

WASHINGTON SUPREME COURT ALLOWS INSURED TO MAINTAIN PROCEDURAL BAD FAITH ACTION AGAINST INSURER THAT HAS NO DUTY TO DEFEND, SETTLE, OR INDEMNIFY

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In *St. Paul Fire & Marine Ins. Co. v. Onvia, Inc.*, 2008 WL 5006458, --- P.2d --- (Wash. No. 80359, Nov. 26, 2008), the Washington Supreme Court held that an insurer may be liable for procedural missteps in handling a claim even if there exists no contractual duty to defend, settle, or indemnify. Addressing questions certified from the U.S. District Court, the Supreme Court confirmed the viability of causes of action for common law bad faith and violation of the Washington Consumer Protection Act. In doing so, the unanimous Supreme Court made clear that the insured in this circumstance is not entitled to a presumption of harm or coverage by estoppel, but must prove all elements of the claim, including actual harm and damages.

Onvia, Inc., sells a service that provides businesses with notices of opportunities to bid for government contracts. After receiving an unsolicited facsimile from Onvia, Responsive Management Systems ("RMS") filed a class action lawsuit against Onvia that sought damages under the Telephone Consumer Protection Act of 1991, the Washington Unsolicited Telefacsimile Act, and the Washington Consumer Protection Act. RMS's complaint alleged that Onvia engaged in "fax blasting," which is the mass sending of unsolicited advertisements via facsimile, and that the class members were entitled to statutory damages of \$500 per facsimile and further relief.

Onvia sought coverage from its general liability insurer, St. Paul Fire & Marine Insurance Company ("St. Paul"). Although Onvia's insurance broker allegedly tendered the RMS lawsuit to St. Paul via facsimile, St. Paul maintains that there is no evidence that it received that communication until it was resubmitted approximately six months later. St. Paul ultimately denied coverage. Onvia and RMS entered into a settlement agreement whereby Onvia stipulated to class certification, entry of a judgment in favor of the class in the amount of \$17.515 million, and an assignment of its right against St. Paul to RMS. In exchange, RMS agreed to execute the judgment only against St. Paul. A state trial court approved the settlement as reasonable, and St. Paul initiated a coverage action in federal court. The U.S. District Court concluded that St. Paul had no obligation to defend, settle, or

indemnify the underlying action against Onvia, and that St. Paul did not commit bad faith when it declined Onvia's tender of defense.¹ The District Court then certified questions to the Washington Supreme Court to determine if the alleged procedural claims handling violations could give rise to a cause of action for bad faith and/or Washington Consumer Protection Act damages under these circumstances. See *Onvia*, Slip Op. at 1-2.

The Washington Supreme Court focused on the unique allegations of an allegedly mishandled claim that itself did not implicate the duty to defend. *Id.* at 8. The Court concluded that "although here the benefit of the insurance contract (*i.e.*, defense, settlement, and payment) is not available to the insured, if St. Paul handled the claim in bad faith, a cause of action based on this conduct remains available to the insured." *Id.* at 9. The Court explained that the duty of good faith is broad and "all-encompassing," and "not limited to an insurer's duty to pay, settle, or defend." *Id.* at 10. It rejected the argument that a rebuttable presumption of harm or coverage by estoppel should be made available as remedies. Instead, the Court held that the insured "must prove actual harm, and its' damages are limited to the amounts it has incurred as a result of the bad faith . . . as well as general tort damages." *Id.* at 11. Finally, the Court determined that the insured may also assert a cause of action under the Washington Consumer Protection Act, but similarly limited available remedies to those available under the statute. *Id.* at 12.

¹ In an unpublished decision, the U.S. Court of Appeals for the Ninth Circuit Court of Appeals affirmed the District Court's conclusion that there was no duty to defend. See *St. Paul v. Onvia*, 9th Cir. No. 07-35549, Nov. 25, 2005 (unpublished memorandum). The 9th Circuit did not consider the bad faith claim.

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 Melissa O'Loughlin White (mwhite@cozen.com, 206-373-7240) or Laura Edwards (ledwards@cozen.com, 206-224-1277).