opposition thereto, the balance of the record, and the applicable law. Being fully advised, and no party having requested oral argument, the court GRANTS Allstate's motion for summary judgment, and DENIES Plaintiffs' motion for partial summary judgment as MOOT.

II. BACKGROUND

This is a dispute between Allstate and several of its insureds. Plaintiffs insured their homes in Glenoma, Washington, through Allstate. (2d Am.Compl. (Dkt.# 37) ¶ 3.1.) On January 7, 2009, a series of landslides caused damage to structures and personal property on Plaintiffs' properties. (*See id.* ¶¶ 3.3–3.7; Allstate Mot at 3.) Plaintiffs claim that the landslides were the result of logging activity on the hillside above their properties. (*Id.* ¶¶ 3.3–3.4.)

The parties are in dispute regarding whether Mr. Stancil and the Hamptons provided notice to Allstate of their claims in 2009. Plaintiffs offer a note in the insurance agent's file as evidence that Mr. Stancil telephoned on January 12, 2009, to notify Allstate of his claim. (Bricklin Decl. (Dkt.# 53) Ex. D at 4.) Mr. Stancil, however, has testified that he remembers few details concerning the conversation. (3/3/14 Wathen Decl. Ex. S (Dkt.# 58–20) at 16:17–18:17; 43:21–44:18.) In addition, Mr. Hampton testifies that he reported the claim to his insurance agent, Bob Baker, shortly after his property was damaged by the landslides in 2009. (Hampton Decl. (Dkt.# 54) ¶ 2.) Mr. Baker, however, has testified that he did not have any such conversation with Mr. Hampton. (3/3/14 Wathen Decl. Ex. O (Dkt.# 58–16) at 22:16–23:3.) Neither Plaintiffs nor Allstate have asserted that the Sprinkles notified Allstate of their claim in 2009. (*See id.* at 23:17–24:11; Allstate Resp. (Dkt.# 58) at 4; Plfs. Mot. at 6 ("The Sprinkles were misled by the policy's exclusion of flood and earth movement perils and did not make a claim at all ....").)

The parties agree, however, that Plaintiffs submitted written notification of their losses and the claims on their policies to Allstate in mid-December 2011. (2/11/14 Wathen Decl. (Dkt.# 55–1) ¶¶ 3–5, Exs. A (Dkt.# 55–2), B (Dkt. # 55–3), C (Dkt.# 55–4).) Around the same time, Plaintiffs brought suit in Lewis County against the companies that had logged the hillside and against the upslope landowner. (*See* 8/28/13 Allstate Mot. (Dkt.# 13) at 2, 7; *see* Plfs. Mot. at 7; 8/28/13 Aragon Decl. (Dkt.# 14) Ex. N (Dkt.# 14–14) (attaching verdict form).)

***2** On December 22, 2011, Allstate requested documentation supporting Plaintiffs' claims. (2/11/14 Wathen Decl. Ex. D (Dkt.# 55–5).) On December 28, 2011, Allstate inspected Plaintiffs' residences. (*See id.* Ex. E

(Dkt.# 55–6).) On January 26, 2012, Allstate reiterated its request for documents supporting Plaintiffs' claims. (*Id.* Ex. F (Dkt.# 55–7).) On March 9, 2012, Allstate requested expert reports regarding the cause of the landslide. (*Id.* Ex. H (Dkt.# 55–9).) On March 12, 2012, counsel for Plaintiffs informed Allstate that Plaintiffs had not received any expert reports in their litigation against the logging companies and landowner. (*Id.* Ex. I (Dkt. # 55–10).) On April 18, 2012, Allstate retained geological expert Robert Pride to examine the cause of the landslide. (*Id.* Ex. K (Dkt.# 55–12); Bricklin Decl. (Dkt.# 53) Ex. E).)

On April 24, 2012, Plaintiffs' counsel informed Allstate of Plaintiffs' intent to withdraw their claims.[1] (*See* 2/11/14 Wathen Decl. Ex. L (Dkt.# 55–13).) On May 8, 2012, Plaintiffs' counsel confirmed in writing Plaintiffs' withdrawal of their claims. (*See id.* Ex. M (Dkt.# 55–14).) Plaintiffs acknowledge that they withdrew their claims with Allstate out of concern that the results of Mr. Pride's investigation and opinion concerning the cause of the landslide might undermine their claims against the logging companies which were about to go to trial. (Plfs. Mot. at 7 .)

On December 14, 2012, in Plaintiffs' Lewis County lawsuit, the jury returned a verdict finding the only remaining defendant in the suit to be not negligent. (9/16/13 Resp. (Dkt.# 15) at 4; Aragon Decl. Ex. N.)

On February 21, 2013, Plaintiffs requested that their homeowners' claims with Allstate be reopened. (2/11/14 Wathen Decl. Ex. N (Dkt.# 55–15).) Six days later, on March 4, 2013, Plaintiffs filed this lawsuit against Allstate in state court. (Not. of Removal (Dkt.# 1) Ex. C (attaching state court complaint).) Plaintiffs initially asserted three causes of action against Allstate: (1) breach of contract, (2) insurance bad faith, and (3) violation of the WCPA. (*See id.* Ex. C at ¶¶ 4.1–4.6.) On March 25, 2013, Allstate removed the action to federal district court. (*See id.*)

The court set a deadline with respect to initial disclosures of June 10, 2013. (Ord. re: Initial Discl. (Dkt.# 6) at 1.) On August 15, 2013, more than two months following the court's imposed deadline, Plaintiffs provided their initial disclosures to Allstate. (2/11/14 Wathen Decl. Ex. P (Dkt.# 55–17); Plfs. Initial Discl. (Dkt.# 12).) The damages listed in Plaintiffs' initial disclosures include items damaged in the mudflow or landslide. (2/11/14 Wathen Decl. Ex. P at 2, Ex. A; Plfs. Initial Discl.) The list does not include any expenses that Plaintiffs expressly identify as related to Allstate's investigation of Plaintiffs' insurance claims, Allstate's alleged failure to investigate, Allstate's alleged violation of one of Washington State's insurance regulations, or any other alleged unfair or deceptive act by Allstate. (*See generally id.*)

***3** On August 28, 2013, Allstate filed an early motion for summary judgment. The court granted summary judgment with respect to Plaintiffs' claims for breach of contract and insurance bad faith based on Plaintiffs' repeated admission that these claims were time barred. (11/12/13 Order at 5.) The court, however, denied Allstate's motion for summary judgment with respect to Plaintiffs' claim for violation of the WCPA. (*See id.* at 5–11.)

At his January 7, 2014, deposition, Mr. Stancil testified that the damages listed in Plaintiffs' initial disclosures are the only damages that he is claiming in this lawsuit. (2/11/14 Wathen Decl. Ex. Q (Dkt.# 55–18) (attaching Stancil Dep.) at 23:23–24:3 ("Q: As you sit here today, are you claiming anything other than the damages that you have set forth that in [Plaintiffs' initial disclosures]?.... A: Right now I can't think of anything else.").) He also testified that none of Allstate's actions had caused any damage to his property or business. (*Id.* at 33:24–34:11.)

Mr. Sprinkle testified at his January 8, 2014, deposition that the items listed in Plaintiffs' initial disclosures included all of his personal property that was damaged by the 2009 landslide, but did not include any damage to his real property. (2/11/14 Wathen Decl. Ex. R (Dkt.# 55–19) (attaching M. Sprinkle Dep.) at 23:20–25:6.) He also testified, however, that the property damage he is claiming in this lawsuit is the same as the property damage he claimed in the Lewis County suit against those parties allegedly atfault for the landslide that damaged his property. (*Id.* at 27:7–25.) In any event, Mr. Sprinkle testified that none of Allstate's actions had caused any damage to his property or business. (*Id.* at 37:24–38:4.)

Ms. Sprinkle confirmed in her January 8, 2014, deposition that Plaintiffs' initial disclosures contained "the universe" of what she was claiming in this lawsuit. (3/3/14 Wathen Decl. (Dkt.# 58) Ex. S (Dkt.# 58–20) (attaching L. Sprinkle Dep.) at 12:15–13:6.) When asked if any of Allstate's actions had damaged her property, Ms. Sprinkle stated that Allstate had "[d]amaged her life," because it "could have made it better." (*Id.* at 13:7–13.) When counsel for Allstate clarified that he was referring to damage that Allstate's actions may have caused to her tangible property, as opposed to emotional damages, Ms. Sprinkle responded, "No." (*Id* . at 13:11–22.) In addition, Ms. Sprinkle confirmed that none of Allstate's actions had caused any damage to her business. (*Id.* at 13:23–25.)

Mr. Hampton testified during his January 8, 2014, deposition that the items listed in Plaintiffs' initial disclosures are the damages that he is claiming in this

lawsuit. (2/11/14 Wathen Decl. Ex. T (Dkt.# 55–21) (attaching Hampton Dep.) at 28:1–16.) He also confirmed that none of Allstate's actions had caused damage to his property. (*Id.* at 40:15–17.) He did state, however, that Allstate's actions had damaged his horse breeding business. (*Id.* at 40:18–25.) Mr. Hampton testified that he breeds horses on his property and sells the colts. (*Id.* at 41:2–5.) He testified that, because Allstate failed to pay his claim in 2009, he could not repair the fences on his property. (*Id.* at 41:6–23.) Because his fences were down, he could not keep his stallion separated from his five mares, and as a result he had to geld the stallion. (*Id.*) He testified that he was selling each colt for $2,000.00 before he ended his horse breeding business. (*Id.* at 41:11–12.) He testified that he had operated the business since 2006 and earned approximately between $10,000.00 and $25,000.00 during that time period. (*Id.* at 43:14–44:1.) He also stated that he did not have a license for the business, did not operate the business under a business name, operated solely in cash, had no records of any of the income he had earned, and had not reported any of the income on his tax returns. (*Id.* at 41:24–42:2; 43:5–13.)

***4** The alleged damage to Mr. Hamptons' horse breeding business was not described or listed in Plaintiffs' initial disclosures. (*See generally* Plfs. Initial Discl.) Mr. Hampton's January 8, 2014, deposition was the first time Plaintiffs disclosed these alleged damages.

The discovery period closed on January 13, 2014—just a few days following Plaintiffs' depositions. (Min.Ord.(Dkt.# 9) at 1.) Plaintiffs did not supplement their initial disclosures or provide a computation of the damages that Mr. Hampton asserts he lost in his horse breeding business within the discovery period. (*See generally Dkt.*) At the time that Allstate filed its motion for summary judgment on February 11, 2014, Plaintiffs still had not supplemented or updated their list or their calculation of damages contained in their initial disclosures. (*See generally* Dkt.) Plaintiffs did not file a supplementation to their initial disclosures until March 6, 2014–nearly two months following the close of discovery and three days after Plaintiffs filed their response to Allstate's motion for summary judgment. (*See* Plfs. Supp. Discl. (Dkt.# 62).) Plaintiffs' supplemental disclosure was filed almost three months after the January 13, 2014, discovery cutoff, and nearly a month following the February 11, 2014, dispositive motions deadline. (Sched.Ord.(Dkt. # 9).) Plaintiffs' supplemental disclosure does not include a list or computation any of the damages Mr. Hampton testified at his January 8, 2014, deposition he had incurred with respect to his horse breeding business. (*See generally* Plfs. Supp. Discl.)

Following the close of discovery, Allstate now moves a second time for summary judgment with respect to Plaintiffs' WCPA claim. (*See generally* Allstate Mot.) Allstate asserts that it is entitled to summary judgment because Plaintiffs have failed to prove certain required elements of their WCPA claims including damages and causation. Specifically, Allstate asserts that Plaintiffs cannot prove that they incurred an injury to their business or property caused by Allstate's alleged unfair or deceptive conduct. (Allstate Mot. at 2.) Plaintiffs, on the other hand, move for partial summary judgment with respect to the other elements of their WCPA claims. (Plfs. Mot. at 1–2.) Specifically, Plaintiffs assert that undisputed facts establish that Allstate has engaged in violations of Washington State's insurance regulations which constitute a per se unfair trade practice and a per se impact on the public interest. (*See generall* Plfs. Mot.) The court GRANTS Allstate's motion for summary judgment and consequently DENIES Plaintiffs' motion for partial summary judgment as MOOT.

III. ANALYSIS

A. Standards on Summary Judgment

Summary judgment is appropriate if the evidence, when viewed in the light most favorable to the non-moving party, demonstrates "that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(a); *see also Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986); *Galen v. Cnty. of L.A.*, 477 F.3d 652, 658 (9th Cir.2007). The moving party bears the initial burden of showing there is no genuine issue of material fact and that he or she is entitled to prevail as a matter of law. *Celotex*, 477 U.S. at 323. If the moving party meets his or her burden, then the non-moving party "must make a showing sufficient to establish a genuine dispute of material fact regarding the existence of the essential elements of his case that he must prove at trial" in order to withstand summary judgment. *Galen*, 477 F.3d at 658. The court is "required to view the facts and draw reasonable inferences in the light most favorable to the [non-moving] party." *Scott v. Harris*, 550 U.S. 372, 378, 127 S.Ct. 1769, 167 L.Ed.2d 686 (2007).

B. Injury and Causation under the WCPA

***5** A claim under the WCPA requires proof of five elements: "(1) [an] 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." *Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co.*, 105 Wash.2d 778, 719 P.2d 531, 533 (Wash.1986). Before a WCPA injury may be found, the claimant must establish an injury to his or her business or property. *Id.* The injury, however, "need not be great." *Mason v. Mortg. Am., Inc.*, 114 Wash.2d 842, 792 P.2d 142, 148 (Wash.1990). The final element requires the existence of a causal link between the deceptive act and the injury suffered. *Schmidt v. Conerstone, Invs., Inc.*, 115 Wash.2d 148, 795 P.2d 1143, 1152 (Wash.1990). Indeed, harm from the insurer's bad faith acts is an element of every action for bad faith handling of an insurance claim or for violation of the WCPA. *Coventry Assocs. v. Am. States Ins. Co.*, 136 Wash.2d 269, 961 P.2d 933, 935–36 (Wash.1998). Allstate asserts that it is entitled to summary judgment because Plaintiffs fail to demonstrate any facts in support of elements four or five of their WCPA claims. (Allstate Mot. at 12–14.)

Allstate asserts that, with the possible exception of damage to Mr. Hampton's horse breeding business, not one Plaintiff identified any damage to property or business caused by any of Allstate's actions. (Mot. at 11–14.) Indeed, with the exception of Mr. Hampton's horse breeding business, all Plaintiffs have denied any damage to their property or business caused by Allstate's actions. (2/11/14 Wathen Decl. Ex. Q (attaching Stancil Dep.) at 33:24–34:11; *id.* Ex. R (attaching M. Sprinkle Dep.) at 37:24–38:4; *id.* Ex. S (attaching L. Sprinkle Dep.) at 13:23–25; *id.* Ex. T (attaching Hampton Dep.) at 40:15–41:23; 43:14–44:1.) Allstate asserts that Plaintiffs' disclosure of the alleged damage to Mr. Hampton's horse breeding business was untimely and should be excluded.

Despite Mr. Hampton's deposition testimony, Plaintiffs do not assert damages to Mr. Hampton's horse breeding business in response to Allstate's motion for summary judgment on their WCPA claims. (*See generally* Plfs. Resp.) Indeed, Plaintiffs do not refer to these damages at all in their responsive memorandum. (*See generally id.*) Instead, Plaintiffs assert that they incurred "investigative expenses as a direct result of Allstate's failure to investigate [their] claims." (Plfs. Resp. at 5.) As evidence of these expenses, Plaintiffs cite to their expert reports in this litigation. (*Id.* (citing Plfs. Discl. Expert Witnesses (Dkt.28, 31).) The court addresses each of these arguments and categories of damages in turn.

1. The Alleged Damage to Mr. Hampton's Horse Breeding Business Is Not Applicable to Plaintiffs' WCPA claim

The damages to Mr. Hampton's horse breeding business are not applicable to his WCPA claim. Mr. Hampton testified that the damage to his horse breeding business occurred because Allstate failed to cover the cost to repair fences under his homeowner policy. (2/11/14 Wathen Decl. Ex. T at 41:6–23.) Plaintiffs are barred from seeking coverage under their policies for the landslide in question. The one-year suit limitation clause in Plaintiffs' policies required Plaintiffs to bring any suit or action against Allstate within one year after inception of the loss or damage. (Aragon Decl. (Dkt.# 14) Ex. A (Dkt.# 14–1) at 21.) Plaintiffs have acknowledged that their coverage action is time-barred by this clause (JSR (Dkt.# 8) at 2; 9/16/13 Resp. (Dkt.# 15) at 3), and the court previously entered summary judgment in favor of Allstate on this claim (11/12/13 Order at 5). Indeed, any action based on the policies would have been time-barred before Plaintiffs' counsel provided written notice of the claims to Allstate in December 2011, before Plaintiffs withdrew their claims in late April or early May, 2012, and before Plaintiffs reopened their claims in February, 2013.

***6** If Mr. Hampton's claim had arisen in the context of a third-party reservation of rights case, then he might still have a claim for coverage by estoppel through his WCPA claim. *See Coventry Assocs.*, 961 P.2d at 939 (citing *Safeco Ins. Co. of Am. v. Butler*, 118 Wash.2d 383, 823 P.2d 499, 505–06 (Wash.1992)). Plaintiffs' homeowner policies, however, fall within the first party context. In *Coventry*, the Washington Supreme Court held that in the context of first party policies, such as Plaintiffs' homeowner policies, coverage by estoppel is not an appropriate remedy. *Coventry*, 961 P.2d at 939–40. Thus, even if Allstate's actions constituted a per se violation of the WCPA and a per se impact on the public interest as argued in Plaintiffs' motion for partial summary judgment (*see generally* Plfs. Mot.), Plaintiffs are not entitled to coverage under their policies or damages that they might have been able to assert with respect to their coverage claims as a part of their WCPA claim. Thus, any claim for damages arising out of Mr. Hampton's claim for coverage, including the repair of his fences, is time-barred, and cannot be revived through his WCPA claim.

In any event, as noted above, Plaintiffs do not assert Mr. Hampton's alleged damages to his horse breeding business in response to Allstate's summary judgment motion on Plaintiffs' WCPA claim. (*See generally* Plfs. Resp.) This may be an implicit recognition by Plaintiffs that, despite their WCPA claim, the policy's suit limitation clause precludes Mr. Hampton from pursuing his claim that Allstate wrongfully denied coverage with respect to the repair costs for his fences. *See e.g. Simms v. Allstate Ins. Co.*, 27 Wash.App. 872, 621 P.2d 155, 159 (Wash.Ct.App.1980) (applying contractual limitation

period to plaintiff's contract claim despite allegations of bad faith); *see also Hunter v. Regence Blue Shield,* No. 56638–5–I, 2006 WL 2396643, at *6 (Wash.Ct.App. Aug.21, 2006) (unpublished) ("[T]he contractual limitation period would be enforceable even in the face of bad faith by Regence.") (citing *Simms,* 621 P.2d at 159); *Schaeffer v. Farmers Ins. Exchange,* No. 48818–0–1, 2002 WL 662889, at *5 (Wash.Ct.App. Apr.22, 2002) (unpublished) ("The policy's suit limitation clause precludes [plaintiff] from pursuing its claim that Farmers wrongfully denied coverage.") (citing *Coventry,* 136 Wash.2d 269, 961 P.2d 933).

Based on the foregoing case law and analysis, the court concludes that the alleged damage to Mr. Hampton's horse breeding business is not cognizable with respect to his WCPA claim and cannot serve as evidence supporting elements four and five of his claim.

2. Plaintiffs' Disclosure of Evidence of Damage to Mr. Hampton's Horse Breeding Business is Untimely and Should Be Excluded

Even if, however, the alleged damage to Mr. Hampton's horse breeding business was cognizable with respect to his WCPA claim, Allstate argues that the court should disregard it. Allstate asserts that, despite the fact that Mr. Hampton must have known of the alleged damages to his horse breeding business shortly after the landslide occurred in 2009, Plaintiffs failed to disclose these damages in their Federal Rule of Civil Procedure 26(a)(1)(A)(iii) initial disclosures, have never provided a "computation" of these damages as required by the same Rule, and have never included these damages or any computation thereof in any supplemental disclosures as required by Rule 26(e)(1). (*See* Allstate Mot. at 13.) In addition, Allstate argues that Plaintiffs' supplementation of its disclosures nearly two months after the discovery cut-off is untimely and should be excluded. (*See* Allstate Reply (Dkt.# 63) at 1, n. 2.)

***7** Rule 37(c)(1) forbids the use of any information required to be disclosed by Rule 26(a) that is not properly disclosed. *See R & R Sails, Inc. v. Ins. Co. of Penn.,* 673 F.3d 1240, 1246 (9th Cir.2012) (quoting *Yeti by Molly Ltd. v. Deckers Outdoor Corp.,* 259 F.3d 1101, 1106 (9th Cir.2001)). Specifically, Rule 37(c)(1) provides:

> If a party fails to provide information or identify a witness as required by Rule 26(a) or (e), the party is not allowed to use that information or witness to supply evidence on a motion, at a hearing, or at a trial, unless the failure was substantially justified or is harmless.
>
> In addition to or instead of this sanction, the court, on motion and after giving an opportunity to be heard:
>
> (A) may order payment of the reasonable expenses, including attorney's fees, caused by the failure;
>
> (B) may inform the jury of the party's failure; and
>
> (C) may impose other appropriate sanctions, including any of the orders listed in Rule 37(b)(2)(A)(i)-(vi).

Fed.R.Civ.P. 37(c)(1). The party facing sanctions bears the burden of proving that its failure to disclose the required information was substantially justified or is harmless. *Torres v. City of L.A.,* 548 F.3d 1197, 1213 (9th Cir.2008). Plaintiffs make no such showing with respect to their failure to provide information concerning the alleged damages to Mr. Hampton's horse breeding business in either their initial or supplemental disclosures. Indeed, as noted above, Plaintiffs do not refer to Mr. Hampton's horse breeding business at all in their responsive memorandum to Allstate's motion. (*See generally* Plfs. Resp. (Dkt.# 59).)

The exclusion of evidence under Rule 37(c)(1) has been described "as a self-executing, automatic sanction to provide a strong inducement for disclosure of material." *Yeti by Molly,* 259 F.3d at 1106. Nevertheless, where it would effectively constitute dismissal of a claim, the court must consider (1) whether the party's noncompliance involves willfulness or bad faith, as well as (2) the availability of lesser sanctions. *R & R Sails,* 673 F.3d at 1247. Because Plaintiffs also rely on other alleged damages (namely, alleged investigative costs) to support their WCPA claim (*see* Plfs. Resp. at 1–2, 4–6), it is unclear if exclusion of Mr. Hampton's alleged damages to his horse breeding business would "amount[ ] to a dismissal of a claim." *R & R Sails,* 673 F.3d at 1247. The court need not decide this issue, however, because even if the higher bar set forth in *R & R Sails* is applicable, exclusion as a sanction is warranted here.

First, the court finds that Plaintiffs' failure to include Mr. Hampton's alleged damages to his horse breeding business in their initial and supplemental disclosures was willful. Plaintiffs acknowledge that "with regard to detailing [their] losses, [they] have not been perfect." (Plfs. Resp. at 16.) They offer the excuse that their "focus" was on certain losses arising under the policy. (*Id.* at 16–19.) As discussed above, however, because Plaintiffs have acknowledged that their coverage claims are time-barred, these damages are not recoverable and cannot be revived through their WCPA claim. Thus, Plaintiffs failed to identify any damages in their initial or supplemental disclosures that are applicable to their WCPA claim. (*See generally* Plfs. Initial Discl.; Plfs. Supp. Discl.)

***8** Mr. Hampton testified that because Allstate did not cover his claim to repair his fences, he was forced to geld his stallion in the spring of 2009, which ended his horse breeding business. (2/11/14 Wathen Decl. Ex. T at 40:18–41:23.) Thus, based on the factual record, there is no doubt that Mr. Hoffman would have known of these damages no later than Spring 2009—shortly after the landslide occurred. Despite this knowledge, Plaintiffs did not include a description of, documentation for, or a calculation of these damages in their initial disclosures. (*See generally* Plfs. Initial Discl.) Further, in response to Allstate's present motion for summary judgment, which expressly argues that Mr. Hampton's alleged damages should not serve as an underpinning for Plaintiffs' WCPA claim (*see* Mot. at 6–7, 12–13), Plaintiffs fail to respond to Allstate's argument concerning Mr. Hampton's horse breeding business or even mention the business at all in their responsive memorandum (*see generally* Plfs. Resp.). Finally, despite being apprised of the issue by Allstate's present motion, Plaintiffs again fail to include Mr. Hampton's alleged damages to his horse breeding business, or a calculation of those damages, in their subsequent late-filed supplemental disclosures. (*See generally* Plfs. Supp. Discl.) Having been expressly apprised of the issue by Allstate's motion, the only reasonable interpretation of the factual record is that Plaintiffs deliberately and willfully omitted any reference to Mr. Hampton's alleged damages to his horse breeding business in their supplemental disclosures.

Second, the court finds that lesser sanctions would not alleviate the harm caused to Allstate by Plaintiffs' failure to include Mr. Hampton's alleged damages in their disclosures. In determining the appropriateness of sanctions, the court ordinarily considers: "1) the public's interest in expeditious resolution of litigation; 2) the court's need to manage its docket; 3) the risk of prejudice to the defendants; 4) the public policy favoring disposition of cases on their merits; [and] 5) the availability of less drastic sanctions ." *Wendt v. Host Intern'l, Inc.*, 125 F.3d 806, 814 (9th Cir.1997). In this case, the first three of these factors—the public's interest in expeditious resolution of litigation, the court's need to manage its docket, and the risk of prejudice to Allstate—all weigh in favor of exclusion. Despite Mr. Hampton's knowledge of the alleged harm to his horse breeding business in the spring of 2009, Allstate did not learn of these alleged damages until nearly five years later at Mr. Hampton's January 8, 2014 deposition. The discovery cut-off occurred just five days later on January 13, 2014. (Min. Ord. at 1.) Thus, there was virtually no time for Allstate to inquire further or conduct any follow-up discovery into Mr. Hampton's business. Further, the trial in this matter is scheduled on May 12, 2014, which is less than one month away. (*Id.*) Permitting Plaintiffs to introduce this evidence now would require a delay in the trial date to provide Allstate with the opportunity to conduct further discovery.

***9** Ordinarily, the public policy favoring disposition of cases on the merits would weigh against exclusion, but here, Plaintiffs have virtually abandoned any claim Mr. Hampton may have had concerning alleged damages to his horse breeding business. Plaintiffs fail to even mention these alleged damages in response to Allstate's second motion for summary judgment on Plaintiffs' WCPA claims (*see generally* Plfs. Resp.) and also fail to include any reference to these damages in their late-filed supplemental disclosures (*see generally* Plfs. Supp. Discl.). The court is left to conclude that Plaintiffs no longer seek a disposition on the merits concerning these damages. Based on the foregoing, the court finds that exclusion, rather than an alternate form of sanctions, is warranted. As a result, even if the damage to Mr. Hampton's horse breeding business were cognizable with respect to Plaintiffs' WCPA claim, the court would not consider it here.

3. Plaintiffs' Expert Witness Expenses Are Not Cognizable As WCPA Damages

The only damages that Plaintiffs raise to establish elements four and five of their WCPA claims in response to Allstate's motion for summary judgment are expenses Plaintiffs allegedly incurred to investigate their coverage claims when Allstate allegedly refused to do so. (*See* Plfs. Resp. at 2–3, 5 ("As long as plaintiffs incurred investigative expenses due to Allstate's failure to investigate, plaintiffs have established the fourth and fifth elements of their CPA claim.").) Under Washington law, such investigative expenses can be recovered as damages in a WCPA action to the extent the expenses were incurred as direct result of the carrier's breach of contract or bad faith. *See Coventry*, 961 P.2d at 938–39.

The only evidence of investigative expenses that Plaintiffs identify and substantiate, however, consists of the costs associated with retaining the expert witnesses whom Plaintiffs have named in this lawsuit. (*See* Plfs. Resp. at 5 ("Nor is there any doubt that plaintiffs have incurred investigative expenses. Plaintiffs have filed reports (on time) from three experts.").) One exception to the rule announced in *Coventry* with respect to investigative expenses relates to the costs litigants incur in the WCPA litigation itself. Washington courts have repeatedly held that costs incurred in having to prosecute a WCPA claim are not sufficient to show injury to property or business—the fourth element of a WCPA claim. *See Panag v. Farmers Ins. Co. of Wash.*, 166 Wash.2d 27, 204 P.3d 885, 901 (Wash.2009) ("The cost of instituting a[W]CPA action ... could not, itself, constitute injury."); *Sign–O–Lite Signs,*

Inc. v. DeLaurenti Florists, Inc., 64 Wash.App. 553, 825 P.2d 714, 721 (Wash.Ct.App.1992) ("[M]ere involvement in having to ... prosecute a CPA counterclaim is insufficient to show injury to her business or property."). Indeed, in *Ledcor Industries (USA), Inc. v. Mutual of Enumclaw Insurance Co.*, 150 Wash.App. 1, 206 P.3d 1255 (Wash.Ct.App.2009), the Washington Court of Appeals specifically held that expert witness fees and other expenses in the WCPA litigation itself were not cognizable injuries under the WCPA. *Id.* at 1262. Because the investigative expenses Plaintiffs assert in response to Allstate's motion relate to the retention of expert witnesses in this litigation, such expenses cannot establish an evidentiary basis to support element four—injury to property or business—of Plaintiffs' WCPA claims.[2]

***10** Because Plaintiffs have failed to come forward with any evidence establishing either elements four—injury to Plaintiffs' business or property—or five—a causal link between Allstate's alleged deceptive act and the injury Plaintiffs suffered-the court concludes that Allstate is entitled to summary judgment with respect to Plaintiffs' WCPA claim.[3] Because the court GRANTS Allstate's motion for summary judgment, Plaintiffs' motion for partial summary judgment with respect to elements one, two, and three of their WCPA claim is MOOT. Accordingly, the court DENIES Plaintiffs' motion for partial summary judgment.[4]

IV. CONCLUSION

Based on the foregoing, the court GRANTS Allstate's motion for summary judgment with respect to Plaintiffs' sole remaining claims under the WCPA (Dkt. # 55) and DENIES Plaintiffs' motion for partial summary judgment (Dkt.# 52) as MOOT. In addition, because the court's order today eliminates the need to conduct a trial, the court DENIES as MOOT Allstate's motions in limine (Dkt. # 69).

All Citations

Not Reported in F.Supp.3d, 2014 WL 1569239

Footnotes

1 Plaintiffs state in their motion that they initially asked Allstate to hold its investigation in abeyance, but Allstate refused. (Plfs. Mot. at 7.) Plaintiffs, however, cite no evidence of this fact in the record and do not explain how holding the investigation in abeyance as opposed to withdrawing the claim altogether would make a difference with respect to any of their claims against Allstate.

2 Although Plaintiffs have not asserted this argument in their responsive memorandum, there is evidence on the record indicating that Plaintiffs initially retained one of their present expert witnesses, Mr. Chris Brummer, prior to this litigation for purposes of their Lewis County lawsuit against the logging companies. (*See* 9/16/13 Bricklin Decl. (Dkt. # 16) Exs. B, C, D (attaching three declarations from Mr. Brummer with captions from Plaintiffs' Lewis County litigation).) Plaintiffs have described their claims against the logging companies in Lewis County as "far larger than their insurance claims" against Allstate. (Plfs. Mot. at 7.) The evidence indicates that Mr. Brummer was initially hired to pursue Plaintiffs' claims against the logging companies in Lewis County and then subsequently hired by Plaintiffs to serve as an expert witness in this lawsuit as well. (*See id.* Ex. D ¶ 1 ("I [Chris Brummer] previously filed two declarations in this [Lewis County] case. I file this [third] declaration in response to statements made in the recently filed Declaration of Ed Heavey and in pleadings filed by defendants in response to the pending partial summary judgment motion [in the Lewis County litigation]."); Plfs. Expert Witness. Discl. (Dkt # 28) ¶ 3 (identifying Mr. Brummer as an expert witness in this case).) There is no evidence in the record, however, in the form of a declaration or otherwise, that Plaintiffs hired Mr. Brummer prior to this litigation to investigate Plaintiffs' claims against Allstate or as a direct result of any of Allstate's alleged unfair or deceptive actions in this case. As the party opposing summary judgment and with the burden of proof at trial, Plaintiffs cannot rest of their allegations, but rather have an obligation under Federal Rule of Civil Procedure 56 to come forward with "significant probative evidence" as to each element of their WCPA claims. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249–50, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986) (party opposing summary judgment must come forward with significant probative evidence as to each element of the claim on which it bears the burden of proof). Here, Plaintiffs failed to establish the fifth element of their WCPA claim—the existence of a causal link between Allstate's alleged unfair or deceptive acts and the expenses Plaintiffs incurred with respect to their retention of Mr. Brummer prior to the present lawsuit. Accordingly, in the absence of any such causal evidence, Plaintiffs' retention of Mr. Brummer prior to their institution of this lawsuit does not alter the court's conclusion with respect to Allstate's motion for summary judgment.

3 Because the court grants Allstate's motion for summary judgment on this ground, it need not consider other alternative bases for summary judgment raised in Allstate's motion.

4 In their memorandum in response to Plaintiffs' motion for partial summary judgment, Allstate moves to strike certain portions of Plaintiffs' motion for lack of foundation under Federal Rule of Evidence 901. (Allstate Resp. (Dkt.# 58) at 1–2.) Because the court denies Plaintiffs' motion for partial summary judgment, the court also denies Allstate's motion to strike as moot.

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APPENDIX OF UNPUBLISHED FEDERAL JUDICIAL OPINIONS CITED IN WEST BEACH CONDOMINIUM'S ANSWER TO COMMONWEALTH INSURANCE COMPANY OF AMERICA'S PETITION FOR REVIEW

NO. 98274-1

2009 WL 1793675
Only the Westlaw citation is currently available.
United States District Court, W.D. Washington, at Seattle.

Veronica L. KEITH, Plaintiff,
v.
CUNA MUTUAL INSURANCE AGENCY, INC., Defendant.

No. 08–01368 RAJ.
|
June 23, 2009.

Attorneys and Law Firms

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ORDER

RICHARD A. JONES, District Judge.

I. INTRODUCTION

***1** This matter comes before the court on cross-motions for summary judgment (Dkt.17, 35). Neither party requested oral argument on either motion, and the court finds the motions suitable for resolution on the basis of the parties' briefing and supporting evidence. For the reasons explained below, the court GRANTS IN PART and DENIES IN PART Defendant's motion (Dkt.# 17) and DENIES Plaintiff's motion (Dkt.# 35).

II. BACKGROUND

In July 2004, Scott Keith was fatally shot by Donald Roy Skewis during a confrontation about an ongoing property dispute. Mr. Keith was covered under an accidental death and dismemberment policy ("the Policy") issued by Defendant CUNA Mutual Insurance Society ("CUNA"), an Iowa corporation. The Policy provides benefits in the event of the insured's accidental death, but excludes benefits for accidental death caused by, or resulting from, "committing or attempting to commit a felony." Long Decl. (Dkt.# 18), Ex. A. The Policy has a section titled "How to File a Claim," which also contains limitations provision:

> You must write Us about a claim within 20 days after the occurrence of any Loss or as soon as You can. We will provide you with claim forms or We will send them to you within 15 days after You tell Us about the claim. If We don't send the forms in 15 days, You can simply send Us written proof of loss. The proof must show the date, the character and extent of the Loss.
>
> You must send proof to Us within 90 days after the date of such Loss. If You cannot send proof to Us within 90 days, You must do so as soon as You can. Unless you have been legally incapable of filing the proof of loss, We won't accept it if it is filed after one year from the time it should have been filed. **You can't start any legal action against Us until 60 days after You send Us proof of loss and You can't start any legal action against Us more than three years (six years for South Carolina residents) after You have sent the proof.**

Id. (emphasis added). The Policy defines "Loss" as an "injury that results in Loss of life ... of an Insured Person and occurs while the Policy is in force." *Id.*

Plaintiff Veronica Keith, Mr. Keith's wife, was the Policy's beneficiary. Ms. Keith submitted proof of loss on November 1, 2004. CUNA denied the claim on December 9, 2004, after the Thurston County Sheriff's Office represented that Mr. Keith had threatened Mr. Skewis with a baseball bat, and was thus attempting to commit a felony. CUNA's denial letter included the following language: "CUNA Mutual Group reserves the right to rely on and assert any and all policy defenses which are or may become applicable to your claim. If you should have any questions concerning this claim or feel that we have been given incorrect information, please contact me[.]"

Long Decl., Ex. C.

On June 30, 2006, Ms. Keith filed a wrongful death lawsuit against Mr. Skewis. She sent a letter to CUNA on August 31, 2006, requesting a review of her claim in light of new evidence she had obtained for purposes of the wrongful death lawsuit. CUNA reaffirmed its denial of Ms. Keith's claim on October 16, 2006, stating that the prosecutor's office had informed CUNA that the homicide was justifiable. The denial letter reiterated:

> ***2** CUNA Mutual Group reserves the right to rely on and assert any and all policy defenses which are or may become applicable to your claim. We regret this action is necessary. If you feel our decision is based on incomplete or incorrect information, we will be happy to review any additional information you would like to provide.

Long Decl., Ex. E.

On May 8, 2007, Ms. Keith's attorney wrote to CUNA to request reconsideration of the claim, contending that CUNA's reliance on the prosecutor's decision not to prosecute was unreasonable because prosecutors consider factors like budget concerns and likelihood of conviction when deciding whether to prosecute, which is not necessarily related to whether Mr. Keith was attempting to commit a felony when he was killed. *See* Long Decl., Ex. F.

CUNA responded on June 20, 2007, reaffirming its denial of Ms. Keith's claim and contending that its denial was based on the representations that Mr. Keith was attempting to commit a felony when he was shot. Based on that information, CUNA reaffirmed its position that Ms. Keith's loss was not covered by the Policy. And again, the denial letter included the following language:

> CUNA Mutual Group reserves the right to rely on and assert any and all policy defenses which are or may become applicable to your claim. We regret this action is necessary. If you feel our decision is based on incomplete or incorrect information, we will be happy to review any additional information you would like to provide.

Long Decl., Ex. G.

On June 16, 2008, Ms. Keith sent a letter to notify CUNA of her claim under Washington's Insurance Fair Conduct Act ("IFCA") for denial of coverage. *See* Beck Decl. (Dkt.# 36), Ex. E at 46. The letter indicated that, pursuant to IFCA, CUNA had twenty days to resolve the claim. CUNA never responded to this notice.

On July 15, 2008, a jury found Mr. Skewis liable for the killing of Mr. Keith. Ms. Keith filed this lawsuit on August 28, 2008, bringing claims for breach of contract, bad faith, violation of the Washington Consumer Protection Act ("CPA"), and violation of the Washington Insurance Fair Conduct Act ("IFCA"). CUNA has moved for summary judgment against all of Ms. Keith's claims as time-barred. Ms. Keith has cross-moved for partial summary judgment, requesting that the court find CUNA liable on all of her claims.

III. ANALYSIS

A. Standard of Review on Summary Judgment.

Summary judgment is appropriate if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Fed.R.Civ.P. 56(c). The moving party bears the initial burden of demonstrating the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). Once the moving party meets that initial burden, the opposing party must then set forth specific facts showing that there is a genuine issue of fact for trial in order to defeat the motion. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986).

B. The Policy's Limitation Provision is Enforceable and Ms. Keith's Contract Claim is Time–Barred.[1]

***3** CUNA argues that Ms. Keith's lawsuit is time-barred under the Policy's limitations provision because the suit was filed more than three years after Ms. Keith submitted her proof of her husband's death. Ms. Keith presents alternative arguments: (1) if the limitations provision is enforceable, the Ms. Keith's suit is nonetheless not time-barred because she filed within three years of the last

date on which she sent information to CUNA; or (2) the limitations provision is not enforceable due to either CUNA's conduct or Washington statute. The court will address each of Ms. Keith's alternative arguments in turn.

1. The Plain Language of the Limitations Provision Indicates That the Triggering Event is Filing the Proof of Loss.

CUNA contends that the three-year period referenced in the limitations provision runs from the date the insured files the proof of loss. Ms. Keith contends that the three-year period begins to run on the last date on which an insured submits evidence.

The interpretation of an insurance contract is a matter of law. *Greene v. Young*, 113 Wash.App. 746, 752, 54 P.3d 734 (2002). An undefined term used in an insurance contract is given its "plain, ordinary, and popular" meaning. *Id.* (quoting *Kish v. Ins. Co. of N. Am. .*, 125 Wash.2d 164, 170, 883 P.2d 308 (1994) (quoting *Boeing Co. v. Aetna Cas. & Sur. Co.*, 113 Wash.2d 869, 877, 784 P.2d 507 (1990))). A court should "consider the policy as a whole, and [ ] give it a 'fair, reasonable, and sensible construction as would be given to the contract by the average person purchasing insurance.' " *Quadrant Corp. v. Am. States Ins. Co.*, 154 Wash.2d 165, 171, 110 P.3d 733 (2005) (quoting *Weyerhaeuser Co. v. Commercial Union Ins. Co.*, 142 Wash.2d 654, 666, 15 P.3d 115 (2000)).

The parties' dispute centers on one sentence of the limitations provision: "You can't start any legal action against Us until 60 days after You send Us proof of loss and You can't start any legal action against Us more than three years (six years for South Carolina residents) after You have sent the proof." According to Ms. Keith, the reference at the end of the sentence to "the proof" is a general term referring to any type of proof or evidence. CUNA contends that "the proof" refers to the sentence's previous reference to "proof," in the context of "proof of loss."

The court agrees with CUNA's interpretation. In the context of this sentence, "the proof" is a shorter reference back to the earlier "proof of loss," because the sentence intends to define specific periods after a fixed point in time. It does not contemplate multiple submissions of proof; if it did, consistent with Ms. Keith's interpretation, it would read something like "... You can't start any legal action against Us more than three years ... after the last date on which You have sent proof ." Instead, the sentence first refers to a 60–day period after sending the proof of loss, and then another three-year period after sending "the proof." Based on the structure of this sentence, the only fair, reasonable, and sensible interpretation is that "the proof" is a reference to the earlier "proof of loss."

***4** Ms. Keith attempts to inject ambiguity into the sentence's meaning via the deposition testimony of former CUNA insurance adjuster Sue Allen. Ms. Allen wrote in Ms. Keith's CUNA file that her date of "proof" was September 5, 2006 (the date CUNA received Ms. Keith's August 31, 2006 letter providing new information), and testified that "proof" means evidence generally but "proof of loss" means proof of death. *See* Beck Decl. (Dkt.# 36), Ex. B at 33–34. According to Ms. Allen, "proof of loss" is defined for purposes of the Policy, but CUNA internal documents also use the term "proof date" to refer to the last date that any evidence was received.

The CUNA internal documents and Ms. Allen's testimony are consistent with the court's interpretation of the policy language: the "proof date" listed on CUNA documents is not the same as the "proof of loss" date mentioned in the limitations provision. Thus, the limitations provision is unambiguous: the submission of the proof of loss is the event which triggers the beginning of the three-year period. Because Ms. Keith's contract claim was filed more than three years after CUNA received the proof of loss, her contract claim is time-barred.

2. Neither Waiver nor Estoppel Applies Here.

According to Ms. Keith, waiver or estoppel should prevent CUNA from enforcing the limitations period against her because its denial letters encouraged Ms. Keith to continue submitting information rather than filing a lawsuit. *See Staats v. Pioneer Ins. Ass'n*, 55 Wash. 51, 53–57, 104 P. 185 (1909) (finding that insurance company had waived a limitations defense because its agent told the plaintiff that he would not take any action on the claim until third parties took action, by which time the limitations period had expired); *Logan v. North–West Ins. Co.*, 45 Wash.App. 95, 100, 724 P.2d 1059 (1986) (holding that an insurer is estopped from asserting a policy limitation if the "insurer's agreement, declaration, or course of action leads the insured to conduct based on that insured's honest belief that forfeiture of his policy will not occur.").

There is no evidence that CUNA induced, misled, or

encouraged Ms. Keith not to file a lawsuit. CUNA sent an initial denial of coverage letter dated December 9, 2002, and each successive letter with Ms. Keith reaffirmed that initial denial of coverage. Each successive letter also stated that CUNA reserved the right to rely on all policy defenses. Though the letters stated that CUNA would review additional information, they did not suggest that CUNA's coverage decision was not final or otherwise discourage filing a lawsuit. Thus, the evidence does not support Ms. Keith's argument for waiver or estoppel.

3. RCW 48.18.200 Does Not Invalidate the Limitations Provision, and Even if it Did, Ms. Keith's Contract Claim is Still Time–Barred.

Ms. Keith contends that the limitations provision is void because it violates RCW 48.18.200, which provides, in relevant part:

> ***5** (1) No insurance contract delivered or issued for delivery in this state and covering subjects located, resident, or to be performed in this state, shall contain any condition, stipulation, or agreement ... (c) limiting right of action against the insurer to a period of less than one year from the time when the cause of action accrues in connection with all insurances other than property and marine and transportation insurances. In contracts of property insurance, or of marine and transportation insurance, such limitation shall not be to a period of less than one year from the date of the loss.
>
> (2) Any such condition, stipulation, or agreement in violation of this section shall be void, but such voiding shall not affect the validity of the other provisions of the contract.

According to Ms. Keith, the limitations provision violates this statute because of the triggering event. Ms. Keith argues that the clause is unenforceable because the three-year period is triggered by the filing of the proof of loss, and not the accrual of a cause of action as contemplated by RCW 48.18.200.

Ms. Keith has not explained how this distinction makes a difference in this case, and has not cited any authority regarding this argument. The court knows of no authority requiring that a limitations provision be triggered by the accrual of a cause of action. In fact, other courts have enforced limitations provisions with similar triggering events. *See, e.g.*, *Simms v. Allstate Ins. Co.*, 27 Wash.App. 872, 878, 621 P.2d 155 (1980) (limitation period began to run on date of loss); *Schaeffer v. Farmers Ins. Exchange*, 111 Wash.App. 1018, 2002 WL 662889 (Wash.App. Div. 1 April 22, 2002) (same).

Furthermore, even if the limitations provision was invalidated by RCW 48.18.200, the statute would provide that Ms. Keith has one year to file a lawsuit from the time the cause of action accrues. Ms. Keith's contract claim alleges that CUNA breached the insurance policy by failing to provide coverage for her claim, and it is well-established Washington law that a claim for breach of contract accrues upon breach. *See Schwindt v. Commonwealth Ins. Co.*, 140 Wash.2d 348, 353, 997 P.2d 353 (2000); *Safeco Ins. Co. v. Barcom*, 112 Wash.2d 575, 583, 773 P.2d 56 (1989); *Taylor v. Puget Sound Power & Light Co.*, 64 Wash.2d 534, 537–38, 392 P.2d 802 (1964). Thus, Ms. Keith's cause of action for breach of contract accrued on December 9, 2004, when CUNA denied coverage. If RCW 48.18.200 aH1Hpplied, then Ms. Keith's contract claim is still time-barred, because she filed after December 9, 2005.

4. The Limitations Provision Does Not Apply to Ms. Keith's Other Claims.

The limitations provision states that it limits "any legal action" filed by the insured against the insurer. Thus, according to CUNA, the limitations provision bars all of Ms. Keith's claims, not just the contract claim. But Ms. Keith contends that because the provision does not expressly apply to all claims, it should not bar her noncontract claims.

As CUNA admits, no Washington court has construed a limitations provision as broad as the one here. The more typical limitations provision includes language referencing claims on or related to the policy. *See, e.g.*, *Schwindt*, 140 Wash.2d at 355–56, 997 P.2d 353 (limitations provision refers to claims "on this policy for the recovery of any claim"); *Simms*, 27 Wash.App. at 878, 621 P.2d 155 (1980) (same); *Schaeffer*, 111 Wash.App. 1018, 2002 WL 662889 (limitations provision refers to "[s]uit on or arising out of this policy"); *1515–1519 Lakeview Blvd. Condo. Ass'n v. State Farm Fire & Cas. Co.*, 105 Wash.App. 1016, 2001 WL 244383 (Wash.App. Div. 1 March 12, 2001) (limitations provision refers to "legal action against us under this insurance"). In each of those cases, the court held that the limitations provision did not bar tort or statutory claims, but applied only to claims on the policy.

***6** The *Lakeview Blvd.* analysis is particularly instructive here, because the language is arguably the broadest and

therefore most similar to the limitations provision before this court. In that case, the insured raised claims against the insurer (1) on the contract, (2) under Washington's Consumer Protection Act ("CPA"), and (3) for unfair trade practices. The limitations provision in the insurance contract applied to "legal action against us under this insurance," and the insurer contended that the provision applied to all of the insurer's claims because none of them would exist without the insurance policy.

Though the court agreed with the insurer as to the claim for coverage under the contract, the court rejected the insurer's arguments as to the other claims:

> Here, the suit limitation clause bars actions "under this insurance" unless brought within two years after the date of loss. Like the one-year limit for claims "on the policy" in *Simms*, the clause here should not bar actions arising under an independent statutory scheme such as the Consumer Protection Act. To do so would frustrate the independent duty of good faith and fair dealing that arises from the Act.

Lakeview Blvd., 105 Wash.App. 1016, 2001 WL 244383 *4. The *Schaeffer* court applied similar reasoning when construing a provision limiting claims "on or arising out of this policy": "The insurer's duty of good faith and fair dealing arises not just from the contract, but from an independent source.... The insurer should not be able to avoid the policy behind the CPA by inserting the one year limitations period authorized by RCW 48.18.200(1)(c)." 111 Wash.App. 1018, 2002 WL 662889 *4. Both of these courts focused on the source of the obligation that underlies the legal action: an insurance contract should be able to limit a claim for breach of a contractual obligation, but not a claim based on duties imposed by other sources.

The court agrees with this reasoning. Though the limitations provision language here is arguably broader than in *Lakeview Blvd.* or *Schaeffer*, both of those courts' holdings were not limited by the contractual language, but focused on the independent nature of the duties or statutes that had been allegedly breached or violated. Applying the Policy's contractual limitations provision to all of Ms. Keith's claims would allow CUNA to avoid its extra-contractual duties or to frustrate the purpose of statutory schemes. For this reason, the court holds that the limitations provision does not apply to Ms. Keith's non-contractual claims.

C. Ms. Keith's IFCA Claim Fails Because IFCA Does Not Apply Retroactively.

In November 2007, Washington voters passed Referendum 67, popularly known as IFCA. The act took effect on December 6, 2007, and was codified as RCW 48.30.015. IFCA creates a private cause of action to a first-party claimant who has been unreasonably denied insurance coverage, and also provides for treble damages and an attorney fee award. *See* RCW 48.30.015(1)-(3). IFCA requires that a first-party claimant "must provide written notice of the basis for the cause of action to the insurer and the office of the insurance commissioner" twenty days prior to filing an IFCA action. RCW 48.30.015(8)(a).

***7** Ms. Keith does not dispute the effective date of IFCA or that the act does not apply retroactively. Instead, she claims that IFCA applies to this case because CUNA continued to deny coverage after IFCA's effective date. The court disagrees.

The last date on which CUNA wrote to Ms. Keith to deny her coverage was June 20, 2007, before IFCA was enacted. An IFCA claim is based on an unreasonable denial of coverage. *See* RCW 48.30.015(1) ("Any first party claimant to a policy of insurance who is unreasonably denied a claim for coverage or payment of benefits by an insurer may bring an action ..."). Denial of coverage is the predicate event for an IFCA claim. But here, CUNA last affirmatively denied coverage in June 2007, months before IFCA went into effect.[2] Thus, Ms. Keith's IFCA claim must fail.

D. Issues of Fact Preclude Summary Judgment on Ms. Keith's Remaining Claims.[3]

The only claims remaining at this point are Ms. Keith's claims for bad faith and violation of the CPA. Ms. Keith has moved for summary judgment as to liability on those claims, arguing that CUNA's denial of coverage and investigation of her claim was unreasonable and in bad faith because CUNA relied on representations from law enforcement officials to apply the felony exclusion and did not adequately consider or investigate the evidence she submitted.

CUNA contends that it was reasonable to consider the decisions of law enforcement officials, and that its

evaluation of Ms. Keith's evidence was sufficient, given its determination that her evidence was not probative as to whether Mr. Keith had committed a felony before he was killed. According to CUNA, there is at least an issue of fact as to the reasonableness of its conduct, such that summary judgment is precluded.

Bad faith is a tort with four elements: (1) the defendant had a duty of good faith; (2) the defendant breached the duty; and (3) the breach is the proximate cause of (4) damages. *Smith v. Safeco Ins. Co.*, 150 Wash.2d 478, 485, 78 P.3d 1274 (2003). A bad-faith denial of insurance coverage may also give rise to a claim under Washington's Consumer Protection Act ("CPA"), RCW Ch. 19.86. *See Transcontinental Ins. Co. v. Washington Pub. Utils. Dists.' Util. Sys.*, 111 Wash.2d 452, 470–71, 760 P.2d 337 (1988). But, if an insurer denies coverage based on a reasonable interpretation of a policy and its conduct is reasonable, then the denial is not in bad faith and the insurer does not violate the CPA. *See Transcontinental*, 111 Wash.2d at 470, 760 P.2d 337. The *Smith* court discussed the reasonableness inquiry in a summary judgment context:

> Whether an insurer acted in bad faith remains a question of fact .... If the insured claims that the insurer denied coverage unreasonably in bad faith, then the insured must come forward with evidence that the insurer acted unreasonably. The policyholder has the burden of proof. The insurer is entitled to summary judgment if reasonable minds could not differ that its denial of coverage was based upon reasonable grounds. If, however, reasonable minds could differ that the insurer's conduct was reasonable, or if there are material issues of fact with respect to the reasonableness of the insurer's action, then summary judgment is not appropriate.

***8** *Smith*, 150 Wash.2d at 485–86, 78 P.3d 1274 (citations omitted).

In this case, the evidence submitted by both parties allows reasonable minds to differ as to whether CUNA's conduct was reasonable. Ms. Keith contends it was unreasonable for CUNA to rely on statements from law enforcement rather than conduct its own independent investigation, but has cited no authority requiring an insurer to perform an independent investigation. In fact, Ms. Keith submitted deposition testimony from a CUNA employee who testified as the Fed.R.Civ.P. 30(b)(6) representative of CUNA, stating that CUNA often relies on statements from law enforcement. *See* Beck Decl. (Dkt.# 36), Ex. C at 77:17–21 ("[CUNA] rel[ies] very heavily on [authorities in the jurisdiction] to perform the investigation. They're in the locale. They have greater training than myself and my staff and are typically more thorough with respect to all the elements of their investigation.") That same employee testified that CUNA typically hires a third-party investigator to investigate foreign claims in locations where CUNA has discovered that the local authorities do not conduct a thorough investigation. *See* Beck Decl., Ex. C at 78:15–79:15. Ms. Keith's submissions did not conclusively establish that the felony exception did not apply, but they may have warranted further investigation on CUNA's part. Under these circumstances, it is not clear that CUNA's conduct was unreasonable or in bad faith. Because reasonable minds could differ on those issues, summary judgment is precluded.

IV. CONCLUSION

For the foregoing reasons, the court GRANTS IN PART and DENIES IN PART Defendants' motion (Dkt.# 17) and DENIES Plaintiff's motion (Dkt.# 35).

IT IS SO ORDERED.

All Citations

Not Reported in F.Supp.2d, 2009 WL 1793675

Footnotes

1 CUNA administers its policies in Iowa. The parties agree that there is no conflict of law (between Washington and Iowa law) as to the issues in CUNA's motion, and that the court should apply Washington law to resolve those issues. *See* Def.'s Mot. (Dkt.# 17) at 6, Pltf.'s Resp. (Dkt. # 37) at 7.

2 The June 2008 demand is not a predicate event for an IFCA claim because it does not contain any different information or evidence than what had been submitted to CUNA in the past. Thus, the last denial of coverage based on a renewed request occurred in June 2007, before IFCA was enacted.

3 Ms. Keith submitted a declaration to support her reply brief on her motion for partial summary judgment. *See* Stempel Decl. (Dkt.# 43). CUNA moved to strike the declaration, on the grounds that it was inappropriate to submit new evidence with a reply brief, and that the statements in the declaration lack foundation, are immaterial, and rely on facts not in evidence. *See* Def.'s Surreply (Dkt.# 45). The court did not consider the Stempel declaration in ruling on the pending motions, and thus the motion to strike is DENIED as moot.

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APPENDIX OF UNPUBLISHED FEDERAL JUDICIAL OPINIONS CITED IN WEST BEACH CONDOMINIUM'S ANSWER TO COMMONWEALTH INSURANCE COMPANY OF AMERICA'S PETITION FOR REVIEW

NO. 98274-1

2018 WL 9439866
Only the Westlaw citation is currently available.
United States District Court, W.D. Washington, at Seattle.

LAKEWOOD SHORES HOMEOWNERS ASSOCIATION, Plaintiff,
v.
CONTINENTAL CASUALTY COMPANY, et al., Defendants.

CASE NO. C18-1353-MJP
|
Signed 12/14/2018

Attorneys and Law Firms

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ORDER DENYING MOTION TO DISMISS

Marsha J. Pechman, United States District Judge

***1** THIS MATTER comes before the Court on Defendants Indian Harbor Insurance Company and Certain Underwriters at Lloyd's, London's Motion to Dismiss. (Dkt. No. 21.) Having reviewed the Motion, the Response (Dkt. No. 22), the Reply (Dkt. No. 25) and the related record, the Court DENIES the Motion.

Background

This case arises out of a claim of coverage for water damage to condominiums maintained by Plaintiff Lakewood Shores Homeowners Association ("Lakewood Shores"). (See Dkt. No. 1, Ex. 2 ("Complaint").) According to the Complaint, Lakewood Shores "[r]ecently ... became aware of long-term water intrusion damage" to residential buildings that comprise the condominium property. (Id. at ¶¶ 10, 12.)

Between 2011 and 2017, Lakewood Shores was covered by various "all-risk" property insurance policies offered by Defendants Continental Casualty Company Eagle West Insurance Company, Great Lakes Insurance, Indian Harbor Insurance Company, and Certain Underwriters at Lloyd's, London. (Id. at ¶ 11.) Relevant to this motion are Policy No. PRO003715001, issued by Indian Harbor Insurance Company ("Indian Harbor"), and Policy No. GEP3187, issued by Certain Underwriters at Lloyd's, London ("Underwriters").[1] (Id. at ¶¶ 6-7.) Both policies were issued to the Commercial Industrial Building Owner's Alliance, Inc. ("CIBA") for the period March 31, 2013 to March 31, 2014, with their substantive terms set forth in the CIBA 2013 All Risk Property Coverage Form (the "Policy"). (Dkt. No. 21 at 4.)

On April 11, 2017, after becoming aware of the water damage, Lakewood Shores submitted a claim for insurance coverage and benefits to each of the Defendants, including Indian Harbor and Underwriters. (Complaint at ¶¶ 12-13.) On June 12, 2017, Indian Harbor and Underwriters (the "Insurers") denied coverage and benefits outright via a joint letter to Lakewood Shores. (Id. at ¶ 33.) The Insurers contend that the Policy provided coverage only for "direct physical loss or damage excluding flood or earthquake occurring *during the policy period*" of March 31, 2013 to March 31, 2014 and that, due to a suit limitation clause in the Policy, they had no obligation to provide coverage. (Dkt. No. 21.) Accordingly, the Insurers contend that they also had no obligation to investigate the claim, and that their failure to do so was not unreasonable. (Id.) The Policy's suit limitation clause provides as follows:

> **38. SUIT AGAINST COMPANY**
>
> No suit, action or proceeding for the recovery of any claim under this policy shall be sustainable in any court of law or equity unless the Named Insured shall have fully complied with all the requirements of this policy, nor unless the same be commenced within twelve (12) months next after inception of the loss provided, however, that if under the laws of the jurisdiction in which the property is located such limitation is invalid, then any such claims shall be void unless such action, suit or proceedings be commenced within the shortest limit of time permitted by the laws of such jurisdiction.

***2** (Id., Ex. 3 at 32.)

On December 12, 2017, Lakewood Shores sent the Insurers an Insurance Fair Conduct Act Notice based upon their failure to conduct a reasonable investigation before denying coverage. (Complaint at ¶ 37.) After the Insurers failed to resolve the claim, Lakewood Shores filed this action alleging bad faith, negligence, and violations of Washington's Consumer Protection Act, RCW 19.86 et seq. ("CPA") and Insurance Fair Conduct Act, RCW 30.015 et seq. ("IFCA").[2] (Id. at 9-11.)

Indian Harbor and Underwriters now move to dismiss each of the claims against them.

Discussion

I. Legal Standard

The Court may dismiss a complaint for "failure to state a claim upon which relief can be granted." Fed. R. Civ. P. 12(b)(6). "A complaint may fail to show a right of relief either by lacking a cognizable legal theory or by lacking sufficient facts alleged under a cognizable legal theory." Woods v. U.S. Bank N.A., 831 F.3d 1159, 1162 (9th Cir. 2016). In ruling on a Rule 12(b)(6) motion, the Court must accept all material allegations as true and construe the complaint in the light most favorable to the non-movant. Wyler Summit P'Ship v. Turner Broad. Sys., Inc., 135 F.3d 658, 661 (9th Cir. 1998). The complaint "must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.' " Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (citing Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 570 (1955)).

In general, the Court may not consider materials beyond the pleadings on a Rule 12(b)(6) motion. However, because the Policy forms the basis of Lakewood Shore's claims, it is incorporated by reference into the Complaint and may be considered on a motion to dismiss. See Friedman v. AARP, Inc., 855 F.3d 1047, 1051 (9th Cir. 2017) ("[E]ven if a document is not attached to a complaint, it may be incorporated by reference into a complaint if the plaintiff refers extensively to the document or the document forms the basis of the plaintiff's claim.") (citation omitted).

II. Motion to Dismiss

Each of Lakewood Shores' claims turns on the reasonableness of the Insurers' conduct in denying coverage without investigating the claim. See, e.g., St. Paul Fire & Marine Ins. Co. v. Onvia, Inc., 165 Wn.2d 122, 196 (2008) ("In order to establish bad faith, an insured is required to show the breach was unreasonable, frivolous, or unfounded."); Transcontinental Ins. Co. v. Wash. Pub. Utils. Dists.' Utils. Sys., 111 Wn.2d 452, 470 (1988) ("A denial of coverage based on a reasonable interpretation of the policy is not bad faith, and even if incorrect, does not violate the [CPA] if the insurer's conduct was reasonable."); Hanson v. State Farm Mut. Auto. Ins. Co., 261 F. Supp. 3d 1110, 1117 (W.D. Wash. 2017) ("[B]oth bad faith and CPA violations turn on the reasonableness of the insurer's actions."); Perez-Crisantos v. State Farm Fire and Cas. Co., 187 Wn.2d 669, 680 (2017) ("[The] IFCA explicitly creates a cause of action for first party insureds who were 'unreasonably denied a claim for coverage or payment of benefits.' ") (quoting RCW 48.30.015(1)).

***3** In general, insurance companies must reasonably investigate an insured's claim in good faith before denying coverage. See Coventry Assocs. v. Am. States Ins. Co., 136 Wn.2d 269, 276, 281 (1998) ("The implied covenant of good faith and fair dealing in the policy should necessarily require the insurer to conduct any necessary investigation in a timely fashion and to conduct a reasonable investigation before denying coverage," such that "an 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 that coverage did not exist."). While the Insurers contend that the duty to investigate is "defined by what is reasonable and necessary under the circumstances," and "[i]f the facts supporting a correct denial are plain and known to the insurer, an insurer has no [duty] to conduct a pointless investigation in order to plumb every irrelevant detail regarding the insurance claim" (Dkt. No. 21 at 7), the cases they rely upon do not support so broad a rule. In each of these cases, the insurers *did* conduct some investigation before denying the insureds' claims. See Rizzuti v. Basin Travel Serv. of Othello, Inc., 125 Wn. App. 602, 618-19 (2005) (finding investigation reasonable as a matter of law where insurer determined that decedent did not purchase insurance, and noting that "[a]n insurer must make a good faith investigation of the facts before denying coverage and may not deny coverage based on a defense that reasonable investigation would have proved to be without merit"); Hanson, 261 F. Supp. 3d at 1119 (finding investigation reasonable as a matter of law where insurer considered post-accident medical records, results of independent examination, and conducted in-person interview with

insured); IDS Prop. Cas. Ins. Co. v. Crawford, 16 F. Supp. 3d 1236, 1239 (W.D. Wash. 2014) (finding investigation reasonable as a matter of law where the insurer's "investigation produced direct, conclusive evidence that [plaintiff's] claim was not covered—her confession that she started the fire"); Continental Cas. Co. v. City of Richmond, 763 F.2d 1076, 1077-79, 1084 (9th Cir. 1985) (finding that under *California* law, insurer did not waive "policy exclusions barring coverage for losses arising from bodily injury, death, assault, or battery" by failing to investigate claim in wrongful death action where the policy "unambiguously precluded coverage.").

Here, the Insurers concede that they did not investigate Lakewood Shores' claim, and contend that because Lakewood Shores had no ability to bring a "suit, action or proceeding for the recovery of any claim" in "any court of law or equity," "[n]o further investigation could have been reasonable or necessary under the circumstances." (Dkt. No. 21 at 7.)

A. Suit Limitation Clause

As an initial matter, the Court finds that the Policy's suit limitation clause is valid and enforceable, and that the expiration of the suit limitation period clearly precludes Lakewood Shores from bringing a "suit, action or proceeding for the recovery of any claim" in "any court of law or equity" at this stage.[3] See RCW 48.18.200(c); Simms v. Allstate Ins. Co., 27 Wn. App. 872, 874 (1980). However, contrary to the Insurers' contentions, the suit limitation clause does not negate *coverage*, nor does it extinguish their obligations under the Policy, including their obligation to conduct a reasonable investigation before denying coverage. See Yancey v. Auto. Ins. Co. of Hartford, Case No. C11-1329RAJ, 2012 WL 12878687, at *9 (W.D. Wash. Oct. 23, 2012); Ashburn v. Safeco Ins. Co. of Am., 42 Wn. App. 692, 698-99 (1986).

In Yancey, the plaintiffs filed suit against their insurer for failure to pay replacement costs for property damage resulting from a fire in January 2010. 2012 WL 12878687, at *1. The insurer initiated an investigation and issued partial payment based on its estimate of the actual cash value of repairs. Id. The investigation and resolution of the claim were delayed for a variety of reasons, and by January 2011, the insurer had yet to conclude its adjustment of the claim. Id. at *1-2. The plaintiffs filed suit in July 2011 for breach of policy, bad faith, and violations of the IFCA and CPA. Id. The insurer moved for summary judgment, relying in part on a suit limitation clause in the policy, which it argued not only barred the plaintiffs' breach of policy claim, but also absolved it of any obligation to pay the remaining amount owed under the policy. Id. at *3. The court disagreed, and held that "[t]he expiration of the policy's suit limitation period does not extinguish other policy obligations," as the policy provided only that "no action" could be brought more than one year after the date of loss but did not state that [the insurer's] obligations end one year after the date of loss." Id. at *9. The court explained that "[i]t is settled law that the expiration of a *statutory* limitations period extinguishes no legal obligations," but "simply deprives the plaintiff of a legal remedy," and thus it could not say that the insurer acted reasonably as a matter of law. Id. (citations omitted).

***4** As Indian Harbor and Underwriters note, Yancey is distinguishable from this case in several material ways: First, the claim was reported to the insurer well within the suit limitation period, and the insurer promptly accepted coverage and began an investigation. Second, as the investigation was underway, the insurer made "substantial payments" for the damage to the property, and indicated that it would make additional payments once the plaintiffs actually repaired or replaced the property. Third, it was not until the plaintiffs actually filed suit that the insurer attempted to invoke the suit limitations period.

Notwithstanding these distinctions, the Court finds Yancey instructive in this case. Here, neither Indian Harbor nor Underwriters made any effort to determine whether the water damage was incurred during the policy period. Instead, they denied the claim outright, and disclaimed *all* obligations to Lakewood Shores. But as in Yancey, "[n]either the [p]olicy's suit limitation clause nor any other provision place[d] an expiration date" on the Insurers' obligations to Lakewood Shores, including their obligation to conduct an investigation and, if they determined that the damage was incepted during the coverage period, pay the claim. 2012 WL 12878687, at *9. As in Yancey, the Insurers improperly conflate Lakewood Shores' lack of a *legal remedy* for their breach of policy claim with lack of a *claim for coverage*—but this is not what the suit limitation clause limits, nor is it how insurance coverage typically operates. Finally, the Court does not believe that the reasoning of Yancey applies *only* where an insured tenders the claim during the suit limitation period. See, e.g., Ashburn, 42 Wn. App. at 698 (explaining that, notwithstanding a one-year suit limitation clause, "[the insurer] had a duty to perform *as soon as the [insureds] filed a claim for covered loss under the policy*," and that the insureds' "failure to *institute suit*" within one year barred only their "judicial remedy for enforcing the duty that had come into existence when [they] filed their

claim.") (emphasis added).

While the Court finds that the suit limitation clause is sufficiently clear (i.e., that it does not eliminate coverage, but rather bars a "suit, action or proceeding for the recovery of any claim" from being sustained in "any court or law of equity" where brought more than one year after the inception of loss), to the extent it is ambiguous at all, its terms are to be construed "strictly against the insurer," Findlay v. United Pac. Ins. Co., 129 Wn.2d 370, 374 (1996), and "to provide coverage whenever possible." Bordeaux, Inc. v. Am. Safety Ins. Co., 145 Wn. App. 687, 694 (2008) (citations omitted). If Indian Harbor and Underwriters wished to eliminate coverage for any claim tendered more than one year after the inception of damage, they certainly could have done so. They did not.

B. Damages for Extra-Contractual Claims

The Insurers briefly contend that, because "*no* investigation could have possibly made any difference" with respect to its claim for coverage, Lakewood Shores has not suffered resulting harm. (See Dkt. No. 21 at 13-14; Dkt. No. 25 at 2.) Even if the Insurers are ultimately correct that there was no coverage (i.e., that the water damage "incepted" either before March 31, 2013 or after March 31, 2014), Lakewood Shores' extra-contractual claims are nevertheless cognizable. In Coventry Associates, the Washington Supreme Court recognized that "an 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 that coverage did not exist.*" 136 Wn.2d at 279 (emphasis added). In such a case, an insurer "is not liable for the policy benefits but, instead, liable for the consequential damages to the insured as a result of the insurer's breach of its ... statutory obligations." Id. at 284; see also RCW 48.30.015(1), (3) (IFCA allows prevailing party to recover "actual damages sustained, together with the costs of the action, including reasonable attorneys' fees and litigation costs," and "expert witness fees"); RCW 19.86.090 (CPA allows prevailing party to recover "actual damages ... together with the costs of the suit, including a reasonable attorney's fee."). Here, Lakewood Shores' Complaint alleges that they incurred damages, including attorneys' fees, as a result of the Insurers' failure to investigate their claim. (See Complaint at 10-11.) Therefore, the Court finds that Lakewood Shores has adequately plead resulting harm, and will not dismiss their extra-contractual claims on this basis.

Conclusion

***5** Viewing the Complaint in the light most favorable to Lakewood Shores, the Court cannot say, as a matter of law, that the Policy did not provide coverage, that the Insurers' failure to investigate was reasonable, or that Lakewood Shores was not harmed as a result. To be clear, the Court does not intend to suggest that the damage sustained by Lakewood Shores is in fact covered under the Policy, or that an insurers' failure to investigate a claim for coverage will be unreasonable in every case. There may be cases where coverage is clearly precluded by the terms of the policy, or where the relevant facts are already known to the insurer such that investigation would be truly pointless. Because this is not such a case, the Court concludes that Lakewood Shores has stated cognizable claims for bad faith, negligence, and violations of the CPA and IFCA, and DENIES the Motion to Dismiss.

All Citations

Slip Copy, 2018 WL 9439866

Footnotes

1 In its Complaint, Lakewood Shores states that "[s]ome or all of the policies provide coverage for water intrusion damage," but does not state whether it believes the Indian Harbor or Underwriters policies include such coverage. (See Complaint at ¶ 11.) Indian Harbor and Underwriters do not appear to contest that water intrusion damage would have been covered under the Policy.

2 The Insurers concede that the No Action Clause does not preclude Lakewood Shores from bringing extracontractual claims. (See Dkt. No. 25 at 2.)

3 The suit limitation clause set forth in the Policy is an "inception" clause, meaning that even if the recently-discovered water damage was "incepted" during the coverage period (i.e., if it was latent between March 31, 2013 and March 31,

2014), Lakewood Shores would nevertheless be precluded from filing suit after March 31, 2015 (i.e., twelve months after the coverage period).

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APPENDIX OF UNPUBLISHED FEDERAL JUDICIAL OPINIONS CITED IN WEST BEACH CONDOMINIUM'S ANSWER TO COMMONWEALTH INSURANCE COMPANY OF AMERICA'S PETITION FOR REVIEW

NO. 98274-1

2005 WL 2656993
Only the Westlaw citation is currently available.
United States District Court,
W.D. Washington.

Jeffrey SMYTH and Betty Smyth, Plaintiffs,
v.
STATE FARM FIRE AND CASUALTY COMPANY, Defendant.

No. C05-838JLR.
|
Oct. 18, 2005.

Attorneys and Law Firms

Simeon J. Osborn, Susan Machler, Osborn Smith PLLC, Seattle, WA, for Plaintiffs.

Bradley Gene Davis, Michelle A. Menely, Timothy J. Whitters, Gordon Thomas Honeywell Malanca Peterson & Daheim, Seattle, WA, for Defendant.

ORDER

ROBART, J.

I. INTRODUCTION

***1** This matter comes before the court on a motion for summary judgment from Defendant State Farm Fire & Casualty Co. ("State Farm") (Dkt.# 8). Neither party has requested oral argument, and the court finds this matter appropriate for disposition based on the parties' briefs and supporting materials. For the reasons stated below, the court GRANTS State Farm's motion.

II. BACKGROUND

Plaintiffs Jeffrey and Betty Smyth own a home on Mercer Island, Washington. In 2001, the Smyths discovered that their roof was leaking. Mr. Smyth contacted State Farm, his homeowner's insurance carrier, and made a claim. The parties continued to negotiate the resolution of that claim for at least a year.

Although the timing is in some dispute, the Smyths discovered substantial additional water damage resulting from the leaking roof sometime in spring 2003. In late May 2003, the Smyths hired a structural engineer who surveyed the extent of the damage. The engineer found serious rotting in extensive sections of the home's walls, and estimated that it would cost more than $300,000 to repair it. In August 2003, the Smyths contacted State Farm and brought an additional claim for this damage.

In September 2003, State Farm sent an engineer to assess the damage to the Smyth home. Based on his assessment, State Farm concluded that the Smyths' policy covered only a small portion of the damage. State Farm ultimately paid the Smyths just under $40,000 on their claim.

The Smyths contested State Farm's assessment of their claim, and in February 2004 filed suit in King County Superior Court. They did not, however, serve State Farm until much later.

Shortly after filing suit, the Smyths entered a tolling agreement with State Farm. The Smyths' policy required them to commence suit against State Farm within one year:

> 6. Suit Against Us. No action shall be brought unless there has been compliance with the policy provisions. The action must be started within one year after the date of loss or damage.

Carlson Decl., Ex. J at POL 000390 (emphasis in original).[1] In a letter confirming their tolling agreement, State Farm quoted the above policy provision (the "Limitations Clause") and immediately thereafter wrote that it was "extending the time by which a suit must be filed from within one year to within eighteen months, or one month from the date State Farm has made an offer to settle the

above referenced claim, whichever is sooner." Carlson Decl., Ex. G (March 2, 2004 letter).

The Smyths did not serve State Farm with the complaint in this action until April 18, 2005.[2] Shortly thereafter, State Farm timely removed the action to this court. It now seeks summary judgment on the Smyths' claims because they did not timely file this action.

III. ANALYSIS

To resolve this motion for summary judgment, the court must draw all inferences from the admissible evidence in the light most favorable to the non-moving party. *Addisu v. Fred Meyer, Inc.,* 198 F.3d 1130, 1134 (9th Cir.2000). Summary judgment is proper where there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Fed.R.Civ.P. 56(c). The moving party bears the initial burden to demonstrate the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett,* 477 U.S. 317, 323, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). Once the moving party has met its burden, the opposing party must show that there is a genuine issue of fact. *Matsushita Elect. Indus. Co. v. Zenith Radio Corp.,* 475 U.S. 574, 586-87, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986). The opposing party must present significant and probative evidence to support its claim or defense. *Intel Corp. v. Hartford Accident & Indem. Co.,* 952 F.2d 1551, 1558 (9th Cir.1991). Where a question presented is purely legal, summary judgment is appropriate without deference to the non-moving party.

***2** The resolution of State Farm's motion for summary judgment depends in part on the interpretation of the Limitations Clause. Under Washington law, interpretation of an insurance policy is a question of law for the court. *Overton v. Consolidated Ins. Co.,* 145 Wash.2d 417, 38 P.3d 322, 325 (Wash.2002). The court should give the terms of the policy a "fair, reasonable, and sensible construction as would be given to the contract by the average person purchasing insurance." *Id.* (internal quotation omitted). Terms defined within a policy are to be construed as defined, while undefined terms are given their ordinary meaning. *Boeing Co. v. Aetna Cas. & Sur. Co.,* 113 Wash.2d 869, 784 P.2d 507, 511 (Wash.1990).

If the policy language on its face is fairly susceptible to two different, but reasonable interpretations, ambiguity exists, and the court will apply the interpretation most favorable to the insured. *Allstate Ins. Co. v. Peasley,* 131 Wash.2d 420, 932 P.2d 1244, 1246 (Wash.1997) (cited in *Petersen-Gonzales v. Garcia,* 120 Wash.App. 624, 86 P.3d 210 (2004)); *Allstate Ins. Co. v. Hammonds,* 72 Wash.App. 664, 865 P.2d 560, 562 (Wash.Ct.App.1994) (ambiguity exists "when, reading the contract as a whole, two reasonable and fair interpretations are possible."). A court must construe ambiguity against the insurer "even where the insurer may have intended another meaning." *Allstate Ins. Co.,* 865 P.2d at 562. Because coverage exclusions "are contrary to the fundamental protective purpose of insurance," courts are to construe them strictly against the insurer and are not to extend them "beyond their clear and unequivocal meaning." *Stuart v. Am. States Ins. Co.,* 134 Wash.2d 814, 953 P.2d 462, 464 (Wash.1998).

A. The Smyths Did Not Timely Commence Their Claim for Breach of Their Insurance Policy.

There is no genuine dispute between the parties over the interpretation of the Limitations Clause. Even if there were, Washington law dictates the court's construction of the policy. The Limitations Clause requires that a suit against State Farm "must be started within one year after the date of loss or damage." Under Washington law, however, a lawsuit does not "start" unless the plaintiff files suit *and* serves the defendant within 90 days of filing:

> For the purpose of tolling any statute of limitations an action shall be deemed commenced when the complaint is filed or summons is served whichever occurs first.... [T]he plaintiff shall cause one or more of the defendants to be served personally, or commence service by publication within ninety days from the date of filing the complaint.... If ... following filing, service is not so made, *the action shall be deemed to not have commenced for purposes of tolling the statute of limitations.*

RCW § 4.16.170 (emphasis added). This statute applies to contractual limitations periods in insurance policies. *Wothers v. Farmers Ins. Co.,* 101 Wash.App. 75, 5 P.3d 719, 721 (Wash.Ct.App.2000).

Wothers definitively establishes that a policyholder cannot toll a policy's contractual limitations period unless it

satisfies *both* the filing and service prongs of RCW § 4.16.170 In *Wothers,* as in this action, the plaintiffs filed suit against their insurance carrier, but did not serve the carrier with the complaint until more than 90 days had passed. *Id.* The plaintiff's policy required him to "bring suit" within one year. *Id.* The court held that even though the plaintiff had filed suit within the one-year limitations period, his failure to serve the complaint within 90 days meant that, under RCW § 4.16.170, he "failed to bring suit within the one year period fixed by the policy." *Id.*[3]

***3** The parties' tolling agreement extended the one-year limitations period in this action by a maximum of six months. The Smyths argue that the tolling agreement added eighteen months to their one-year limitations period, a contention that finds no support in the plain language of the tolling agreement or anywhere else in the record. The tolling agreement "extend[ed] the time by which a suit must be filed from within one year to within eighteen months, or one month from the date State Farm has made a [settlement offer], whichever is sooner." Carlson Decl., Ex. G. The language is unambiguous: at most, State Farm extended the one-year limitations period by six months. *In re Estates of Wahl,* 99 Wash.2d 828, 664 P.2d 1250, 1252 (Wash.1983) ("The interpretation of an unambiguous contract is a question of law and may be resolved on summary judgment.").

The undisputed facts show that Smyths' "date of loss or damage" was more than 18 months before it served State Farm in this action. Their breach of policy claim is timely only if their "loss or damage" occurred less than 18 months before April 12, 2005, the date they served their complaint. Thus, their loss must have occurred no earlier than October 12, 2003. The record before the court reveals that by the end of May 2003, the Smyths' structural engineer had informed them of the extensive damage to their home, and had provided an estimate for the repair. It was this damage that led the Smyths to file the claim on which this action is based. The court need not determine exactly when the Smyths' "loss or damage" accrued-it holds that the loss accrued no later than June 2003. This lawsuit commenced more than 18 months later, and is therefore untimely as to the breach of policy claim.[4]

B. The Court Grants Summary Judgment Against the Smyths' Remaining Claims as Well.

In addition to their breach of policy claim, the Smyths have theories of relief that fall outside the scope of the Limitations Clause. They brought claims for bad faith denial of insurance coverage, violations of the Washington Consumer Protection Act ("CPA"), breach of fiduciary duty, and outrage. The court grants summary judgment on these claims because the Smyths have insufficient evidence to support them.

1. The Smyths Have No Evidence Supporting Their Related Claims for Bad Faith, CPA Violations, and Breach of Fiduciary Duty.

The Smyths' claims for bad faith, CPA violations, and breach of fiduciary duty are closely related. A bad faith claim requires a showing that the insurer acted in a manner that was "unreasonable, frivolous, or unfounded." *Dewitt Constr., Inc. v. Charter Oak Fire Ins. Co.,* 307 F.3d 1127, 1138 (9th Cir.2002) (citation omitted). Even where an insurer incorrectly denies insurance coverage, it does not act in bad faith unless its interpretation of the policy was unreasonable. *Wright v. Safeco Ins. Co. of Am.,* 124 Wash.App. 263, 109 P.3d 1, 9-10 (Wash.Ct.App.2004). An insurer's fiduciary duty is generally identical to its duty to act in good faith, and the Smyths do not identify any differences between the duties as they apply in this case. *Van Noy v. State Farm Mut. Auto. Ins. Co.,* 142 Wash.2d 784, 16 P.3d 574, 579 n. 2 (Wash.2001) ("We are doubtful that there is any real difference between a 'fiduciary' duty and a duty of 'good faith' in the insurance context."). To prove a CPA violation, a Plaintiff must begin by showing an "unfair or deceptive act or practice." *Indus. Indem. Co. of the Northwest, Inc. v. Kallevig,* 114 Wash.2d 907, 792 P.2d 520, 528 (Wash.1990).

***4** Before examining the evidence supporting the Smyths' related bad faith, CPA, and breach of fiduciary duty claims, the court notes that under any of these theories, the Smyths must show that State Farm's actions caused them harm. *Griffin v. Allstate Ins. Co.,* 108 Wash.App. 133, 29 P.3d 777, 785 (Wash.Ct.App.2001). Here, even if State Farm had improperly denied coverage, the Smyths' late service of the complaint would have prevented them from recovering damages under their policy.[5] Thus, unless State Farm's alleged bad faith or breach of duty caused the Smyths to bring this action too late, the Smyths have no claim that would entitle them to coverage under their policy or damages equivalent to coverage.

The court finds no evidence that State Farm is responsible for the Smyths' failure to timely bring this action. The evidence permits only one conclusion: State Farm extended the time period for bringing this action, and the Smyths nonetheless failed to timely bring it. There is no evidence that State Farm induced the Smyths' untimely filing, much less that it did so in bad faith.

Although the Smyths' delay in bringing this action prevents them from recovering under their policy or recovering equivalent damages under a bad faith theory, there is a narrow strand of their bad faith claim remaining. Washington law recognizes that even where an insurer properly denies coverage, it can be liable for bad faith. *Coventry Assocs. v. Am. States Ins. Co.*, 136 Wash.2d 269, 961 P.2d 933, 937 (Wash.1998). For a first-party insured, however, bad faith will not create a "coverage by estoppel." *Id.* at 939. Instead, the insured's remedy is limited to damages that flow directly from the bad faith actions. *Id.* at 939-940.

The court finds no evidence supporting the narrow strand of the Smyths' bad faith claim that survives their failure to timely bring this action. As noted above, the Smyths bear the burden of showing that State Farm's actions were not merely erroneous, but were unreasonable, frivolous, or unfounded. State Farm offers strong evidence that it handled the Smyths' claim appropriately. Upon receiving notice of the claim, State Farm sent an engineer to the Smyth home for an inspection. Based on the inspection results, State Farm determined that only a portion of the damage to the home fell within the Smyths' policy. This evidence is sufficient to force the Smyths to come forward with evidence that State Farm either inappropriately investigated the damage or otherwise acted unreasonably, and that they suffered damage as a result. The Smyths have not done so.

The only evidence that the Smyths offer to support their bad faith claim is an expert report from Richard Kilpatrick ("Kilpatrick Report"), an attorney and former insurance claims adjuster. The court declines to accept Mr. Kilpatrick's report as evidence for several reasons. First, Mr. Kilpatrick is, by his own admission, "[p]rimarily a plaintiff trial lawyer." Kilpatrick Report appendix. On the record before the court, Mr. Kilpatrick has no experience as an insurance claims adjuster since 1973. Although Mr. Kilpatrick's legal practice apparently involves "[m]atters of insurance problems [sic], including coverage and bad faith issues" (Kilpatrick Report appendix), his experience as a lawyer is, without more, insufficient to qualify him as an expert on the propriety of State Farm's actions.

***5** Second, even if Mr. Kilpatrick were qualified to offer opinions in this case, his opinions are fatally conclusory. Under Fed.R.Civ.P. 26(a)(2), an expert must submit a report that "contain[s] a complete statement of all opinions to be expressed and the basis and reasons therefor...." Mr. Kilpatrick does not, for the most part, state any basis or reasons for his opinions. For example, he opines that "[p]arts of the [Smyth] home needed further investigation through destructive opening to properly determine the extent of the substantial of [sic] structural impairment in the home." Kilpatrick Report at 2. He does not explain why State Farm's inspection was inadequate. He does not explain what sources he relied on to determine what constitutes an adequate inspection. He does not explain what a proper inspection would have revealed. As a second example, he states that State Farm "must pay for reasonable inspections," but does not explain what inspections it failed to pay for or how those inspections would have made a difference in the resolution of this claim. *Id.* He alleges that "State Farm was not clear with the insured," but does not point to a single example of a statement State Farm made that was unclear. Ironically, he concludes (again without stating the basis of or reasons for his opinion) that "[n]o critical analysis and fair weighing of the evidence [by State Farm] is demonstrated in the materials I have seen so far." *Id.* at 3, 961 P.2d 933. The court cannot accept Mr. Kilpatrick's opinion, because it demonstrates no critical analysis or fair weighing of the evidence. It thus falls short of the requirements of federal law. The same is true of the remainder of the opinions in Mr. Kilpatrick's report. The court therefore declines to accept the report as evidence. Because the Smyths offer no other evidence to support their bad faith, CPA, or breach of fiduciary duty claims, the court grants summary judgment against them.

2. The Smyths Have No Evidence that Demonstrates Arguably Outrageous Conduct.

Finally, the court grants summary judgment against the Smyths' unsubstantiated outrage claim. An outrage plaintiff must prove that a defendant engaged in either intentional or reckless "extreme and outrageous conduct" and that the conduct caused plaintiff "severe emotional distress." *Dicomes v. State of Washington*, 113 Wash.2d 612, 782 P.2d 1002, 1012 (Wash.1989). "Extreme and outrageous" conduct is conduct that is "so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community." *Id.* (citation omitted). Before allowing an outrage claim to proceed, the court must decide whether reasonable minds could differ over whether the conduct was extreme and outrageous. *Id.* at 1013. Here, the Smyths have provided no evidence of extreme and outrageous conduct. The court finds that reasonable minds could not differ on this point, and thus grants summary judgment against the Smyths' outrage claim.

IV. CONCLUSION

***6** For the foregoing reasons, the court GRANTS State Farm's motion for summary judgment (Dkt.# 8). The court directs the clerk to enter judgment for State Farm.[6]

Dated this 17th day of October, 2005.

All Citations

Not Reported in F.Supp.2d, 2005 WL 2656993

Footnotes

1 The court has quoted language from the Smyths' 2002-2003 policy. The parties do not dispute that every version of the policy contained the same one-year limitations period.

2 As an Illinois corporation, State Farm operates as a foreign insurer in Washington. Thus, the Washington Insurance Commissioner is its statutorily appointed agent for service of process under RCW § 48.05.200. When the Smyths served State Farm in April 2005, they did so by serving the Insurance Commissioner. Carlson Decl., Ex. K. It is undisputed that the Smyths did not serve State Farm by any other means.

3 The *Wothers* court did not cite the text of the policy provision at issue. As noted above, the policy apparently required the insured to "bring suit" within one year. In this case, the policy required the Smyths to "start" this action within one year. This difference in language only strengthens State Farm's position. Under RCW § 4.16.170, an action does not "commence" unless a plaintiff files a complaint and serves it within 90 days. The court is thus compelled to hold that an action does not "start" unless a plaintiff files a complaint and serves it within 90 days.

4 Even if the court were to hold that the Smyths' loss did not accrue until they filed their claim with State Farm in August 2003, this action would still be untimely.

5 For this reason, the court declines to consider the Smyths' argument that State Farm improperly denied coverage based on a policy amendment that it did not properly disclose to the Smyths. The amendment, which altered coverage for structural collapse, did not alter the Smyths' obligation to bring suit within one year of loss.

6 The Smyths ask the court to delay resolution of this motion pending consideration of their cross-motion for summary judgment (Dkt. # 19), which is not yet ripe. The court has reviewed the cross-motion and finds that it raises no argument or evidence that would alter the court's analysis of this motion. The court therefore declines to delay its disposition of this motion.

6

APPENDIX OF UNPUBLISHED FEDERAL JUDICIAL OPINIONS CITED IN WEST BEACH CONDOMINIUM'S ANSWER TO COMMONWEALTH INSURANCE COMPANY OF AMERICA'S PETITION FOR REVIEW

NO. 98274-1

2012 WL 12878687
Only the Westlaw citation is currently available.
United States District Court,
W.D. Washington,
at Seattle.

Scott Yancey, et al., Plaintiffs,
v.
The Automobile Insurance Company of Hartford, Defendant.

CASE NO. C11-1329RAJ
|
Signed 10/23/2012

Attorneys and Law Firms

Michael Thomas Watkins, Law Offices of Michael T. Watkins, Joel B. Hanson, Seattle, WA, for Plaintiffs.

James Thomas Derrig, Seattle, WA, for Defendant.

ORDER

Richard A. Jones, United States District Court Judge

I. INTRODUCTION

***1** This matter comes before the court on two summary judgment motions from the Defendant, The Automobile Insurance Company of Hartford ("Hartford"), and a summary judgment motion from Plaintiffs Scott and Elizabeth Yancey. Only the Yanceys requested oral argument. The court finds oral argument unnecessary. For the reasons stated below, the court GRANTS Hartford's first motion (Dkt. # 16) in part and DENIES it in part, GRANTS Hartford's second motion (Dkt. # 42) in part and DENIES it in part, and DENIES the Yanceys' motion (Dkt. # 47). This order concludes with instructions for the parties to prepare for trial, which will begin on December 3, 2012.

II. BACKGROUND

In January 2010, an accidental fire significantly damaged the Yanceys' Snohomish County home. The Yanceys quickly notified Hartford, the carrier of Ms. Yancey's homeowner's insurance policy (the "Policy"). Although no one disputes that Mr. Yancey lived at the home, he was not a named insured on the Policy.

For a host of reasons, the Yanceys and Hartford never reached agreement on how much Hartford owed. The court summarizes the parties' negotiations here, but the parties should not mistake this summary for findings of fact. With the exception of a few undisputed facts that the court highlights in its later analysis, the court's decision today does not depend on any factual findings.

A. Negotiations Over Damage to the Yanceys' Home

The initial reason for delay in resolving the Yanceys' claims was that Snohomish County did not inspect the damage to their house until March 2010. Everyone agrees that the inspection was necessary to determine what would be necessary to ensure that the reconstruction complied with building codes. Before the inspection, a construction company whom Hartford contacted estimated repair costs at $120,000.[1] Another construction company, whom the Yanceys contacted, estimated those costs at $137,000.

Snohomish County's March 24 inspection report had a substantial impact. The report concluded that it would be cheaper to build a new house than to comply with building codes while repairing the existing house. While Hartford and the Yanceys' construction company discussed the issue, Hartford issued Ms. Yancey a check for just over $81,000. That check covered the actual cash value of the damage to the home, an amount Hartford estimated by taking a $40,000 depreciation deduction from its then-current estimate of $121,000 in repair costs. In the letter accompanying the check, Hartford's claim adjuster explained that the Policy covered the full replacement cost of the home, but permitted Hartford to pay only the actual cash value until the Yanceys actually

replaced the home. The letter also explained that the Policy covered only $45,000 for repair costs incurred to comply with building codes.

In the interim, the Yanceys proceeded with plans to build a new house. Hartford was at the same time attempting, with limited success, to obtain information from the Yanceys' construction company about the cost of code-mandated upgrades.

***2** The Yanceys did not formally demand payment until September 2010. By then, they had hired an attorney, who sent a demand for almost $232,000. That demand relied on the Snohomish County inspection report as well as a follow-up report from engineers whom the Yanceys' contractor hired. The demand insisted that Hartford pay replacement cost for all damage to the home, rather than actual cash value. Hartford wrote back in fewer than two weeks, explaining that it still had questions about the need for code-mandated upgrades and that in any event, it had no obligation to pay the replacement cost of the home until the Yanceys incurred replacement costs. Hartford asked to use the same engineers the Yanceys had used to investigate the code-mandated upgrades.

In October, after additional discussions with Snohomish County inspectors, the engineers issued a substantially modified report. Most importantly, neither the engineers nor the inspectors still believed that it was necessary to demolish the existing home. The engineers offered new opinions about the need for code-related upgrades. Based on those new opinions, Hartford's construction company estimated costs of $147,000 for repairs and $57,000 for code-mandated upgrades. When Hartford, the Yanceys, the construction company, and the engineers met at the home a few days later, Hartford's construction company increased the estimate of repair costs to $162,000, leaving the code-mandated upgrade estimate essentially unchanged. By December, Hartford revised its estimate, allocating $163,000 for repair costs and $38,000 for code upgrades.

On January 5, 2011, a year and a day after the fire, Hartford made an additional payment to the Yanceys, bringing the total amount paid to $117,000. As with its previous payment, Hartford made an estimate of actual cash value, promising to pay replacement costs once the Yanceys actually incurred them.

At some point late in either late 2010 or early 2011, the Yanceys abandoned their plans to rebuild their home and purchased a manufactured home. They claim that they did so with Hartford's consent. Hartford balked, however, when asked to pay the costs of moving the home and constructing a foundation for it. Among other things, Hartford contended that the manufactured home (including basement space) would be much larger than the house damaged in the fire.

In May 2011, the Yanceys' counsel sent Hartford a "Whole Loss and Damage claim" for $246,000. That claim was based on the cost of purchasing and moving the modular home plus installing a new foundation that would also serve as a basement.

B. Negotiations Over the Yanceys' Personal Property Damage

Along with their efforts to reach agreement on the repair or replacement of their home, the parties also attempted to resolve a claim for personal property damaged in the fire. Hartford assigned a different claim adjuster for the Yanceys' personal property. The adjuster met with Ms. Yancey shortly after the fire and worked with her to create an inventory of damaged personal property. That inventory included estimates of both actual cash value and replacement cost. In April 2010, the adjuster sent Ms. Yancey an estimate of $51,000 to replace the personal property, or $37,000 less depreciation. As was the case with the house, the Policy contained a provision that permitted Hartford to pay the actual cash value initially, then pay the replacement cost once Ms. Yancey actually replaced the items. Hartford sent a check for $37,000. Ms. Yancey worked to compile receipts to support a replacement claim. She submitted some receipts in June 2010; the adjuster sent some follow-up questions. She received no response until January 2011, when Ms. Yancey's attorney sent her a three-page list of questions and comments directed toward the adjuster's estimate. She responded quickly in an email in which she explained that she had still received no responses to her June 2010 follow-up questions, and that the three-page list did not give her enough information to reassess her estimate. She asked for more information. She may have received some information by December 2010, as the record reflects that she slightly increased her estimate of the personal property damages. Hartford did not receive a comprehensive statement of the Yanceys' claim for personal property damages until June 2011, when a private adjuster whom the Yanceys hired sent a revised inventory of personal property. According to that inventory, the actual cash value of the personal property losses was $67,000 and the replacement cost was $85,000. There is no evidence that Hartford did anything after it received that inventory.

***3** For the sake of completeness, the court notes that the parties have disputes over whether Hartford properly paid the Yanceys for the additional living expenses that the fire caused, including the loss of use of their home. Those disputes, however, are not at issue in the motions before the court.

The record is unclear as to the current status of the parties' disputes. The Yanceys now live in North Dakota, and it is unclear what happened to their Snohomish County property. It appears that the only payments Hartford made are actual cash value payments for real and personal property that the court previously identified, along with unspecified payments for additional living expenses.

The Yanceys and their minor daughter sued Hartford in July 2011. They claimed that Hartford breached the Policy, acted in bad faith, violated portions of the Washington Administrative Code ("WAC") applicable to insurance practices, the Washington Consumer Protection Act ("CPA," RCW Ch. 19.86), and the Insurance Fair Conduct Act ("IFCA," RCW Ch. 48.30). Mr. and Ms. Yancey later agreed to dismiss their daughter's claims. Now before the court are three partial summary judgment motions. Those motions and the voluminous evidentiary record underlying them are a hodgepodge of repetitive narratives of each party's versions of the facts, irrelevant accusations, and improper attempts to have the court resolve disputed facts. The court has attempted to extract from that morass the issues that it can resolve on summary judgment. The court now addresses those issues.

III. ANALYSIS

On a motion for summary judgment, the court must draw all inferences from the admissible evidence in the light most favorable to the non-moving party. *Addisu v. Fred Meyer, Inc.*, 198 F.3d 1130, 1134 (9th Cir. 2000). Summary judgment is appropriate where there is no genuine issue of material fact and the moving party is entitled to a judgment as a matter of law. Fed. R. Civ. P. 56(a). The moving party must initially show the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). The opposing party must then show a genuine issue of fact for trial. *Matsushita Elect. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986). The opposing party must present probative evidence to support its claim or defense. *Intel Corp. v. Hartford Accident & Indem. Co.*, 952 F.2d 1551, 1558 (9th Cir. 1991). The court defers to neither party in resolving purely legal questions. *See Bendixen v. Standard Ins. Co.*, 185 F.3d 939, 942 (9th Cir. 1999).

A. The Yanceys Have Conceded to the Dismissal of Their Breach-of-Policy Claim.

The Yanceys' complaint asserts five claims based on five different legal theories. All five claims contend that Hartford acted unlawfully with respect to compensating them for the damage to their home, the damage to their personal property, and their additional living expenses as a result of the fire. One of their claims asserted that Hartford's conduct breached the Policy.

Hartford's first summary judgment motion asked the court to dismiss the breach-of-policy claim because it was beyond the Policy's one-year suit limitation clause. That clause provides as follows: "No action can be brought unless the policy provisions have been complied with and the action is started within one year after the date of loss." Policy at 2 of 22.[2] No one disputes that the Yanceys loss occurred on January 4, 2010, and that they did not sue until at least July 2011.

***4** The Yanceys chose to concede their breach-of-policy claim rather than attempt to circumvent the Policy's one-year limitation clause. The court suggests no opinion on whether they could have avoided that clause. *But see F.C. Bloxom Co. v. Fireman's Fund Ins. Co.*, No. 10-1603RAJ, 2012 U.S. Dist. LEXIS 55228, at *13-18 (W.D. Wash. Apr. 19, 2012) (considering application of equitable estoppel and equitable tolling to one-year suit limitation clause). The court will, however, hold the Yanceys to their concession. The court dismisses their breach-of-policy claim.

B. Overview of the Yanceys' Extracontractual Claims and Insurance Policy Interpretation in Washington

The Yanceys' four remaining claims are extracontractual: they assert violations of Hartford's common law duty of good faith, violations of the Unfair Claims Settlement Practices Regulation (WAC §§ 284-30-300 to 284-30-450, hereinafter "insurance regulations"), violations of the CPA, and violations of IFCA. Hartford concedes that the Policy's one-year suit limitations period does not apply to the Yanceys' extracontractual claims.

Def.'s Mot. (Dkt. # 22) at 9 (citing *Simms v. Allstate Ins. Co.*, 621 P.2d 155, 158 (Wash. Ct. App. 1980)). The court now provides a brief overview of the legal foundation of those claims to give context to its later analysis.

An insured's assertion of bad faith against her insurer is a tort claim. *Safeco Ins. Co. of Am. v. Butler*, 823 P.2d 499, 503 (Wash. 1992). A denial of coverage is in bad faith if it is unreasonable, frivolous, or unfounded. *Overton v. Consolidated Ins. Co.*, 38 P.3d 322, 329-30 (Wash. 2002). In considering an insurance claim, an insurer must give equal consideration to the insured's interests and its own interests. *Am. States Ins. Co. v. Symes of Silverdale, Inc.*, 78 P.3d 1266, 1270 (Wash. 2003). Violation of Washington's insurance regulations is evidence of bad faith. *See Coventry Assocs. v. Am. States Ins. Co.*, 961 P.2d 933, 935 (Wash. 1998). Because Washington has declared that insurance impacts the public interest, an insured establishes a CPA violation when it proves injury to its business or property as a result of an act in bad faith. *See Overton*, 38 P.3d at 330 (citing RCW § 19.86.020); *Kirk v. Mt. Airy Ins. Co.*, 951 P.2d 1124, 1126 (Wash. 1998) ("[T]he business of insurance affects the public interest ...."); RCW § 48.01.030 (declaring that "[t]he business of insurance is one affected by the public interest"); *see also Indus. Indem. Co. of the N.W. v. Kallevig*, 792 P.2d 520, 530 (Wash. 1990) (holding that a single violation of WAC § 284-30-330 is sufficient to support a CPA violation). Unlike the CPA, IFCA targets insurance practices specifically. IFCA gives a cause of action to a first-party insured against an insurer who "unreasonably denie[s] a claim for coverage or payment of benefits." RCW § 48.30.015(1).

Because the court's resolution of the motions before it will require it to interpret the Policy, the court reviews the applicable legal principles. In Washington, insurance policy interpretation is a legal question. *Overton*, 38 P.3d at 325 ("Interpretation of insurance policies is a question of law, in which the policy is construed as a whole and each clause is given force and effect."). The court must give the terms of the policy a "fair, reasonable, and sensible construction as would be given to the contract by the average person purchasing insurance." *Id.* (internal quotation omitted). Terms defined within a policy are to be construed as defined, while undefined terms are given their "ordinary and common meaning, not their technical, legal meaning." *Allstate Ins. Co. v. Peasley*, 932 P.2d 1244, 1246 (Wash. 1997). Dictionaries may assist in determining the ordinary meaning of a term. *Boeing Co. v. Aetna Cas. & Sur. Co.*, 784 P.2d 507, 511 (Wash. 1990). If policy language on its face is fairly susceptible to two different but reasonable interpretations, ambiguity exists. *Peasley*, 932 P.2d at 1246 (cited in *Petersen-Gonzales v. Garcia*, 86 P.3d 210 (Wash. Ct. App. 2004)); *Allstate Ins. Co. v. Hammonds*, 865 P.2d 560, 562 (Wash. Ct. App. 1994) (ambiguity exists "when, reading the contract as a whole, two reasonable and fair interpretations are possible."). Extrinsic evidence may provide the meaning of an ambiguous term, but only where that evidence shows that both parties to the policy intended a particular meaning. *Am. Nat'l Fire Ins. Co. v. B&L Trucking & Const. Co.*, 951 P.2d 250, 256 (Wash. 1998); *see also Quadrant Corp. v. Am. States Ins. Co.*, 110 P.3d 733, 737 (Wash. 2005) ("If a clause is ambiguous, [a court] may rely on extrinsic evidence of the intent of the parties to resolve the ambiguity."). Because parties rarely negotiate the terms of an insurance policy, there is rarely evidence of the parties' mutual intent as to the meaning of a policy term. Where extrinsic evidence does not resolve an ambiguity, the court must construe the ambiguous term in favor of the insured. *Weyerhaeuser Co. v. Commercial Union Ins. Co.*, 15 P.3d 115, 141 (Wash. 2000); *see also Hammonds*, 865 P.2d at 562 (directing courts to resolve ambiguity against insurer "even where the insurer may have intended another meaning").

C. No One Has a Standalone Right to Sue for Violations of Washington Insurance Regulations.

***5** The Yanceys' complaint purports to state a standalone claim for violations of Washington's insurance regulations. There is no such claim. *See Escalante v. Sentry Ins. Co.*, 743 P.2d 832, 840 (Wash. Ct. App. 1987) (finding "no clearly expressed intent in RCW 48.30.010 or the WAC regulations to provide private causes of action for isolated violations of the regulations"). An insured can assert a CPA claim based on a violation of an insurance regulation, just as the Yanceys have done. *Kallevig*, 792 P.2d at 530; *see also Pain Diagnostics & Rehab. Assocs., P.S. v. Brockman*, 988 P.2d 972, 976 (Wash. Ct. App. 1999) ("[P]rivate causes of action for violations of the insurance statutes and regulations must be brought under the CPA."). The Yanceys also argue that IFCA gives them the right to sue for a violation of an insurance regulation, a contention the court will address in the next section. But without the benefit of another statute creating a private right of action, they cannot sue Hartford for violating an insurance regulation.

D. IFCA Does Not Provide a Cause of Action Solely

For Violations of Washington's Insurance Regulations.

IFCA gives a cause of action to a first-party insured "who is unreasonably denied a claim for coverage or payment of benefits by an insurer." RCW § 48.30.015(1). The superior court presiding over an IFCA suit can award enhanced damages and attorney fees in certain circumstances, including when the insurer violates certain Washington insurance regulations.

> (1) Any first party claimant to a policy of insurance who is unreasonably denied a claim for coverage or payment of benefits by an insurer may bring an action in the superior court of this state to recover the actual damages sustained, together with the costs of the action, including reasonable attorneys' fees and litigation costs, as set forth in subsection (3) of this section.
>
> (2) The superior court may, after finding that an insurer has acted unreasonably in denying a claim for coverage or payment of benefits or has violated a rule in subsection (5) of this section, increase the total award of damages to an amount not to exceed three times the actual damages.
>
> (3) The superior court shall, after a finding of unreasonable denial of a claim for coverage or payment of benefits, or after a finding of a violation of a rule in subsection (5) of this section, award reasonable attorneys' fees and actual and statutory litigation costs, including expert witness fees, to the first party claimant of an insurance contract who is the prevailing party in such an action.

RCW § 48.30.015; § 48.30.015(5) (enumerating a host of insurance regulations).

By its plain language, IFCA gives an insured no right to sue solely for a violation of a Washington insurance regulation. The right to sue arises solely from an unreasonable denial of a claim for coverage or payment of benefits. Regulatory violations matter only when deciding whether to award attorney fees or enhance damages. Ms. Yancey offers no argument for interpreting IFCA as she prefers.[3] So far as the court is aware, no Washington court has addressed the issue. The federal courts who have addressed the issue have overwhelmingly interpreted IFCA in accordance with its plain language.[4] This court, like those before it, holds that IFCA does not create a cause of action solely for violation of Washington's insurance regulations.

E. Mr. Yancey Has No Right to Sue Hartford.

***6** Hartford is correct, as a matter of law, in its assertion that Mr. Yancey has no right to sue it. There is no dispute that Mr. Yancey is not a named insured in the Policy.[5] The sole clause to which the Yanceys point that allegedly gives him his own rights to enforce the Policy is a clause that covers, in some circumstances, the personal property of others:

> We cover personal property owned or used by an **insured** while it is anywhere in the world. At your request, we will cover personal property owned by:
>
> 1. Others while the property is on the part of the residence premises occupied by the insured;
>
> 2. A guest or a **residence employee**, while the property is in any residence occupied by an insured.

Policy at 3 of 22.

Mr. Yancey mistakenly contends that this provision makes him a third-party beneficiary of the Policy. To create a third-party beneficiary, contracting parties must "intend that the promisor assume a *direct obligation* to the intended beneficiary at the time they enter into the contract." *Del Guzzi Constr. Co. v. Global NW Ltd.*, 719 P.2d 120, 125 (Wash. 1986) (emphasis added). The Policy unambiguously declares that Hartford will insure the property of others only at the request of the insured. In other words, the Policy expressly declines to create a direct obligation to others, and instead promises the obligation to the insured to invoke at her discretion. Mr. Yancey is neither an insured nor a third-party beneficiary of the Policy. Because Mr. Yancey is neither an insured nor a beneficiary of the Policy, he cannot sue for its breach.

Mr. Yancey's attempt to bring extracontractual claims fares no better. Only an insured or a direct beneficiary of an insurance policy can sue an insurer for breach of its duty of good faith or for CPA violations based on the insured's claims handling practices. *Tank v. State Farm Fire & Cas. Co.*, 715 P.2d 1133, 1140 (Wash. 1986); *Dussault v. Am. Int'l Group, Inc.*, 99 P.3d 1256, 1259 (Wash. Ct. App. 2004) ("An action for breach of good faith against an insurer is limited to the insured."). IFCA provides a cause of action only for a "first party claimant to a policy of insurance." RCW § 48.30.015(1). IFCA defines a "first party claimant" as an "individual ... asserting a right to payment as a covered person under an insurance policy ...." RCW § 48.30.015(4). Either Mr. Yancey has no IFCA claim because he is not a "covered person," or his IFCA claim fails as a matter of law

because although he is "asserting a right to payment as a covered person," he is not actually a covered person. In either event, the court need not discuss his IFCA claim further.

F. Putting Aside an Exception That Does Not Apply to Ms. Yancey, the Policy Obligates Hartford to Pay the Replacement Cost of Damaged Property Only When Ms. Yancey Actually Replaces It.

The Policy gives Ms. Yancey a conditional opportunity to receive the replacement cost, as opposed to the actual cash value, for both her home and covered personal property. Once a loss is established, Hartford must pay the actual cash value of the loss. Only when Ms. Yancey actually replaces damaged property does Hartford's obligation to pay replacement cost arise. For example, with respect to damage to the house, the Policy provides as follows:

> ***7** We will pay no more than the **actual cash value** of the damage until actual repair or replacement is complete. Once actual repair or replacement is complete, we will settle the loss according to the provisions of [the portion of the Policy addressing the calculation of replacement cost].

Policy at 13 of 22. The Policy explains that replacement cost is the least of the Policy's liability limit, the replacement cost "for that part of the building damaged for like construction and use on the same premises," or the "necessary amount actually spent to repair or replace the damaged building." *Id.*

The court finds that the Policy unambiguously explains that Hartford's obligation to pay replacement cost does not arise until the actual replacement of the damaged property. Ms. Yancey offers no alternative interpretation of the Policy.

The portion of the Policy that addresses personal property damages uses somewhat different language. It obligates Hartford to pay replacement cost for personal property as well as certain fixtures. Policy (Value Added Package) at 1 of 2. It also limits Hartford's obligation to pay replacement cost depending on the value of the property in question:

> When the cost to replace or repair an article or articles is more than $2,000, we will pay no more than the **actual cash value** for the loss until the actual repair or replacement is complete.

Id.

According to Ms. Yancey, the Policy obligates Hartford to pay replacement cost, regardless of actual replacement, for any article whose replacement cost is less than $2,000, regardless of how many articles are damaged or their aggregate value. According to Hartford, it can wait for actual replacement in any case where aggregate replacement cost of all articles damaged in a single occurrence exceeds $2,000. In this case, for example, the fire destroyed hundreds of articles of personal property. Few, if any, of those articles had a replacement value exceeding $2,000. In the aggregate, however, the replacement cost of all of the articles greatly exceeded $2,000. So far, Hartford has paid only its estimate of the actual cash value of the lost articles.

The court finds no ambiguity in the Policy's provisions for payment of the cost of replacing personal property. No one disputes that the cost of repairing or replacing the "articles" that Ms. Yancey lost in the fire is more than $2,000. The Policy provides that "[w]hen the cost to replace or repair ... articles is more than $2,000," Hartford need not pay more than the actual cash value of the articles until their actual replacement. If Ms. Yancey's interpretation were correct, then the words "or articles" in the clause would be superfluous. The plain meaning of the addition of the words "or articles" is to cover both situations where a single article is worth more than $2,000 *and* situations where the aggregate value of articles (individually worth less than $2,000) exceeds $2,000.

Ms. Yancey suggests that, because the Policy had a $1,000 deductible, Hartford's interpretation with respect to personal property would obligate it to pay replacement cost regardless of replacement only for occurrences of property loss where the aggregate replacement cost is between $1,000 and $2,000. Ms. Yancey is correct, but there is nothing suspect about this aspect of the Policy. The replacement costs provisions of the Policy, for both real and personal property, reflect Hartford's preference to pay replacement cost only upon actual replacement. For small personal property losses (worth less than $2,000), Hartford's preference apparently gave way to the administrative convenience of quickly resolving small claims.

***8** Although the court concludes that the Policy unambiguously permits Hartford to withhold payment of replacement cost until actual replacement, Hartford's duty of good faith requires it to conduct itself reasonably. Hartford could not, for example, refuse to provide information about what it considered an acceptable replacement cost, then require Ms. Yancey to replace real or personal property without knowing whether they would receive payment. There is evidence that Hartford gave Ms. Yancey estimates of replacement cost for both real and personal property.

G. Ms. Yancey's Pre-Suit Notice Preserved an IFCA Claim Based On Her Personal Property Losses.

Hartford contends that Ms. Yancey cannot pursue an IFCA claim with respect to her personal property losses because she did not properly disclose that claim in her pre-suit notice. IFCA, unlike the other statutes at issue in these motions, requires a plaintiff to notify her insurer before filing suit:

> (a) Twenty days prior to filing an action based on this section, a first party claimant must provide written notice of the basis for the cause of action to the insurer and office of the insurance commissioner. ...
>
> (b) If the insurer fails to resolve the basis for the action within the twenty-day period after the written notice by the first party claimant, the first party claimant may bring the action without any further notice.
>
> (c) The first party claimant may bring an action after the required period of time in (a) of this subsection has elapsed.

RCW § 49.30.015(8). Ms. Yancey gave Hartford an IFCA notice in May 2011, more than twenty days before she filed suit. In fact, for reasons the court cannot explain, she gave Hartford two IFCA notices on the same day. In the first, she asserted a "Whole Loss and Damage claim of RCV $128,181.29 for [her] dwelling" (Derrig Decl. (Dkt. # 17), Ex. 2); in the second, she asserted a "Whole Loss and Damage claim of $34,613.47 for [her] additional living expenses" (*Id.*, Ex. 3). Hartford's view is that because neither notice contains an express claim for Ms. Yancey's covered personal property, she cannot bring an IFCA claim based on that property. Hartford ignores that attached to Ms. Yancey's first notice was a two-page "Claim Summary" that included three damage categories: "Structure," "Contents," and "Loss of Use." It is apparent that the "Structure" category corresponds to damages to the house, the "Loss of Use" category corresponds to additional living expenses, and the "Contents" category corresponds to personal property.

Although Ms. Yancey's pre-suit IFCA notice leaves much to be desired, the court finds it adequate to notify Hartford that she intended to file a suit challenging Hartford's failure to pay her fully for her personal property. IFCA requires no more.

H. The Expiration of the One-Year Contractual Limitations Period Did Not Absolve Hartford of Its Duty to Pay Ms. Yancey.

By January 4, 2011, one year after the fire at the Yanceys' home, Hartford had yet to conclude its adjustment of her claim. It had made substantial payments for the damage to the home, to the Yanceys' personal property, and for their additional living expenses. The evidence suggests that Hartford was considering making additional payments in each of those categories. At a bare minimum, it was willing to make additional payments to cover replacement cost if Ms. Yancey could demonstrate that she had actually repaired or replaced her personal or real property. The extent to which Hartford's failure to pay more was unreasonable or unlawful is the focus of the parties' extensive factual disputes.

***9** As the court has already noted, at midnight on January 5, the Policy's one-year suit limitation period expired. Whether the passage of a year was an absolute bar to a breach-of-policy claim is a question that Ms. Yancey mooted when she conceded that claim. But Hartford has taken the suit limitation clause a step further, arguing that the passage of a year not only prevented Ms. Yancey from suing for a breach of the Policy, it extinguished Hartford's obligation to pay Ms. Yancey.

The expiration of the Policy's suit limitation period does not extinguish other Policy obligations. That is apparent from the Policy itself, which merely provides that "[n]o action can be brought unless the policy provisions have been complied with and the action is started within one year after the date of loss." Policy at 2 of 22. The Policy does not state that Hartford's Policy obligations end one year after the date of loss. If Hartford wished to have such a policy, it might have included a clause providing as follows: "If we manage to delay payment for more than one year after your loss, we do not have to pay you anything." It is settled law that the expiration of a

statutory limitations period extinguishes no legal obligations, it simply deprives the plaintiff of a legal remedy. *Stenberg v. Pac. Power & Light Co.*, 709 P.2d 793, 795 (Wash. 1985) ("A statute of limitation, in effect, deprives a plaintiff of the opportunity to invoke the power of the courts in support of an otherwise valid claim."); *Lombardo v. Mottola*, 566 P.2d 1273, 1276 n.7 (Wash. Ct. App. 1977); *Jordan v. Bergsma*, 822 P.2d 319, 320 (Wash. Ct. App. 1992); *CHD, Inc. v. Taggart*, 220 P.3d 229, 235 (Wash. Ct. App. 2009). So, for example, where a legislature retroactively extends a statute of limitations, it does not revive an extinguished claim, it merely provides a new remedy. *Campbell v. Holt*, 115 U.S. 620, 625 (1885). So far as the court is aware, no Washington court has considered precisely the same issue with respect to a contractual limitations period. At least one Washington court, however, has described a contractual limitations clause as a limitation on a legal remedy rather than a means to extinguish contractual duties. *Ashburn v. Safeco Ins. Co.*, 713 P.2d 742, 745 (Wash. 2004). Neither the Policy's suit limitation clause nor any other provision places an expiration date on Hartford's duties to Ms. Yancey.

Moreover, although Ms. Yancey has conceded her contractual remedy, she has several other potential remedies. IFCA allows her to recover "actual damages sustained" as a result of an unreasonable denial of coverage or benefits. RCW § 48.30.015(1). Actual damages in this case may include the amount the Policy obligated Hartford to pay Ms. Yancey. The CPA provides Ms. Yancey with a remedy for damage to her "business or property" as a result of unfair practices, including violations of Washington's insurance regulations. RCW § 19.86.090; *see also* RCW § 48.01.030 (declaring that "[t]he business of insurance is one affected by the public interest"). If, for example, the evidence presented at trial demonstrates that Hartford declined to pay Ms. Yancey benefits because of its mistaken belief that the passage of a year meant it had no further obligation to pay, then Ms. Yancey could recover the unpaid benefits via the CPA.

I. A Jury Must Decide Whether Hartford Conducted Itself Reasonably.

On summary judgment, the court can resolve no more of the parties' disputes. The parties remaining disputes amount to little more than finger pointing. Each of Ms. Yancey's extracontractual claims depends on proving that Hartford acted unreasonably. IFCA expressly requires an unreasonable denial of coverage or benefits. To the extent that Ms. Yancey's bad faith and CPA claims depend on a general duty of good faith, they claims also depend on the reasonableness of Hartford's behavior. To the extent that Ms. Yancey's bad faith and CPA claims depend on proving violations of Washington insurance regulation, every regulation that Ms. Yancey has accused Hartford of violating expressly incorporates a reasonableness requirement. WAC §§ 284-30-330(3)-(4), 284-30-360(4), 284-30-370. Hartford insists that it acted reasonably as a matter of law, but Ms. Yancey has offered evidence from which a jury could conclude otherwise. Ms. Yancey has not asked the court to find Hartford's conduct unreasonable as a matter of law. The court could not do so in any event.

IV. CONCLUSION

***10** For the reasons stated above, the court GRANTS Hartford's first motion (Dkt. # 16) in part and DENIES it in part, GRANTS Hartford's second motion (Dkt. # 42) in part and DENIES it in part, and DENIES the Yanceys' motion (Dkt. # 47).

The court sets trial for December 3, 2012. The parties shall submit motions in limine in accordance with Local Rules W.D. Wash. CR 7(d)(4) and CR 7(e)(5) no later than November 1, 2012. The parties shall file jury instructions in accordance with Local Rules W.D. Wash. CR 51(e), a joint pretrial order in accordance with Local Rules W.D. Wash. CR 16, and trial briefs no later than November 15, 2012. The parties shall provide trial exhibits in accordance with the court's December 1, 2011 minute order (Dkt. # 12) no later than November 28, 2012. The court sets a pretrial conference for November 28, 2012 at 2:00 p.m.

DATED this 23rd day of October, 2012.

All Citations

Not Reported in F.Supp.2d, 2012 WL 12878687

Footnotes

1 The court uses round numbers throughout this order.

2 The court relies on the version of the Policy at Exhibit 1 to the Declaration of James Derrig. Dkt. # 17. The court cites either the 22-page main section of the Policy or the 2-page Value Added Package.

3 Instead of argument, Ms. Yancey filed a surreply in response to Hartford's second summary judgment motion insisting that Hartford had acted improperly by not pointing out until its reply brief that IFCA does not permit a suit solely for violation of an insurance regulation. The court finds that the plain language of the statute was more than sufficient to put Ms. Yancey on notice of her obligation to defend her interpretation. The court observes that both parties delayed and complicated the court's consideration of these motions by filing unnecessary surreplies and supplemental briefs once briefing had concluded. If either party persists in this practice, the court will impose sanctions.

4 *See*, *e.g.*, *Lease Crutcher Lewis WA, LLC v. Nat'l Union Fire Ins. Co.*, No. 08-1862RSL, 2010 U.S. Dist. LEXIS 110866, at *15 (W.D. Wash. Oct. 15, 2010); *Weinstein & Riley, P.S. v. Westport Ins. Corp.*, No. 08-1694JLR, 2011 U.S. Dist. LEXIS 26369, at *80 (W.D. Wash. Mar. 14, 2011); *Polygon NW Co. v. Nat'l Fire & Marine Ins. Co.*, No. 11-92Z, 2011 U.S. Dist. LEXIS 56408, at *11 n.5 (W.D. Wash. May 24, 2011); *Pinney v. Am. Family Mut. Ins. Co.*, No. 11-175MJP; 2012 U.S. Dist. LEXIS 22328, at *13 (W.D. Wash. Feb. 22, 2012); *Country Preferred Ins. Co. v. Hurless*, No. 11-1349RSM, 2012 U.S. Dist. LEXIS 86334, at *7-8 (W.D. Wash. Jun. 21, 2012); *Hann v. Metro. Cas. Ins. Co.*, No. 12-5031RJB, 2012 U.S. Dist. LEXIS 111734, at *4-5 (W.D. Wash. Jul. 30, 2012) (declining to certify question to Washington Supreme Court).

5 The Policy designated as additional insureds all relatives of the insured who reside in the home. Policy at 1 of 22. At all relevant times, however, Ms. Yancey and Mr. Yancey were not married.

HARPER HAYES PLLC

April 13, 2020 - 2:48 PM

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