WASHINGTON INSURANCE LAW LETTER™

A SURVEY OF CURRENT INSURANCE LAW AND TORT LAW DECISIONS

EDITED BY WILLIAM R. HICKMAN

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NO RETROACTIVE POLICY ANNULMENT

FACTS:

Steve went into the hospital September 10, 1998, for a gastroenterostomy. He was dead by October 1.

Between the time of Steve's surgery and his death, the hospital was insured with ACIC. The policy was renewed April 1, 1999, and again on April 1, 2000. The policies were claims-made-and-reported policies. After the policies had been renewed for the final year, the hospital filed for bankruptcy. The hospital and ACIC agreed to cancel the policy effective August 1, 2000. There would be no coverage for any claim which had not been made by August 1, 2000.

The widow filed her suit against the hospital three months later. She alleged that the hospital did not have imaging equipment that could accommodate obese patients like her Steve. ACIC got first notice of the claim in December 2000.

ACIC filed suit in federal court in Seattle to resolve the coverage issues. The district court judge concluded as a matter of law that the ACIC policies did not provide any coverage. The widow appealed to the Ninth Circuit.

The Ninth Circuit punted the question to the Washington Supreme Court via the certified question procedure. By a vote of 4/2/3, the "majority" held that the agreement to cancel the claims-made policies was a prohibited retroactive annulment under the Insurance Code (RCW 48.18.320) which prohibits retroactive annulment of a policy after occurrence of injury, death, or damage for which the insurer might be liable.

HOLDINGS:

(1) Occurrence and claims-made policies are fundamentally different. Often there are sound reasons for treating them differently. Occurrence policies generally provide coverage for damage that occurs during the policy period regardless of when the damage is discovered. Claims-made policies generally provide coverage for claims which the insurer receives notice of during the policy period regardless of when the damage occurred.

(2) In construing a statute, the court's primary objective is to ascertain and give effect to the intent and purpose of the legislature in creating the statute.

(3) To determine legislative intent, the court looks first to the language of the statute.

(4) If a statute is clear on its face, its meaning is to be ascertained from the language of the statute alone.

(5) This statute is clear on its face. It is applicable to all insurance contracts. This includes claims-made policies. Accordingly, we hold RCW 48.18.320 prohibits and voids any agreement between an insured and insurer to retroactively cancel or rescind an insurance policy to the extent that it is made after the occurrence of the peril insured against.

(6) The agreement to cancel the policies in this instance is a prohibited retroactive annulment and void as to perils insured against that occurred before the cancellation agreement was made.

COMMENT:

Three justices dissented, pointing out that the majority opinion had obliterated the distinction between claims-made and occurrence policies. They noted that the majority was ignoring elementary rules of statutory construction when it failed to discern that where the legislature said "retroactively annulled," it did not mean "cancellation." They concluded that a correct interpretation of the statute would conclude that it does affect the cancellation of a claims-made policy where the insurer has no notice of a claim.

Another problem with the majority is that it fails to factor in the fact that the Insurance Code was written in 1948. In 1948, claims-made policies were as rare as hen's teeth. The legislators who enacted the statute did not intend to include claims-made policies because they never heard of claims-made policies.

There are some in the coverage community who strongly feel that this is the worst insurance coverage opinion ever published. But those of us with a *Mahler* fixation know that while this opinion may affect a few claims, *Mahler* goes on day after day, week after week, picking the pockets of Washington policyholders.

American Continental Ins. Co. v. Steen, ___ Wn.2d ___, ___ P.3d ___ (2004), 2004 WL 107542 (Wash. May 14, 2004).

BACK TO THE BASICS

FACTS:

Mary sold some land to Greg in April 2001. On the Form 17, there were representations that there were no known defects in the pumping system or the toilets. Actually, there had been sewer back-up problems for over three years. By November 2001, the toilet had overflowed three times. Greg sent down a video camera which revealed tree roots and blockage.

Greg sued Mary for failing to disclose accurate and truthful information. Mary tendered to Allstate which accepted under a reservation of rights.

Allstate filed a declarative action. The trial court ruled that Allstate had a duty to defend and a duty to pay. Allstate appealed.

While the case was on appeal, the underlying case settled with Allstate paying 12/13 of the settlement.

On appeal, the Court of Appeals ruled that Allstate had a duty to defend but had no duty to pay. The court also held that Mary was entitled to attorney's fees, but **only** to the extent of her successful duty to defend claim. Mary was not entitled to attorney fees on the duty to pay question.

HOLDINGS:

(1) The duty to defend arises at the time an action is brought, and is based on the potential for liability. The duty to defend arises when a complaint against the insured, construed liberally, alleges facts which could, if proven, impose liability upon the insured within the policy's coverage.

(2) Only if the alleged claim is clearly not covered by the policy is the insurer not obligated to defend. An ambiguous complaint is to be liberally construed in favor of triggering the duty to defend. If the insurer is unsure of its obligation to defend, it may defend under a reservation of rights, while seeking a declaratory judgment that it has no duty to defend. The duty to defend is broader than the duty to indemnify.

(3) The duty to indemnify is a separate obligation. The duty to indemnify hinges on the insured's actual liability to the claimant and actual coverage under the policy. To determine coverage, the insured must establish that the loss falls within the "scope of the policy's insured losses."

(4) The complaint alleges a triggering event, the failure to disclose. This is essentially a misrepresentation claim. The complaint alleges both property damage to the sewer line and loss of use.

(5) The question of whether the failure to disclose constituted an accident was ambiguous. Allstate was required to defend.

(6) The property damage did not arise from the alleged misrepresentation. The property damage arose independently of any alleged misrepresentation. The property damage arose from roots, the degradation of the pipe material, or the placing into the sewer system of inappropriate

items. The property damage or loss of use did not "arise from" the representations in the real estate form.

COMMENT:

This little opinion is an absolute gem.

In support of its analysis that the property damage was not caused by the misrepresentation, the court relied upon two cases: *Bush v. Shoemaker-Beal*, 26 Kan. App. 2d 183, 987 P.2d 1103 (1999) (the termite caused the damage, not the negligent misrepresentation); *State Farm Lloyds v. Kessler*, 932 S.W.2d 732 (Tex. App. 1996) (the misrepresentation caused economic damages, not physical property damage).

Allstate Ins. Co. v. Bowen, ___ Wn. App. ___ , ___ P.3d ___ (2004), 2004 WL 1243936 (Wash. App. May 3, 2004).

REED MCCLURE SUPER LAWYERS

Just as we were going to press with this issue, it was announced that three Reed McClure lawyers have been named as Super Lawyers for 2004. They are: Jack Rankin, Pam Okano, and Nancy Elliott. We will have more information next issue. For now, a great big congratulations to Jack, Pam, and Nancy!!

$17,400,000.00 IS REASONABLE!

The opinion starts out: "When an insurer refuses, in bad faith, to defend a claim brought against its insured, the insured may protect its interests by settling with the plaintiff and then seek recovery from the insurer in a bad faith action."

FACTS:

Alia won a construction contract with Seattle. Alia was insured by XLE. Alia subbed the shoring work to Cascade. Cascade agreed to defend and indemnify Alia for any damage attributable to Cascade. Alia was named an additional insured under Cascade's CGL policy with Royal.

Work on the project began. Alia was excavating. Cascade was shoring. A Cascade employee

named Debra was working on the project when a 1,000-lb. steel pipe fell on her. She sustained substantial injuries.

Debra sued Alia alleging negligence. Alia tendered its defense to Cascade and to Royal. Both refused to defend. Alia was defended by its own carrier XLE. Alia sued Cascade for indemnity. Royal defended Cascade.

Alia and Debra entered into a $20 million settlement, with $6 million payable in cash, and an assignment of Alia's claims against Cascade and Royal. Alia assigned all of its interests to XLE, and XLE assigned a 60% interest to Debra. Debra agreed to a covenant not to execute against Alia and XLE in excess of $6 million.

Debra then requested a reasonableness hearing in the personal injury proceeding. The court allowed Royal to intervene but refused to reopen discovery, pointing out that Royal had the full opportunity to do discovery when it was defending Cascade.

After the reasonableness hearing, the trial court concluded that the $20 million settlement was **unreasonable**, but that a $17.4 million settlement would be **reasonable**. It also found that there was no fraud or collusion. Debra and Alia changed their settlement number from $20 million to $17.4 million. The trial court entered judgment against Alia.

Royal appealed, arguing that the reasonableness determination should have been made in the bad faith suit against Royal, that it should have been allowed to conduct discovery, and that the settlement was not reasonable. The Court of Appeals affirmed, finding that the personal injury action was the proper forum to resolve the question of reasonableness, and that the $17.4 million settlement was reasonable.

HOLDINGS:

(1) Royal was not entitled to reopen discovery and postpone the date of the reasonableness hearing. Royal was not a stranger to the underlying personal injury case, inasmuch as it had provided counsel for insured subcontractor.

(2) The appellate court reviews the trial court's decision to limit discovery for an abuse of discretion.

(3) Royal will have a full opportunity to defend itself in the bad faith action. There it can argue that it did not act in bad faith and is therefore not liable for any of the settlement amount.

(4) A trial court's finding of reasonableness is a factual determination that will not be disturbed on appeal when supported by substantial evidence.

(5) In determining whether a settlement is reasonable, the trial court should consider:

> "the releasing person's damages; the merits of the releasing person's liability theory; the merits of the released person's defense theory; the released person's relative fault; the risks and expenses of continued litigation; the released person's ability to pay; any evidence of bad faith, collusion, or fraud; the extent of the releasing person's investigation and preparation of the case; and the interests of the parties not being released."

(6) Given the extent of Debra's injuries, Alia's clear liability, Alia's financial situation, and the anticipated costs of future litigation, the trial court did not abuse its discretion in concluding that $17.4 million was reasonable.

COMMENT:

Shucks. It seems like just yesterday that we got all excited when, after trial, a jury awarded $6 million to a high school football player. Or worse yet, $10 million to a lump of protoplasm. But that was after a trial.

A couple of interesting items in the opinion: One was a summary of the 800+ page exhibit prepared by Debra and Alia in support of a finding of reasonableness. It's like a road map to the big hit.

The second is in a footnote at the end of the opinion. After noting that Royal had urged $14.8 million as an alternative figure, the court characterized the $2.6 million gap as being a "relatively small difference"!

Howard v. Royal Specialty Underwriting, Inc., ___ Wn. App. ___ , 89 P.3d 265 (2004).

RES IPSA FOREVER

FACTS:

Keith had three bad wisdom teeth. He went to see Dr. John. Dr. John looked at the x-rays. He interpreted an "artifact" on the x-ray as identifying the lower right jaw. He operated on the lower right jaw. There were no wisdom teeth in the lower right jaw.

The "negative exploration" by Dr. John caused injury to the nerve in Keith's jaw. He sued Dr. John. Both sides had expert testimony. Dr. John's expert said it was reasonable for him to rely on the x-ray and his interpretation of the ambiguous mark on the x-ray was not negligent. Keith's expert said Dr. John violated the standard of care.

The jury found for Keith. Dr. John appealed, arguing that the trial court had made a mistake when it instructed the jury on res ipsa loquitur. The Court of Appeals agreed with Dr. John. It pointed out that the res ipsa loquitur doctrine has no application when there is evidence that the action would occur without negligence on the part of the defendant.

The Supreme Court accepted review and reversed, making the factual determination that Dr. John's evidence had not completely explained how the event occurred.

HOLDINGS:

(1) The doctrine of res ipsa loquitur spares the plaintiff the requirement of proving specific acts of negligence in cases where a plaintiff asserts that he or she suffered injury, the cause of which cannot be fully explained, and the injury is of a type that would not ordinarily result if the defendant were not negligent.

(2) Res ipsa loquitur is applicable only when the evidence shows

(A) the accident or occurrence producing the injury is of a kind which ordinarily does not happen in the absence of someone's negligence, (B) the injuries are caused by an agency or instrumentality within the exclusive control of the defendant, and (C) the injury-causing accident or occurrence is not due to any voluntary action or contribution on the part of the plaintiff.

(3) It is arguable that an oral surgeon's act of drilling on the wrong side of a patient's mouth is akin to a surgeon's amputation of the wrong limb.

(4) We conclude that it is within the general experience of mankind that the act of drilling on the wrong side of a patient's jaw would not ordinarily take place without negligence.

(5) A jury instruction invoking the doctrine of res ipsa loquitur is inapplicable where there is evidence that is *completely* explanatory of how an accident occurred and no other inference is possible that the injury occurred another way.

(6) The Court of Appeals erred in concluding that the cause of Pacheco's injury was fully explained.

(7) We hold that a plaintiff is entitled to an instruction on the doctrine where the elements of res ipsa loquitur are satisfied, even if the defendant's testimony suggests but does not completely explain how the event causing injury to the plaintiff may have occurred.

COMMENT:

What it means is that any time a plaintiff comes close to res ipsa loquitur, the trial court will have to instruct on it since it will always be a jury question as to whether or not there was complete explanation.

Pacheco v. Ames, 149 Wn.2d 431, 69 P.3d 324 (2003), *reversing* 110 Wn. App. 912, 43 P.3d 535 (2002).

EARLY ON A DARK AND RAINY MORNING . . .

FACTS:

. . . Frank was driving his pickup north on I-5. He lost control and rolled the pickup, coming to rest in the oncoming traffic lanes. He was still in his seat belt hanging upside down. The pickup was insured by Allstate.

Along came Jeffrey, driving his employer's car which was insured by T.H.E. Insurance Company. (I am not making that up.) Jeffrey apprised the situation, parked his vehicle, and sought to effectuate a rescue of Frank. While Jeffrey was talking to Frank, a northbound van slammed into the pickup, killing Jeffrey.

The van driver was underinsured. This dispute was whether Jeffrey's estate had a UIM claim under the Allstate policy or the T.H.E. policy or both or neither. That question turned upon whether Jeffrey was "using" the overturned pickup or his employer's auto when he was killed.

The trial court ruled he was "using" the auto and was not "using" the pickup. The Court of Appeals reversed, ruling he was "using" the pickup and was not "using" the auto.

COURT OF APPEAL HOLDINGS:

(1) Underlying the UIM statute is a strong public policy to ensure coverage for innocent victims of uninsured drivers. The purpose of UIM coverage is to permit the injured party to recover those damages he or she would have received if the tortfeasor had been insured.

(2) Under the liability provisions of the Allstate policy, any person "using" the vehicle with the named insured's permission is covered. The statutory policy of RCW 48.22.030 vitiates

any attempt to make the meaning of insured for purposes of uninsured motorist coverage narrower than the meaning of that term under the primary liability section of the policy.

(3) Case law establishes that "using" is broad and includes all proper uses of a vehicle.

(4). Case law also establishes the general criteria for determining whether a person is "using" a vehicle and thus insured under a UIM endorsement.

a. There must be a causal relation or connection between the injury and the use of the insured vehicle;

b. The person asserting coverage must be in a reasonably close geographic proximity to the insured vehicle, although the person need not be actually touching it;

c. The person must be vehicle oriented rather than highway or sidewalk oriented at the time; and

d. The person must also be engaged in a transaction essential to the use of the vehicle at the time.or inferred from the mere happening of an accident.

COMMENT ON COURT OF APPEALS HOLDINGS:

At that point in time, Cool Spring 2002, XXVI, No. 2 Washington Insurance Law Letter, we were of the view that the trial judge had it right: Jeffrey was "using" the auto, not the pickup. The parties were not satisfied. Both the estate and the insurer of the pickup petitioned for review.

SUPREME COURT HOLDINGS:

The Supreme Court granted review and "surprise!," it "held" that Jeffrey was "using" both vehicles and so there was UIM coverage under both policies. (Note that this is what four justices said; four other justices said the Court of Appeals was correct; and the last justice said that the trial judge was correct.)

COMMENT ON SUPREME COURT HOLDING:

The message is you just got to be in the neighborhood.

COMMENT:

A while back, the Alaska Supreme Court issued a coverage/bad faith/punitive damages opinion, *Great Divide Ins. Co. v. Carpenter,* 79 P.3d 599 (Alaska 2003), which was summarized by Alaska counsel:

1. A tree falls in the woods.

2. There is an insurance policy nearby.

3. There is coverage.

Now we have the Washington answer:

1. There is an auto accident on I-5.

2. There are two policies nearby.

3. They both have coverage.

Butzberger v. Foster, ___ Wn.2d ___, 89 P.3d 689 (2004), *aff'g in part, rev'g in part,* 112 Wn. App. 81, 47 P.3d 177 (2002).

NO UIM WALL PINNING COVERAGE

FACTS:

Mark worked at Larry's Chevron station as a mechanic. One day, Mark was working on Tom's truck. Tom turned on the ignition. This caused the truck to lurch forward and pin Mark to the wall. Tom had no insurance.

But Larry had a general liability garage policy. That policy excluded coverage for autos used in connection with garage operations. But this exclusion did not apply to customers' vehicles. An endorsement to the policy provided liability coverage for bodily injury arising out of the use of customers' vehicles used in the business but excluded claims made by employees. The policy had no UIM provision whatsoever.

Mark sued, arguing that the insurance company was required to offer UIM to Larry, and that the employee exclusion did not apply. The trial court concluded that RCW 48.22.030(2) did not require UIM to be offered, and the employee exclusion applied.

Mark appealed to the Court of Appeals, arguing that any insurance policy that provides coverage for any vehicle must also provide UIM protection. The court disagreed, holding that the UIM statute did not apply because the policy was not issued with respect to a vehicle registered or principally garaged in Washington.

The Supreme Court granted Mark's petition so that it could determine whether a general liability garage policy that provided liability coverage on customers' cars was required by the UIM statute to provide UIM coverage. The court decided it was not required.

HOLDINGS:

(1) Mark's argument is contrary to the plain wording of the UIM statute.

(2) The statute does not mandate coverage in connection with every type of liability policy that will cover damages caused by vehicles.

(3) It does not comport with the clear language of the statute to require an insurer to offer uninsured motorist coverage for vehicles not owned by the insured.

(4) The statute contemplates uninsured motorist coverage in connection with new or renewal automobile policies for motor vehicles an insured registers or principally garages in Washington. RCW 48.22.030(2) relates to an ownership interest by the insured and is expressly for the protection of the insured.

(5) The liability policy in this case was not issued with respect to any motor vehicle under RCW 48.22.030(2). The policy was issued with respect to garage operations. Thus, it was not an automobile policy but a general liability garage policy.

COMMENT:

The clarity of the lack of a statutory basis for UIM coverage in this instance can be seen when we note that the decision was unanimous - a rare event for the current court in insurance matters..

For you scorekeepers out there, please note that of the last eight insurance opinions from the Supreme Court, this is the only one which found in favor of the insurance company. But that should come as no particular surprise. During the oral argument of one of those seven losses, one justice stated: "Notwithstanding the policy language, we're going to apply an equitable principle. . . ."

Hodge v. Raab, ___ Wn.2d ___, 88 P.3d 959 (2004), *aff'g* 116 Wn. App. 303, 65 P.3d 679 (2003).

IS IT ADVERTISING OR JUST INFRINGEMENT?

FACTS:

Elmer designed and patented a better way for roof top advertising signs to attach to the roofs of cars. (Not quite up there with finding a cure for cancer, but it keeps the guys in the patent office out of mischief.) Auto Sox sells rooftop advertising signs. Elmer sued Auto Sox for patent infringement.

Auto Sox tendered to its insurance company which denied coverage because patent infringement is not "advertising injury." Auto Sox sued the insurance company. The trial court ruled that the claim for patent infringement was an advertising injury. The Court of Appeals granted discretionary review and reversed holding that a claim for selling a patented rooftop sign was not "advertising injury."

HOLDINGS:

(1) Interpretation of an insurance contract is a question of law.

(2) In construing the language of an insurance policy, the policy should be given a fair, reasonable, and sensible construction as would be given to the contract by the average person purchasing insurance.

(3) If the language is clear and unambiguous, the court must enforce it as written and may not modify it or create ambiguity where none exists.

(4) Misappropriation of an advertising idea is the wrongful taking of another's manner of advertising.

(5) If the insured took an idea for soliciting business or an idea about advertising, then the claim is covered. But if the allegation is that the insured wrongfully took a patented product and tried to sell that product, then coverage is not triggered.

(6) Auto Sox did not take Elmer's ideas about how to solicit customers with his patented design for a rooftop sign. Auto Sox took his idea for the manner in which a rooftop sign is attached to a vehicle.

(7) A claim for patient infringement is not covered by the advertising injury provision of the CGL policy.

COMMENT:

A majority of cases from around the country also hold that patent infringement claims are not covered as a misappropriation of an advertising idea in an insurance policy.

The court distinguished this situation from that found in the recent decision of *Amazon.com Intern., Inc. v. Am. Dynasty Surplus Lines Ins. Co.,* 120 Wn. App. 610, 85 P.3d 974 (2004). There, the allegation that Amazon used the patented product as an advertising technology gave rise to a duty to defend.

Auto Sox USA Inc. v. Zurich No. Am., ___ Wn. App. ___ , 88 P.3d 1008 (2004).

NO PIP SET-OFF

FACTS:

Jessie was a passenger in a car driven by Larry. It collided head-on with a car on the wrong side of the road.

The liability carrier for the bad driver paid its $25,000 limits. Larry's insurer paid $10,000 in PIP. Jessie then asked for UIM arbitration with her own carrier, Allstate. The arbitrator set the damages at $122,112.40 subject to applicable set-offs. The parties agreed that the $25,000 should be subtracted but got into a dispute as to whether the $10,000 could be subtracted. The policy provided that UIM payments would be reduced by any amounts paid under PIP.

Allstate moved for an order authorizing a $10,000 set-off against the UIM arbitration. The trial court denied the motion and also awarded Jessie $3,000 in attorney fees.

Allstate appealed. The Court of Appeals in the first paragraph of its opinion said it had already answered the question presented 18 years ago: *Allstate Ins. Co. v. Welch,* 45 Wn. App. 740, 741, 727 P.2d 268 (1986), *rev. denied,* 107 Wn.2d 1033 (1987).

HOLDINGS:

(1) In order to be enforceable, the terms and conditions of the insured's contract with the UIM carrier must be consistent with the statute and cases construing it.

(2) The underinsured provisions allow an injured party to recover those damages which the insured party would have received had the responsible party been insured with liability limits as broad as the injured party's statutorily mandated underinsured motorist coverage limits.

(3) Any policy provision which limits or reduces the amount of UIM coverage mandated by statute is void as against public policy.

(4) An insurer cannot limit or reduce the amount of underinsured motorist coverage

mandated by statute unless such limitation or reduction has been expressly authorized by the Legislature.

(5) This PIP offset provision is against public policy and therefore void.

(6) An award of attorney fees is "required in any legal action where the insurer compels the insured to assume the burden of legal action, to obtain the full benefit of his insurance contract." An award of fees is appropriate where the insurer forces the insured to litigate questions of coverage, but not where the dispute merely involves the value of a claim. Generally coverage questions involve who is insured, the type and risk insured against, or whether the insurance contract exists.

(7) This controversy is not over the extent of damages. This dispute is over the validity of an insurance provision that reduces coverage. The award of attorney fees was proper. Jessie is also entitled to attorney fees on appeal.

Schlener v. Allstate Ins. Co. , ___ Wn. App. ___, 88 P.3d 993 (2004).

MAHLER THUMPS *THIRINGER*

FACTS:

While Cook's house was under construction, a fire started in an exhaust flue installed by Lavine. Cook claimed a loss in excess of $300,000. His fire insurer, USAA, paid him policy limits of $212,000. USAA retained a $212,000 subrogation interest in Cook's claim against Lavine.

Lavine's insurer purchased USAA's subrogation interest for $126,000. Cook went to trial against Lavine and lost.

Cook then turned to USAA and demanded it pay him a portion of what it had received from Lavine's insurer. USAA declined. Cook sued, arguing that USAA was not entitled to any recovery until Cook had been fully compensated. The trial court dismissed the claim. The Court of Appeals affirmed, holding that the rule of full compensation of insureds does not apply where there is no third party who is liable to the insured.

HOLDINGS:

(1) In the insurance context, the doctrine of subrogation enables an insurer that has paid an insured's loss pursuant to a policy to recoup the payment from the party responsible for the loss.

(2) While an insurer is entitled to be reimbursed to the extent that its insured recovers payment for the same loss from a tortfeasor responsible for the damage, it can recover only the excess which the insured has received from the wrongdoer, remaining after the insured is fully compensated for his loss.

(3) Washington courts have applied the *Thiringer* rule only when a third party is liable to the insured.

(4) The *Thiringer* full compensation rule has never been applied in situations where there is no liable third party.

(5) When the insured has no basis in tort or contract for a recovery, then *Thiringer* does not apply.

COMMENT:

Holding #2 above sets out the rule established in *Thiringer v. Am. Motors Ins. Co.,* 91 Wn.2d 215, 219, 588 P.2d 191 (1978). Holding #1 comes from *Mahler v. Szucs,* 135 Wn.2d 398, 413, 957 P.2d 632, 966 P.2d 305 (1998).

Cook v. USAA Cas. Ins. Co., ___ Wn. App. ___, ___ P.3d ___ (2004), 2004 WL 1194077 (Wash. App. Jun. 1, 2004).

FOLLOW UP FOLLOW UP

Following up on the California rule we mentioned last issue which provides that an insurer is not obliged to pay a stipulated judgment when the company was providing a defense, did not agree to the stipulation, and the policyholder was not harmed by the stipulation, we note *Low v. Golden Eagle Ins. Co.,* 110 Cal. App. 4th 1532 (2003). Here the court held that the no-voluntary-payments provision applied to a post-tender breach such that the insurer was not required to pay for the policyholder's settlement done without the insurer's knowledge or consent.

And for those of you wanting to know the current score on autoerotic asphyxiation (See "A Real Swinger" – Part IV, XXVI, No. 2, p. 43 for an explanation of the details), we have two: *MAMSI Life & Health Ins. Co. v. Callaway,* 375 Md. 261, 825 A.2d 995 (2003); *Critchlow v. First Unum Life Ins. Co.,* 340 F.3d 130 (2nd Cir. 2003). In the former, the Maryland Court of Appeals said AE can be distinguished from other extreme recreational activities because skydivers and rock climbers do not set out to injure themselves, while deliberately constricting the flow of oxygen to the brain is a self-inflicted injury. (This method of problem-solving is known as begging the

question.) The opinion, which contains a long quotation from John Milton, *Paradise Lost*, bk. 2, 1.592 (1667), was not unanimous.

Also not unanimous was the opinion from the Second Circuit. The dissent quoted at length from a Ninth Circuit opinion which held that in an ERISA context, death from AE is not a self-inflicted injury. Clearly, we are getting closer to the day when the U.S. Supreme Court will be called upon to decide whether death from AE misadventure is an accident or a self-inflicted injury.

All of that leads us to *Chale v. Allstate Life Ins. Co.,* 353 F.3d 742 (9th Cir. 2003). Here, the court had to answer the question whether a climbing death on Mt. Kilimanjaro falls within the meaning of the terms "accidental injury" and "disease." In a remarkably lucid opinion, the court concluded that death from altitude-induced edema was "accidental" and it was not a "disease."

Back in the Late Summer/Fall 2003, p.41, we covered the Washington Supreme Court's retreat from its 9-0 opinion in *Ellwein*, We may note that this about-face was reviewed in a national article in *Insurance Litigation Reports*, vol. 26, No. 1: "Bad Faith & Summary Judgment in Washington." What is surprising about the article is not that it was written and printed but that it was written by a Chicago lawyer, William T. Barker. He felt he had a certain proprietary interest in *Ellwein* since the opinion had expressly relied upon an article he had written earlier. He also said that *Ellwein* had contained a couple of mistakes but now that they had been repudiated, the narrow holding of *Ellwein* with respect to first party cases remains sound and undisturbed.

Last issue we pointed out that some of the litigation guidelines being issued by some insurance companies created situations which were in conflict with the Rules of Professional Conduct. A guideline which appears often is that the insurance company will not pay a lawyer for doing routine calendaring. What can occur when this procedure is followed is pointed up in *Pincay v. Andrews,* 351 F.3d 947 (9th Cir. 2003). Here, the attorney delegated to the firm's calendaring clerk the job of figuring out the deadline for filing a Notice of Appeal from a "seven figure judgment." He missed by 30 days. The trial judge gave the lawyer an extension. The Ninth Circuit in a 2-1 opinion took away the extension. The majority said that the lawyer's reliance on the law firm's calendaring clerk did not amount to excusable neglect, it was just neglect.

And we note *U.S. v. Ratigan,* 351 F.3d 957 (9th Cir. 2003). It has something to do with the armed robbery of a bank in Spokane. But what makes it memorable is this statement by the court:

> We respectfully note that all the time and energy expended in this § 2255 proceeding could have been avoided by careful lawyering by the government, but like an occasional doctor, a lawyer also sometimes leaves a sponge in the patient.

Also from Spokane in an unpublished Division III opinion, *Hahn v. Hartman,* 2004 WL 1157842 (Wash. App. May 25, 2004), we have what happened in the trial court when plaintiff's counsel decided to take on the defendant' expert:

Q So is that what you put on your intake questionnaire? Do you come here today because you have an injury that's bothering you from a motor vehicle accident, or are you coming here for good health and feeling?

A Yes, I do.

Q So if it's a motor vehicle accident, you don't want to deal with them, but, if it's for good health, you do?

A I'll be honest with you. In 31 years of practice and I've seen hundreds of cases and I've gone to court—not to court. I've sent in forms for them for their injuries. **In 31 years I have never had anybody come back for care after they got their settlement from a motor vehicle accident.**

Plaintiff's Counsel: Your Honor, I'd move to strike that as inappropriate and irrelevant from a personal standpoint. He has no foundation to make that pejorative statement.

WITNESS: I do. 31 years.

THE COURT: The motion is denied.

AN ANNOUNCEMENT OF CONSIDERABLE IMPORTANCE

Over the past couple of years, our clients and friends have called upon our services with ever increasing frequency. In response to this we have added lawyers, paralegals, secretaries, and support staff. Realizing that we had outgrown our space here on the 49th floor of Two Union Square, we are picking up and moving this year to the 15th floor to better serve our clients. All of us here at Reed McClure thank you for your support. We look forward to seeing you after we have moved into our new space.

AN ANNOUNCEMENT OF NOT QUITE AS CONSIDERABLE IMPORTANCE

Remember, selected back issues of the Law Letter are available on our web site at www.rmlaw.com/newsletter.html ... and Pam Okano's periodic Coverage Column is available at www.wdtl.org/ (see Coverage Uncovered).

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