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3 UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
4 AT TACOMA

5 TIM RYAN CONSTRUCTION, INC,

6 Plaintiff,

7 v.

8 BURLINGTON INSURANCE  
9 COMPANY,

10 Defendant.

CASE NO. C12-5770 BHS

ORDER DENYING MOTION  
FOR RECONSIDERATION

11 This matter comes before the Court on Defendant Burlington Insurance  
12 Company's ("Burlington") motion for reconsideration (Dkt. 22 ). The Court has  
13 considered the pleadings filed in support of and in opposition to the motion and the  
14 remainder of the file. For the reasons stated herein, the Court denies the motion.

15 **I. PROCEDURAL & FACTUAL BACKGROUND**

16 On August 28, 2012, TRC filed a lawsuit against Burlington alleging: (1) breach  
17 of contract by Burlington's refusal to defend TRC in an April 11, 2011 lawsuit filed  
18 against it; (2) that Burlington acted in bad faith and violated numerous provisions of the  
19 Insurance Fair Conduct Act ("IFCA"); and (3) that Burlington committed violations of  
20 the Consumer Protection Act, Chapter 19.86 RCW. Dkt. 1 at 6-7. On October 8, 2012,  
21 Burlington filed an answer to TRC's complaint and a counterclaim seeking declaratory  
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1 judgment that Burlington has no duty to defend TRC in the April 11, 2011 lawsuit  
2 (“underlying lawsuit”), and that Burlington has no duty to indemnify TRC in the  
3 underlying lawsuit. Dkt. 8 at 6-7. It also seeks costs and disbursements incurred herein  
4 and any other relief the court deems just and equitable. *Id.* On October 18, 2012, TRC  
5 filed a motion for partial summary judgment. Dkt. 9. On October 22, 2012, TRC filed an  
6 answer to Burlington’s answer and counterclaim. Dkt. 10. On November 5, 2012,  
7 Burlington filed a response to TRC’s motion for partial summary judgment. Dkt. 15. On  
8 November 9, 2012, TRC filed a reply to Burlington’s response. Dkt. 18.

9       On December 17, 2012, the Court issued an order granting in part TRC’s motion  
10 for partial summary judgment. Dkt. 22. The Court found, in part, that Burlington  
11 breached its duty to defend TRC as an additional insured under a policy Burlington held  
12 with Sound Glass Sales, Inc. (“Sound Glass”), a TRC subcontractor on a project that is a  
13 subject of the underlying lawsuit, and that Burlington acted in bad faith in doing so. *See*  
14 Dkt. 22. On December 31, 2012, Burlington filed a motion for reconsideration of the  
15 Court’s order, arguing that it was manifest error of law for the Court to find Burlington’s  
16 conduct was unreasonable as a matter of law such that it acted in bad faith. *See* Dkt. 25.  
17 Burlington does not contest the Court’s determination that it has a duty to defend TRC.

18       On January 23, 2013, upon review of the motion for reconsideration, the Court  
19 found that Burlington raised some potentially persuasive arguments. Dkt. 33 at 5. To  
20 fully assess the motion for reconsideration, the Court established a briefing schedule  
21 requiring TRC to respond to Burlington’s arguments regarding whether it acted in bad  
22 faith in determining if it had a duty to defend TRC and renoted the motion for

1 reconsideration. *Id.* On February 8, 2013, TRC filed a response. On February 20, 2013,  
2 Burlington filed a reply. Dkt. 41.

## 3 **II. DISCUSSION**

### 4 **A. Motion for Reconsideration Standard**

5 Motions for reconsideration are governed by Local Rule CR 7(h), which provides  
6 as follows:

7 Motions for reconsideration are disfavored. The court will ordinarily  
8 deny such motions in the absence of a showing of manifest error in the  
9 prior ruling or a showing of new facts or legal authority which could not  
10 have been brought to its attention earlier with reasonable diligence.

11 Local Rule CR 7(h)(1). In this case, Burlington argues that the Court committed manifest  
12 error in concluding that it acted in bad faith because under Burlington's interpretation of  
13 its policy coverage was possible and therefore neither illusory nor unreasonable. Dkt. 25  
14 at 3-6.

15 TRC argues that Burlington acted in bad faith as a matter of law essentially  
16 because it declined to defend TRC based on a questionable interpretation of the AIE,  
17 which has not been considered by Washington courts; it failed to give TRC the benefit of  
18 any doubt as to the duty to defend; and it failed to timely defend TRC under a reservation  
19 of rights. Dkt. 40 at 4. Further, TRC argues that Burlington acted in bad faith as a matter  
20 of law independently of whether its interpretation of AIE was unreasonable because,  
21 regardless of Burlington's purportedly reasonable interpretation of the AIE, it relied on a  
22 questionable interpretation of the AIE and failed to give TRC the benefit of the doubt as  
to the duty to defend. *Id.* at 4-5.

1 With regard to attorneys' fees and IFCA claims, Burlington maintains that if the  
2 Court reconsiders its underlying finding that Burlington's denial was unreasonable as a  
3 matter of law, such reconsideration will also decide the outcome of TRC's partial  
4 summary judgment motion on those claims. Dkt. 25 at 1-2, n.1. TRC disputes  
5 Burlington's contentions and maintains the Court's reconsideration of its finding that  
6 Burlington unreasonably denied coverage has no impact on the award of attorney fees  
7 and maintains that Burlington violated IFCA. Dkt. 40 at 10-11.

8 **1. Duty to Defend and Bad Faith Standards**

9 **a. Duty to Defend**

10 The duty to defend "is broader than the duty to indemnify." *Woo v. Fireman's*  
11 *Fund Ins. Co.*, 161 Wn.2d at 52. The duty to defend "arises at the time an action is first  
12 brought, and is based on the potential for liability." *Id.* (quoting *Truck Ins. Exch. v.*  
13 *VanPort Homes Inc.*, 147 Wn.2d 751, 760 (2002)). "An insurer has a duty to defend  
14 'when a complaint against the insured, construed liberally, alleges facts which could, if  
15 proven, impose liability upon the insured within the policy's coverage.'" *Woo*, 161  
16 Wn.2d at 52-53 (quoting *Truck Ins.*, 147 Wn.2d at 760). An insurer is not relieved of its  
17 duty to defend unless the claim alleged in the complaint is "clearly not covered by the  
18 policy." *Id.* (citing *Kirk v. Mt. Airy Ins. Co.*, 134 Wn.2d 558, 561 (1998)). Moreover, if  
19 a complaint is complaint is ambiguous, a court will construe it liberally in favor of  
20 "triggering the insurer's duty to defend." *Id.* (citing *R.A. Hanson Co. v. Aetna Ins. Co.*,  
21 26 Wn. App. 290, 295 (1980)). In contrast, the duty to indemnify "hinges on the  
22 insured's actual liability to the claimant and actual coverage under the policy." *Hayden*

1 | *v. Mutual of Enumclaw Ins. Co.*, 141 Wn.2d 55, 64 (2000). In sum, the duty to defend is  
2 | triggered if the insurance policy conceivably covers the allegations in the complaint,  
3 | whereas the duty to indemnify exists only if the policy actually covers the insured’s  
4 | liability.

5 |         The insurer must investigate the claim, that is, consider facts outside the  
6 | complaint, if (1) coverage is not clear from the face of the complaint but may nonetheless  
7 | exist, or (2) the allegations are in conflict with facts known to or readily ascertainable by  
8 | the insurer, or the allegations of the complaint are ambiguous or inadequate. *Truck Ins.*,  
9 | 147 Wn.2d at 276. However, “[t]he insurer may not rely on facts extrinsic to the  
10 | complaint to deny the duty to defend—it may do so only to trigger the duty.” *Woo*, 161  
11 | Wn.2d at 54 (*citing Truck Ins.*, 147 Wn.2d at 761).

12 |                 **b.         Bad Faith**

13 |         An insurer acts in bad faith if its breach of the duty to defend was unreasonable,  
14 | frivolous, or unfounded. *American Best Food, Inc. v. Alea London, Ltd.* 168 Wn 2d 398,  
15 | 412-13 (2010) (*citing St. Paul Fire & Marine Ins. Co. v. Onvia, Inc.*, 165 Wn.2d 122, 130  
16 | (2008) (citations omitted)). While “[t]he insurer is entitled to investigate the facts and  
17 | dispute the insured’s interpretation of the law,” it must defend the claim “if there is any  
18 | reasonable interpretation of the facts or the law that could result in coverage....”  
19 | *American Best Food, Inc.*, 168 Wn.2d at 412-13. Additionally, an insurer’s “refusal to  
20 | defend [an insured] based upon an arguable interpretation of its policy [is] unreasonable  
21 | and therefore in bad faith.” *Id.* at 414. An insured may defend under a reservation of  
22 |

1 rights and may seek declaratory relief to establish that its policy excludes coverage.

2 *Truck Ins. Exch.*, 147 Wn.2d at 760–61.

3 A motion for summary judgment should be granted only when, viewing the  
4 evidence in the light most favorable to the nonmoving party, there is no genuine issue as  
5 to any material fact and the moving party is entitled to judgment as a matter of law. Fed.  
6 R. Civ. P. 56(a); *Sony Computer Entm't Am., Inc. v. Am. Home Assurance Co.*, 532 F.3d  
7 1007, 1011 (9th Cir.2008). The factual issue of whether an insurer acted in bad faith may  
8 be decided on a motion for summary judgment “if there are no disputed material facts  
9 pertaining to the unreasonableness of the insurer’s conduct under the circumstances,” or  
10 “reasonable minds could not differ that [the insurer’s] denial of coverage was based upon  
11 unreasonable grounds.” *Smith v. Safeco Ins. Co.*, 150 Wash.2d 478, 486-87 (2003); *see*  
12 *Michelman v. Lincoln Nat’l Life Ins. Co.*, 685 F.3d 887, 902 (9th Cir.2012).

## 13 **2. Application of Duty to Defend and Bad Faith Standards**

### 14 **a. Policy**

15 At issue in this suit is a portion of Burlington’s policy with Sound Glass, which is  
16 an additional insured endorsement for TRC. It reads:

17 WHO IS AN INSURED (Section II) is amended to include as an  
18 insured the person or organization shown in the schedule, but only with  
19 respect to liability arising out of “your work” for that insured by or for you.  
20 It is agreed that such insurance as is afforded by this policy for the benefit  
21 of the Additional Insured shall be primary insurance, and any other  
22 insurance maintained by the Additional Insured shall be excess and non-  
contributory, but only as respects any claim, loss or liability arising out of  
the operations of the Named Insured, and only if such claim, loss or  
liability is determined to be solely due to the negligence or responsibility of  
the Named Insured.

1 Dkt. 9 at 9.

2 In Burlington's response to TRC's motion for partial summary judgment, it argues  
3 that the clear language of the policy indicates that the "Additional Insured" (TRC) will be  
4 covered "only if such a claim, loss or liability is determined to be solely due to the  
5 negligence or responsibility of the Named Insured" (Sound Glass). Dkt. 15 at 5-6. In  
6 determining that Burlington acted in bad faith, the Court agreed with TRC's analysis of  
7 the AIE, finding TRC's

8 interpretation of the language of the policy reasonable. Burlington's duty  
9 to defend its additional insured is not conditioned upon the existence of  
10 other insurance maintained by TRC; nor is it conditioned upon a  
11 determination that Sound Glass is solely liable. Dkt. 9 at 20. The  
12 endorsement simply provides that other insurance maintained by TRC is  
13 automatically rendered excess and non-contributory to Burlington's  
14 primary coverage.

15 Dkt. 22 at 10-11. Based on this interpretation, the Court found that the final  
16 determination of the named insured's loss and liability has no bearing on an insurer's  
17 duty to defend in the first instance. *Id.* Thus, the Court agreed with what TRC advanced  
18 as Burlington's interpretation of the AIE and concluded that:

19 (a) a determination concerning the extent of the Named Insured's liability  
20 necessary requires a resolution/adjudication of the underlying claim; and  
21 (b) a resolution/adjudication of the underlying claim leaves nothing left to  
22 defend. Thus, Burlington's interpretation of the Additional Insured  
Endorsement (as "applying" only once a loss is determined to be solely due  
to the negligence or responsibility of the Named Insured) renders  
Burlington's duty to defend illusory.....

23 Dkt. 22 at 11 (*citing* Dkt. 9 at 20-21).

1 In its motion for reconsideration, Burlington maintains that, contrary to TRC and  
2 the Court’s reading, Burlington never interpreted or advanced the argument that the  
3 language of the AIE meant that in order to “determine” whether it had duty to defend  
4 required resolution or adjudication of Sound Glass’s liability. Dkt. 25 at 3-6. Burlington  
5 argues that “[u]nder the AIE, the TBIC policy provides primary coverage (for purposes of  
6 triggering the duty to defend) when the claim or loss is determined to be solely due to the  
7 named insured’s negligence or responsibility.” *Id.* at 4. According to Burlington, the  
8 insurer has the duty to determine if the underlying “claim” or “loss” is based solely on the  
9 named insured’s negligence or responsibility. *Id.* Burlington contends this is precisely  
10 the type of “determination” insurers typically make in analyzing the duty to defend. *Id.*  
11 (*citing see, e.g., Woo*, 161 Wn.2d 43, 53-54 (“Notice pleading rules \* \* \*impose a  
12 significant burden on the insurer to determine if there are any facts in the pleadings that  
13 could conceivably give rise to a duty to defend”)). Thus, Burlington argues that the  
14 Court based its decision on an interpretation it never advanced and with which Burlington  
15 disagrees. *Id.* at 5.

16 TRC observes that the interpretation of the AIE that Burlington offers in its  
17 motion for reconsideration draws a “curious distinction” between “claim” or “loss” and  
18 “liability.” Dkt. 40 at 8. The term “liability” means “[t]he quality or state of being  
19 legally obligated or accountable; legal responsibility to another or to society, enforceable  
20 by civil remedy or criminal punishment ....” Black’s Law Dictionary, 9<sup>th</sup> edition.  
21 Without directly conceding, Burlington implies that an insured’s “liability” is a  
22 determination made by the court, rather than the insurer in this context. Dkt. 25 at 4,



1 n.2.<sup>1</sup> Yet, Burlington’s interpretation reads against the plain language of the AIE, which  
2 says, in pertinent part, coverage exists “only if such a claim, loss or liability is determined  
3 to be solely due to the negligence of the Named Insured.” Dkt. 9 at 9. The Court finds  
4 that Burlington’s analysis of the AIE is at least arguable. Burlington effectively argues  
5 that in one clause the word “determination” has two different subjects, the insurer and the  
6 court, and therefore two different meanings, depending on the context of who is doing the  
7 determining. While Burlington’s interpretation of its policy language may not render its  
8 duty to defend illusory, as the Court previously found (Dkt. 22 at 11), Burlington’s  
9 interpretation of the language in the AIE is at least arguable.

10 In defending its position that Burlington acted in bad faith, TRC maintains that  
11 under *American Best Foods v. Alea*, 168 Wn.2d 398 (2010), Burlington acted in bad faith  
12 as a matter of law. In *American Best Foods*, as TRC interprets it, the insurer (Alea)  
13 denied having a duty to defend its insured based on an interpretation of an exclusion that  
14 had yet to be considered by Washington courts. Dkt. 40 at 3. Alea argued it did not  
15 commit bad faith because its refusal to defend the insured was based on a reasonable  
16 interpretation of the exclusion. *Id.* Noting the lack of Washington case law interpreting  
17 the exclusion and the uncertainty created by differing interpretations of the policy  
18 exclusion in other jurisdictions, however, the Washington Supreme Court confirmed the  
19 insurer breached its duty to defend in bad faith as a matter of law by relying on an

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21 <sup>1</sup> According to Burlington, “[t]he court in the underlying action might ultimately  
22 determine liability, but would not make any other determination as to the whether the claim or  
loss (including portions that do not ultimately result in liability) fall within the scope of the AIE”  
Dkt. 25 at 4, n. 2.

1 arguable interpretation of its policy and failing to give the insured the benefit of any  
2 doubt as to the duty to defend. *Id.* The court in *American Best Foods* held in relevant  
3 part:

4           Again, if there is any reasonable interpretation of the facts or the law  
5 that could result in coverage, the insurer must defend. *Truck Ins. Exch.*, 147  
6 Wash.2d at 760, 58 P.3d 276 (*citing Kirk*, 134 Wash.2d at 561, 951 P.2d  
7 1124)... It cannot be said that the insurer did not put its own interest ahead  
8 of its insured when it denied a defense based on an arguable legal  
9 interpretation of its own policy. Alea failed to follow well established  
10 Washington State law giving the insured the benefit of any doubt as to the  
11 duty to defend and failed to avail itself of legal options such as proceeding  
12 under a reservation of rights or seeking declaratory relief. Alea's failure to  
13 defend based upon a questionable interpretation of law was unreasonable  
14 and Alea acted in bad faith as a matter of law.

15 *Id.* (*citing American Best Foods*, 168 Wn. 2d at 413). The Court finds the foregoing to be  
16 an accurate representation of relevant portions of the case.

17           TRC argues that Burlington denied having a duty to defend based on an  
18 interpretation of the AIE that had yet to be considered by Washington courts; as  
19 acknowledged by Burlington, there is uncertainty created by different interpretations of  
20 the AIE in other jurisdictions (e.g. Illinois)<sup>2</sup>; Burlington failed to give TRC the benefit of

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21           <sup>2</sup> In an attempt to argue that its interpretation of the AIE was reasonable, Burlington  
22 discusses the conflicting Illinois court decisions with similar AIE provisions. Burlington states  
"TRC previously relied on a different Illinois case, *Pekin Ins. Co. v. Hallmark Homes, LLC*, 912  
N.E.2d 250 (Ill.Ct. App. 2009), for the proposition that the theoretical possibility that an  
additional insured could be liable based solely on the named insured's negligence is enough to  
trigger the defense obligation. Dkt. 14-1, p. 17 n.62." Burlington states the *Hallmark Homes*  
case is inconsistent with the cases it cited because that court explicitly disagreed with the  
reasoning in the other cases Burlington cites for support. *Hallmark Homes*, 912 N.E.2d at 256.  
Burlington maintains "[t]hat the appellate courts of Illinois disagree on whether or not language  
similar to the AIE requires a defense in these circumstances simply demonstrates that TBIC's  
position is not unreasonable." Dkt. 25 at 6 n.6.

1 any doubt as to the duty to defend; and Burlington failed to timely defend TRC under a  
2 reservation of rights or seek declaratory relief. Dkt. 40 at 4. Thus, argues TRC, like  
3 Alea, Burlington acted in bad faith as a matter of law.

4       Though the Court concurs with Burlington’s argument that the facts of this case  
5 differ from *American Best Foods* (Dkt. 41 at 3-5), it disagrees that the factual variance  
6 compels a different outcome. Not having presented or found any Washington case law  
7 which addresses substantially similar AIE language; relying on an interpretation of its  
8 policy language about which not only TRC disputed but also Illinois courts hold  
9 conflicting views (albeit with slightly different language), and which the Court finds  
10 arguable, Burlington’s refusal to defend TRC without first defending under a reservation  
11 of rights and seeking declaratory relief was unreasonable and constitutes bad faith as a  
12 matter of law. *See American Best Foods*, 168 Wn.2d at 412-113.

13       However, even if the Court did not find that Burlington acted in bad faith based on  
14 the reasoning set forth above, it still finds that it acted in bad faith in its resort to extrinsic  
15 evidence to support its position that it had no duty to defend TRC.

16                   **b.     Extrinsic Evidence**

17       The undisputed facts of this case are that TRC tendered the complaint in the  
18 underlying lawsuit to Burlington in February 2012. Based on allegations in the  
19 complaint, Burlington found that Sound Glass was not alleged to be solely liable for the  
20 claimed damages, as it maintains that based on the complaint coverage was not available.  
21 Dkt. 16 at 3. While effectively asserting that the complaint itself served as a sufficient  
22 basis to deny coverage, in an attachment to Burlington’s April 10, 2012 letter to TRC

1 denying coverage, it also acknowledged the “vague allegation” existed “that Sound  
2 Glass’s work [was] defective.” Dkt. 10-6 at 52.

3 It is also undisputed that TRC provided additional information regarding Sound  
4 Glass’s workmanship and Burlington reviewed that extrinsic evidence. However, some  
5 inconsistency exists in Burlington’s responses regarding its review of extrinsic evidence.  
6 On the one hand, Burlington states that on the face of the complaint, it was clear Sound  
7 Glass was not solely liable and therefore not covered under the policy. Dkt. 16 at 3. On  
8 the other hand, Burlington maintains that notwithstanding that determination it was  
9 entitled to look to extrinsic evidence, citing the two exceptions provided under  
10 Washington law which permit resort to extrinsic evidence for the purposes of finding a  
11 duty to defend. *See* Dkts. 16 at 3 & 41 at 6, n. 11. To have found it necessary to review  
12 extrinsic evidence, Burlington must have found coverage was unclear from the face of the  
13 complaint, or the allegations conflicted with readily known information or were  
14 ambiguous or inadequate<sup>3</sup>. *Truck Ins*, 147 Wn.2d at 276.<sup>4</sup>

15 Burlington’s actions and admissions are evidence that some doubt existed as to  
16 whether Burlington had a duty to defend. Otherwise, Burlington would have had no need  
17 to assess the extrinsic evidence. Yet, Burlington did assess extrinsic evidence and,  
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19 <sup>3</sup> The Court finds Burlington’s argument that it looked to extrinsic evidence “for the sole  
20 purpose of finding coverage” unpersuasive, as Burlington cites no case law to support that such  
21 conduct is permissible for an insurer who subsequently uses that extrinsic information to deny or  
22 to continue to deny coverage. Dkt. 41 at 6.

<sup>4</sup> Although Burlington maintains that it acted “exactly as prescribed in Washington cases”  
(Dkt. 41 at 6), Burlington never identifies which of the two exceptions it availed itself of when it  
resorted to extrinsic evidence and continued to deny coverage. *Id.*

1 | contrary to law, it continued to deny that it had a duty to defend based on that evidence.”  
2 | *Woo*, 161 Wn.2d at 54 (“The insurer may not rely on facts extrinsic to the complaint to  
3 | deny the duty to defend—it may do so only to trigger the duty”). Given the allegations in  
4 | the complaint that various subcontractors were alleged to be liable, the fact that Sound  
5 | Glass was a TRC subcontractor, Burlington’s acknowledgment that vague allegations  
6 | existed regarding Sound Glass’s defective work, and Burlington’s resort to review of  
7 | extrinsic evidence to determine whether it had a duty to defend, the Court concludes that  
8 | Burlington acted in bad faith in its handling of TRC’s claims by failing to resolve all  
9 | doubts about coverage in favor of the insured and resorting to extrinsic evidence to  
10 | support its denial of its duty to defend.

11 | **B. Other Claims**

12 | The Court’s prior order finding violations of IFCA and awarding attorney fees  
13 | (Dkt. 22 at 13-15) remains unchanged.

14 | **III. ORDER**

15 | Therefore, it is hereby **ORDERED** that Burlington’s motion for reconsideration  
16 | (Dkt. 25) is **DENIED**. To the extent the reasoning in this order conflicts with the Court’s  
17 | prior order (Dkt. 22), the reasoning herein supersedes that of the prior order.

18 | Dated this 22nd day of March, 2013.

19 | 

20 | \_\_\_\_\_  
21 | BENJAMIN H. SETTLE  
22 | United States District Judge