SMITH FREED & EBERHARD P.C.

WASHINGTON CASE UPDATE

case in point ...

Plaintiff Denied Two Bites at the Apple in Claim Against Insurer

From the Desk of Kyle Riley: In this case, the Washington Court of Appeals held that a party may not bring two identical lawsuits against an insurer, even when the plaintiff alleges that one of the lawsuits was a direct action against an insurer, and the other was an effort to collect on a judgment against the insurance company's insured.

Claims Pointer: In order to avoid duplicate lawsuits, courts invoke the doctrine of *res judicata*, which bars substantially similar claims. Claim splitting is not allowed in Washington, but the defense can be waived. This case shows that if a party obtains a judgment against an insured that can be garnished against the insurer, they cannot later sue the insurer for a direct action against the policy. Insurers and their attorneys should be wary of claims that appear to be identical, and preserve the defense of *res judicata* and seek dismissal when appropriate.

Berschuer Phillips Constr. Co. v. Mut. of Emunclaw Ins. Co., in the Court of Appeals of the State of Washington, Division I, No. 68259-8-I, --- P3d ----, (May 6, 2013).

In 2002, Berschauer Phillips Construction ("BP") contracted with Concrete Sciences Services of Seattle ("CSS") to stain the floors at a local middle school. The floors did not properly absorb the stain. At the time, CSS was insured by Mutual of Emunclaw ("MOE"). In 2004, BP filed a lawsuit against CSS alleging defective workmanship. CSS failed to make an appearance and BP obtained a default judgment. BP then informed MOE of the default judgment and demanded payment. MOE then moved to vacate the judgment against CSS. The trial court denied the motion and the Court of Appeals affirmed.

In 2008, BP filed a lawsuit in Thurston County against MOE, alleging negligence, breach of contract, bad faith, and breach of the Consumer Protection Act. After several procedural delays, that lawsuit was dismissed with prejudice. BP then filed a new lawsuit against MOE, this time in King County. The lawsuit alleged that CSS was insured by MOE and because BP had a default judgment against CSS (from the 2004 lawsuit); BP was entitled to collect on that judgment directly against MOE. MOE moved to dismiss, arguing that BP's claims were barred by *res judicata* and collateral estoppel. The trial court sided with MOE and dismissed BP's lawsuit. BP appealed.

Under the doctrine of *res judicata*, a party cannot bring a claim that addresses the same subject matter, cause of action, and parties as a previous action. In determining the claims filed by BP in Thurston County and, later, King County, were too similar, the Court of Appeals examined BP's theories of liability in the two cases.

The Thurston County claims, the Court noted, were based on BP's alleged right to execute on its default judgment against CSS by levying the causes of action held by CSS against MOE. On appeal, BP tried to argue that its subsequent King County lawsuit was based on its "direct right" to proceed against MOE. The Court of Appeals was not persuaded by BP's argument. The Court found that the fundamental issue in both lawsuits was the same: "whether CSS is liable for a loss covered by the MOE policy, and whether MOE had a duty under its policy to indemnify CSS." Not only was the subject matter the same, the Court held, but the parties involved were also identical. BP attempted to counter this conclusion by arguing that it had acted in a different capacity in the two lawsuits, but the Court rejected that argument. The Court held that BP acted in its own capacity against MOE and sought to advance its own interest in both lawsuits. Finally, BP argued that MOE acquiesced to the claim splitting and waived the defense of *res judicata*. The Court disagreed, finding that MOE promptly notified BP that they would seek dismissal due to BP's improper attempts to split claims amongst a variety of lawsuits. Because of these parallels, the Court dismissed BP's action.

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