

WASHINGTON SUPREME COURT HOLDS "SELECTIVE TENDER" RULE APPLIES TO BAR EQUITABLE CONTRIBUTION CLAIMS BETWEEN INSURERS, BUT "LATE TENDER" RULE APPLIES TO PERMIT SUBROGATION CLAIMS BY ONE INSURER AGAINST ANOTHER

William F. Knowles, Esquire • 206.340.1000 • wknowles@cozen.com
Matthew D. Taylor, Esquire • 206.373.7208 • mtaylor@cozen.com

In *Mutual of Enumclaw Ins. Co., et al. v. USF Ins. Co.*, ___ P.3d ___, 2008 WL 4070270 (Sept. 4, 2008), the Washington Supreme Court held that (1) the "selective tender" rule applied to bar an insurer's equitable contribution claim against an insurer that did not contribute to a settlement; but that (2) the "late tender" rule applied to permit an insurer's conventional subrogation claim against the non-contributing insurer, thus returning to the trial court the factual question of whether the non-contributing insurer was prejudiced by the late notice.

USF Insurance Company ("USF"), Mutual of Enumclaw Insurance Company ("MOE"), and Commercial Underwriters Insurance Company ("CUIC") all insured Dally Homes, Inc. ("Dally"), a homebuilder and developer, for a condominium development called Windsong Arbor. The Windsong Arbor Homeowners Association sued Dally for construction defects. On the advice of counsel, Dally declined to tender the claim to USF. Counsel felt that tender was improper because he knew of the potential suit before the USF policy inception. Dally tendered the claim to other insurers but not to USF.

Dally settled with MOE and CUIC. MOE and CUIC later brought an action for contribution and subrogation against USF. At issue in the action was whether the "selective tender" rule applied to bar MOE and CUIC's claims or whether the "late tender" rule applied to allow them. Also at issue was whether USF had shown that it was prejudiced as a matter of law by late notice of the claims. The trial court granted summary judgment to USF on both of the claims, reasoning that "selective tender" applied. The Court of Appeals reversed, holding that the "late tender" rule applied and that summary judgment was improper.

The Supreme Court reversed the Court of Appeals as to the contribution claim, holding that the "selective tender" rule applied to bar MOE and CUIC's claims for equitable contribution.

The Court discussed the nature of equitable contribution, which "allows an insurer to recover from another insurer where both are independently obligated to indemnify or defend the same loss." 2008 WL 4070270, at *3. The Court noted that the duty to defend and indemnify does not become an obligation until a claim is tendered, and further, the insurer that seeks contribution does not sit in the place of the insured and cannot tender a claim to the other insurer. Thus, according to the Court, "if the insured has not tendered a claim to an insurer prior to settlement or the end of trial, other insurers cannot recover in equitable contribution against that insurer." *Id.* The Court favorably compared this rule to the "selective tender" rule, which "states that where an insured has not tendered a claim to an insurer, that insurer is excused from its duty to contribute to a settlement of the claim." *Id.*

The Court next described why the "late tender" rule does not apply in equitable contribution claims. Under the "late tender" rule, an insured's failure to provide timely notice of a claim does not relieve the insurer of its duty to perform unless the insurer can prove the late notice caused actual and substantial prejudice. According to the Court, the underlying rationale of the "late tender" rule is that, unlike traditional contracts, insurance policies implicate the public interest by helping spread risk, and therefore, if an insurer is relieved of its responsibilities without suffering prejudice, that would be "tantamount to a questionable windfall for the insurer at the expense of the public." *Id.* at *3, quoting *Automobile Ins. Co. v. Salzberg*, 85 Wash.2d 372, 376-77, 535 P.2d 816 (1975). In the context of equitable contribution, the Court stated there is no risk to the public:

The rationale for the "late tender" rule does not apply to claims of equitable contribution. As noted above, equitable contribution is a right of one insurer to collect

from another insurer on a loss that both insurers are *concurrently obligated* to cover. When an insurer brings a contribution claim against another insurer, the first insurer has already fully covered the loss and the danger to the public has been avoided.

Id. at *4.

Regarding the subrogation claim, the Court came to a different conclusion, holding that the “selective tender” rule did not apply:

The “selective tender” rule does not apply to this claim. Conventional subrogation claims rest on a contractual assignment of the insured’s rights to the insurer; thus, the “insured’s right to control tender” rationale for the “selective tender” rule is not persuasive in this context. When Dally assigned its rights under its other insurance policies to MOE and CUIC in the settlement agreement, it knowingly relinquished whatever right it may have had to control the enforcement of its insurance contracts, and it gave that right to MOE and CUIC.

Id. at *6.

On the issue of whether USF must demonstrate “actual and substantial prejudice,” the Court noted that generally, “[w]hether or not late notice prejudiced an insurer is a question of fact, and it will seldom be decided as a matter of law.” *Id.* The Court went on to hold that USF had suffered no prejudice as a matter of law:

In this case, USF has not demonstrated that it was prejudiced as a matter of law. It has shown that it did

not have notice of the claim against Dally until 2004, nearly four years after the initial complaint, two years after Dally’s settlement with MOE and CUIC, and some time after MOE and CUIC’s contribution litigation with the other insurers was complete. However, it has not shown how that delay specifically deprived it of the ability to put forth defenses to coverage or to contest the value of the damages, etc.

Id. at *9.

The Supreme Court thus reversed the Court of Appeals as to the equitable contribution claim, holding it was barred by the “selective tender” rule, but affirmed as to the conventional subrogation claim, holding it was permitted by the “late tender” rule.

The Supreme Court’s opinion bars equitable contribution claims by settling insurers against insurers that did not receive a tender of the claim. Thus, a settling insurer that intends to “pay and chase” other insurers needs to make sure that the other insurers received a tender from the insured. On the other hand, the lack of a tender will not bar a settling insurer’s subrogation claim via an assignment against a non-participating insurer, but the settling insurer’s subrogated claim is subject to all coverage defenses that could be asserted if the insured were to pursue a claim against the non-settling insurer.

To discuss any questions you may have regarding the opinion discussed in this Alert, or how it may apply to your particular circumstances, please contact Bill Knowles (wknowles@cozen.com, 206.224.1289) or Matt Taylor (mtaylor@cozen.com, 206.373.7208).