

ALERT

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WASHINGTON COURT HOLDS INSURER NOT BOUND BY FINDINGS IN UNDERLYING CASE WHERE INSURED SETTLED LAWSUIT PRIOR TO ADJUDICATION

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In *Green v. City of Wenatchee, et al.*, --- P.3d ----, 2009 WL 116927 (January 20, 2009), the Washington Court of Appeals held that for purposes of a reasonableness hearing, an insurer was not bound by stipulated findings of fact and conclusions of law entered as part of a settlement agreement where the trial court did not address the merits of plaintiff's liability claims and the defenses. The Court of Appeals vacated an order that declared a \$1 million consent judgment reasonable and remanded the matter to the trial court for consideration of reasonableness factors prescribed by Washington law.

Doris Green was charged with child sexual abuse. Westport Insurance Corporation's ("Westport") insured, attorney Jeffrey Barker, and his firm briefly represented Ms. Green before they withdrew due to a conflict. Mr. Barker arranged for another attorney to represent Ms. Green. Ms. Green was subsequently convicted of the criminal charges and sentenced to a 280-month prison term. Mr. Barker's associate represented Ms. Green at contemporaneous dependency proceedings. Her parental rights were terminated at the conclusion of the dependency proceedings.

Subsequently, the Court of Appeals reversed the parental rights determination, the criminal charges were dismissed and the conviction was vacated. Ms. Green then sued Mr. Barker and his firm for malpractice, breach of contract and violation of the Consumer Protection Act. Westport defended Mr. Barker under a wasting legal malpractice insurance policy. After the action was removed to federal court, the defendants moved for summary judgment dismissal of Ms. Green's claims. The federal district court granted summary judgment dismissal of the federal claims against Mr. Barker and remanded the state claims against him to the state superior court. Mr. Barker subsequently entered into a joint settlement agreement to resolve three

legal malpractice cases pending against him, including Ms. Green's case. He agreed to pay Ms. Green a nominal sum, from which she was to pay a portion to the two other settling plaintiffs, and to have consent judgments entered against him in favor of all settling plaintiffs with a covenant from each not to execute against him personally. The consent judgment amount in favor of Ms. Green was \$1 million. Mr. Barker then assigned to plaintiffs his rights to pursue bad faith claims against Westport.

Ms. Green moved for a determination of the reasonableness of the settlement and her \$1 million consent judgment. Her motion was supported by proposed findings of fact and conclusions of law stipulated to by Ms. Green and Mr. Barker, which purportedly established Mr. Barker's liability. On April 10, 2006, the trial court entered the stipulated findings of fact, conclusions of law and consent judgment, but did not rule on the reasonableness of the settlement. Westport later intervened and opposed the reasonableness motion for various reasons, including its position that the consent judgment was unreasonable and the product of collusion. The parties also addressed whether Westport was bound by the stipulated findings and conclusions where it did not object to their entry at an earlier hearing or seek to intervene at an earlier date.

The trial court ruled that Westport, which had notice of the lawsuit and had defended Mr. Barker, was bound by the findings of fact, conclusions of law and consent judgment because it did not seek to intervene in the underlying lawsuit to challenge Mr. Barker's liability. The trial court held that the consent judgment was reasonable because Ms. Green's pleadings supported such damages and Westport presented no contrary evidence. On reconsideration, the trial court adhered to its earlier ruling and stated that Westport had been free to challenge the reasonableness of the judgment. In fact, the

trial court stated that Westport was not equitably estopped from challenging the reasonableness of the judgment against Mr. Barker simply because it had not participated in the stipulated judgment. In declaring the consent judgment reasonable, however, the court held that it had considered all evidence presented by both sides in making its decision, that there was ample evidence supporting Ms. Green's damages, that by virtue of his agreement Mr. Barker was bound by the stipulated findings making him liable, and that the settlement was not the product of collusion.

On appeal, the Court of Appeals reversed, holding that the trial court erred when it ruled that Westport was bound, for purposes of the reasonableness hearing, by the stipulated findings of fact and conclusions of law establishing Mr. Barker's liability to Ms. Green. The Court noted that Westport did not settle the *Green* lawsuit during its defense of Mr. Barker and did not participate in the settlement. The Court further recognized that if a consent judgment is reasonable, it forms the presumptive measure of damages in a subsequent bad faith action against the insured. Moreover, the Court recognized the potential for collusion or fraud attendant to such settlements. Thus, to protect insurers from excessive consent judgments, trial courts must determine whether the settlement agreement is reasonable using the reasonableness factors prescribed by Washington law.

In addressing whether Westport had standing to contest the validity of the settlement agreement, the Court examined Court Rule 52 and relevant case law supporting Westport's contention that the merits of the claim and defenses must be addressed to determine reasonableness. The Court held that

because the underlying liability lawsuit was settled, findings of fact and conclusions of law were unnecessary under CR 52. Westport had no standing to challenge the stipulated liability findings and conclusions contained in the settlement to which it was not a party, but they were unnecessary, ineffective and not binding on Westport with respect to coverage.

The trial court was required to address the merits of Ms. Green's case and Mr. Barker's defenses, however, when determining reasonableness of the settlement. After Ms. Green's state court claims were remanded to state court, the summary judgment motion as to those claims was not renewed and the claims were never addressed in the state court liability action before settlement. Findings of fact and conclusions of law are not binding on an insurer where the issues settled by the parties were not litigated. Thus, the trial court impermissibly bound Westport to Mr. Barker's liability stipulation without making the necessary reasonableness findings with respect to his defenses. Although the trial court ruled it had considered all of the evidence from both sides in light of the reasonableness factors, that ruling was not supported by the record.

The Court of Appeals therefore vacated the order declaring the consent judgment reasonable and remanded the matter for reconsideration and entry of findings of fact relative to the specific reasonableness factors that trial courts in Washington are required to consider.

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 Helen Boyer (hboyer@cozen.com, 206.373.7204) or Katina Thornock (kthornock@cozen.com, 206.224.1292).