

Supreme Court No. 80937-2

SUPREME COURT
OF THE STATE OF WASHINGTON

MUTUAL OF ENUMCLAW INSURANCE COMPANY,

Respondent,

v.

RED OAKS CONDOMINIUM OWNERS ASSOCIATION,
a Washington non-profit corporation,

Petitioner.

RESPONDENT'S SUPPLEMENTAL BRIEF

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I. Supplemental Statement of Issues.

- a. Should the Court affirm the Court of Appeals determination that Mutual of Enumclaw's duty of good faith and fair dealing did not include an obligation to settle Red Oaks' claim in the circumstance of this case?
- b. Does the "Work" exclusion prevent coverage for Red Oaks' claims in this case?
- c. Does the "Faulty Workmanship" exclusion independently prevent coverage for Red Oaks claims in this case?
- d. Do Red Oaks' Bad Faith allegations fail as a matter of law?
- e. Do Red Oaks' Consumer Protection Act allegations fail as a matter of law?

II. Introduction.

As the Court is now aware, this is an insurance coverage case between Red Oaks Condominium Owners Association ("Red Oaks") and Mutual of Enumclaw Insurance Company ("Mutual of Enumclaw"). Red Oaks alleged claims against the developer and general contractor of the Red Oaks Condominiums, Sundquist Holdings, Inc. ("Sundquist"), for a number of construction defects. Sundquist was insured by Mutual of Enumclaw.

Red Oaks and Sundquist settled their contentions, with Sundquist agreeing to allow a stipulated judgment be entered against it, and Red Oaks covenanting not to execute on that judgment. *Red Oaks COA v.*

Sundquist Homes, Inc., 128 Wash. App. 317, 320, 116 P.3d 404 (2005). Sundquist assigned to Red Oaks all of its rights vis-à-vis Mutual of Enumclaw. *Id.* In this lawsuit, Mutual of Enumclaw asserts that policy exclusions bar coverage. Red Oaks, as Sundquist's assignee, asserts that the policy provides coverage, and that Mutual of Enumclaw handled the claim in bad faith. As the briefing before the Court bears out, there is no coverage under the policy, and Mutual of Enumclaw acted in good faith. The Court should affirm the decision to this effect from the Court of Appeals.

III. Red Oaks did not petition for review from the Court of Appeal's determination that Mutual of Enumclaw had no duty to settle Red Oaks' claim. That issue is not before the Court.

In the Court of Appeals, Red Oaks argued that Mutual of Enumclaw acted in bad faith by not settling the Red Oaks' claims at mediation. *Brief of Appellant* at 43. The Court of Appeals unequivocally rejected this argument, and Red Oaks did not petition for review of that issue. *Court of Appeals Op.* at 16. In order for an issue to be properly before this Court, it must be identified with specificity in the Petition for Review. RAP 13.7(b) limits the issues to be reviewed by this Court to those "raised in . . . the petition for review and the answer." As the Court held in *State v. Collins*, 121 Wn.2d 168, 178-179, 847 P.2d 919 (1993):

The proper method for raising an issue in a petition for review is described in RAP 13.4(c)(5), which provides that the petition for review must contain '[a] concise statement of the issues presented for review.' This court has required that the petition for review state the issues with specificity.

See also Douglas v. Freeman, 117 Wn.2d 242, 257-258, 814 P.2d (1991).

Regardless of whether this issue is properly before the Court, the Court of Appeals correctly rejected Red Oaks' theory. Red Oaks asserted that because an insurer "must refrain from engaging in any action which would demonstrate a greater concern for the insurer's monetary interest than for the insured's financial risk," Mutual of Enumclaw was obligated to fund the \$1.9 million settlement, regardless of whether the policy provided coverage. *Brief of Appellant* at 41-42. The Court of Appeals responded that an insurer that correctly defends under a reservation of rights is entitled to a judicial ruling on whether its policy provides indemnity coverage (citing *Truck Ins. Exch. v. VanPort Homes, Inc.*, 147 Wn.2d 751, 761, 58 P.3d 276 (2002); *Kirk v. Mt. Airy Ins. Co.*, 134 Wn.2d 558, 563 n.3, 951 P.2d 1124 (1998). *Court of Appeals Op.* at 16. Additionally, the Court of Appeals affirmed that an insurer has no obligation to pay claims that are not covered by its policy, citing *James E. Torina Fine Homes, Inc. v. Mut. of Enumclaw Ins. Co.*, 118 Wn. App. 12, 18, 74 P.3d 648 (2003) and *Hayden v. Mut. of Enumclaw Ins. Co.*, 141 Wn.2d 55, 1 P.3d 1167 (2000). *Id.* The Court of Appeals ruled that the

duty to give equal consideration to the insured's interests in all matters does not require an insurer to abandon its own rights under the insurance contract:

We decline to rule that an insurer's refusal to pay out a settlement negotiated by its insured, at a time when the insurer contests whether the applicable policy covers the loss, amounts to a breach of the duty of good faith, simply because the insured might eventually face greater financial liability for non-covered losses.

Id.

Red Oaks has cited not a single opinion from any jurisdiction that even suggests that an insurer's obligation of good faith and fair dealing includes the duty to waive its coverage defenses and fund a settlement that its insured elects to consummate. This Court has repeatedly ruled that defending under a reservation of rights is the legally correct way for an insurer to preserve coverage defenses. *Truck Ins. Exch. v. VanPort Homes, Inc.*, 147 Wn.2d 751. That is exactly what Mutual of Enumclaw did in the case at bar, and the Court of Appeals properly rejected Red Oaks' argument¹.

¹ On appeal, Red Oaks suggested in passing that perhaps the insurer should be obligated, as a matter of good faith, to fund the settlement, then look to its insured for reimbursement in the event a court later determines that there is no coverage under the policy. *Appellant's Reply at 21-22*. No case in any jurisdiction has ever come to such a conclusion, and Red Oaks' failure to cite authority to support its assertion renders it waived. RAP 10.3(a)(6); *State v. Kilgore*, 107 Wn.App. 160, 175-76, 26 P.3d 308 (2001), *aff'd*, 147 Wn.2d 288, 53 P.3d 974 (2002); RAP 10.3(a)(6). Regardless, as a matter of public policy, adopting such a rule would create *de facto* coverage, no matter what the policy covers, for a huge range of claims where the insured does not have the financial ability to "reimburse" the insurer. A prime example of such an insured is the

IV. Policy exclusions prevent coverage for Red Oaks' claims in this case.

1. The Nature of General Liability Policies.

Because Red Oaks is arguing that Sundquist's general liability policy should cover the entire cost of repairing Sundquist's poor construction, it bears keeping in mind that the Courts of this State have repeatedly emphasized and enforced the distinction between construction performance bonds and Commercial General Liability (CGL) policies. Commercial liability policies are created to protect a commercial enterprise from "the possibility that the goods, products or work of the insured, once relinquished or completed, will cause bodily injury or damage to property other than to the product or completed work itself, and for which the insured may be found liable." *Henderson, Insurance Protection for Products Liability and Completed Operations – What Every Lawyer Should Know*, 50 Neb. L. Rev 415, 441 (1971). An insured contractor has control over the risk incurred from flaws in its work by "taking pains" to control the quality of its work and products. *Weedo, v. Stone-E-Brick, Inc.*, 81 N.J. 233, 239, 405 A.2d 788, 791 (1979). Although the contractor may become contractually liable for the failure to provide an appropriate level of quality, repairing or replacing a faulty

single-propose corporation or limited liability company that many real estate developers use to construct and sell condominiums. There is no justification for imposing this very substantial additional burden of paying uncovered claims on insurers acting in good faith.

product is a normal business expense to be borne by the contractor in order to satisfy customers. *Id.* at 239. This cost is finite, within the control of the insured, and not normally the subject of liability insurance. Requiring an insurer to cover this type of loss is like “making the insurer a sort of silent business partner subject to great risk in the economic venture without any prospects of sharing in the economic benefit.” *Toombs NJ, Inc., v. Aetna*, 404 Pa Super 471, 476, 591 A.2d 304, 306 (1991).

The risk that the contractor’s faulty work or product will injure other property or persons is another matter, however, because the potential liability is almost limitless. *Weedo v. Stone-E-Brick, Inc.*, 81 N.J. at 239 - 240. It is this risk of injury to persons and property other than the contractor’s work or product that is addressed by commercial liability policies. This Court has affirmed that this principle is the lens through which the policy should be read. *Hayden v. Mutual of Enumclaw Ins. Co.*, 141 Wash.2d 55, 1 P.3d 1167, 1172 (2000).

Despite these general rules favoring the insured, however, one overriding principle governs this case: CGL policy holders like Krause have purchased a general liability policy, not “a performance bond, product liability insurance, or malpractice insurance.” *Aetna Cas. & Sur. Co. v. M & S Indus., Inc.*, 64 Wash.App. 916, 921, 827 P.2d 321 (1992) (citing case); *see also Reliance Ins. Co. v. Mogavero*, 640 F.Supp. 84, 85 (D.Md.1986) (“**overriding principle**” in poor workmanship case was that insurer “issued a general liability policy, not a performance bond”).

Id. at 65 (emphasis added).

Mutual of Enumclaw does not, of course, challenge the precept that ambiguous policy language is interpreted in the light most favorable to the insured. But as this Court recognized in *Hayden*, that language also must be interpreted in light of the purpose of the policy, which is not to guarantee the work of the insured, but to insure against damage to *other* property.

2. *The “Work” Exclusion Prevents Coverage for Sundquist’s Work, whether performed by Sundquist Employees or Sundquist Subcontractors.*

The Court of Appeals ruled that the Work exclusion in the UMB 3011 endorsement to Sundquist’s Umbrella policy applied to prevent any indemnity obligation under the Umbrella². Red Oaks argues this was error, asserting that the Work exclusion can be read to provide coverage for liability arising out of the work of subcontractors. The Work exclusion states that there is no coverage:

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)

The only question this exclusion presents the Court is whether the Red Oaks condominiums represent work performed “by Sundquist.” As a

² The trial court ruled that there was no coverage in the underlying policy because of that policy’s “Product” exclusion. CP 702. Red Oaks did not challenge that determination on appeal.

factual matter in this case, Sundquist was the developer and general contractor that built the condominiums. The only natural use of these words in American English is that the condominiums are the work of the entity ultimately responsible for building them. Developers happily take credit for “building” high quality structures - as well they should; regardless of the fact that a subcontractor may have been entrusted with some element of the project, it is the developer that must ultimately either put its stamp of approval on that element, or pursue its rights against the subcontractor. There is simply no ambiguity when one states that the Red Oaks condominiums were the work of Sundquist. Reasonable speakers of English would not doubt that the condominiums were Sundquist’s work, even if Sundquist might have hired subcontractors to help construct them.

Washington construction law tracks perfectly with this basic principle defining the relationship between a general contractor and its work. This rule was articulated by this Court’s decision in *Honeywell, Inc. v. Babcock*, 68 Wn.2d 239, 243, 412 P.2d 511 (1966): “The general contractor [is] responsible to the owner for the satisfactory and full completion of the subcontractors’ work under the contract.”³ These

³ In addition to its plenary obligations to the owner, the general contractor also has ultimate responsibility for the safety-related condition of the site during construction. “A general contractor’s supervisory authority is per se control over the workplace, and the duty is placed upon the general contractor as a matter of law. It is the general contractor’s responsibility to furnish safety equipment or to contractually require subcontractors to

concepts have been appropriately applied to the Work exclusion in insurance policies. *Schwindt v. Underwriters at Lloyds of London*, 81 Wn. App. 293, 914 P.2d 119 (1996), *rev. den.* 130 Wn.2d 1003, 925 P.2d 989 (1996). In *Schwindt*, the Court of Appeals ruled:

[T]he named insured is the general contractor and work performed by the insured must necessarily be such work as the named insured is required to perform under the construction contract. . . . The contractor can employ subcontractors or use employees to do the work, but in the end, when the work is complete, all the work called for by the contract on the part of the contractor must be deemed to be work performed by the contractor.

Id. at 30 (citation omitted)

Because Sundquist was responsible for *all* of the work at the Red Oaks condominiums, the entire project is Sundquist's work. Red Oaks has presented *no* authority that the Work exclusion in the Umbrella Endorsement, standing alone, is ambiguous with regard to coverage for property damage caused by subcontractors. A plain reading of that exclusion precludes the coverage Red Oaks seeks.

In order to justify its assertion that there was ambiguity in the Work exclusion, Red Oaks focuses on a different (though similar) exclusion that exists in a part of the Umbrella policy that was deleted by the UMB 3011 endorsement. The inoperative exclusion, which Red Oaks

furnish adequate safety equipment relevant to their responsibilities." *Stute v. P.B.M.C., Inc.*, 114 Wn.2d 454, 464, 788 P.2d 545, 550-51 (1990).

contends creates the ambiguity, excludes property damage arising out of work performed “by or on behalf of” the named insured. CP 75. As a matter of law, the effect of using of different language in the endorsement does not change the plain meaning of the operative, endorsement-version of the exclusion, which excludes *all* of the work for which the named insured was responsible. This issue has been exhaustively addressed in Mutual of Enumclaw’s appellate brief and Answer to Petition for Review. Here, suffice to say that an exclusion deleted by endorsement cannot, by an inconsistency with an active exclusion, create an ambiguity. *Ryan v. Harrison*, 40 Wn. App. 395, 399, 699 P.2d 230 (1985).

Additionally, Red Oaks suggests that the Court of Appeals created an “unprecedented” new burden on the insured, by allegedly requiring the insured to prove an insurer’s intent to provide coverage. Red Oaks misses the mark. Either an exclusion is ambiguous or it is not; if it *is* ambiguous, it will be interpreted in the insured’s favor as a matter of hornbook insurance law. On the contrary, if the exclusion unambiguously excludes coverage, then the party seeking to alter the plain meaning of the policy language has always had the burden of proving “intention.” As this Court held in *Dwellely v. Chesterfield*, 88 Wn.2d 331, 560 P.2d 353 (1977), the party asserting a mutual intention that a policy mean something other than

what it says has the burden of proving that intention. That burden is not new, and it is not unprecedented; Red Oaks simply did not meet it.

3. *The “Faulty Workmanship” exclusion prevents coverage for Red Oaks’ claims in this case.*

a. *Mutual of Enumclaw is entitled to assert the Faulty Workmanship Exclusion.*

As a point of departure, Red Oaks has asserted that Mutual of Enumclaw is precluded from raising the applicability of the Faulty Workmanship exclusion on appeal. *Reply to Ans. To Pet. for Rev.* at 1. Red Oaks’ position is based on the fact that the trial court ruled on summary judgment that the Faulty Workmanship exclusion did not prevent coverage, and Mutual of Enumclaw struck its Notice of Cross Appeal on that issue. Mutual of Enumclaw wanted to ensure that it did not waive any rights on appeal, and thus filed a Notice of Cross Appeal. After preliminary research, Mutual of Enumclaw determined that doing so had been unnecessary, and properly withdrew its cross appeal. The reason cross appeal is unnecessary is that as the prevailing party at the trial court, Mutual of Enumclaw is asserting the Faulty Workmanship exclusion as an alternative basis for affirming the judgment, and not seeking any additional relief. The prevailing party need not cross appeal a trial court ruling if it seeks no further affirmative relief. It may argue any ground to

support a judgment supported by record. *State v. Kindsvogel*, 149 Wn.2d 477, 481, 69 P.3d 870, (2003).

b. Coverage is properly precluded under the Faulty Workmanship Exclusion.

Like the Work exclusion, the Faulty Workmanship exclusion in the Umbrella's endorsement is also designed to prevent Sundquist's policy from becoming a performance bond. The Faulty Workmanship exclusion states that there is no coverage for property damage to:

That particular part of any property . . . 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.
(CP 87)

Where the insured was the general contractor, the "particular part" on which the insured worked was the entire structure. Thus all of the particular parts of the Red Oaks condominiums that needed restoration, repair or replacement were excluded from coverage under Sundquist's policy.

Relying on its argument that Mutual of Enumclaw was precluded from asserting the Faulty Workmanship exclusion, Red Oaks has never submitted any appellate briefing on this issue. At the trial court, Red Oaks' principle argument was that some of "particular parts" that needed restoration, repair or replacement needed remediation because of faulty workmanship on other parts, and thus the exclusion did not completely

eliminate coverage. CP 803. If Sundquist had been a subcontractor working on a project, and had accidentally damaged the work of another subcontractor, then Red Oaks' argument would have force⁴; in that case, Sundquist might not have performed workmanship on the particular part of the property (the other subcontractor's work) which needed repair. The defect in applying that argument to the case at bar, however, is that Sundquist was *actually* the general contractor, and was thus responsible for the entire thing.

This point was addressed in the case of *Schwindt v. Underwriters at Lloyds of London*, 81 Wn. App. 293. In *Schwindt*, defects in the workmanship of the general contractor and its subcontractors resulted in extensive *consequential* property damage to the building. *Id.* at 295 – 296. Lloyds relied upon the Work exclusion, discussed above, when it denied coverage for the claim. The Lloyds exclusion also contained the “that particular part” language that is crucial to an interpretation of Mutual of Enumclaw's Faulty Workmanship exclusion. The Lloyds exclusion prohibited coverage:

for damage **to that particular part** of any property upon which the Assured is or has been working caused by the faulty manner in which the work has been performed. . . .

Id. at 295 (*emphasis added*).

⁴ See *Dewitt Const. Inc. v. Charter Oak Fire Ins. Co.*, 307 F.3d 1127, 1132 (9th Cir. 2002).

The assured also argued that this exclusion does not “extend to claims of bad work or bad use of material resulting in damage beyond the removal and replacement of the **particular item** of defective work.” *Id.* at 302 (*emphasis added*). This was Red Oaks’ argument below. Disagreeing, *Schwindt* found that “because this damage is still a part of the defective building itself, it falls within the policy exclusions.” *Id.* at 303-304. Thus the Faulty Work exclusion eliminated not only coverage for the poor wiring and poor waterproofing, but also the resulting consequential damage to a chiller and floor tiles (respectively). *Id.* at 304. This was so because when the insured is a general contractor, the *entire structure* is “that particular part” of property upon which the insured is working. *Id.* at 304 – 305. The Faulty Workmanship exclusion unambiguously prevents coverage for Sundquist’s liability to Red Oaks.

New York is in accord. In the case of *William Crawford, Inc. v. Travelers Ins. Co.*, 838 F. Supp. 157 (S.D.N.Y. 1993), the insured was a general contractor that was hired to remodel a large apartment. In an attempt to cause fresh plasterwork to dry correctly, the insured set up a series of fans, one of which caught fire and caused extensive damage. *Id.* The insurer asserted no coverage because of an exclusion for “*That particular part* of real property damage on which you or any contractors

or subcontractors working directly or indirectly on your behalf are performing operations.” *Id.* at 158 (*emphasis added*). The insured argued that the particular part on which it was working was a very small area, and the vast majority of the extensive fire damage to other areas in the apartment should fall within policy coverage. *Id.* The court rejected the insured’s argument, holding that because the insured was working as the general contractor, the entire apartment remodel was the “particular part” on which the insured was working. *Id.* at 159.

The case of *ACUITY v. Burd & Smith Const. Inc.* 721 N.W.2d 33, 37 (N.D. 2006) applied the same reasoning as *Schwindt*, though with a different conclusion because the insured was hired only to put a new roof on an existing building. The roof leaked, the insured was sued, and the insurer asserted the Faulty Workmanship exclusion to prevent coverage. *Id.* The court ruled that the particular part of the property on which the insured was working was *only* the roof, and water damage to parts of the structure other than the roof qualified for policy coverage. *Id.* at 40. The court’s analysis, however, is particularly instructive; the court held that the way to determine the “particular parts” on which the insured worked is to examine the scope of the insured’s responsibility for the entire structure (in that case, determined by the scope of the roofing contract). *Id.* The court noted that where the insured is responsible for the entire house, the

Faulty Workmanship exclusion applies to property damage to all parts of the house. *Id. at 42, cf. Grinnell Mut. Reinsurance Co. v. Lynne*, 686 N.W.2d 118 (N.D. 2004).

In the case at bar, Sundquist was responsible for the quality of construction of the entire Red Oaks condominium structure. Because all of the alleged property damage was damage to *that* structure, the Court should rule that the Faulty Workmanship exclusion bars coverage.

V. The Court of Appeals Correctly Affirmed Dismissal of Red Oaks' Bad Faith Claims.

The fundamental misconception upon which Red Oaks builds its bad faith argument against Mutual of Enumclaw was crystallized in one sentence in Red Oaks' Petition for Review: "Once the [factual] investigation was complete, MoE had obtained all the information it needed to determine whether Red Oaks' claims were covered by Sundquist's policy." *Pet. for Rev.* at 11. The flaw in Red Oaks reasoning is that the determination of whether the "facts" gave rise to an indemnity obligation was not Mutual of Enumclaw's to make. The question of whether the policy provided coverage was purely legal, and both parties were entitled to a judicial resolution of it. While Mutual of Enumclaw had a good faith belief that the law would support its interpretation of the policy exclusions, Mutual of Enumclaw did not bet Sundquist's defense

on this belief. Instead, Mutual of Enumclaw did exactly what this Court has instructed; it provided a defense under a reservation of rights and litigated the indemnity issue in a declaratory judgment action. *See, eg. Truck Ins. Exch. v. VanPort Homes, Inc.*, 147 Wn.2d 751. Red Oaks appears to believe that Mutual of Enumclaw was possessed of legal clairvoyance, but refused in bad faith to share its knowledge. Mutual of Enumclaw and Red Oaks, however, were in exactly the same position with respect to their ability to forecast the result of the coverage lawsuit.

Because Mutual of Enumclaw reserved its rights, Sundquist was entitled to be informed of the basis in the policy for that reservation. An insurer has the responsibility to fully inform the insured of its reasons for its reservation of rights and of developments relevant to coverage under the policy. *Tank v. State Farm Fire & Cas. Co.*, 105 Wn.2d 381, 715 P.2d 1133 (1986). As the Court of Appeals correctly ruled, Mutual of Enumclaw did exactly that, effectively reserving its rights in its November 12, 2003 letter. CP 43. Despite Red Oaks' odd instance to the contrary, this reservation *did* identify both the Work and Faulty Workmanship exclusions in the Umbrella endorsement. CP 47.

Red Oaks also claims that Mutual of Enumclaw was in bad faith because it allegedly waited until just a few days before the May 2004 mediation to inform Sundquist that Mutual of Enumclaw would not make

settlement funds available, and did not formally “deny” the claim or provide reasons for a denial. Factually, Red Oaks is mistaken. Mutual of Enumclaw informed Sundquist in its reservation of rights letter that construction defect claims occasionally are entirely outside of policy coverage, and that Mutual of Enumclaw intended to bring a declaratory judgment action for a judicial resolution of its indemnity obligation. CP 47-49. Additionally, it is undisputed that at the end of October, 2003, Mutual of Enumclaw adjuster David Michlitsch told Larry Sundquist, Sundquist’s in house counsel, and Sundquist’s coverage attorney Richard Beal, that Mutual of Enumclaw was not providing settlement authority on any of the claims against Sundquist, which included the Red Oaks claim. CP 939. Mutual of Enumclaw was both consistent in its position, and upfront with Sundquist. These actions cannot lead to liability for bad faith, and this Court should affirm the Court of Appeals rejection of Red Oaks’ bad faith claims.

VI. The Court of Appeals Correctly Affirmed the Trial Court’s Dismissal of Red Oaks’ WAC and CPA Claims.

Red Oaks’ final argument is that the Court of Appeals erred in dismissing its claims that Mutual of Enumclaw violated the WAC, and correspondingly, the Consumer Protection Act. Red Oaks’ alleges that Mutual of Enumclaw violated WAC 284-30-330(13):

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

It is undisputed that Mutual of Enumclaw did *not* deny Sundquist's claim. Instead, Mutual of Enumclaw accepted the tender under a reservation of rights and provided a full defense. As described above, the insurer's obligation when it reserves its rights is to inform the policyholder of the relevant portions of the policy that could restrict coverage. Mutual of Enumclaw met that obligation. An insurer defending under a reservation is permitted (and under some circumstances, required) to wait for an actual judgment to be entered against its insured before pursuing a declaratory judgment action on the coverage issue. *Mutual of Enumclaw Ins. Co. v. Dan Paulson Const., Inc.*, 161 Wn. 2d 903, 910, 169 P.3d 1, 5 (2007). No case has ever held, nor has any regulation established, that the insurer must issue an "interim denial" when the judgment against the insured is entered (or the insured settles), but before the declaratory judgment action has resolved. Mutual of Enumclaw did not violate WAC 284-30-330(13)⁵.

⁵ Red Oaks also asserts that this provision required Mutual of Enumclaw to provide an additional explanation of why it was not going to fund the settlement, because the proposed terms constituted an "offer of a compromise settlement." *Appellant's Reply at 21*. Aside from the fact that the reservation of rights letter already explained Mutual of Enumclaw's position, this provision addresses the scenario where an insurer offers to

Red Oaks additionally claims that Mutual of Enumclaw violated

WAC 284-30-380(1):

Within fifteen working days after receipt by the insurer of properly executed proofs of loss, the first party claimant shall be advised of the acceptance or denial of the claim by the insurer. 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. The denial must be given to the claimant in writing and the claim file of the insurer shall contain a copy of the denial.

Once again, Mutual of Enumclaw did not deny Sundquist's claim.

But it did provide the reasons for which it was reserving its rights. Mutual of Enumclaw did not violate WAC 284-30-380(1), and the Court of Appeals correctly dismissed that claim. Because the alleged WAC violations were the only basis for Red Oaks' argument that Mutual of Enumclaw violated the CPA, the CPA claims were also properly dismissed.

VII. Conclusion.

Mutual of Enumclaw respectfully requests that the Court affirm the Court of Appeals decision in this case.

compromise its coverage position, not where the insured gets an offer to settle from its opponent in the underlying case. This WAC provision is inapplicable to the case at bar.

DATED this 8th day of August, 2008.

HACKETT, BEECHER & HART

/s/ Original Signature on File
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CERTIFICATE OF SERVICE

The undersigned declares under the penalty of perjury that on Friday, August 8, 2008, she caused a copy of *Respondent's Supplemental Brief* to be served on the following counsel by e-mail, per agreement:

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/s/ Original Signature on File
Linda Voss

FILED AS ATTACHMENT TO E-MAIL