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# Washington District Court Addresses Insured's Right To All Risk Coverage When A Loss Is Not Fortuitous

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In *Mkt. Place North Condo. Ass'n v. Affiliated FM Ins. Co.*, No. C17-625 RSM, 2018 U.S. Dist. Lexis 76724 (W.D. Wash. May 7, 2018), the United States District Court for the Western District of Washington found in favor of Affiliated FM Insurance Company ("AFM") on the insured's Motion for Summary Judgment, finding that coverage under an "all risk" insurance policy may be in dispute if evidence shows that the loss was not unforeseen.

The insured purchased and maintained "all risk" property insurance policies from AFM from 2005 through 2016. During renovations to the outdoor deck of the Condominium, the insured discovered water intrusion damage throughout the property. After learning of the damage, the insured put its insurer AFM on notice.

In late 2016, AFM met with the insured to examine the damage to the property and signs that additional damage existed. At that time, the insured proposed an investigative plan to AFM, which AFM rejected on the belief that it did not have a legal obligation "to investigate potential damage as opposed to actual damage." The insured then sent AFM a notice under Washington's Insurance Fair Conduct Act ("IFCA") for its failure to investigate. AFM did not withdraw its rejection and the insured filed suit against AFM for breach of contract.

After suit was filed, AFM agreed to participate and split associated costs of the investigation, which produced evidence of long-term and ongoing water intrusion damage. Upon completion of the investigation, AFM changed its position and denied coverage relying on the policy exclusions of: defective construction, faulty maintenance, and/or wear and tear/corrosion/deterioration, as well as the fact that the insured may have known about the water damage on an ongoing basis. In response to AFM's denial, the insured issued another notice under the IFCA and amended its complaint to include an IFCA claim.

The insured filed a Motion for Summary Judgment asking the Court to find that the insured's 2015-2016 policy covered both water intrusion damage and mold since the policy did not include an exclusion for such, that AFM owes coverage to the insured under that insurance policy and that AFM's denial of coverage violated Washington's IFCA. In support of its claim that the policy covered water damage, the insured argued that an "all risk" policy covers any liability that is not excluded. Although, AFM did not contest that the 2015-2016 policy covered water intrusion and mold, it did dispute coverage based on the insured's loss not being fortuitous.

The Court entered partial summary judgment in favor of the insured only as to the 2015-2016 policy covering both water intrusion damage and mold, since the policy did not include an exclusion. However, focusing on AFM's fortuity argument, the Court denied the insured's claim that AFM owes coverage under the policy since sufficient questions of fact exist to prevent summary judgment. Since fortuity is inherent in every "all risk" policy, evidence indicating that the insured knew of the continued risk of damage prior to the issuance of the insurance policy is not an unexpected loss. The Court also denied the insured's argument that AFM's denial of coverage violated the IFCA because it was impossible for the Court to determine, with certainty, the reasonableness of AFM's denial of coverage.