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WASHINGTON DEFAULT ORDER SET ASIDE IN PART BECAUSE INSURER HAD STRONG DEFENSES BASED ON "ONGOING OPERATIONS" ENDORSEMENT, COVERAGE GRANT AND EXCLUSIONS

By: William F. Knowles and Tylor C. Laney
wknowles@cozen.com; tlaney@cozen.com

In Sacotte Construction, Inc. v. National Fire & Marine Insurance Company et al., 2008 WL 509169 (February 25, 2008) the Washington Court of Appeals held that an attorney's telephone call to opposing counsel, which was acknowledged in two contemporaneous e-mails, constituted substantial compliance with appearance requirements such that the opposing party was required to provide actual notice of its motion for default. The Court also held that the trial court should have set aside the default order because the insurer had strong defenses based on the additional insured endorsement language and other coverage defenses.

Sacotte Construction, Inc. (Sacotte) filed a motion for default judgment against National Fire & Marine Insurance Company (NFM), without notice to NFM or its coverage attorney, after NFM's attorney called Sacotte's counsel to advise that NFM would be appearing in the underlying suit alleging breach of the duty to defend. Sacotte obtained the default judgment and the trial court denied NFM's motion to vacate. NFM appealed the order denying the motion to vacate the default judgment, and the Washington Court of Appeals held that NFM was entitled to notice because it substantially complied with the appearance requirements.

The Sacotte litigation arose out of alleged construction defects at the Issaquah Ridge condominium project. In the construction defect lawsuit, the homeowners association sued the developer, who in turn sued Sacotte, the general contractor. NFM insured Bellows Construction (Bellows), a subcontractor who applied waterproof coating on the decks at the project.

After Sacotte was sued by the developer, it tendered its defense to the subcontractors' insurance companies, including NFM, claiming it was an additional insured under the policies. NFM and others did not respond to the tender. Sacotte then sued the insurance companies for failure to defend. After NFM received the summons and complaint in the failure to defend lawsuit it contacted its coverage counsel, who telephoned Sacotte's counsel to advise that NFM would be appearing in the matter shortly. Immediately thereafter, NFM's counsel sent two e-mails to NFM docu-

menting his telephone conversation with Sacotte's counsel. Significantly, NFM and Sacotte's counsel knew each other from prior cases, and in fact Sacotte's counsel involved NFM's counsel in another construction defect case that caused NFM's counsel to have a non-waivable conflict of interest in the duty to defend lawsuit. Meaning, NFM's counsel could not represent NFM in the Sacotte litigation.

Sacotte filed its default motion without providing notice to NFM or its coverage counsel, and then presented findings of fact, conclusions of law, and the default judgment in the ex parte department of the court. The findings, conclusions, and judgment were entered as proposed. The judgment held NFM liable for the entire project, although it had insured only the scope of work performed by Bellows. The trial court denied NFM's motion to vacate the default judgment.

The Court of Appeals found several reasons to reverse the trial court's ruling. First, the Court of Appeals held that NFM was entitled to vacation of the default judgment because NFM presented evidence of a strong defense on the merits and also that its failure to appear was not willful. When considering whether to vacate a default judgment, the Washington courts consider whether the default party has shown

1. that there is substantial evidence to support at least a prima facie defense to the claim asserted,

2. that its failure to appear was occasioned by mistake, inadvertence, surprise, excusable neglect, or that there was irregularity in obtaining the judgment,

3. that the party acted with due diligence after receiving notice that the default judgment was entered, and

4. whether substantial hardship would result to the plaintiff if the judgment were set aside.

The Court concluded that NFM presented strong defenses based on the policy language, noting that "ongoing operations" would not cover any work completed prior to or after the named insured's operations on the project, damages that occurred before the policy were excluded, and the policy was excess over all other available coverage.

Second, the Court of Appeals found that NFM "substantially complied" with the appearance requirements by telephonically advising Sacotte's counsel of its intent to appear in the litigation. Under the applicable court rules, notice of a motion for default must be provided to any party who has appeared in the action for any purpose. Prior cases decided that "substantial compliance" with the appearance requirement was sufficient for notice to be provided. The Court of Appeals held that "substantial compliance can be accomplished with an informal appearance if the party shows intent to defend and acknowledges the court's jurisdiction over the matter after the summons and complaint are filed."

The Court further held that the "phone call was sufficient because it was made after the complaint was filed specifically to avoid default without notice, showing NFM's intent to defend." The Court was not persuaded by Sacotte's argument that the telephone call was ineffective because NFM's attorney had a non-waivable conflict of interest, noting instead that "when an attorney appears for a defendant, it is the defendant who has made the appearance, not the attorney."

Finally, the Court of Appeals stated that it could vacate the default judgment on equitable grounds, relying on prior cases that held "a default judgment should be set aside if the plaintiff has done something that would render enforcing the judgment inequitable." The Court concluded that Sacotte's counsel had a duty to notify NFM of the default proceedings to avoid abusing the judicial process.

The *Sacotte* decision is important because it recognizes the strength of coverage defenses typically asserted in response to construction defect additional insured claims and expands the interpretation of an "appearance" to protect parties who advise opposing counsel telephonically of their intent to appear.

Please contact William F. Knowles, wknowles@cozen.com, or Tylor C. Laney, tlaney@cozen.com, in our Seattle office (800-423-1950) if you have any questions.