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No. 56591-5-I

80937-2

THE COURT OF APPEALS FOR THE STATE OF WASHINGTON,

DIVISION ONE

RED OAKS CONDOMINIUM OWNERS ASSOCIATION,
a Washington nonprofit corporation,

Appellant,

v.

MUTUAL OF ENUMCLAW INSURANCE COMPANY,

Respondent.

APPELLANT'S BRIEF

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SUMMARY

This appeal presents two basic issues to the Court. The first is to determine the scope of insurance coverage provided to a general contractor under specific language in a "completed operations" policy endorsement. Second, the Court is being asked to decide the duty of an insurer, in a reservation of rights case, to update its coverage position to its insured throughout settlement negotiations and particularly as of the date of settlement of the underlying case it is defending.

ASSIGNMENTS OF ERROR

1. The trial court erred when it determined as a matter of law that coverage claims involving property damage to subcontractor work were barred by a Broad Form Property Damage Endorsement excluding coverage for damage to "work performed by the Named Insured," a general contractor. CP 87.
2. The trial court erred when it determined as a matter of law in its July 8, 2005 Order that Enumclaw's conduct did not constitute bad faith. CP 1317.

3. The trial court erred when it determined as a matter of law in its July 8, 2005 Order that Mutual of Enumclaw's conduct did not violate the Consumer Protection Act, ch. 19.86 RCW. CP 1317.

ISSUES PRESENTED

1.1 Whether under Washington rules of construction the UMB 3011 exclusion for "property damage to work performed by the Named Insured" is unambiguous, and only excludes coverage for property damage to work performed by the Named Insured.

2.1 Whether an insurer who refuses at the eleventh hour to fund a negotiated settlement and who also fails to deny coverage and give its basis for doing so has breached its duty of good faith.

2.2 Whether an insurer who fails to update its insured through settlement negotiations in an underlying case, and who fails, pursuant to WAC 284-30-330(13) to provide the basis for its refusal to settle the underlying case, has acted in bad faith.

2.3 Whether a policyholder and its assignee are entitled to know as of the date of a mediated settlement either that indemnity would be forthcoming or that the insurer would deny coverage and the basis for the declination.

2.4 Whether an insurer who refuses to fund a reasonable settlement and knowingly exposes its insured to increased liability

has failed to consider the financial interests of its policyholder equal to its own as required by Tank.

2.5 Whether an insurer who violates the minimum standards for fair claims settlement set forth at WAC 284-30-300 has acted in bad faith.

2.6 Whether an insurer whose conduct constitutes bad faith is estopped from denying coverage, even where the coverage issue was resolved against the insured.

3.1 Whether Enumclaw's actions also violated the Washington Consumer Protection Act.

STATEMENT OF THE CASE

Sundquist Homes, Inc. (Sundquist) is a local builder of homes, apartments, and condominiums since 1976. CP 185. Since its inception, Sundquist has employed a project manager, superintendent, and the occasional laborer; otherwise subcontractors perform the actual construction work. CP 186. Accordingly, any liability claims asserted against Sundquist for property damage would typically be based on problems with work performed by subcontractors and to work completed by subcontractors. CP 186.

Sundquist had been insured with Mutual of Enumclaw (Enumclaw) beginning in 1978 for builder's risk insurance, which provides first-party coverage for damage occurring to buildings during the course of construction. CP 186. In 1981, Sundquist purchased from Enumclaw liability coverage for third party claims for bodily injury or damage to property. CP 186. Sundquist specifically purchased "completed operations" coverage for future lawsuits that might be brought against it after its buildings were completed and sold. CP 186. Sundquist paid additional premiums for the "completed operations" coverage. CP 71; 102.

Sundquist met with insurance agents, usually annually, sometimes more frequently, and discussed the nature of the company's insurance needs and concerns regarding liability and coverage with respect to its expanding business. CP 188. Enumclaw agents sold Sundquist coverage under a comprehensive general liability policy (CGL) and an umbrella policy, which were renewed annually by certificate. Sundquist understood that the umbrella policy provided broader coverage and higher liability limits than the primary policy. CP 192.

In 1993, Sundquist specifically discussed with Enumclaw agents its concerns regarding the upsurge in construction defect

lawsuits being filed against contractors. CP 189-90; 548.

Sundquist understood its policies with Enumclaw might not cover property damages to any work specifically performed by Sundquist. CP 190. But based upon representations by Enumclaw agents, Sundquist believed the policies it purchased provided coverage for property damage to and arising out of work performed by subcontractors. CP 190.

The Red Oaks Condominium in Lynnwood, Washington is a Sundquist project, completed exclusively with subcontractor labor. At the time of construction, Sundquist was insured under primary and umbrella policies issued by Enumclaw. Sundquist substantially completed Red Oaks condominium by mid-1999. CP 23, 29. By early 2002, defects with Red Oaks condominium were suspected. CP 824. It had become apparent that construction methods and materials used by various subcontractors had failed to prevent water from seeping into the structure of the Red Oaks buildings and caused substantial property damage to the structure and sheathing. CP 19; 775-781.

From May 2002 until April 2003, Sundquist and the Red Oaks Condominium Owners Association (Red Oaks) unsuccessfully attempted to reach an agreement to repair the

buildings. CP 824. Sundquist notified Enumclaw of the problems with Red Oaks in February 2003. CP 935.

Enumclaw appointed Jeff Frank of Bullivant Houser Bailey to represent Sundquist in April of 2003. CP 936. Sundquist and Red Oaks, with Enumclaw's approval, executed an ER 408 agreement in September 2003. CP 819. The purpose of the agreement was to avoid costly litigation and timely resolve Red Oaks' complaints. The agreement provided that an independent engineer would inspect the buildings and define the scope of necessary repairs. CP 819-19. Then, two independent contractors were to bid on the repairs. CP 820. After the bids were submitted, the parties were to attend a one-day mediation to determine the final costs to settle the dispute. CP 820. Enumclaw chose the independent engineer and contractors, and agreed to fund the cost of settlement negotiations. CP 946.

Two months after the parties executed the ER 408 agreement, Enumclaw sent to Sundquist a letter accepting tender of the defense of Red Oaks' claims and, for the first time, reserving its right to deny coverage under the policies at issue.¹ CP 44-49.

¹ Enumclaw sent a reservation of rights letter to Sundquist in August 2003 with respect to similar property damage claims being made by the Barrington

Enumclaw identified the "your product" exclusion in the CGL, but failed to identify the umbrella policy exclusion for "work performed by the Named Insured," referred to as the "your work" exclusion, as a possible basis to deny coverage. CP 47.

In accordance with the ER 408 agreement, the appointed engineer completed the investigation and scope of repairs and two contractors submitted bids. The proposed settlement for the repairs negotiated by the parties was in the neighborhood of 1.2 million dollars and fell well within the Sundquist policy limits. CP 947-948. Dave Michlitsch, the Enumclaw claims representative coordinating the defense, evaluated the proposed settlement and found it to be reasonable. CP 940, 947-48. The ER 408 mediation was scheduled for March 4, 2004. CP 938.

Despite the fact that it did not deny coverage, Enumclaw refused to settle Red Oaks' claims. Three days before the scheduled settlement conference, Michlitsch informed Sundquist's defense attorney, Jeff Frank, that he had no settlement authority for Red Oaks' claims. CP 1272.

The mediation process having failed, the process converted to one of arbitration. CP 820. Enumclaw twice attempted to

Condominium Homeowner's Association. CP 1119-1121. Enumclaw settled the Barrington claims in 2004.

intervene in the arbitration between Red Oaks and Sundquist in order to gather information it could use to defeat coverage. CP 875-878. Because Enumclaw would provide no settlement authority, Red Oaks terminated the ER 408 agreement.

Red Oaks filed suit against Sundquist at the end of March, 2004. CP 16-22. Red Oaks asserted statutory claims for breach of the implied warranty of quality, violations of the Washington Condominium Act, RCW 64.34 et seq., and violations of the Consumer Protection Act, RCW 19.86. CP 20-21. Sundquist agreed to settle Red Oaks claims for \$1,948,000, including attorney fees. Red Oaks agreed to take an assignment of Sundquist's claims against Enumclaw and the subcontractors in exchange for a consent to judgment. Sundquist assigned all remaining claims to Red Oaks, including its bad faith and Consumer Protection Act violation claims. A court approved the settlement as reasonable. Enumclaw unsuccessfully challenged the reasonableness determination. See Red Oaks v. Sundquist, 128 Wn. App. 317, 116 P.3d 404 (2005).

At the time Red Oaks agreed to take the assignment, Enumclaw had not updated its coverage position since November 2003 – it neither denied coverage and provided its reasons as

required by WAC 284-30-330(13), nor did it identify the UMB 3011 “your work” exclusion as a potential basis to deny coverage.

Rather than seeking judicial clarification of its obligations with respect to the coverage issues in a declaratory judgment action, Enumclaw waited until Red Oaks filed suit to assert coverage as a defense to Red Oaks’ claims.

Enumclaw moved for summary judgment on coverage issues near the end of 2004. CP 1402-1424. It argued the “your products” exclusion of the CGL policy and the “cost of repair” exclusion in the umbrella policy barred coverage for the claimed damages. With respect to the CGL, the trial court resolved the coverage issue in favor of Enumclaw. Nevertheless, the court’s ruling specifically did not preclude coverage under the umbrella policy. CP 702. This Order is not at issue in the appeal.

When Enumclaw failed to have the case dismissed under the “your product” and “cost of repair” exclusions identified in its reservation of rights letter, Enumclaw examined the umbrella policy for the first time to find other language that might defeat coverage. In June 2005, the trial court granted Enumclaw’s second motion for summary judgment on the coverage issue under the umbrella policy “your work” exclusion. CP 898-900.

Red Oaks immediately moved for summary judgment on the remaining bad faith and consumer protection act claims. CP 901-927. It was, and remains, Red Oaks' contention that Enumclaw's actions violated several WAC provisions for the handling of claims and demonstrated greater concern for its own financial interests than those of its policyholder. CP 1311-1315. Enumclaw stipulated to all facts alleged by Red Oaks but argued, essentially, that there was no bad faith because coverage for the underlying claims were resolved in its favor. CP 1095-1114. The trial court entered summary judgment in favor of Enumclaw and dismissed Red Oaks' lawsuit with prejudice. CP 1316-1317. Red Oaks appeals.

ARGUMENT

The appellate court reviews summary judgment de novo. All facts and inferences must be viewed in the light most favorable to the non-moving party. Summary judgment is inappropriate if reasonable minds could reach more than one conclusion. Safeco v. Butler, 118 Wn.2d 383, 394-95, 823 P.2d 499 (1992).

A. The umbrella policy does not exclude coverage for property damage to work performed by subcontractors.

During the course of litigation, Enumclaw sought on two separate occasions to deny coverage for Red Oaks' claims. In

2004, Enumclaw moved for summary judgment under the “product” exclusion in the CGL policy and the “cost of repair” exclusion contained in the umbrella policy. CP 1402-1424; Appendix A. Enumclaw had identified these exclusions in its November 2003 reservation of rights letter. CP 44-49; Appendix B.

The trial court determined the CGL provided no coverage because “a builder’s building is its product for purposes of a product exclusion found in the relevant CGL policy as a matter of law.” CP 702. This conclusion is consistent with this court’s opinion in Enumclaw v. Archer Construction, 123 Wn. App. 728, 97 P.3d 751 (2004). This Order is not at issue on appeal.

The trial court, however, explicitly rejected Enumclaw’s claim that the “cost of repair” exclusion in the umbrella policy also excluded coverage. CP 701-702. In short, the trial court effectively concluded there was still coverage for Red Oaks’ claims under the umbrella policy. See Appendix A.

Undeterred, Enumclaw again moved for summary judgment in June 2005 arguing no coverage under the umbrella policy. CP 898-900. Now, for the first time, Enumclaw relied on a provision in the Broad Form Property Damage endorsement that was intended to supercede the narrower exclusions in the umbrella policy itself.

See CP 71-87; Appendix A. The trial court was persuaded by Enumclaw's argument that the work of subcontractors merged into the work of Sundquist for purposes of the completed operations "your work" exclusion. As explained below, this is error and should be reversed.

1. The policy language is unambiguous and only excludes coverage for damages to work performed by the Named Insured.

Determining whether coverage exists under an insurance policy is a two step process; first the insured must show its loss is within the scope of the policy's insured losses; then the burden shifts to the insurer to show the loss is excluded by specific policy language. McDonald v. State Farm Fire & Cas. Co., 119 Wn.2d 724, 731, 837 P.2d 1000 (1992). Here, there is no dispute that the loss is within the scope of the policy's insured losses – the issue is whether Enumclaw has met its burden of establishing the loss falls within the "your work" exclusion. It has not.

The interpretation of an insurance policy is a question of law reviewed de novo. Alaska Nat. Ins. Co. v. Bryan, 125 Wn. App. 24, 30, 104 P.2d 1 (2004). Insurance policy language is interpreted as it would be understood by an average person and in a manner that gives effect to each provision. Schwindt v. Underwriters at Lloyd's

of London, 81 Wn. App. 293, 298, 914 P.2d 119 (1996). Insurance contracts are unambiguous if they are subject to only one reasonable interpretation. Findlay v. United Pacific Ins. Co., 129 Wn.2d 368, 917 P.2d 116 (1996).

An umbrella policy does not simply provide excess coverage for amounts exceeding CGL policy limits, but protects against gaps in the underlying policy. See Prudential Property & Cas. Ins. Co. v. Lawrence, 45 Wn. App. 111, 119, 724 P.2d 418 (1986). In Sundquist's umbrella policy, Enumclaw promised to "indemnify the insured for ultimate net loss in excess of the retained limit or underlying limit, whichever is greater, which the insured may sustain by reason of liability." CP 72 (emphasis added). The Sundquist policy specifies the "retained limit" is the amount of ultimate net loss resulting from any one occurrence not covered by the underlying insurance. CP 74. Thus Sundquist's umbrella policy, like umbrella policies generally, provides:

primary coverage in areas which might not be included in the basic coverage, since it is the intent of the company to afford a comprehensive protection in order that such peace of mind may truly be enjoyed. In those areas, such coverage will, in fact, be primary.

Lawrence, 45 Wn. App. at 119, quoting 8A J. Appelman, Insurance § 4909.85, at 452-53 (1981).

The basic umbrella policy Enumclaw sold to Sundquist clearly excluded coverage for damage to both the general contractor's work, as well as to work of subcontractors. The UP-2 Basic Umbrella Form provides:

This policy does not apply:

(d) to property damage to...

(1) goods or products (including any container thereof) manufactured, sold, handled or distributed by the named insured, or by others trading under his name, or premises alienated by the named insured, arising out of such goods, products or premises or any part of such goods, products or premises;

(2) work performed by or on behalf of the named insured arising out of the work or any portion thereof, or out of the materials, parts or equipment furnished in connection therewith[.]

CP 75 (emphasis added).

But Sundquist also purchased a Broad Form Property Damage endorsement, or UMB 3011, that explicitly replaced the umbrella policy's property damage exclusion. CP 87. The UMB 3011 omits entirely the "goods or products" exclusion. With respect to the "your work" exclusion, the words "or on behalf of" are deleted:

With respect to the COMPLETED OPERATIONS HAZARD to Property Damage to work performed by the Named Insured arising out of the work or any portion thereof, or out of materials, parts, or equipment furnished in connection therewith.

CP 87 (emphasis added).²

Courts interpreting insurance policies look to the definitions provided in the policy itself. Kitsap County v. Allstate Ins. Co., 136 Wn.2d 567, 576, 964 P.2d 1173 (1998). The umbrella policy issued by Enumclaw defines “named insured” as “the person or organization named in the declarations”. CP 72. The person or organization named in the declaration is Sundquist Homes Inc. and its owners. CP 71. The policies that Enumclaw issued to Sundquist omitted the reference to work performed “on behalf of” the Named Insured in the Broad Form Property Damage endorsement.

It is a fundamental rule of construction that courts will not disregard language used by the parties and will give effect to all contract provisions. Morgan v. Prudential Ins. Co. of Am., 86 Wn.2d 432, 434, 545 P.2d 1193 (1976); Better Financial Solutions, Inc. v. Transtech Electric, 112 Wn. App. 697, 51 P.3d 108 (2002). The only reasonable interpretation is that the “your work” exclusion

² In its June 2005 Summary Judgment order, the trial court specifically resolved a second portion of the Broad Form endorsement relied upon by Enumclaw, the “faulty workmanship” exclusion, did not exclude coverage. CP 899. Enumclaw filed a notice of appeal requesting review of the court’s determination of the “faulty workmanship” exclusion. Enumclaw struck the appeal as unnecessary. The trial court’s ruling on the “faulty workmanship” exclusion stands and Enumclaw should not be allowed to again assert this as a basis for denial on remand.

applies only if property damage arises out of work performed by the “Named Insured” – Sundquist. It is undisputed that Sundquist performed none of the “work” at issue in the Red Oaks lawsuit. See CP 773-781. The only reasonable interpretation of the policy language is that the UMB 3011 only excludes coverage for property damage to work performed by Sundquist. The Court should conclude that the trial court erred when it concluded otherwise.

2. The UMB 3011 provided broader coverage than that in the basic umbrella policy.

The UMB 3011 endorsement replaced the exclusions in the umbrella policy and provides broader coverage. Commonly, insurers cover broad risks at the beginning of a policy but shift certain risks back to the insured by means of exclusions. An endorsement increases coverage for an additional premium by narrowing the exclusions set forth in the underlying policy. See Maryland Cas. Co. v. Reeder, 221 Cal.App.3d 961, 270 Cal.Rptr. 719, 722 (1990)(citing MaCaulay, Justice Traynor and the Law of Contracts (1961) 13 Stan.L.Rev. 812). The only reasonable interpretation is the UMB 3011 endorsement at issue increased the coverage of the basic umbrella policy and was intended to exclude coverage only for damage to “work performed by the Named

Insured.” This is supported by the fact that nearly half of the premiums Sundquist paid to Enumclaw were for completed operations coverage. CP 194. That the premiums charged by Enumclaw may not have been sufficient to cover the actual risk is not the issue.

Enumclaw argued that the “your work” exclusion applied to work performed on behalf of the “Named Insured” by arguing that with respect to the completed operations, the work of subcontractors merged into the Named Insured’s product. This reasoning is flawed.

3. Other courts hold where the language “on behalf of” is omitted, the exclusion is limited to damages to work performed by the policyholder.

Although no Washington court has issued an opinion on the meaning of the UMB 3011 exclusion at issue here, most states considering whether there is coverage under nearly identical endorsements agree that where the policy omits the words “on behalf of,” the exclusion does not encompass work performed by subcontractors.

Perhaps the best known precedent is the Ninth Circuit opinion in Fireguard Sprinkler System, Inc. v. Scottsdale Ins. Co., 864 F.2d 648 (9th Cir. 1988). The Ninth Circuit addressed the issue

of whether a completed operations hazard endorsement excluded coverage for damage to the work product where the damage was caused by work performed by subcontractors. The trial court had erroneously relied on Minnesota authority and concluded that work performed by subcontractors was not covered by the policy because the work of subcontractors became the insured's work upon completion. The Ninth Circuit reversed, holding a broad form property damage endorsement substantially identical to Sundquist's "is intended to cover losses caused by the work of subcontractors." Fireguard, 864 F.2d at 650.

The most important factor in Fireguard was that the insurer, like Enumclaw, had specifically limited the exclusion and broadened coverage of the underlying policy when it deleted any reference to work performed "on behalf of" the policyholder:

The inclusion or deletion of the phrase "or on behalf of" is critical to the interpretation of this policy.... Fireguard argues that the language of the policy supports its interpretation, because: (1) the exclusion applies only to work performed "by the named insured" and it alone is the named insured; (2) the phrase "or on behalf of" would have included subcontractors' work if included in the endorsement, but its omission limits the exclusion to the named insured's work; and (3) the deletion in Section VI(A)(3) of the endorsement was deliberate, because "on behalf of" appears in the immediately preceding

paragraphs, sections VI(A)(1) and (2), of the endorsement.

Fireguard, 864 F.2d at 650-651 (citations omitted). The Ninth

Circuit concluded:

The language of the completed operations hazard exclusion in the endorsement, as opposed to that in the basic policy, does not exclude from coverage the work performed by subcontractors. . . . If Scottsdale wanted to exclude work performed by subcontractors in the endorsement of this carefully drafted policy, it need only have inserted "or on behalf of" in section VI(A)(3) to make its intent crystal clear. Words deleted from a contract may be the strongest evidence of the intention of the parties.

Fireguard, 864 F.2d at 653.

When presented with a similar policy provision, the Alaska Supreme Court also concluded the insurer's omission of the language "on behalf of" in the policy endorsement limited the exclusion to work performed by the policyholder only. Fejes v. Alaska Ins. Co., 984 P.2d 519 (1999). In that case, a homeowner successfully sued a general contractor for defective installation of a drain, which had in turn caused the homeowner's septic system to fail. The contractor's insurer rejected tender and denied coverage. The Alaska Supreme Court concluded an endorsement indistinguishable from the UMB 3011 sold to Sundquist provided broader coverage than the underlying policy:

Exclusion (o) excludes coverage for “property damage to work performed by or on behalf of the named insured arising out of the work or any portion thereof, or out of material, parts, or equipment furnished in connection therewith.” But AIC’s policy also contains a broad form property damage liability coverage endorsement, which replaces Exclusion (o) with Exclusions (A)(1) through (A)(3). The endorsement expands liability coverage for property damage.

Fejes, 989 P.2d at 524. The Fejes court noted the broad form endorsement essentially paralleled the policy exclusion, but with one critical difference:

[Exclusion (A)(3)] deletes (o)’s exclusion of work performed “on behalf of a named insured.” The effect of this deletion is to provide coverage as to work performed for the named insured by subcontractors. ... Since the property damage in this case arose from the subcontractor’s work, the exclusion does not apply.

Fejes, 989 P.2d at 525 (emphasis added).

In yet another case, an apartment owner sued for construction defects and resulting property damage in McKellar Dev. Of Nevada, Inc. v. Northern Ins. Co. of New York, 837 P.2d 858 (1992). The owner alleged the soil compaction performed by one of McKellar’s subcontractors was faulty, causing resulting damage to the apartment. Just like here, Northern Insurance issued a basic policy that excluded property damage “to work

performed by on or behalf of the named insured,” while the Broad Form Property Damage endorsement deleted the “on behalf of” language. McKellar, 837 P.2d at 859. The Nevada Supreme Court concluded:

Thus, the [Broad Form Property Damage] completed operations hazard exclusion eliminates the phrase “on behalf of” and applies only to work performed “by the named insured.” We agree with appellants that the elimination of the phrase “or on behalf of” indicates that the work of subcontractors was intended to be covered by the policies.

McKellar, 837 P.2d at 860. Other states have correctly determined there is coverage for damages to subcontractor’s work where an identical endorsement omits the language “on behalf of” from the underlying policy exclusion. Washington should also.

4. Insurance industry publications demonstrate the endorsement covers damage to work of subcontractors.

The Fireguard court found persuasive insurance industry publications showing the industry interpreted the endorsement as providing coverage for losses caused by the work of subcontractors. The Insurance Services Office (ISO) promulgates standardized insurance industry coverage forms and publishes explanatory memoranda called circulars. Many of the cases interpreting the “your work” exclusion in the Broad Form Property

Damage endorsement have noted that the insurance industry's contemporaneous interpretation of the revised language differs substantially from the interpretations the carriers tend to advance when denying coverage.

The insureds' interpretation of the endorsement is supported by the insurance industry's own construction of the broad form endorsement. As we have seen, the terms of the endorsement were drafted by the ISO, which also publishes circulars designed to explain the intent, purpose and effect of its standard form provisions. In one such circular, the ISO explains the broad form endorsement is intended to "exclude[e] only damages caused by the insured to his own work. Thus, . . . [t]he insured would have coverage to damage to his work arising out of a subcontractor's work [and] [t]he insured would have coverage for damage to a subcontractor's work arising out of the subcontractor's work."

Maryland Cas. Co. v. Reeder, 27 Cal.Rptr. at 725. The Reeder court concluded:

There is compelling evidence from the insurance industry itself that the endorsement Maryland issued was drafted as a means of covering the very risk that Maryland seeks to avoid. Accordingly, like the court in Fireguard, we find the broad form endorsement provides coverage for damage claims growing out of services provided by subcontractors retained during development of the condominium project.

Reeder, 270 Cal. Rptr. at 726.

Likewise, the Fejes Court found persuasive the Fireguard opinion, particularly the insurance industry publications themselves:

The [ISO] circular notes that the broad form exclusions are intended to 'exclude only damages caused by the named insured to his own work. Thus, the insured would have coverage for damage to his work arising out of a subcontractor's work and the insured would have coverage for damage to a subcontractor's work arising out of the subcontractor's work.'

Fejes, 984 P.2d at 525, quoting Fireguard, 864 F.2d at 652.

The majority of courts from around the country agree with the ISO's intent with respect to coverage for subcontractor work under the Broad Form Property Damage endorsement. See e.g. Fireguard; Fejes; McKellar; Reeder.

Enumclaw used standard industry forms for its policies. CP 653. The completed operations coverage provided in the UMB 3011 endorsement is identical to that discussed in the above cited cases and is apparently based on the standard provision promulgated by the ISO. As noted in the above cited authority, according to the ISO circular, the endorsement does not exclude damages to work performed by subcontractors. The UMB 3011 endorsement deleted the "on behalf of" language in the underlying policy and replaced it with a narrower exclusion that only bars coverage for damage to "work performed by the Named Insured." The damaged work was performed by subcontractors. Based on

the foregoing, the only reasonable interpretation is that the umbrella policy provides coverage.

5. The “business risk” doctrine should not be used to override the specific and unambiguous terms of the insurance policy.

Enumclaw below argued that Schwindt stands for the proposition that “Washington has expressly adopted the Minnesota Rule” under which omission of the “on behalf of” language is deemed to be without effect. CP 1449; Schwindt v. Underwriters at Lloyd’s of London, 81 Wn. App. 293, 914 P.2d 119 (1996). Schwindt does not control.

The Minnesota “business risk” doctrine was articulated in Bor-Son Building Corp. v. Employers Commercial Union Ins. Co. of Am., 323 N.W.2d 58 (Minn. 1982). In that case, an entire Housing Authority building project was completed by subcontractors and supervised by policyholder Bor-Son. Federal regulations held Bor-Son fully responsible for all development and construction. Bor-Son was required to furnish a performance bond and CGL insurance coverage for the project. Bor-Son was found liable for construction defects and sought indemnity from its insurance carrier under the CGL policy.

To protect the owner, HRA, from loss resulting from building damage, Bor-Son was required to furnish a performance bond. To protect those who sustained damage to person or property other than for damages to buildings ... Bor-Son was required to carry comprehensive general liability insurance. The distinction between a performance bond and a comprehensive general liability insurance policy, in our view, is crucial to the resolution of the issues of this case.

Bor-Son, 323 N.W.2d at 61-62.

But critically, the Minnesota Supreme Court has very recently modified the Bor-Son “business risk” doctrine by holding the extent to which a standard form CGL policy covers the business risk of the insured must be determined from the specific terms of the insurance contract. Wanzek Construction, Inc. v. Employers Insurance of Wausau, 679 N.W.2d 322, 326 (Minn. 2004).

In Schwindt, a contractor was sued for negligent workmanship and breach of contract and sought indemnity under its CGL. The court held “that work of subcontractors is necessarily included in exclusions pertaining to faulty work or defective products of the contractor.” Schwindt, 81 Wn. App. at 306. Enumclaw would have the Court rashly expand the rule to include damage to the work of subcontractors in the UMB 3011 “your work” exclusion. The Court should decline to do so. First, the holding in

Schwindt is expressly limited to the “faulty work or defective products” exclusions in a CGL. Schwindt, 81 Wn. App. at 305-6.

Second, and most importantly, the Schwindt court distinguished the result in that case from cases following Fireguard:

Finally, Schwindt and Jones argue that the exclusions do not apply to ... work done by subcontractors because the policy exclusions refer to ... work done by ‘the Assured,’ not ‘on behalf of’ the assured. They rely on cases where the policy had previously omitted the language, ‘on behalf of,’ evidencing an intent not to include subcontractors in the products exclusions provisions. But these cases do not address the policy language at issue in this case. Here, there is no comparable evidence that the insurers did not intend to include the work of subcontractors in these provisions.

Schwindt, 81 Wn. App. at 305. Here the UMB 3011 omitted the language “on behalf of,” which it had used elsewhere in superceded language in the same umbrella policy, and is conclusive evidence that Enumclaw did not intend to exclude from coverage damage to work performed by subcontractors.

The rule articulated in Fireguard is the modern rule. Most cases decided after Fireguard have adopted the Fireguard court’s interpretation of the “your work” exclusion and have rejected the line of cases cited in Schwindt. See 3 Law and Prac. Of Ins. Coverage Litig. § 45:61(2) at 2, 3. There are no cases denying

coverage for damages to or arising out of subcontractor work, where the insurer omitted the language “on behalf of” from the “your work” exclusion. The only reasonable conclusion is that the “your work” exclusion in the UMB 3011 endorsement applies strictly to work performed by the “Named Insured.”

6. Any ambiguity is to be resolved in favor of coverage.

Because insurance policies are written entirely by the insurer with no opportunity for input from the public, the carrier has the opportunity to make the policy say clearly and unambiguously what the carrier wants the policy to mean. An insurance policy provision is ambiguous when it is fairly susceptible to two different, reasonable interpretations. Stanley v. Safeco Ins. Co. of Am., 109 Wn.2d 738, 741, 747 P.2d 1091 (1988). Where an insurance policy is susceptible to two interpretations, the meaning and construction most favorable to the insured must be employed, even where the insurer intended otherwise. Shotwell v. Transamerica Title Ins. Co., 91 Wn.2d 161, 167-68, 588 P.2d 208 (1978). The Supreme Court later expanded this rule:

The rule strictly construing ambiguities in favor of the insured applies with added force to exclusionary clauses which seek to limit policy coverage. Exclusions of coverage will not be extended beyond their ‘clear and unequivocal’ meaning.

Lynott v. Nat'l Union Fire Ins. Co., 123 Wn.2d 678, 690-91, 871 P.2d 146 (1994)(quoting American Star Ins. Co. v. Grice, 121 Wn.2d 869, 875, 854 P.2d 622 (1993))(emphasis in original).

Red Oaks maintains there is only one reasonable interpretation of the policy language and thus there is no ambiguity. However, if the Court were to conclude otherwise, then under the rules of construction, any ambiguity must be resolved against Enumclaw. The purpose of insurance is to insure, and that construction should be taken which will render the contract operative rather than inoperative. Scales v. Skagit Cy. Med. Bur., 6 Wn. App. 68, 70, 491 P.2d 1338 (1971). Red Oaks contends the "rule" articulated by Enumclaw – that there is no coverage for damage to the work of subcontractors – is contrary to Washington caselaw because it resolves the ambiguous policy exclusion in favor of the insurer.

To interpret an insurance policy, the court should conduct an examination of the situation of the parties and the circumstances under which the instrument was executed. Lynott, 123 Wn.2d at 682-84.

Sundquist raised concerns in 1992 and 1993 with Enumclaw agents about the upsurge of construction defect cases being filed against contractors. CP 188-89. Sundquist specifically purchased completed operations coverage in its liability policies so that it would have coverage for future lawsuits that might be brought after the completed building were sold. CP 186. Sundquist communicated to its agents that obtaining the best available insurance policies and broadest coverage was of paramount importance. CP 188. Sundquist received assurances from Enumclaw agents that while damage to work specifically performed by Sundquist might not be covered, any resulting damage and any work performed by subcontractors would be covered under its policies. A December 1993 letter demonstrates that Enumclaw agents believed Sundquist's policies provided coverage for damages to work performed by subcontractors:

The other areas of concern are claims against subcontractors where the general contractor's policy is being brought in to defend right away. In the past, a claimant would go the subcontractor first, then the general contractor for damages. Thus, the insurance company, with very little premium charge, is insuring the subs under the general's policy.

CP 198. Enumclaw had settled similar claims against Sundquist brought by different condominium owners' associations under the very same policies at issue here. CP 193; 568; 1158; 1174.

The extrinsic evidence shows that both Sundquist and the Enumclaw agents who sold the policy believed it provided coverage for Red Oaks' complained of damages. Both the rules of construction and the rules of interpretation support the contentions of Red Oaks.

B. Enumclaw's actions constitute bad faith as a matter of law.

Red Oaks argued below that Enumclaw should be estopped from denying coverage because it failed to comply with the enhanced duties of good faith and fair dealing applicable to an insurer defending under a reservation of rights ("bad faith"). Enumclaw maintained there was no bad faith because it appointed an attorney to represent Sundquist, and allowed Sundquist to decide whether to settle. But the enhanced duty of good faith and fair dealing requires more.

Insurance companies must conduct their relations with their policyholders in good faith. RCW 48.01.030; Coventry Assoc. v. American States Ins. Co., 136 Wn.2d 269, 276, 961 P.2d 933

(1998). Because an insurer's duty of good faith is separate from its duty to indemnify, Red Oaks may maintain its bad faith and CPA claims even if this Court determines there is no coverage. See Coventry, 136 Wn.2d at 279.

In Washington, an insurer has a duty to consider the interests of its insured equally with its own in all matters. Tank v. State Farm Fire & Cas. Co., 105 Wn.2d 381, 391, 715 P.2d 1133 (1986). A reservation of rights defense mandates the insurer fulfill an enhanced obligation of good faith. Tank, 105 Wn.2d at 387. Where an insurer fails to act in good faith in handling a claim under a reservation of rights, the insurer is estopped from denying coverage. Safeco Ins. Co. of Am. v. Butler, 118 Wn.2d 383, 393, 823 P.2d 499 (1992).

In this case, Enumclaw committed numerous violations of its enhanced obligations under Tank, as well as per se unfair and deceptive trade practices found at WAC 284-30-330. Any one of these violations at the very least raise a triable issue of fact of coverage by estoppel under Butler.

The Court in Tank set forth specific criteria to evaluate whether an insurer has acted in good faith in a reservation of rights context. The insurer must perform a thorough investigation; retain

competent defense counsel; fully inform the insured of “all developments relevant to his policy coverage and the progress of his lawsuit”; and refrain from any action that demonstrates a greater concern for the insurer’s monetary interest than for the insured’s financial risk. Tank, 105 Wn.2d at 387.

Enumclaw breached its duty of good faith and fair dealing when it failed to keep Sundquist updated as to its coverage position with respect to the UMB 3011; refused at the eleventh hour to fund the settlement agreement for the Red Oaks’ claims without making any attempt to resolve the coverage issues; failing to inform Sundquist of developments that would affect coverage under the CGL “product” exclusion, and particularly its apparent conclusion that the UMB 3011 “your work” exclusion barred coverage; and demonstrating greater concern for its own financial interests than those of Sundquist. As a result of Enumclaw’s refusal to fund the parties’ proposed settlement, its policyholder Sundquist was exposed to greater liability and was placed in the position of contemplating bankruptcy. CP 1251.

Red Oaks submitted deposition testimony, declarations, and documents evidencing Enumclaw’s actions. Because Enumclaw conceded all the facts alleged by Red Oaks, CP 1095, Red Oaks

met its burden of proving the absence of any material facts. The Court in Tank ultimately determined the insurer's actions demonstrated good faith with respect to its insured. The facts in this case, however, compel a different result.

1. Enumclaw failed to perform a thorough investigation into whether there was coverage under Sundquist's policies.

Both Sundquist and Red Oaks have a right to rely on Enumclaw's coverage position at the time of settlement. Enumclaw's failure to investigate whether there was coverage under the UMB 3011 "your work" exclusion until more than one year after Red Oaks sued and the case settled was unreasonable.

An insurer can avoid bad faith by defending its insured under a reservation of rights. The insured receives the defense promised and at the same time the insurer's interest is protected: "if coverage is found not to exist, the insurer will not be obligated to pay." Kirk v. Mt. Airy, 134 Wn.2d 558, 563, 951 P.2d 1124 (1998)(emphasis added).

While the duty to indemnify hinges on the insured's actual liability to claimant and actual coverage under the policy, Hayden v. Enumclaw, 141 Wn.2d 55, 1 P.3d 1167 (2000), Red Oaks contends the insurer must investigate and disclose to its policyholder its

coverage position before settlement mediation. See WAC 284-30-330(13). The implied covenant of good faith and fair dealing requires the insurer to perform any necessary investigation in a timely manner and to conduct a reasonable investigation before denying coverage. An insurer's failure in either regard constitutes a breach. Coventry Assocs. v. Am. States. Ins. Co., 136 Wn.2d 269, 281, 961 P.2d 933 (1998)(quoting 1 Allan D. Windt, Insurance Claims & Disputes §2.05, at 38 (3d ed.1995)).

In Tank the Court held an insurer had a duty to investigate the cause of the insured's accident and the nature and severity of the plaintiff's injuries. Tank, 105 Wn.2d at 388. Red Oaks asserts this duty to investigate extends to require insurers to promptly and diligently investigate the basis for coverage or the denial thereof under the policy. This is consistent with caselaw and insurance regulations governing the fair handling of claims settlements. See WAC 284-30-330; 370; 380.

In November 2003 Enumclaw agreed to defend Sundquist under a reservation of rights. CP 44-49. Enumclaw identified several potentially applicable exclusions and pledged to "investigate this case and try to distinguish between claims that are covered and those that are not." CP 48. Enumclaw concluded:

There are a number of significant coverage issues presented by these policies and the claims that have been brought. Enumclaw intends to commence a declaratory judgment action in order to get court guidance on these issues. In the meantime the company will continue to provide [Sundquist]'s defense at least until these issues are resolved.

CP 49.

But Enumclaw did not commence a declaratory judgment action to clarify its coverage obligations, even as the date of settlement mediation approached, and where Enumclaw's claims adjuster agreed the proposed settlement was reasonable.

Rather than seek a determination of actual coverage under the policy in a timely manner, Enumclaw failed to update its reservation of rights even once – right up through mediation of the underlying case. And when Enumclaw suddenly announced three days before the mediation that it would provide no settlement funding, it failed to provide any legal or factual basis for its refusal to participate in the very mediation it had authorized.

The enhanced obligations of Tank required Enumclaw to timely investigate and resolve any questions regarding coverage by seeking a declaratory judgment, or to deny coverage outright and provide the basis for doing so as required by WAC 284-30-330(13). Under that provision, an insurer acts unfairly by:

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

WAC 284-30-330(13).

Enumclaw's failure to do so constitutes a triable issue of whether Enumclaw breached its duty of good faith and fair dealing.

2. Enumclaw breached its duty to inform Sundquist of all developments relevant to coverage.

One of the enhanced obligations in Tank requires full disclosure of a reservation of rights together with updates relevant to policy coverage:

[T]he company has the responsibility for fully informing the insured not only of the reservations of rights defense itself, but of all developments relevant to his policy coverage and the progress of his lawsuit.

Tank, 105 Wn.2d at 388. The duty of full disclosure obligates an insurer to disclose the provisions in the policy upon which it relies for denying a claim. WAC 284-30-330(13).

Without this information, a policyholder cannot make an informed decision regarding its financial risk and whether to settle the underlying claim. More importantly, a party considering taking an assignment of rights in satisfaction of judgment has a right to rely on the insurer's stated coverage position. Here, Enumclaw

clearly stated that the CGL policy "is not intended to guarantee the quality of the business' workmanship, product or work." CP 46. As of the date of settlement, Enumclaw's stated position with respect to the UMB 3011 endorsement was that it would exclude coverage for "faulty workmanship":

The Umbrella Policy will not pay for the cost of damage to your clients' own work or products, or products they sold, damage caused by their "faulty workmanship" (Section VI (d),(f) and forms UMB 2055 9/88 and UMB 3011 9/88), or for the loss of use of undamaged property caused by [Sundquist's] delay, failure to perform a contract, or failure of [Sundquist's] products or work to meet the standards represented or warranted (Section VI (g)). Damage must occur during the policy period to be covered. Claims for lawyer's fees and other litigation costs are not covered because they are not for "property damage."

CP 47. Enumclaw's position was that it intended to commence a declaratory judgment action to obtain court guidance on the coverage issues. CP 49. Enumclaw failed to do so.

Red Oaks contends that both the policy holder and the claimant who takes an assignment of rights are entitled to know as of the date of the settlement the insurer's coverage position: either that the insurer is going to indemnify, or is going to deny coverage and give the reasons for doing so as required by WAC 284-30-330(13).

Enumclaw breached this duty to inform and essentially sandbagged its policyholder. In its November 2003 reservation of rights letter, Enumclaw failed to identify the UMB 3011 “your work” exclusion as a basis to deny coverage. Because Enumclaw did not provide updates on its coverage position, Red Oaks took an assignment from Sundquist in satisfaction of judgment without knowledge that Enumclaw would later deny coverage based on a previously undisclosed policy exclusion.

The express public policy of this state strongly encourages settlement. Seafirst Ctr. Ltd. Partnership v. Erickson, 127 Wn.2d 355, 365, 898 P.2d 299 (1995); Kirk v. Enumclaw, 114 Wn.2d 550, 554-55, 789 P.2d 84 (1990). Assignees have a right to know and rely on the insurers stated coverage position before taking an assignment. To hold otherwise would discourage the settlement of claims, promote tactical sandbagging, and force a policyholder to conduct litigation and formal discovery with its insurer, simply to learn the basis of its coverage position.

In addition to failing to give its policyholder updates as to its coverage position, Enumclaw also failed to inform Sundquist of developments affecting coverage under the CGL “products” exclusion. Enumclaw generally referenced the “products” exclusion

as a possible basis to deny coverage in its reservation of rights letter, but failed to inform Sundquist of significant developments pertaining to that exclusion – namely that it had received a favorable judgment in the trial court on the products exclusion, the appellate court had taken the question under consideration, and a conclusive opinion was forthcoming. See, Mutual of Enumclaw v. Archer Construction, Inc., 123 Wn. App. 728, 97 P.3d 751 (2004).

Enumclaw's failure to communicate to Sundquist its intention not to fund the negotiated settlement until three days before the mediation conference was a breach of its duty to inform. There was no legitimate Enumclaw interest to be served by non-disclosure. The record shows that Michlitsch testified he suspected on October 29, 2003 that Enumclaw did not intend to provide any settlement authority for Red Oaks' claims, but this was not communicated to Sundquist or its attorney Jeff Frank until March 1, 2004. CP 1174-75. In fact, Sundquist had every reason to believe Enumclaw would agree to fund the settlement as it had settled other similar claims under the same policies and had sponsored the ER 408 process, which included the settlement mediation, from the beginning of its defense of the Red Oaks case. CP 1174.

Enumclaw knew in October 2003 there might be coverage issues, but it failed to apply for a declaratory judgment, as pledged in its reservation of rights letter. Instead, it moved forward with the ER 408 process, led its policyholder to believe the Red Oaks' claims would be settled, and only at the last moment refused to fund the settlement without updating its coverage position in the slightest. This placed Sundquist between a rock and a hard place – faced with making the ultimate choice to settle Red Oaks' claims without knowing Enumclaw's coverage position or face the prospect of defending a lawsuit it knew it would lose and risk bankruptcy. This should not be tolerated

3. Enumclaw consistently demonstrated greater concern for its own financial interests.

Throughout the course of the case, Enumclaw has demonstrated greater concern for its own interests than for those of its insured. An insurer defending under a reservation of rights must give equal consideration in all matters to the insured's interests. Tank, 105 Wn.2d at 386. Enumclaw's failure to do so constitutes bad faith.

This court has stated that an insurer has a duty to diligently investigate a claim and if the insured's liability is clear, the insurer

has an affirmative duty to make a good faith effort to settle the case. Truck Exchange of Farmers Ins. Group v. Century Indem. Co., 76 Wn. App. 527, 534, 887 P.2d 455, rev. denied, 887 Wn.2d 455, 898 P.2d 308 (1995). An insurer breaches its affirmative duty to make a good faith effort to settle by negligently or in bad faith failing to settle the claim against the insured within the policy limits. Tyler v. Grange Ins. Ass'n, 3 Wn. App. 167, 179, 473 P.2d 193 (1970).

Enumclaw argued to the trial court that an insurer breaches its duty to settle only when it fails to settle within the policy limits and exposes the insured to liability in excess of policy limits. CP 1104. This is an unnecessarily narrow and restrictive reading of Washington caselaw. An insurer must act “as though it bore the entire risk, including any judgment in excess of the policy limits” when it makes the settlement decision. Truck Exch., 76 Wn. App. at 534 (emphasis added). Enumclaw’s decisions were not undertaken as though it bore the entire risk.

Enumclaw failed to settle the claims against its policyholder under circumstances that limited the damages, restricted recoverable attorney fees to an hourly, rather than a contingent fee basis, and were otherwise favorable to the pecuniary interests of its

insured. CP 818-822. It did so with full knowledge that its failure to fund the settlement would likely expose its insured to an additional five or six hundred thousand dollars of liability. CP 951. It then attempted to intervene in the arbitration between Sundquist and Red Oaks “in order to gather information that will impact the coverage analysis.” CP 875.

Here, Enumclaw’s actions clearly demonstrated a greater concern for its own financial interests. The only reasonable conclusion is that Enumclaw, by not giving equal consideration in all matters to the interests of its insured, acted in bad faith.

4. Enumclaw’s actions violated the minimum good faith standards applicable to insurance carriers.

In addition to the specific criteria set forth above, violations of the regulations promulgated by the Washington Insurance Commissioner and set forth at WAC 284-30-300 et. seq. constitute a breach of an insurer’s duty of good faith. Tank, 105 Wn.2d at 386. Red Oaks asserts the conduct described above and other instances summarized at CP 1311-1315 violated the minimum standards for insurers set forth at WAC 284-30-330 et. seq. and constitute bad faith as a matter of law. Enumclaw stipulated to the facts Red Oaks relied on. CP 1095. Accordingly, the trial court

erred when it refused to grant Red Oaks summary judgment for bad faith based upon the WAC violations.

Unfair practices include misrepresenting pertinent facts and refusing to pay without a reasonable investigation (WAC 284-30-330), failure to disclose all relevant policy provisions (WAC 284-30-350), and the failure to state specific grounds for the denial of a claim, WAC 284-30-380; -330(13). Coventry, 136 Wn.2d at 276. An insurer must promptly provide a reasonable explanation for the denial of a claim. Truck Ins. Exchange v. Vanport Homes, Inc., 147 Wn.2d 751, 764, 58 P.3d 276 (2002). Enumclaw should not be permitted to argue that it complied with the duty to state the specific grounds for a denial of coverage simply because it never actually denied coverage to Sundquist. This is especially true where evidence shows its claims adjuster understood that Enumclaw may have formed the intention not to cover Red Oaks claims months before it shared this information with Sundquist. CP 938-939.

5. Enumclaw should be estopped from denying coverage

An insurer who acts in bad faith while handling a claim under a reservation of rights will be estopped from denying coverage. Butler, 118 Wn.2d at 392. The duty of good faith can be violated by

conduct short of intentional bad faith or fraud. Industrial Indemnity Co. of the Northwest, Inc. v. Kallevig, 114 Wn.2d 907, 916-17, 792 P.2d 520 (1990). Because Enumclaw breached its enhanced duty of good faith and fair dealing, it should be estopped from denying coverage.

Enumclaw identified the UMB 3011 “faulty workmanship” exclusion as a potential basis to deny coverage in its Nov. 2003 reservation of rights. CP 47. However, Enumclaw failed to identify the UMB 3011 “your work” exclusion as a basis to deny coverage in the reservation of rights. WAC 284-30-380 provides, in part:

No insurer shall deny a claim on the grounds of a specific policy provision, condition, or exclusion unless reference to such provision, condition, or exclusion is included in the denial.

WAC 284-30-380. An insurance company that fails to specifically identify a coverage provision in a reservation of rights letter and then later attempts to rely on that provision to deny coverage should be estopped. Weber v. Biddle, 4 Wn. App. 519, 524-25, 483 P.2d 155 (1971)(reservation of rights letters ineffective absent reference to “the specific policy defenses upon which the insurer intends to rely”).

Red Oaks, as Sundquist's assignees, had a right to rely on Enumclaw's stated coverage position at the time of the settlement mediation. Butler mandates that Enumclaw's breach of its duty of good faith and fair dealing estops it from denying coverage under the Sundquist policies.

Dismissal on summary judgment of a bad faith claim is only appropriate where the insurer is entitled to prevail as a matter of law on the facts construed most favorably to the insured. Smith v. Safeco Ins. Co., 150 Wn.2d 478, 484, 78 P.3d 1274 (2003). Here there were no facts in dispute. Once Red Oaks met its burden to prove the absence of any material facts, it was entitled to summary judgment on its bad faith and CPA claims.

In the alternative, Red Oaks maintains that summary judgment was inappropriately and inexplicably granted to Enumclaw where it is clear that at the very least there was a triable issue of fact as to whether Enumclaw is estopped under Butler from asserting coverage defenses it failed to disclose prior to the mediated settlement of the claims against its policyholder.

C. Enumclaw's actions violated the Consumer Protection Act.

The Consumer Protection Act (CPA), ch. 19.86 RCW, provides a private cause of action against insurers for unfair or deceptive practices. To assert a cause of action under the CPA, a claimant must show (1) an unfair or deceptive act or practice in trade or commerce that impacts the public interest; and (2) a resulting injury to the claimant's business or property. Torina Fine Homes v. Mutual of Enumclaw, 118 Wn. App. 12, 20, 74 P.3d 648 (2003)(citing Industrial Indem. Co. of the N.W. Inc. v. Kallevig, 114 Wn.2d 907, 920, 792 P.2d. 520, 7 A.L.R.5th 10014 (1990)).

The first element is satisfied by showing a violation of any subsection of WAC 284-30-330. Torina, 118 Wn. App. at 20. The court will presume harm in any case where the insurer acted in bad faith. Kirk v. Mt. Airy, 134 Wn.2d at 562. The second element, or harm, is met where expenses are incurred as a direct result of the bad faith. Griffin v. Allstate Ins. Co., 108 Wn. App. 133, 148, 29 P.3d 777 (2001). Sundquist was ultimately liable for a much higher judgment as a result of the failed ER 408 negotiations. CP 818-822; 951.

Only an insured may bring a cause of action for a per se violation of the consumer protection act. Kagele v. Aetna Life and Cas. Co., 40 Wn. App. 194, 199, 698 P.2d 90 (1985). Red Oaks, as assignees of insured's claims, stands in the shoes of the insured and is entitled to bring this claim.

ATTORNEYS' FEES

Red Oaks respectfully requests attorney fees on appeal under the attorney fees provision of the Consumer Protection Act, RCW 19.86.090, Olympic Steamship v. Centennial, 117 Wn.2d 37 (1991), and RAP 18.1.

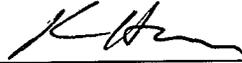
CONCLUSION

Red Oaks respectfully requests this Court reverse the trial court's determination of June 10, 2005, that the Broad Form Property Damage exclusion to "work performed by the named insured" excludes coverage for damage to work performed by subcontractors.

If the Court determines that Enumclaw failed to meet its enhanced duty of good faith to its insured, Red Oaks respectfully requests reversal of the trial court's July 8, 2005, order and a directive to the trial court to enter judgment in favor of Red Oaks.

Dated this 6 day of March, 2006.

CONDOMINIUM LAW GROUP, PLLC



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Condominium Owners Association

Appendix A

POLICY

The company agrees with the insured, named in the declarations made a part hereof, in consideration of the payment of the premium and in reliance upon the statements in the declarations and subject to all of the terms of this policy:

I. COVERAGE

The company agrees to indemnify the insured for ultimate net loss in excess of the retained limit or underlying limit whichever is greater, which the insured may sustain by reason of liability

- (a) imposed upon the insured by law, or
- (b) assumed under any contract or agreement by the named insured, or by any officer, director, stockholder, partner or employee while acting within the scope of his duties as such,

because of personal injury, property damage or advertising liability caused by or arising out of an occurrence which takes place during the policy period anywhere in the world.

II. DEFENSE - SETTLEMENT

With respect to any occurrence not covered by the underlying policies listed in the schedule of underlying insurance or any other underlying insurance available to the insured and provided such occurrence is covered by the terms and conditions of this policy, except for the amount of the retained limit specified in the declarations, the company shall:

(a) defend any suit seeking damages because of personal injury, property damage or advertising liability, even if the allegations of such suit are groundless, false or fraudulent; but the company may make such investigation, negotiation and settlement of any claim or suit as it deems expedient;

(b) pay all premiums on bonds to release attachments for an amount not in excess of the applicable limit of liability of this policy, all premiums on appeal bonds required in any such defended suit, but without any obligation to apply for or furnish any such bonds;

(c) pay all expenses incurred by the company, all costs taxed against the insured in any such suit and all interest accruing after entry of judgment until the company has paid or tendered or deposited in court such part of such judgment as does not exceed the limit of the company's liability thereon;

(d) reimburse the insured for all reasonable expenses, other than loss of earnings, incurred at the company's request;

and the amounts so incurred, except settlements of claims and suits, are payable by the company in addition to the applicable limit of liability of this policy.

In jurisdictions where the company may be prevented, by law or otherwise, from carrying out this agreement, the company shall pay any expense incurred with its written consent, in accordance with this agreement.

The insured shall promptly reimburse the company for any amount of ultimate net loss paid on behalf of the insured within the retained limit specified in the declarations.

III. LIMITS OF LIABILITY

Regardless of the number of persons or organizations who are insureds under this policy and regardless of the number of claims made or suits brought against any or all insureds, the total limit of the company's liability for ultimate net loss resulting from any one occurrence shall be the occurrence limit stated in the declarations; provided, however, that the company's liability shall be further limited to the amount stated as the aggregate limit in the declarations with respect to all ultimate net loss caused by one or more occurrences during each annual period while this policy is in force commencing from its effective date and arising out of any hazard for which an aggregate limit of liability applies in the underlying policies.

IV. DEFINITION OF INSURED, NAMED INSURED

The "named insured" means the person or organization named in the declarations and includes any subsidiary thereof and any other organization coming under the named insured's financial control of which it assumes active management.

The unqualified word "insured" includes the named insured and also:

(a) any officer, director or stockholder of the named insured while acting within the scope of his duties as such, and, if the named insured is or includes a partnership, any partner thereof but only with respect to his liability as such;

(b) except with respect to the ownership, maintenance or use, including loading or unloading of automobiles while away from premises owned by, rented to or controlled by the named insured or the ways immediately adjoining, or of aircraft,

- (1) any employee of the named insured while acting within the scope of his duties as such; or
- (2) any person or organization acting as agent with respect to real estate management for the named insured;

(c) with respect to any automobile owned by the named insured or hired for use by or on behalf of the named insured, any person while using such automobile and any person or organization legally responsible for the use thereof, provided its actual use is with the permission of the named insured, except

- (1) any person or organization, or any agent or employee thereof, operating an automobile sales agency, repair shop, service station, storage garage or public parking place, with respect to any occurrence arising out of the operation thereof; or
- (2) the owner or any lessee, other than the named insured, or a hired automobile or any agent or employee of such owner or lessee;

(d) with respect to any aircraft chartered with pilot by or on behalf of the named insured, any person using such aircraft and any person legally responsible for the use thereof, provided its actual use is with the permission of the named insured, except

- (1) the owner, pilot or air crew thereof or any other person operating the aircraft; or
- (2) any manufacturer of aircraft, engines or aviation accessories, or any aviation sales, service or repair organization or airport or hangar operator or any employee of any of them;

(e) any person or organization to whom or to which the named insured is obligated by virtue of a written contract to provide insurance such as is afforded by this policy, but only with respect to operations performed by the named insured or facilities owned or used by the named insured, and subject to the underlying limit applicable to the insurance for the named insured with respect to such operations or facilities;

(f) any other person or organization who is an insured under any policy of underlying insurance, listed in the schedule of underlying insurance, subject to all the limitations upon coverage under such policy other than the limits of the underlying insurer's liability.

This insurance does not apply to personal injury, property damage or advertising liability arising out of the conduct of any partnership or joint venture of which any insured is a partner or member and which is not designated in this policy as a named insured.

The insurance afforded applies separately to each insured against whom claim is made or suit is brought, but the inclusion herein of more than one insured shall not operate to increase the limits of the company's liability.

V. OTHER DEFINITIONS

Wherever used in this policy:

"AIRCRAFT" means any heavier-than-air or lighter-than-air aircraft designed to transport persons or property.

"ADVERTISING LIABILITY" means liability arising out of the named insured's advertising activities for libel, slander or defamation of character; invasion of rights of privacy; infringement of copyright, title or slogan; and piracy or unfair competition or idea misappropriation under an implied contract - committed or alleged to have been committed during the policy period.

"AUTOMOBILE" means a land motor vehicle, trailer or semi-trailer designed for travel on public roads (including any machinery or equipment attached thereto) but does not include "mobile equipment."

"MOBILE EQUIPMENT" means a land vehicle (including any machinery or apparatus attached thereto), whether or not self-propelled, (1) not subject to motor vehicle registration, or (2) maintained for use exclusively on premises owned by or rented to the named insured, including the ways immediately adjoining, or (3) designed for use principally off public roads, or (4) designed or maintained for the sole purpose of affording mobility to equipment of the following types forming an integral part of or permanently attached to such vehicle: power cranes, shovels, loaders, diggers and drills; concrete mixers (other than the mix-in-transit type); graders, scrapers, rollers and other road construction or repair equipment; air-compressors, pumps and generators, including spraying, welding and building cleaning equipment; and geophysical exploration and well servicing equipment.

"OCCURRENCE" means an accident, including continuous or repeated exposure to conditions, which results in personal injury, property damage or advertising liability neither expected nor intended from the standpoint of the insured.

With respect to personal injury and property damage, all such exposure to substantially the same general conditions existing at or emanating from one location or source shall be deemed one occurrence.

With respect to advertising liability, all ultimate net loss arising out of any advertisement, publicity article, broadcast or telecast or any combination thereof involving the same injurious material or act, regardless of the frequency of repetition thereof or the number of kind of media used, whether claim is made by one or more persons, shall be deemed to arise out of one occurrence.

"PERSONAL INJURY" means (1) bodily injury, sickness, disease, disability or shock, including death at anytime arising therefrom, and, if arising out of the foregoing, mental anguish and mental injury; (2) false arrest, false imprisonment, wrongful eviction, wrongful entry, wrongful detention, or malicious prosecution; (3) libel, slander, defamation of character, humiliation, or invasion of the rights of privacy, unless arising out of advertising activities; and (4) racial or religious discrimination (unless coverage is prohibited by law) not committed by or at the direction of the insured or any executive officer, director or stockholder thereof, but only with respect to the liability other than fines and penalties imposed by law; caused by an occurrence during the policy period.

"PRODUCTS-COMPLETED OPERATIONS LIABILITY" means liability arising out of

- (1) goods or products (including any container thereof, other than a vehicle) manufactured, sold, handled or distributed by the named insured or by others trading under his name, other than equipment rented to or located for use of others but not sold, and any representation or warranty made at any time with respect thereto, but only if the personal injury or property damage occurs away from premises owned by or rented to the named insured and after physical possession of such goods or products has been relinquished to others.

(2) operations by or on behalf of the named insured or reliance upon a representation or warranty made at any time with respect thereto, but only if the personal injury or property damage occurs after such operations have been completed or abandoned and occurs away from premises owned by or rented to the named insured. Operations include materials, parts or equipment furnished in connection therewith. Operations shall be deemed completed at the earliest of the following times:

- (a) when all operations to be performed by or on behalf of the named insured under the contract have been completed, or
- (b) when all operations to be performed by or on behalf of the named insured at the site of the operations have been completed, or
- (c) when that portion of the work out of which the personal injury or property damage arises has been put to its intended use by any person or organization other than another contractor or subcontractor engaged in performing operations for a principal as a part of the same project.

Operations which may require further service or maintenance work, of correction, repair or replacement because of any defect or deficiency, but which are otherwise complete, shall be deemed completed.

Completed Operations does not include personal injury or property damage arising out of:

- (a) operations in connection with the transportation of property, unless the personal injury or property damage arises out of a condition in or on a vehicle created by the loading or unloading thereof, or
- (b) the existence of tools, uninstalled equipment or abandoned or unused materials, or
- (c) operations for which the classification stated in the underlying insurance specifies "including completed operations."

"PROPERTY DAMAGE" means

- (1) physical injury to or destruction of tangible property which occurs during the policy period, including the loss of use thereof at any time resulting therefrom, or
- (2) loss of use of tangible property which has not been physically injured or destroyed provided such loss of use is caused by an occurrence during the policy period.

"RETAINED LIMIT" is the amount, stated as such in the declarations, of ultimate net loss resulting from any one occurrence to be retained by the insured if the insurance afforded by the underlying insurance is inapplicable to such occurrence.

"UNDERLYING LIMIT" means

- (1) the amount of the applicable limits of liability of the underlying insurance as stated in the schedule of underlying insurance, less the amount, if any, by which an aggregate limit of such insurance has been reduced by payment of loss; and
- (2) in addition to the amount applicable in paragraph (1), the amount of any other valid and collectible insurance available to the insured, whether such other insurance is stated to be primary, contributing, excess or contingent (except insurance purchased to apply in excess of the sum of underlying limits described in paragraph (1), or the retained limit, and the limit of liability hereunder); or
- (3) if the insurance afforded by the underlying insurance policies stated in the schedule of underlying insurance is inapplicable to the occurrence, the amount stated in the declarations as the retained limit, or the amount of other insurance stated in paragraph (2), whichever is greater.

The limits of liability of any underlying insurance policy stated in the schedule of underlying insurance shall be deemed applicable irrespective of (a) any defense which the underlying insurer may assert because of the insured's failure to comply with any condition of the policy subsequent to an occurrence, or (b) the inability of the underlying insurer to pay by reason of bankruptcy or insolvency.

"ULTIMATE NET LOSS" means the total of the following sums arising with respect to each occurrence to which this policy applies:

- (1) all sums which any insured, or any organization as his insurer, or both, become legally obligated to pay as damages, whether by reason of adjudication or settlement, because of personal injury, property damage or advertising liability; and
- (2) all expenses incurred by an insured in the investigation, negotiation, settlement and defense of any claim or suit seeking such damages, excluding only (a) the salaries of the insured's regular employees, (b) office expenses of the insured, and (c) all expense included in other valid and collectible insurance.

VI. EXCLUSIONS.

This policy does not apply:

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- (a) to any obligation for which the insured or any carrier as his insurer may be held liable under any workmen's compensation, unemployment compensation or disability benefits law, or under any similar law;
- (b) to any employee as an insured with respect to personal injury to another employee of the same employer injured in the course of his employment; but this exclusion shall not apply to personal injury with respect to which insurance is afforded such insured by underlying insurance;
- (c) to liability arising out of the ownership, maintenance, operation, use, loading or unloading of
 - (1) aircraft owned by or chartered without crew by or on behalf of the named insured, or
 - (2) watercraft over 50 feet in length, if the occurrence takes place away from premises owned by, rented to or controlled by the named insured;

but this exclusion (c) shall not apply to liability for personal injury to any employee of the insured arising out of and in the course of his employment by the insured, unless such liability is excluded under exclusion (a) above, or liability arising out of operations performed by independent contractors;

- (d) to property damage to
 - (1) goods or products (including any container thereof) manufactured, sold, handled or distributed by the named insured, or by others trading under his name, or premises alienated by the named insured, arising out of such goods, products or premises or any part of such goods, products or premises;
 - (2) work performed by or on behalf of the named insured arising out of the work or any portion thereof, or out of materials, parts or equipment furnished in connection therewith;
- (e) to advertising liability arising out of
 - (1) failure of performance of contract, other than the unauthorized appropriation of ideas based upon alleged breach of an implied contract;
 - (2) personal injury or property damage;
 - (3) infringement of trademark, service mark or trade name, other than titles or slogans, by use thereof on or in connection with goods or services sold, offered for sale or advertised;
 - (4) incorrect description, or mistake in advertised price of goods or products sold, offered for sale or advertised;
- (f) to such part of any damages or expense which represents the cost of inspecting, repairing, replacing, removing, recovering, withdrawing from use or loss of use of, because of any known or suspected defect or deficiency therein, any
 - (1) goods or products or any part thereof (including any container) manufactured, sold, handled or distributed by the named insured, or by others trading under his name; or
 - (2) work completed by or for the named insured; or
 - (3) other property of which such goods, products or work completed are a component part or ingredient;
- (g) to loss of use of tangible property which has not been physically injured or destroyed resulting from
 - (1) a delay in or lack of performance by or on behalf of the named insured of any contract or agreement, or
 - (2) the failure of the named insured's products or work performed by or on behalf of the named insured to meet the level of performance, quality, fitness or durability warranted or represented by the named insured;

but this exclusion does not apply to loss of use of other tangible property resulting from the sudden and accidental physical injury to or destruction of the named insured's products or work performed by or on behalf of the named insured after such products or work have been put to use by any person or organization other than an insured;

- (h) to personal injury or property damage arising out of the discharge, dispersal, release or escape of smoke, vapors, soot, fumes, acids, alkalis, toxic chemicals, liquids or gases, waste materials or other irritants, contaminants or pollutants into or upon land, the atmosphere or any water course or body of water but this exclusion does not apply if such discharge, dispersal, release or escape is sudden and accidental;
- (i) except with respect to occurrences taking place in the United States of America, its territories or possessions, or Canada, to any liability of the insured directly or indirectly occasioned by, happening through or in consequence of war, invasion, acts of foreign enemies, hostilities (whether war be declared or not), civil war, rebellion, revolution, insurrection, military or usurped power or confiscation or nationalization or requisition or destruction of or damage to property by or under the order of any government or public or local authority;
- (j) to personal injury or property damage;
- (1) with respect to which an insured under this policy is also an insured under a nuclear energy liability policy issued by Nuclear Energy Liability Insurance Association, Mutual Atomic Energy Liability Underwriters or Nuclear Insurance Association of Canada, or would be an insured under any such policy but for its termination upon exhaustion of its limit of liability; or
- (2) resulting from the hazardous properties or nuclear material and with respect to which
- (a) any person or organization is required to maintain financial protection pursuant to the Atomic Energy Act of 1954 or any law amendatory thereof, or
- (b) the insured is, or had this policy not been issued would be entitled to indemnity from the United States of America, or any agency thereof, with any person or organization;
- (3) resulting from the hazardous properties of nuclear material, it
- (a) the nuclear material is at any nuclear facility owned by, or operated by or on behalf of an insured or has been discharged or dispersed therefrom;
- (b) the nuclear material is contained in spent fuel or waste at any time possessed, handled, used, processed, stored, transported or disposed of by or on behalf of an insured; or
- (c) the personal injury or property damage arises out of the furnishing by an insured of services, materials, parts or equipment in connection with the planning, construction, maintenance, operation or use of any nuclear facility, but if such facility is located within the United States of America, its territories or possessions or Canada, this exclusion (3) (c) applies only to property damage to such nuclear facility and any property thereat;

provided that the words property damage include all forms of radioactive contamination of property.

As used in this exclusion:

"hazardous properties" include radioactive, toxic or explosive properties;

"nuclear material" means source material, special nuclear material or by-product material;

"source material", "special nuclear material", and "by-product material" have the meanings given them in the Atomic Energy Act of 1954 or in any law amendatory thereof;

"spent fuel" means any fuel element or fuel component, solid or liquid, which has been used or exposed to radiation in a nuclear reactor;

"waste" means any waste material containing by-product material and resulting from the operation by any person or organization of any nuclear facility included within the definition of "nuclear facility" under paragraph (1) or (2) thereof;

"nuclear facility" means

- (1) any nuclear reactor,
- (2) any equipment or device designed or used for (a) separating the isotopes of uranium or plutonium, (b) processing or utilizing spent fuel, or (c) handling, processing or packaging waste,
- (3) any equipment or device used for the processing, fabricating or alloying of special nuclear material if at any time the total amount of such material in the custody of the insured at the premises where such equipment or device is located consists of or

contains more than 25 grams of plutonium or uranium 233 or any combination thereof, or more than 250 grams of uranium 235,

- (4) any structure, basin, excavation, premises or place prepared or used for the storage or disposal of waste,

and includes the site on which any of the foregoing is located, all operations conducted on such site and all premises used for such operations;

"nuclear reactor" means any apparatus designed or used to sustain nuclear fission in a self-supporting chain reaction or to contain a critical mass of fissionable material

VII. CONDITIONS

1. **PREMIUM:** The premium for this policy shall be as stated in the declarations.
2. **INSPECTION AND AUDIT:** The company shall be permitted but not obligated to inspect the named insured's property and operations at any time. Neither the company's right to make inspections nor the making thereof nor any report thereon shall constitute an undertaking, on behalf of or for the benefit of the named insured or others, to determine or warrant that such property or operations are safe.

The company may examine and audit the named insured's books and records at any time during the policy period and extensions thereof and within three years after the final termination of this policy, as far as they relate to the subject matter of this insurance.

3. **NOTICE OF OCCURRENCE:** Whenever it appears that an occurrence is likely to involve indemnity under this policy, written notice thereof shall be given to the company or any of its authorized agents as soon as practicable. Such notice shall contain particulars sufficient to identify the insured and also reasonably obtainable information respecting the time, place and circumstances of the occurrence, the names and addresses of the injured and of available witnesses.

The insured shall give like notice of any claim made on account of such occurrence. If legal proceedings are begun the insured, when requested by the company, shall forward to it each paper thereon, or a copy thereof, received by the insured or the insured's representatives, together with copies of reports of investigations made by the insured with respect to such claim proceedings.

4. **ASSISTANCE AND COOPERATION OF THE INSURED:** Except as provided in Insuring Agreement 11 (defense settlement) the company shall not be called upon to assume charge of the settlement or defense of any claim made or proceeding instituted against the insured.

The company shall have the right and shall be given the opportunity to associate with the insured or its underlying insurers, or both, in the defense and control of any claim, suit or proceeding which involves or appears reasonably likely to involve the company and in which event the insured, such insurers and the company shall cooperate in all things in defense of such claim, suit or proceeding.

The insured shall cooperate with the underlying insurers as required by the terms of the underlying insurance and comply with all the terms and conditions thereof, and shall enforce any right of contribution or indemnity against any person or organization who may be liable to the insured because of liability with respect to which insurance is afforded under this policy of the underlying policies.

5. **APPEALS:** In the event the insured or the insured's underlying insurer elects not to appeal a judgment in excess of the underlying limit or retained limit, the company may elect to do so at its own expense, and shall be liable for the taxable costs, disbursements and interest incidental thereto, but in no event shall the liability of the company for ultimate net loss exceed the amount herein applicable for any one occurrence plus the taxable costs, disbursements and interest incidental to such appeal.
6. **LOSS PAYABLE:** The company's liability under this policy with respect to any occurrence shall not attach until the amount of the applicable underlying limit has been paid by or on behalf of the insured, or the amount of the retained limit has been paid by the insured on account of such occurrence.

The insured shall make claim for any loss under this policy within twelve (12) months after (a) the insured shall have paid ultimate net loss in excess of the underlying limit or retained limit with respect to any occurrence, or (b), the insured's obligation to pay such amounts shall have been finally determined either by judgment against the insured after actual trial or by written agreement of the insured, the claimant and the company.

All losses covered by this policy shall be due and payable by the company within 30 days after they are respectively claimed and proven in accordance with the terms of this policy.

7. **BANKRUPTCY OR INSOLVENCY:** Bankruptcy or insolvency of the insured shall not relieve the company of any of its obligations hereunder.

8. **SUBROGATION:** In the event of any payment under this policy, the company shall participate with the insured and any underlying insurer in the exercise of all the insured's rights of recovery against any person or organization liable therefor. Recoveries shall be applied first to reimburse any interest (including the insured) that may have paid any amount, with respect to liability in excess of the limit of the company's liability hereunder; then to reimburse the company up to the amount paid hereunder; and lastly to reimburse such interests (including the insured) of whom this insurance is excess, as are entitled to claim the residue, if any. Reasonable expenses incurred in the exercise of rights of recovery shall be apportioned among all interests on the ratio of their respective losses for which recovery is sought.
9. **CHANGES:** Notice to or knowledge possessed by any agent or by any other person shall not effect a waiver or a change in any part of this policy not estop the company from asserting any rights under the terms of this policy; nor shall the terms of this policy be waived or changed, except by endorsement issued to form a part of this policy, signed by an authorized representative of the company.
10. **ASSIGNMENT:** Assignment of interest under this policy shall not bind the company until its consent is endorsed hereon.
11. **MAINTENANCE OF UNDERLYING INSURANCE:** Each policy described in the schedule of underlying insurance shall be maintained in full effect during the currency of this policy, except for any reduction of the aggregate limits contained therein solely by payment of claims arising out of occurrences taking place during the period of this policy. Failure of the named insured to comply with the foregoing shall not invalidate this policy but in the event of such failure, the company shall be liable only to the extent that it would have been liable had the named insured complied therewith.

Upon notice that any aggregate limit of liability under any policy of underlying insurance has been exhausted the named insured shall immediately make all reasonable efforts to reinstate such limits.

The named insured shall give the company written notice as soon as practicable of any change in the scope of coverage or in the amount of limits of insurance under any underlying insurance and of the termination of any coverage or exhaustion of aggregate limits of any underlying insurer's liability.

12. **CANCELLATION:** The policy may be cancelled by the named insured by surrender thereof to the company or by any of its authorized agents or by mailing to the company written notice stating when thereafter the cancellation shall be effective. This policy may be cancelled by the company by mailing to the named insured first named in the declarations at the address shown in this policy written notice stating when not less than thirty days thereafter such cancellation shall be effective. The mailing of notice as aforesaid shall be sufficient proof of notice. The effective date of cancellation stated in the notice shall become the end of the policy period. Delivery of such written notice either by the named insured or by the company shall be equivalent to mailing.

If the named insured cancels, earned premium shall be computed in accordance with the customary short rate tables and procedure. If the company cancels, earned premium shall be computed pro rata. Premium adjustment may be made either at the time cancellation is effected or as soon as practicable thereafter but payment or tender of unearned premium is not a condition of cancellation.

If this policy insures more than one named insured, cancellation may be effected by the first of such named insureds as named in the declarations for the account of all insureds; and notice of cancellation by the company to such first named insured shall be notice to all interests therein. Payment of any unearned premium to such first named insured shall be for the account of all interests therein.

13. **DECLARATIONS:** By acceptance of this policy the named insured agrees that the statements in the application and the declarations, and in any subsequent notice relating to underlying insurance are its agreements and representations, that this policy is issued and continued in reliance upon the truth of such representations and that this policy embodies all agreements existing between the named insured and the company or any of its agents relating to this insurance.

In Witness hereof, Mutual of Enumclaw Insurance Company, has caused this policy to be signed by its President and Secretary, but the same shall not be binding unless countersigned on the declarations page by a duly authorized agent of the company.

Ernie Oschwald

SECRETARY

Gene P. Schmidt

PRESIDENT

**BROAD FORM PROPERTY DAMAGE
INCLUDING COMPLETED OPERATIONS**

The exclusions of this policy relating to Property Damage are replaced by the following exclusion:

A. To Property Damage:

- 1. To property owned or occupied by or rented to the Insured or, except with respect to the use of elevators, to property held by the Insured for sale or entrusted to the Insured for storage or safekeeping.
- 2. Except with respect to liability under a written sidetrack agreement or the use of elevators to:
 - (a) property while on premises owned by or rented to the Insured for the purpose of having operations performed on such property by or on behalf of the Insured,
 - (b) tools, or equipment while being used by the Insured in performing his operations,
 - (c) property in the custody of the insured which is to be installed, erected or used in construction by the Insured,
 - (d) that particular part of any property, not on premises owned by or rented to the Insured,
 - (1) upon which operations are being performed by or on behalf of the Insured at the time of the Property Damage arising out of such operations, or
 - (2) out of which any Property Damage arises, or
 - (3) the restoration, repair or replacement of which has been made or is necessary by reason of faulty workmanship thereon by or on behalf of the insured;

B. With respect to the COMPLETED OPERATIONS HAZARD to Property Damage to work performed by the Named Insured arising out of the work or any portion thereof, or out of materials, parts or equipment furnished in connection therewith.

The insurance afforded by this endorsement shall be excess insurance over any valid and collectible property insurance (including any deductible portion thereof) available to the Insured, such as but not limited to Fire and Extended Coverage, Builder's Risk Coverage or Installation Risk Coverage.

Appendix B

Law Offices of

HACKETT, BEECHER & HART

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Of Counsel
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* Also Admitted in
California

November 12, 2003

Richard T. Beal, Jr.
Stanislaw Ashbaugh
701 5th Avenue, Suite 4400
Seattle, WA 98104

RE: Weathersfield; Barrington Condominiums; Red Oak Condominiums; Mill
Creek Court Condominiums and Gold Leaf Apartments

Mutual of Enumclaw insured:

Before 11/1/00: Sundquist Homes Inc. & Larry J. &
Diane Y. Sundquist & Clifford & Laura Sundquist
DBA: 44th West Partnership;

After 11/1/00 – Sundquist Homes, Inc.

Mutual of Enumclaw Policy Numbers: PK 57984 and PK 83205

Dear Rick:

ACCEPTANCE OF TENDER/RESERVATION OF RIGHTS

Mutual of Enumclaw has accepted the tender of defense for Sundquist Homes, Inc. and Larry Sundquist and his wife in the claims brought by the owners of the Sundquist projects listed above. I understand Jeff Frank has been appointed to defend in Weathersfield, Barrington and Mill Creek Court, the claims that have resulted in lawsuits. The tender has been accepted subject to the reservation of rights outlined below.

Mutual of Enumclaw issued two policies, PK 57984 that ran from 2/1/93 until 2/1/99 and PK 83205 from 2/1/99 until 2/1/02. The named insured included the Sundquists and Sundquist Homes, Inc. as members of a partnership until 11/1/00 when the named

FULLIRIT D

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insured was amended to Sundquist Homes, Inc. One of the benefits provided under the policy is that the company will appoint a lawyer to represent your clients in these actions or help with the cost of a lawyer appointed by another insurer of your clients. The obligation to pay damages assessed against your clients and to provide them with a lawyer to defend the actions is contingent upon the existence of coverage in the policy for the claims that have been made. As pointed out below, there are limitations on the coverage available under the policy.

As a result of the limitations of your clients' insurance, it is vitally important to notify every insurance carrier with whom they have liability coverage in order for them to have the maximum insurance protection. Because claims in construction defect cases often arise several years after the completion of the project, it is common for the parties involved in the project to have been insured by more than one insurance company between the time the project began and the time the claim was brought. All of your clients' insurance companies are likely to have an obligation to pay their claims and provide their defense. In order to have the maximum protection your clients must immediately notify each of these companies.

During some of the potentially applicable years, the Mutual of Enumclaw policy was issued to the 44th Street Partnership comprised of Sundquist Homes, Inc. and several members of the Sundquist family. For these years any coverage would be limited to the projects in which the Partnership was involved.

I note that Larry Sundquist and his wife are named defendants in the Mill Creek Court case and that Weathersfield is reserving a number of John and Jane Does suggesting the Sundquists may later be brought into that action. It appears that coverage for Mr. and Mrs. Sundquist could be available if they were a partner in a covered partnership facing allegations of liability as a partner, or the spouse of a partner with respect to the conduct of partnership business, or if the named insured is a corporation, if they were an executive officer, director, or stockholder while acting within the scope of their duties for the corporation. (L 6394a (Ed. 1 -73) at II Persons Insured.(b) and (c); LE 18 (03 98) and LE 18 (03 83) at IX). In addition, subject to certain exceptions, the Sundquists may be covered for acting as an employee of the named insured while within the scope of the employee's duties. (LE 18 (03 83) and LE 18 (03 98) at IX). The Umbrella Policy provides similar, but more limited coverage. (UP 2, IV). If, on the other hand, Mr. or Mrs. Sundquist was acting as an individual, as is apparently alleged in the Mill Creek Court case, there may not be coverage for them.

The claims against your clients are outlined in the complaints brought by the three homeowners associations. This letter may refer to those allegations, but in doing so I do

not make the assumption that these allegations are correct. In general all of the claims, including those in which there is no lawsuit, involve allegations that defective construction allowed water leaks causing additional damage. The company will investigate these claims and your clients' appointed lawyer will vigorously defend them. We share the mutual hope that these claims can be successfully defended.

I am enclosing eight documents; one entitled "Comprehensive General Liability Insurance" L 6394a (Ed. 1-73), the second and third entitled "Broad Form Extended Liability Endorsement," LE 18 (03 83) effective until 2/1/99 and LE 18 (03 98) effective after that date. The fourth is "Special Multi-Peril Policy Conditions and Definitions" MP 00 90 (Ed. 07 77). A Cross Liability endorsement is the fifth document. These documents are part of the Comprehensive General Liability Policy. I am also enclosing Forms UP-2, UMB 2055 9/88 and UMB 3011 9/88 a portion of the Umbrella Policy.

Both of these policies are designed to pay damages arising from "property damage" caused by an "occurrence" during the policy period. (CGL First Paragraph, Section I, and Definitions on Page 6 MP 00 90 (Ed. 07 77), Umbrella, Section I Coverage and Section V., Other Definitions): If damage has progressively worsened over time, it would be thought to be caused by a single "occurrence." To the extent damage caused by the insureds may have occurred during any policy period, the occurrence limits for the period are available to pay covered claims for that period unless claims against Sundquist reduce the amount available or unless an insured became aware of the potential claim before the policy period began.

Mutual of Enumclaw's CGL Policy is intended to provide coverage for casualty loss. Casualty loss is unpredictable, potentially unlimited liability that can arise from accidentally causing injury to other persons or their property. Normal business risks are the responsibility of the business owner, and not the insurance company. Normal business risks are the usual, frequent, or predictable consequences of doing business which business management can and should control. These normal business risks are excluded from coverage because the general liability policy is not intended to guarantee the quality of the business' workmanship, product, or work.

Because this is a policy designed to cover accidental "property damage" claims, contract claims are not usually covered. Agreements are covered only if they meet the definition of "incidental contract" in the CGL Policy, or a "liability assumed under contract" in the Umbrella Policy. (CGL Policy: L 6394a (Ed. 1-73) I, Coverage A and B, Exclusion (a) and definitions on Page 6 of MP 00 90 (Ed. 07 77); Umbrella Policy: UP2, I Coverage (b)).

The claims arising from a contractor's work often imply damage of two different types: damage to the work, product, or property of others; as well as damage to the contractor's own work or product. These two types of damage are treated differently by liability policies. Liability insurance policies are designed to focus on claims that the contractor has damaged another person's property, and are not designed to operate as a performance bond to assure the quality of the contractor's own work or product. As a result, the policy excludes damage to an insured's "products," "premises alienated" by an insured, an insured's "work," property from which "property damage arises" or which must be repaired because of an insured's "faulty workmanship," as well as the loss of use of undamaged property caused by an insured's failure to perform, or its work or product to meet required standards. (CGL Exclusions (l), (m), (n) and endorsements LE 18 (03 83) and LE 18 (03 98) at V). Because the policy is designed to pay for certain types of your clients' liability, damage to property they own is not covered. (LE 18 (03 83) and LE 18 (03 98) at V.) The exclusions are designed to operate whether the damage occurs during work on the project or after it is completed. Because coverage is provided for "property damage" a claim against your clients for lawyers' fees or litigation costs is not covered.

The Umbrella Policy is designed to supplement the General Liability Policy by indemnifying your clients for an "ultimate net loss" for "property damage" liability caused by an "occurrence" which exceeds the coverage provided by the General Liability Policy or the "retained limit," if it is applicable. ("Ultimate Net Loss," "occurrence," "property damage," "Retained Limit," in Section V; and Section I Coverage of the Umbrella Form).

Like the General Liability Policy, the Umbrella Policy coverage is subject to exclusions. The Umbrella Policy will not pay for the cost of damage to your clients' own work or products, or products they sold; damage caused by their "faulty workmanship" (Section VI (d), (f) and forms UMB 2055 9/88 and UMB 3011 9/88), or for the loss of use of undamaged property caused by your clients' delay, failure to perform a contract, or failure of their products or work to meet the standards represented or warranted. (Section VI (g)). Damage must occur during the policy period to be covered. Claims for lawyer's fees and other litigation costs are not covered because they are not "property damage."

One of the claims alleges a violation of the Consumer Protection Act. This claim may be based on an allegation of intentional deception, as are many of these claims. If that is the case, this claim is not covered by your policy. Intentional damage is excluded from coverage: (CGL Policy: Definition of "Occurrence" P. 6 MP 00 90 (Ed. 07 77); Umbrella Policy: V. Other Definitions, definition of "occurrence"). Even if the Consumer Protection claim is not based on an accusation of intentional injury, it is not

covered. This is because the violation is almost certain to cause purely economic damage rather than property damage as defined in the policy. (CGL Policy, P. 6 MP 00 90 (07 77) "property damage"; Umbrella Policy, Section V. "property damage"). If you have information suggesting this is factually incorrect please notify me. Similarly, allegations of misrepresentation or fraud would not be covered for the same reasons.

Under the Mutual of Enumclaw policy, an insured has duties to the insurance company that must be satisfied in order to be eligible for benefits under the policy. Your clients must provide specified information and cooperate both with their defense and with the company's effort to sort out coverage issues. (CGL: MP 00 90 (Ed. 07 77) Page 4, Paragraphs 4 and 5; Umbrella UP2, VII Conditions, Paragraphs 3 and 4). The failure to adequately satisfy these duties can result in a reduction of or a denial of coverage.

Mutual of Enumclaw has appointed a lawyer to defend your clients. However, this lawyer would be unable to represent your clients on issues relating to insurance coverage. Your clients may wish to consult you if they have concerns about the company's position on coverage or if claims in excess of the policy limits are made.

Construction defect cases are almost always factually very complex. Commonly, some of the claims made against an insured will be covered by a liability policy, however, as you can see from the nature of the exclusions, it is also common for portions of the claim to be excluded from coverage. Occasionally construction defect claims only affect damage excluded from insurance coverage. Mutual of Enumclaw will investigate this case and try to distinguish between claims that are covered and those that are not.

While this investigation is pending, in order to determine its obligations under the policy without prejudicing your clients, Mutual of Enumclaw is providing your clients' defense in the actions under a full reservation of the right to later deny coverage, the obligation to pay, and the obligation to defend. Mutual of Enumclaw will only pay for covered damages and may withdraw your clients' defense should the investigation determine there is no coverage under the policy. Because the company is reserving its rights, you and your clients should not interpret the actions of anyone representing the company as a waiver of any rights under the policy unless you or your clients are specifically notified that the company is waiving its rights. In the meantime, your clients will be vigorously defended in the actions and will continue to be unless a failure of coverage is discovered.

Please feel free to contact me if you have questions about coverage.

DECLARATORY JUDGMENT ACTION

There are a number of significant coverage issues presented by these policies and the claims that have been brought. Mutual of Enumclaw intends to commence a declaratory judgment action in order to get court guidance on these issues. In the meantime the company will continue to provide your clients' defense at least until these issues are resolved.

Sincerely,

HACKETT, BEECHER & HART



David R. Collins

DRC:lv

enclosures: L 6394a., LE 18 (03 83), LE 18 (03 98), MP 00 90 (Ed. 07 77), UMB
2055 9/88, UMB 3011 9/88 and Cross Liability Endorsement

cc: Larry Beck, Mutual of Enumclaw
Jeff Frank

Appendix D

**APPENDIX TO PLAINTIFF'S REPLY
PARTIAL LIST OF INSTANCES OF MOE'S BAD FAITH CONDUCT**

No.	Bad Faith Conduct	Consider Insured's Interests?	WAC 284-30-	Other Bad Faith
1.	Failing to send a reservation of rights letter until November 2003, after the ER 408 Agreement had been entered into and the parties had committed to mediation. (Notice of Red Oaks claim was first provided to MOE on February 7, 2003. Ex. 1 at 7.)	No	330(1), (2), (5), 360, 370, 380 ²	
2.	Asserting it has no duty to investigate reasonableness of settlement in reservation of rights defense unless coverage is clear.	No	330(3), (4), 370	Violates <i>Smith v. Safeco factors</i> , <i>Truck Exchange v. Century</i> , <i>Tank mandates</i> thorough investigation into the cause of the claim and the nature and severity of damages; <i>Besel</i> estoppel permitted for failure to investigate.
3.	Failure of MOE's coverage claims handlers to conduct any investigation into facts of the Red Oaks claim prior to settlement of claim. Compare Ex. 2 to Collins Decl. at 3 (" <i>The company will investigate these claims and your clients' appointed lawyer will vigorously defend them.</i> ") with Ex. 2 at 30-31, 34-35 (Mr. Beck testified he never investigated the claim) (emphasis added).	No	330(3), (4), 370, 380	Violates <i>Smith v. Safeco factors</i> , <i>Tank mandates</i> thorough investigation into the cause of the claim and the nature and severity of damages; <i>Besel</i> estoppel permitted for failure to investigate.
4.	Failure to inform the insured of the arguments it was making in <i>Archer</i> . See	No		<i>Tank</i> failure to inform

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	Exs. 1 and 2 to Collins Decl. (no reference to entire development or condominium being "your work" or "your product").			insured of all developments relevant to coverage
5.	Failure to cite to <i>Archer</i> decision in correspondence with insured after <i>Archer</i> was decided on August 1, 2003.	No		<i>Tank</i> failure to inform insured of all developments relevant to coverage
6.	Failing to consider whether aggregate total of claims under policies would potentially exceed limits before deciding it would not engage in settlement discussions on Red Oaks claim.	No	330(4), 370	<i>Truck Exchange v. Century</i> , <i>Besel</i> estoppel permitted for failure to investigate
7.	Attempting to intervene in the arbitration between the insured and the insured's adversary on March 10, 2004, "in order to gather information that will impact the coverage analysis."	No		<i>Tank</i> mandates thorough investigation into the cause of the claim and the nature and severity of damages, while being mindful of the conflict of interest that exists.
8.	Suing insured and insured's adversary in same declaratory judgment lawsuit on March 3, 2004.	No		
9.	Refusing to determine reasonableness of settlement because of expressed concern, as Court of Appeals noted, that MOE would be "potentially exposing itself to liability." Ignored insured's concern with expense of having to litigate to Court of Appeals and failed at any previous time to inform insured of its failure to investigate.	No	370, 380	<i>Besel</i> estoppel permitted for failure to investigate
10.	Representing to the Court of Appeals that the reason it refrained from participating in the reasonableness hearing concerning	No	330(1), 370, 380(3)	

**APPENDIX TO PLAINTIFF'S REPLY
PARTIAL LIST OF INSTANCES OF MOE'S BAD FAITH CONDUCT**

	the extent of plaintiff's damages was that "an insurer must avoid litigating issues which might establish the insured's liability, prejudicing the insured's ability to defend the underlying action," but then conceding that MOE sought to intervene in the arbitration for the specific purpose of gathering information "concerning damages that had been identified to the homeowners' association and how those damages came about." Ex. 2 at 26-27.			
11.	Failing to set or consider a deadline for asserting a counterclaim against the insured in the pending declaratory judgment action. Ex. 2 at 16.	No	330(3)	
12.	Waiting until March 1, 2004 to inform insured that there would be no settlement authority at the March 4, 2004 mediation, even though the mediation had been scheduled since September 18, 2003 (date parties met to discuss ER 408 Agreement). See Ex. 8.	No	330(2)	<i>Tank failure to inform insured of all developments relevant to coverage and settlement.</i>
13.	Failing to ask insured's defense counsel whether information being provided to MOE could be used for coverage determination and determination of reasonableness of settlement before objecting to settlement at trial court level and before appealing to Court of Appeals. See Ex. 12 at 36-38.	No	330(3), 370	<i>Besel estoppel permitted for failure to investigate</i>
14.	Failing to inform the insured, the trial court in the <i>Red Oaks</i> lawsuit, and the Court of Appeals that its claims handler had already determined the reasonableness of the settlement demand.	No	330(1), (11)	
15.	Failing to establish guidelines for how claims should be handled where defense and coverage issues are segregated, so as to ensure that policyholder's interests are protected and investigation proceeds in timely fashion.	No	330(3), 370	
16.	Funding under policy's duty to indemnify without reserving right to later deny coverage (plaintiff's attorney fees and costs of experts)	No	330(9)	<i>Tank failure to inform insured of all developments relevant to</i>

**APPENDIX TO PLAINTIFF'S REPLY
PARTIAL LIST OF INSTANCES OF MOE'S BAD FAITH CONDUCT**

				coverage
17.	Allowing ER 408 Agreement to be executed without stating that there would be no coverage under policy, even though Red Oaks would later be able to use whatever experts determined in later litigation.	No	380	
18.	Failing to deny coverage unequivocally prior to September March 1, 2004, even though MOE now argues that there was "no coverage under the Sundquist's liability policy for property damage to the Sundquist's own work" – the entire condominium. Opposition at 2-3.	No	380	<i>Tank failure to inform insured of all developments relevant to coverage</i>
19.	Failing to settle pursuant to ER 408 Agreement, even though MOE found settlement data reasonable and recognized that its insured would automatically face greater exposure (effect of plaintiff's contingent fee agreement and plaintiff's entitlement to using expert work product).	No		<i>Violates Smith v. Safeco factors, Tyler, Truck Exchange v. Century</i>
20.	Failing to seek a declaratory judgment immediately after assuming the defense under a reservation of rights.	No		<i>Truck Exchange v. Vanport method for resolving whether duty to defend exists during defense</i>
21.	Pursuant to the ER 408 Agreement, agreeing to pay: 1) 100% of costs of mediator; 2) Red Oaks' counsel's attorney fees; and 3) costs of joint investigators, who could later be used by Red Oaks, without reserving rights to deny coverage or seek reimbursement, in the event there was no coverage under the policies.	No	380	
22.	Failing to keep any record of September 28, 2003 meeting with insured, where MOE now claims coverage was denied and funding of Red Oaks claim discussed. <i>But see Ex. 1 at 22-24.</i>	No	340	
23.	Failing to keep any record of decision to approve ER 408 agreement and to pay	No	340	

**APPENDIX TO PLAINTIFF'S REPLY
PARTIAL LIST (INSTANCES OF MOE'S BAD FAI CONDUCT**

	plaintiff's costs under duty to indemnify.			
24.	Failing to keep any record of decision to refuse to authorize settlement.	No	340	
25.	Asserting currently that MOE denied coverage on the Red Oaks claim prior to March 1, 2004, even though there is no written communication denying coverage, no written notation in the claim file, and no MOE witness who has testified to denying coverage on Red Oaks claim prior to March 1, 2004.	No	330(1), 380(1), (2)	<i>Tank failure to inform insured of all developments relevant to coverage</i>
26.	Failing to respond to defense counsel's letter forwarding January 12, 2004 letter from mediator, in which mediator states that "persons with decision making authority must actively participate" in mediation. Ex. 10	No	340, 330(2)	<i>Tank failure to inform insured of matters relevant to settlement</i>