

THE HONORABLE JOHN C. COUGHENOUR

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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

COLORADO CASUALTY INSURANCE
COMPANY,

Plaintiff,

v.

STARLINE WINDOWS, INC., et al.

Defendants.

CASE NO. C12-2218-JCC

FINDINGS OF FACT AND
CONCLUSIONS OF LAW

This matter was tried to the Court, sitting without a jury, from April 28 to April 30, 2014. Plaintiff Colorado Casualty Insurance Company (“Colorado”) appeared through its attorneys Russell Love and Mark Thorsrud of Thorsrud Cane & Paulich. Defendants The Bristol at Southport, LLC (“Bristol”) and Starline Windows, Inc. (“Starline”) appeared through Daniel Heffernan and Brent Hardy of Heffernan Law Group PLLC. Defendant Royal & Sun Alliance Insurance Company of Canada (“RSA”) appeared through its attorney Michael Ricketts of Gordon Thomas Honeywell, LLP. After bench trial and pursuant to Federal Rule of Civil Procedure 52(a), the Court makes the following findings of fact and conclusions of law:

I. FINDINGS OF FACT

1. Colorado is a New Hampshire corporation with its principal place of business in Boston, Massachusetts. Colorado is authorized to do business in the state of Washington.
2. Starline is a Washington corporation with its principal place of business in

1 Washington. Starline sold and serviced vinyl and aluminum windows in the western United
2 States.

3 3. Bristol is a Washington limited liability company and the owner of The Bristol
4 Apartments located in Renton, Washington (“the Project”).

5 4. RSA is a Canadian insurance company which issued a number of liability policies
6 to Starline Windows Ltd. (“Starline LTD”) and to Starline Windows (2001) Ltd. as named
7 insureds from 2000 to 2012.

8 5. Colorado issued a primary and an excess liability policy to Starline with coverage
9 effective May 20, 2001 to May 20, 2002 under a primary policy, and coverage effective
10 September 14, 2001 to May 20, 2002 under an excess policy (collectively, the “Colorado
11 policies”).

12 6. RSA issued two policies to Starline LTD that included Broad Form Vendors
13 Endorsements. The first RSA policy covered the period December 15, 2000 to December 15,
14 2001 (the “00-LTD Policy”). The second policy covered the period December 15, 2001 to
15 December 15, 2002 (the “01-LTD Policy”). The 00-LTD Policy contained a pro-rata Other
16 Insurance clause. The 01-LTD Policy contained a super-escape Other Insurance clause. The
17 Court credited the testimony of Katie Ewles concerning the content of the 01-LTD Policy and
18 found Colorado’s arguments to the contrary particularly unconvincing.

19 7. The Project was built from approximately 2000 to 2002. Certificates of
20 Occupancy were issued for the Project in early January 2003.

21 8. The Project’s general contractor was Mego Construction, Inc. (“Mego”). Starline
22 contracted with Mego to furnish windows for the Project pursuant to purchase orders dated
23 January 9, May 1, May 23, and August 24, 2001. The windows for the Project were
24 manufactured by Starline LTD in a factory in Langley, B.C.

25 9. Pursuant to the purchase orders, Starline was responsible for delivering the
26 windows to a framing plant, where the windows were unpacked and installed into prefabricated,

1 panelized walls for the Project. Starline was then responsible for delivering the windows to the
2 Project jobsite.

3 10. The windows, installed as part of the panelized wall assemblies, were shipped flat
4 on trucks to the Project jobsite. This method of shipping damaged the structural and
5 waterproofing integrity of the windows. Starline used additional bracing on later shipments,
6 which mitigated but did not prevent the damage.

7 11. Beginning in late 2001 and continuing into 2002—during the period of the
8 Colorado policies—the Starline windows installed at the Project were leaking and causing water
9 damage. At least some of the damage was caused by the structural defects resulting from the
10 method of shipping.

11 12. Beginning around February 2002, Starline performed repairs to many windows at
12 the Project. The parties incorrectly believed that these repairs were successful and had stopped
13 the leaking. Instead, some of the work—such as cutting the glazing tape on the windows—
14 exacerbated the problems.

15 13. Normally Starline issued project-specific forms of warranties, which were dated,
16 named the project involved, and specified the type of windows covered. In this case, Starline
17 issued a Starline Limited Ten-Year Warranty (the “Warranty”), which was a generic warranty.
18 Starline delivered the warranty to Mego for the benefit of Bristol. Starline’s business included
19 service work on windows covered under warranties it issued, including the windows at the
20 Project covered under the Warranty.

21 14. The windows continued to leak occasionally over the following years. When
22 windows leaked, Bristol would contact Starline, which would service the windows and perform
23 repairs under the Warranty.

24 15. In August 2010, Bristol discovered widespread defects in the Starline windows
25 throughout the Project. The subsequent investigation and review of the records revealed that
26 many of the Project’s windows had been leaking since construction and there had been ongoing

1 water damage to the Project since that time. The leaks were caused by both manufacturing and
2 non-manufacturing defects, and were caused in part by Starline’s shipping and/or window
3 rework operations. There was no showing at trial about the extent of leaking and water damage
4 caused by manufacturing defects.

5 16. In September 2010, Bristol sent a letter notifying Starline of the damage. Bristol
6 sent the letter to a Canadian address and to an American address and requested that Starline
7 correct or replace the windows as required by the Warranty.

8 17. On June 23, 2011, Bristol filed a lawsuit against Starline in the Superior Court of
9 the State of Washington for King County under Cause No. 11-2-21741-8 SEA (“the Bristol
10 lawsuit”). Colorado defended Starline under a reservation of rights. Colorado sent Starline two
11 reservation-of-rights letters, one dated March 17, 2012, and another dated November 15, 2012.

12 18. In the Bristol lawsuit, the window defects were generally referred to as
13 “manufacturing defects.” However, for most of the Bristol lawsuit, the distinction between
14 “manufacturing” and “non-manufacturing” defects was not a point of contention. During the
15 Bristol lawsuit the parties were aware of some problems that in this federal case have been
16 referred to as “non-manufacturing defects.” The Court therefore gives little weight to Plaintiff’s
17 suggestion that the parties in the Bristol lawsuit thought that the only possible source of damage
18 was manufacturing defects introduced at the manufacturing facility.

19 19. In August 2012, Starline moved for summary judgment on the basis that statutes
20 of limitations barred Bristol’s claims. The trial court denied the motion.

21 20. Colorado and other insurers attended an unsuccessful mediation in the Bristol
22 lawsuit on October 4, 2012.

23 21. On October 22, 2012, Starline made a demand to Colorado for payment of its
24 remaining primary policy limits, which had been reduced to \$744,578.87 through payments on
25 other claims against Starline. The next day, Starline made a supplemental demand for policy
26 limits under the Colorado primary policy, and also tendered defense and indemnity of Starline in

1 the Bristol lawsuit under the Colorado excess policy.

2 22. Colorado and other insurers attended a second unsuccessful mediation in the
3 Bristol lawsuit on November 27, 2012.

4 23. Colorado was obstructive to settlement negotiations and failed to make a good-
5 faith effort to settle Bristol's claim against Starline. Colorado lacked a reasonable basis for
6 insisting that responsibility for Starline's liability to Bristol be assumed by others; conditioned its
7 involvement in further mediations on receiving, well in advance, a complete copy of certain RSA
8 policies; and made no offer to pay any amount in indemnity for Bristol's claims against Starline.
9 The Court found Colorado's witnesses, who each testified about the settlement negotiations, not
10 credible in their explanations regarding Colorado's actions.

11 24. At some point during the fall of 2012 the roles of Starline LTD and Starline
12 Windows (2001) Ltd. came into question. Up until this point, all parties had taken for granted
13 that Starline was responsible for the Warranty.

14 25. On November 29, 2012, Bristol filed a lawsuit against Starline LTD and Starline
15 Windows (2001) Ltd. in the Superior Court of the State of Washington for King County under
16 Cause No. 12-2-38074-1 SEA. The defendants removed that action to the United States District
17 Court for the Western District of Washington under Cause No. 12-cv-2089-RSL.

18 26. Colorado filed this declaratory-judgment action on December 19, 2012, seeking a
19 declaration that the Colorado Policies provided no coverage for Starline's liability as asserted in
20 the Bristol lawsuit. At the time it filed this action, Colorado knew Bristol had claims against
21 Starline of approximately \$6 million under the Warranty and separately under the WPLA.
22 Colorado amended its complaint twice, first to assert claims that RSA was primary and then to
23 assert claims against RSA for Colorado's defense costs and attorney fees.

24 27. Shortly before trial of the Bristol lawsuit, Starline entered into a written
25 settlement agreement with Bristol, Starline LTD, Starline Windows (2001) Ltd., RSA, and
26 Maryland Casualty Company and Assurance Company of America (collectively "Zurich").

1 Zurich had issued liability policies of insurance to Starline as named insured from July 2002
2 through December 2003. Under the settlement agreement, RSA paid \$1,175,000 to Bristol;
3 Zurich paid \$500,000 to Bristol; and Starline confessed judgment in favor of Bristol in the
4 amount of \$3,550,000. The court entered the Confession of Judgment and Order in the Bristol
5 Lawsuit on May 30, 2013.

6 28. Allstate Insurance Company and The Burlington Insurance Company separately
7 settled with Bristol, paying \$150,000 and \$175,000 respectively. These payments partially
8 satisfied the Confession of Judgment, reducing its principal unsatisfied amount to \$3,225,000.

9 29. The total settlement for Bristol therefore included \$2 million in cash and an
10 unsatisfied Confession of Judgment against Starline in the principal amount of \$3,225,000.
11 Bristol also obtained an assignment of Starline's rights, claims, and causes of action against
12 Colorado arising out of the Project and the Bristol Lawsuit. In exchange, Bristol released the
13 other settling parties and insurers, and agreed to indemnify and hold them harmless from claims
14 by Colorado.

15 30. In reaching these settlements, Bristol spent approximately \$500,000 on
16 investigation costs, expert and attorney fees, and litigation expenses.

17 31. At the time of these settlements, Starline's potential liability to Bristol was nearly
18 \$7.3 million, which included the estimated costs of stripping and then replacing the Project's
19 existing stucco cladding, Bristol's investigation costs, and estimated lost rental income and
20 mitigating costs.

21 32. At the time of settlement, Bristol, Starline, and the other settling parties and
22 insurers believed that Starline Windows (2001) Ltd. manufactured the windows furnished by
23 Starline to the Project.

24 33. In November 2013, Bristol began a strip and re clad of the Project, replacing the
25 original stucco cladding with Hardie panels. The Hardie recladding is less expensive and will
26 take less time to perform than a recladding with stucco would have taken. The total costs for this

1 compromise repair will exceed \$5.6 million, including the repair work, the investigation costs,
2 and the lost rental income and mitigating costs.

3 34. The current repair work is necessary solely because of the defective and leaking
4 Starline windows and resulting water damage to the Project.

5 **II. CONCLUSIONS OF LAW**

6 *A. Jurisdiction*

7 1. This Court has jurisdiction under 28 U.S.C. § 1332 because the parties are diverse
8 and the amount in controversy exceeds \$75,000.

9 *B. Colorado's Claims*

10 2. Colorado has the burden of proving its claim that the two applicable RSA
11 policies, the 00-LTD Policy and the 01-LTD Policy, provide coverage and are primary. The
12 evidence established that the 01-LTD Policy contains a super-escape Other Insurance clause. The
13 01-LTD Policy is therefore excess to Colorado's policy.

14 3. The 00-LTD Policy provides coverage for Starline under the Broad Form Vendors
15 Endorsement. That endorsement provides coverage only for damage arising out of manufacturing
16 defects. Colorado did not show that manufacturing defects were the sole cause of any damage.
17 Colorado also provided no evidence about the extent of damage caused by the manufacturing
18 defects. Absent such proof, Colorado has failed to meet its burden of showing the amount of any
19 primary coverage under the 00-LTD Policy by which this Court can measure any offset or credit
20 to which Colorado might be entitled.

21 4. Colorado's claim that RSA is primary because Starline has a right of indemnity
22 against Starline LTD also fails. There was no evidence of any agreement whereby Starline
23 agreed to indemnify Starline LTD. Implied indemnity claims against a settling defendant are
24 precluded so long as the settlement is reasonable. *See Toste v. Durham & Bates Agencies*, 67
25 P.3d 506, 523–24 (Wash. Ct. App. 2003).

26 *C. Defendants' Claims*

1 5. Absent proof of the amount of damage caused during a period, insurers on a risk
2 for a period of ongoing loss and damage are jointly and severally liable for the entire loss.
3 Defendants proved at least some damage occurred between December 15, 2001, and May 20,
4 2002, a time period for which there was no overlapping RSA coverage. Coverage under the
5 Colorado Policies is therefore triggered, and Colorado is jointly and severally liable for the entire
6 ongoing loss. The water damage to the Project is direct, physical damage so is recoverable under
7 the Warranty and the WPLA, as are the costs for stripping and recladding the Project.

8 6. Both parties agree that this Court can and should determine the reasonableness of
9 Defendants' settlements. The February 28, 2013 settlement, and the subsequent settlements with
10 Allstate and Burlington, were reasonable under the *Chaussee* factors. *See Mut. Of Enumclaw Ins.*
11 *Co. v. T&G Constr., Inc.*, 199 P.3d 376, 381 (2008). Starline's liability to Bristol for its
12 reasonable damages exceeded the amount of the settlements. The evidence showed that Bristol's
13 claims had merit, that considerable preparation took place over 20 months of litigation in the
14 Bristol lawsuit, and that Starline lacked substantive defenses to the claims. The settlement terms
15 reflected the extensive damage and the risks and expense of continued litigation, including
16 Starline's inability to pay, except through its insurers who had not accepted coverage. There was
17 no evidence of bad faith, collusion, or fraud in connection with the settlement.

18 7. Because the Court finds Defendants' settlements reasonable, the underlying
19 Confession of Judgment's unsatisfied principal amount of \$3,225,000 is the presumptive
20 measure of the harm. *See Besel v. Viking Ins. Co.*, 49 P.3d 887, 892 (2002). Colorado failed to
21 show that the settlement was the product of fraud or collusion.

22 8. Defendants also showed that Colorado acted in bad faith. The evidence, including
23 this Court's assessment of the credibility of Colorado's witnesses, demonstrated to this Court
24 that Colorado was obstructive to settlement of the claims against its insured, made no good-faith
25 effort to settle Bristol's claim against Starline, never offered or agreed to pay any amount in
26 indemnity for Bristol's claim against Starline, and failed to give equal consideration to Starline's

1 interests. Colorado instead put its own interests ahead of those of its insured. Colorado
2 unreasonably attempted to avoid or limit its own coverage obligations to Starline by insisting that
3 responsibility for the claims be assumed by others, despite lacking a reasonable basis for this
4 assertion. Colorado also attempted in bad faith to take advantage of Starline's settlement to avoid
5 its obligations.

6 9. Colorado's bad-faith conduct estops it from denying coverage. *Safeco Ins. Co.*,
7 823 P.2d 499, 506 (Wash. 1992); *Mutual of Enumclaw, Inc. Co. v. Dan Paulson Const., Inc.*, 169
8 P.3d 1, 10 (Wash. 2007).

9 10. Colorado's bad-faith actions during the settlement process also constitute a
10 violation of Washington's Consumer Protection Act ("CPA") because the conduct meets the five
11 required elements of a CPA claim. *See Hangman Ridge Training Stables, Inc. v. Safeco Title Ins.*
12 *Co.*, 719 P.2d 531, 533 (1986). Colorado's conduct was an unfair or deceptive act or practice, *see*
13 Wash. Admin. Code § 284-30-330, occurring in "trade or commerce," *see Salois v. Mutual of*
14 *Omaha Ins. Co.*, 581 P.2d 1349, 1352 (1978), that affected the public interest, *see Wash. Rev.*
15 *Code* § 48.01.030, and forced Starline into consenting to judgment against it as trial approached.

16 *D. Colorado's Defenses*

17 11. Colorado did not show that Starline breached the cooperation and subrogation
18 clauses of the Colorado Policies, because Colorado's bad-faith actions excused Starline from
19 those clauses. Neither did Colorado meet its burden of demonstrating that it was actually and
20 substantially prejudiced by Starline's settlement.

21 12. Colorado did not prove that Starline assumed liability under the Warranty.
22 Instead, the evidence showed that Starline's liability under the Warranty was primary. Starline
23 issued the Warranty, which was a generic form of warranty, and it performed obligations under
24 the Warranty for nearly a decade. All relevant parties treated Starline as the relevant entity under
25 the Warranty. Moreover, the Warranty was not the only source of Starline's liability in the
26 Bristol lawsuit.

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III. CONCLUSION

13. Defendants are entitled to judgment against Colorado in the principal amount of \$3,225,000.00, plus CPA treble damages in the amount of \$25,000.

14. Because the amount of \$3,225,000.00 was not deemed reasonable by the state court, there was no basis for calculating any amount due with exactness until now. The Court therefore concludes that it was not a liquidated sum as of May 2013 and awards no prejudgment interest.

15. Defendants are also entitled to award of their attorney and expert fees and costs against Colorado under *Olympic S.S. Co., Inc. v. Centennial Ins. Co.*, 811 P.2d 673 (1991) and *Panorama Village Owners Ass'n v. Allstate Inc. Co.*, 26 P.3d 910 (144-45) (2001), in an amount to be determined by the Court upon application for same by Defendants.

DATED this 27th day of May 2014.



John C. Coughenour
UNITED STATES DISTRICT JUDGE