INSURANCE LAW UPDATE:
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THIRD PARTY ADMINISTRATORS:
A TPA OR INDEPENDENT ADJUSTER MAY BE LIABLE TO THE INSURED FOR VIOLATING CLAIM HANDLING REGULATIONS

Merriman v. Am. Guarantee, 198 Wash.App. 594 (2017)

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1. A loss payee under an insurance policy can be a first party claimant;
2. A public adjuster can contractually assume liability to the insured for violating claim handling guidelines, and
3. Under certain circumstances, an insured can assert claims for negligence, negligent misrepresentation, bad faith and non per se Consumer Protection Act (CPA) claims against an independent adjuster.

The Merrimans brought a negligence action against Bernd after a fire at Bernd's storage warehouse destroyed over $300,000 worth of the Merrimans' property. Bernd was insured by American Guarantee. American Guarantee engaged York to not only adjust claims for the Bernd warehouse fire, but to more broadly administer the entire review, adjustment, settlement, and payment process under a preexisting third party administrator (TPA) agreement between its parent company and York. York, in turn, engaged Partners to serve as its "boots on the ground" for the Bernd claims.

By agreeing to perform claim administration, adjustment and payment in compliance with Washington law otherwise applying only to the insurer, the third party administrator becomes directly liable to the insured.

The fire was likely caused by a cigarette carelessly discarded by a Bernd employee. In addition to destroying the warehouse, the fire destroyed property belonging to 38 customers - among them, the Merrimans. The total loss exceeded the business and personal property limits of $777,500. However, if Bernd was liable for the fire, an additional $3 million in liability coverage and another $435,000 under a commercial inland marine policy was available.

York did not disclose the additional liability coverages and failed to provide a copy of the policy to Partners. Instead, York instructed Partners to tell the property owners that Partners did not know what Bernd's coverages were. York also instructed Partners to tell the customers to file a claim under their own homeowner's insurance.

1. The Loss Payees Are First Party Insureds

The Court cited conflicts within the policy as to who is an "insured" and thus found the policy ambiguous. Looking to secondary sources, the Court was swayed by the common definition of "insured" as someone who is covered or protected by an insurance policy or will receive a certain sum upon the happening of a specified contingency or event.

The Loss Payable section of the policy was also instructive. The American Guarantee policy states:"[O]ur payment … will only be for the account of the owner of the property" as compared to language seen in other policies that reads: "[L]oss shall be *adjusted with the named insured for the account of the owners* of the property." If the insurer *adjusts the loss with* named insured only, other loss payees are third parties.

2. Duty of Good Faith

The duty of good faith applies to all persons (and entities) doing business in the insurance industry, not only insurers. RCW 48.01.030. York therefore can be held liable to the customers for "bad faith."

3. Negligent Misrepresentation.

York may "participate" in making a negligent misrepresentation without being in direct communication with the plaintiffs. Washington law provides that "[n]o insurer shall fail to fully disclose to first party claimants all pertinent benefits, coverages or other provisions of an insurance policy or insurance contract under which a claim is presented." WAC 284-30-350(1). Even though York is not an "insurer" under WAC 284-30-350(1), York agreed contractually to comply with and perform American Guarantee's legal obligations to the customers.

4. Negligent Claim Handling

Negligence and bad faith claims are distinct claims. By definition, an independent adjuster represents the interests of the insurer only. RCW 48.17.010(l)(a) The Court agreed an independent adjuster owes no general duty of care to an insured, but York was more than an independent adjuster. York contractually assumed American Guarantee's legal obligations to the insureds, including Bernd's customers.

The Court found that York's role was beyond that of an independent adjuster by agreeing to fulfill American Guarantee's duties under the insurance code. York's contract with American Guarantee included promptly and thoroughly reviewing, processing, adjusting, settling and paying claims in full compliance with (1) the TPA agreement, (2) the policy, and (3) all legal and regulatory requirements.

5. Does Merriman Change Existing Adjuster Liability Law? No.

There is still no general duty of care owed by adjusters to insureds unless the adjuster voluntarily assumes a greater duty by agreeing to fully comply with and perform the insurer's

separate legal and regulatory requirements. This greater duty of the adjuster cannot exceed that which American Guarantee was not itself already required to do.

6. How to Administer Claims Exceeding Policy Limits

If the total value of claims presented exceeded American Guarantee's policy limits, York may owe conflicting duties to American Guarantee, Bernd and class plaintiffs. The Court recognized this conflict, but noted that it could be remedied by depositing policy funds with the trial court and have the trail court decide how they should be distributed.