# WASHINGTON INSURANCE LAW LETTER™

*A SURVEY OF CURRENT INSURANCE LAW AND TORT LAW DECISIONS*

## edited by William R. Hickman

*VOLUME XXIII, NO. 3* *END OF THE MILLENIUM 1999*

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# A NOT SO LEGAL SECRETARY

## FACTS:

Wayne was a lawyer. He had charge of a client's checkbook. He delegated the check writing to his legal secretary. Before being discovered she diverted about a quarter million into her own account. Wayne told his insurance broker, who told the law firm's malpractice carrier, CNA, about the problem. The problem got worse when the E&O carrier pointed to the dishonest employee exclusion. CNA agreed to pay for Wayne's choice of attorney to represent him. CNA offered to toss in $125,000 to help settle the claim. Wayne turned them down.

CNA filed a dec action in federal court. The federal judge refused to hear the case and dismissed it. So Wayne sued CNA in state court. He sued as to duty to defend, duty to pay, CPA, bad faith, negligence, attorney fees, and punitive damages. The trial court dismissed all the claims. Wayne appealed. The Court of Appeals affirmed.

## HOLDINGS:

(1) Summary judgment in an insurance coverage case should be granted where (1) there is no dispute about the facts and (2) coverage depends solely on the language of the insurance policy.

(2) An insurance company, as a private contracting entity, is generally permitted to limit the liability it assumes under its policies.

(3) The policy covers "wrongful acts" of those insured. It excludes coverage for claims arising out of: any dishonest, fraudulent, criminal, or malicious act or omission by you or any of your partners, officers, stockholders, or employees.

(4) The dishonest employee exclusion unambiguously bars coverage.

(5) In order to establish a bad faith breach of an insurance contract, the insured must show that the breach was "unreasonable, frivolous, or unfounded." An insured may maintain an action against an insurer for bad faith investigation of the insured's claim and violation of the CPA, regardless of whether the insurer was ultimately correct in denying coverage under the policy. But it is not bad faith for an insurer to deny coverage based on a reasonable interpretation of the insurance policy.

(6) CNA satisfied the four *Tank* factors.

## COMMENT:

A stunning opinion. Counsel for the insured made not only arguments which should be made, they made complex arguments not seen before. In addition to what is noted above, the court also

discussed why the efficient proximate cause rule did not apply, and why CNA had no duty to Wayne to protect him from the criminal acts of his own secretary.

Oddly, this important opinion was filed in June 1999, but was not published until August 1999.

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*Stouffer & Knight v. Continental Casualty Co*., 96 Wn. App. 741, 982 P.2d 105 (1999)

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# THE FLOATING LAYER TAKES A HIT

## FACTS:

Sang's truck stalled on I-5. Margery collided with Sang, pushing Sang's truck into the Batacans' passing vehicle.

Sang was uninsured, but Margery had $300,000 limits through Safeco. The Batacans sued Sang and Margery and claimed UIM coverage through their own carrier, Allstate.

Unable to agree, the Batacans and Allstate submitted to UIM arbitration as the policy required. The arbitration panel determined that Sang and Margery were each 50 percent at fault. The Batacans' damages were assessed at a total of $60,000. Allstate refused to pay, claiming that it could offset Margery's $300,000 liability limits against the assessed damages.

Allstate sued, seeking a judicial declaration that it was not required to pay any UIM damages to the Batacans. The Batacans counterclaimed for breach of contract, CPA violations, bad faith, fraud, and equitable relief.

The Batacans settled with Margery and Safeco for $54,000. The trial court declared that the Batacans were not entitled to UIM coverage and dismissed the Batacans' counterclaims. The Court of Appeals agreed, reasoning that Sang and Margery were jointly and severally liable, thus Margery's $300,000 limits completely offset the UIM arbitration award.

The Supreme Court reversed in a 5-3 decision, determining that Allstate should have paid the $30,000 attributed to Sang.

## HOLDINGS:

(1) A tortfeasor's uninsured vehicle remains "uninsured" for purposes of UIM coverage even if another tortfeasor's liability policy limits exceed the injured parties' total damages.

(2) For tortfeasors to be jointly and severally liable under the statute, there must be a judgment entered against them. An arbitration determination apportioning fault between absent tortfeasors is not a judgment against them.

(3) Where arbitration is provided for in the policy, a UIM carrier has two options. It can either buy out the claim of its insured and sue the tortfeasors or pay its insured the damages attributed to the underinsured tortfeasor and retain the right to sue that tortfeasor.

DISSENT:

The dissenters asserted that an arbitration award should be treated like a judgment for joint and several liability purposes. Additionally, they stressed that UIM coverage is secondary coverage and that such coverage should not even be implicated if there is adequate liability insurance to pay the assessed damages.

COMMENT:

The purpose of UIM is to provide a layer of insurance protection floating above all available liability coverages. The Supreme Court decision is in conflict with that purpose.

It is becoming more and more apparent that the UIM insurers should dump the arbitration provision in the UIM coverage. Superior Court courtrooms and juries exist for the purpose of resolving how badly hurt a UIM insured was.

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*Allstate Ins. Co. v. Batacan,* 139 Wn.2d 443, 986 P.2d 823 (1999)

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# I DO NOT MAKE THESE UP

FACTS (AS SET OUT BY THE COURT):

In the early morning hours of August 27, 1991, seventeen-year-old Shannon, who was involved in a covert liaison with Piccirillo, a married woman with children, suddenly died while having sexual relations with Piccirillo in her automobile. After failing to revive Shannon, Piccirillo sat in her car for a time, then dressed, pulled up Shannon's pants, and drove to Shannon's house, where he lived with his family. There she sat in her car at the curb for perhaps ten minutes trying to decide what to do, including whether to call an ambulance, get Shannon's mother, or take Shannon to the hospital. She finally decided that she "didn't know what to do," opened the passenger door of her car, said "I'm sorry," and pushed Shannon's body out into the gutter in front of his house. As she did so, she "thought about . . . the effect it [the fact that Shannon's body had been so discarded] would have on the people that loved him."

Upon learning of the circumstances of the discovery of her son's body (apparently by her landlord) while at the hospital where the body had been taken, the plaintiff, Cynthia Richardson, suffered a nervous breakdown. As a result, she required hospitalization, experienced insomnia, appetite loss and panic attacks, confined herself to her home for a year, and for many years thereafter regularly took medication for anxiety and depression.

Cynthia sued Piccirillo for wrongful death and intentional and negligent infliction of emotional distress.

Piccirillo had a deluxe homeowners policy with Liberty Mutual. It had a $100,000 each occurrence limit.

Cynthia wanted $200,000 on the ground that Shannon's death and Piccirillo's disposal of the body constituted two separate and distinct occurrences.

Liberty agreed to pay $100,000 on the wrongful death claim. The question of whether the disposal of the body warranted an additional payment was submitted to the court.

The trial court ruled that death and disposal were two distinct occurrences separated by time, space, and reflection. However, he then ruled that there was no coverage for the disposal claim because the harm was expected and intended.

On appeal, the Court of Appeals said that the question of whether the callous dumping of a dead body was so outrageous as to warrant an inference of harm as a matter of law was a novel question. But the court did not have to wrestle with it because Cynthia's emotional distress was not a "bodily injury" within the meaning of the policy.

## HOLDINGS:

(1) "Bodily injury" as used in an insurance policy is a narrow and unambiguous term. It includes only actual physical injuries to the human body and the consequences thereof; it does not include humiliation and mental anguish and suffering.

(2) Bodily injury imports harm arising from corporeal contact. In this connection "bodily" refers to an organism of flesh and blood. It is not satisfied by anything short of physical, and is confined to that kind of injury.

(3) The words "bodily injury" in an insurance policy do not comprehend nonphysical harm to the person, such as mental suffering not connected with or arising out of physical injuries.

(4) In short, emotional distress is not a bodily injury for insurance coverage purposes.

COMMENT:

"There are more things in heaven and earth . . . , Than are dreamt of . . . "
Shakespeare, *Hamlet,* I.v. 166.

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*Richardson v. Liberty Mutual Fire Ins. Co.* 47 Mass. App. Ct. 698 (1999)

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# THE SNOW BOWL

FACTS:

The Bowl leased a building and opened a bowling alley. The building owner wanted insurance, so the Bowl purchased a CGL policy.

In December 1996, Father Winter dumped several feet of snow in the valley, and the roof of the bowling alley collapsed.

The owner sued the Bowl for damage to the building. The Bowl tendered to the CGL carrier, which denied coverage.

The Bowl sued the CGL carrier, which in turn sued the owner. The CGL carrier pointed to section I(A)(2)(j)(1) of the policy which excluded coverage for damage to property the insured owns, rents, or occupies. Since the insured rented and occupied the building that collapsed, the company felt there was no coverage.

On the other hand, the owner pointed to the personal injury liability coverage. It was defined to include wrongful invasion of the right of private occupancy. The landlord argued that the destruction of the building invaded his right of private occupancy.

The trial court granted summary judgment to the insurer. The Court of Appeals affirmed.

HOLDINGS:

(1) The interpretation of an insurance contract is a question of law. We construe the policy as a whole, giving it a fair and sensible construction that would be understood by the average person. At the same time, we do not allow an insured's expectations to override the plain language of the contract. If the policy language is fairly susceptible to two different interpretations, we attempt to determine the parties' intent by examining extrinsic evidence. Any ambiguity that remains will be

construed against the insurer, especially if the ambiguity is in an exclusionary clause that seeks to limit policy coverage.

(2) We must keep in mind the aim of a comprehensive general liability policy. Such policies are designed to cover tort liability for injury to third parties and other property, not to provide coverage for the insureds' damages to their own or rented property.

(3) Section I(A)(2)(j)(1) of the policy excludes damage to property "you own, rent, or occupy." This exclusion clearly applies to the destruction of the building.

(4) Specific provisions in an insurance contract control over general provisions. Section I(A)(2)(j)(1)'s exclusion of damage to property rented by the insured is clear and specific and relates directly to the purpose of a commercial general liability policy: coverage for tort liability to third parties and other property. The specific exclusion of section I(A)(2)(j)(1) is not rendered ambiguous by the general terms of the exclusion in section I(A)(2)(b).

(5) To determine whether personal injury coverage applies, the court must first look to the type of offense alleged. The claims here for breach of contract and negligence are not analogous to claims for the offenses of wrongful entry or invasion of the right of private occupancy.

(6) The average purchaser of insurance would not reasonably expect the personal liability provisions to cover a breach of contract and negligence.

COMMENT:

What a reasonable, clear, and lucid opinion. Over the past few years, many opinions have transformed the CGL policy from a third party liability policy into a first party property damage policy. As the court said, a CGL policy is designed to provide tort liability for damage to third persons and other property.

Why this significant opinion was issued in June but not published until August is not apparent.

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*Cle Elum Bowl, Inc. v. North Pacific Ins. Co.,* 96 Wn. App. 698, 981 P.2d 872 (1999)

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# A PAIN IN THE PIP

## FACTS:

State Farm personal injury protection ("PIP") claimants sought treatment from Havsy and his Pain Clinic. They all signed a form granting Pain an assignment to pursue claims for remuneration. Pain submitted bills to State Farm which questioned whether the treatment was "reasonable and necessary." State Farm asked Independent Medical Services and Haelan, Inc., to review Pain's bills. Both Independent Medical Services and Haelan requested that Ronald O. Brockman, D.O., review these medical records to ascertain whether they were reasonable and necessary.

Dr. Brockman suggested that in at least two of the instances independent medical examinations ("IME") were needed. Havsy "strenuously objected to the contents of the reviews." Havsy attempted to accompany the claimants on these IMEs.

State Farm denied PIP payments for a portion of treatment provided by Pain. Pain filed a lawsuit against State Farm, Independent Medical Services, Haelan, and Dr. Brockman for: (1) Consumer Protection Act violations; and (2) violations of the Insurance Code pursuant to RCW 48.01.030.

Pain claimed that: (1) Dr. Brockman offered "unqualified opinions on the reasonableness of treatment"; (2) the independent medical records reviewers forwarded Dr. Brockman's opinions to State Farm "knowing the opinions were meritless;" and (3) State Farm then "unreasonably relied upon Dr. Brockman's opinions in denying the insurance claims". Pain brought this lawsuit both "in its own stead, and as assignee" of its patients' policies. The trial court entered summary judgment dismissing all the claims. The Court of Appeals affirmed.

## HOLDINGS:

(1) There is no remedy for breach of the duty of good faith under RCW 48.01.030 for "individual interests." Rather, it only is intended to govern the "regulatory scheme." A private suit "for violations of the insurance statutes and regulations must be brought under the CPA." Consequently, Pain's claim for breach of the duty of good faith against State Farm under RCW 48.01.030 failed.

(2) Pain did not prove a violation of the Consumer Protection Act. The court held that "only an insured may bring a per se action" for a direct claim for breach of the Consumer Protection Act. Pain therefore lacked a direct claim to sue upon.

(3) Pain asserted that the assignment clause in the patient contract granted it standing to sue. The court disagreed. The court noted that "an assignee steps into the shoes of assignor and cannot recover more than the assignor could recover." (*Citing Havsy v. Flynn*, 88 Wn. App. 514, 519, 945

P.2d 221 (1997).) Here, the assignors were not entitled to reimbursement for medical expenses from Haelan, Independent Medical Services, or Dr. Brockman. Consequently, that assignment failed.

(4) Pain was liable for attorney fees.

COMMENT:

Two of the respondents were represented by Reed McClure's Mike Rogers.

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*Pain Diagnostics & Rehabilitation Assocs. v. Brockman,* ____ Wn. App. ____, ____ P.2d ____ (No. 22706-1-II, Ordered Published November 19, 1999)

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# THE EXCLUSION GOT ESCROWED

FACTS:

Dan and Pam loaned $250,000 to Aquatic Ventures. Dan and Pam thought they secured this loan with a lien on a medical office building. This transaction was facilitated by Puget Sound Escrow, a wholly owned subsidiary of Aquatic Ventures. Dan and Pam noticed that the title report for the medical building referenced prior interests in the property. Puget Sound Escrow produced a letter assuring Dan and Pam of their security in the office building. The other interests in the property were never removed. One of these prior interests proceeded to foreclose on the building. Puget Sound Escrow went out of business. Dan and Pam got a default judgment for their lost $250,000 against Puget Sound Escrow.

Puget Sound Escrow's errors and omissions carrier, Fireman's Fund, filed a declaratory relief action to determine if there was a duty to defend or indemnify under two theories: (1) there was no coverage because Aquatic Ventures was an excluded entity under the "Business Enterprises" exclusion as a controlled entity; and (2) there was no fee collected by Puget Sound Escrow from Dan and Pam and therefore there was no professional escrow service rendered.

HOLDINGS:

(1) Courts interpret insurance contracts as an average insurance purchaser would understand them and give undefined terms in these contracts their plain, ordinary, and popular meaning. Because coverage exclusions are contrary to the fundamental protective purpose of insurance, they are strictly construed against the insurer and will not be extended beyond their clear and unequivocal meaning. A strict application should not trump plain, clear language resulting in a strained or forced construction.

(2) The purpose of the business exclusion is predominantly to avoid collusive suits or the shifting of a business loss to a malpractice carrier. In cases where those concerns are not present, the courts have interpreted this exclusion narrowly.

(3) There is no suggestion that Dan and Pam engaged in any kind of collusion with Aquatic Ventures or Puget Sound Escrow to shift business losses to Fireman's Fund. The claims against Puget Sound Escrow arise out of and are connected with Puget Sound Escrow's failure to remove three senior liens from the medical office building's title, not Aquatic Ventures' alleged misappropriation of the loan proceeds.

(4) The business enterprises clause does not exclude the claims from coverage under the policy.

(5) The errors and omissions policy covers only escrow services performed for a fee.

(6) The fee requirement cannot defeat coverage because it conflicts with the Escrow Agent Registration Act's requirement that escrow agents engaged in the business of performing escrow services for compensation obtain "coverage for unintentional errors and omissions of the escrow agent and its employees."

(7) Washington courts will not enforce limitations in insurance contracts which are contrary to public policy and statute. The overall purpose of the Escrow Agent Registration Act is to regulate escrow agents for the benefit of the public.

(8) Although a fee requirement does not expressly contradict the Escrow Agent Registration Act, it does frustrate the policy behind the Act's requirement that escrow agents obtain errors and omission insurance.

## COMMENT:

At first glance it appears that the court is wrong on both counts. However, upon careful reading it is clear that the handling of the "business enterprise" exclusion is a classic application of the rule of narrow construction of an exclusion.

The same cannot be said for the "fee" requirement discussion. Once it was established that the "fee" requirement did not expressly contradict any part of the statute, then the discussion was over. Under this court's analysis, any provision, condition, definition, or exclusion which might under some scenario defeat coverage is in conflict with the statute, and thus, ineffective. Wrong!

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Fireman's Fund v. Puget Sound Escrow Closers, Inc., *96 Wn. App. 227, 979 P.2d 872 (1999)*

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# NEVERS, NEVERS LAND . . . AND BEYOND!

## FACTS:

Pham rearended Kim. Kim sued Pham. Kim was awarded $35,000 at the mandatory arbitration.

## PROCEDURE:

Pham was displeased with this award. Pham **did** serve and file a request for trial de novo within the 20 day period set forth in Mandatory Arbitration Rule (MAR) 7.1(a).

Pham **did not** file a written proof of service within the 20-day period.

The case was set for a jury trial in October 1997. For a variety of reasons, the parties agreed to continue the trial until March 1998.

On December 4, 1997, the *Nevers v. Fireside, Inc.,* 133 Wn. 2d 804, 947 P. 2d 721 (1997), decision was issued, holding that the proof of service must be filed within the 20-day period.

Two weeks before trial the court granted Kim's motion to strike the trial de novo and entered judgment on the arbitration award.

The Court of Appeals affirmed the judgment.

## HOLDINGS:

(1) A party to a mandatory arbitration does not get a trial de novo unless there is strict compliance with MAR 7.1(a) requiring the filing and service, within 20 days after the arbitration award was entered, of **both** a written request for a trial **and** a written proof that a copy of the request has been served with all other parties appearing in the case.

(2) An appellate opinion interpreting and explaining a court rule applies retroactively.

(3) Under MAR 7.3, which requires a court to assess attorney fees against a party who does not improve their position at the trial de novo, a mandatory award of attorney fees will be assessed against a party who requests a trial de novo but fails to comply with the necessary procedural requirements.

## COMMENT:

Just when it seemed the *Nevers* playing field was leveled ever so slightly by *Roberts v. Johnson,* 137 Wn 2d 84, 969 P. 2d 446 (1999), and the filing requirements it placed on the arbitrator, Division I announces attorney fees are mandatory against a party who incorrectly requests a trial de novo.

This case also illustrates the prejudice which can occur to one side when the parties agree to a continuance. If this case had gone to trial in October of 1997, you would not be reading about it in the Washington Insurance Law Letter.

Pham was represented on appeal by Reed McClure's Marilee Erickson.

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*Kim v. Pham,* 95 Wn. App. 439, 975 P.2d 544 (1999)

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# YOU SNOOZE, YOU LOSE

## FACTS:

Mr. Von Stein was involved in a rear-end accident with Ms. Cook. Cook sued Von Stein.

## PROCEDURE:

Pursuant to the mandatory arbitration rules, Cook's suit was arbitrated. She was awarded, $8,074.61.

The arbitrator filed the award with the superior court, **but** did not file a proof of service of the award.

Von Stein timely filed a demand for a trial de novo, **but** did not file a proof of service of the demand. The case went to trial. The jury returned a defense verdict.

After the jury returned its verdict Cook moved for a judgment notwithstanding the verdict and, in the alternative, a new trial.

Cook also raised the issue of Von Stein's failure to file a proof of service of his demand for trial de novo. Cook argued that under *Nevers v. Fireside, Inc.* 133 Wn.2d 804, 947 P.2d 721 (1997), Von Stein's procedural error vitiated the jury trial and required entry of the arbitrator's award.

The trial court denied all of Cook's motions, and entered judgment on the verdict.

Cook appealed. Division II of the Court of Appeals affirmed.

## HOLDINGS:

(1) The Superior Court's jurisdiction is invoked upon the filing of the underlying lawsuit. It is not lost merely because the dispute is transferred to mandatory arbitration.

(2) The Superior Court never lost jurisdiction of the case. Therefore, it had jurisdiction to conduct the trial de novo.

(3) Cook's failure to raise the issue of failure to file proof of service of the demand for trial de novo constituted a waiver of the objection.

(4) To allow a party to raise the "failure to provide proof of service" issue after the verdict would allow a party to insure against an adverse verdict in a trial de novo by not raising the proof of service issue immediately, but instead using it as a hedge against an unfavorable verdict.

COMMENT:

Division II recognized that Division I recently allowed the proof of service issue to be raised just prior to the trial de novo. *See, Kim v. Pham*, 95 Wn. App 439, 975 P.2d 544 (1999), *discussed at page 54 of the Washington Insurance Law Letter.* The Court points out it is not deciding when the last possible moment is before a party waives its objection to this issue. It is, however, clearly stating that waiting until after the verdict is returned is too late. This leaves open the possibility that a party may wait and see how the trial goes, and then raise the issue before a verdict is rendered.

And what is the source of this procedural game playing? It is the Supreme Court opinion in *Nevers*. There the court embraced a wholly arbitrary rule all in the name of the orderly administration of justice. One wonders what variety of justice they were thinking of when we see a secretarial oversight cited as the reason for denying a party her constitutional right to trial by jury.

Our friends at WSTLA, who purport to be defenders of the right to trial by jury, have been noticeably silent on this issue.

Von Stein was represented on appeal by Reed McClure's Marilee Erickson.

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*Cook v. Von Stein,* ____ Wn. App. ____, 985 P.2d 956 (1999)

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# TRIAL BY JURY—INVIOLATE OR VIOLATED

FACTS:

After an auto accident, Aranda was sued by Hittle. The case was sent to mandatory arbitration. The arbitrator awarded $12,000.

In January 1997, Aranda filed for trial de novo, but did not file a proof of service of the demand.

After a jury trial in March 1998, the jury awarded Hittle $2,500. Three months later, Hittle asked the court to vacate the jury award, and to enter judgment on the arbitration award because Aranda had not filed a proof of service of the trial de novo request back in January 1997.

The trial court denied the motion, and entered judgment on the jury verdict. Hittle appealed. The Court of Appeals affirmed.

## HOLDINGS:

(1) Along with the request for trial de novo, one must also file proof of service of the trial request. We interpret this requirement strictly.

(2) A party waives the right to object to noncompliance with the proof of service requirements by waiting until a trial de novo.

(3) Hittle's approach would increase congestion in the courts by allowing a party to await the outcome of the trial de novo before deciding whether to object to the defect in service.

(4) Hittle's failure to object to the missing proof of service until the conclusion of a trial de novo constitutes a waiver of her objection to the defect.

(5) Aranda suggests that the *Nevers* decision does not apply here because he filed his request for trial de novo in January 1997, nearly a year before the Supreme Court issued the *Nevers* decision in December 1997. The *Nevers* decision applies retroactively.

(6) Principles of equitable estoppel support the trial court's ruling. The doctrine of laches supports the trial court's ruling.

(7) We do not accept Aranda's argument that it was necessary to deny Hittle's motion to vacate the jury verdict to avoid violating his right to a trial by jury.

(8) A party can waive the right to trial by jury by inaction.

## COMMENT:

Well, the court got it right on waiver, estoppel, and laches. Its statement as to the retroactive effect of *Nevers*, while unfair, is consistent with case law.

However, its dictum as to the right to trial by jury misses the mark by a country mile. In Washington, the right to trial by jury shall remain inviolate. That is what our 1889 constitution says.

In this case, Aranda timely filed a jury demand, and timely filed the jury fee. At that point, his right to a jury trial became carved in stone. Nothing short of an express written waiver of the right to trial by jury would be consistent with a right which the constitution describes as inviolate. For anyone to even entertain the idea that a right, which we can trace back to the Magna Carta of 1215, can be lost by the oversight of failing to file a piece of paper proving that you filed another piece of paper trivializes the right to trial by jury.

In support of holding no. 8, the court cited two cases where a jury demand had not been filed.

Aranda was represented on appeal by Reed McClure's Marilee Erickson.

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*Haywood v. Aranda,* ___Wn. App. ___, 987 P.2d 121 (1999)

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# GUEST COMMENTS

Judge Richard A. Posner is a member of the U.S. Court of Appeals for the 7th Circuit. He is described as a "libertarian conservative." His view of opinion-writing judges appeared in the September 26, 1999 issue of the New York Times:

> Posner has strong feelings about the art of opinion-writing. "There is a tremendous amount of sheer hypocrisy in judicial opinion-writing," he said. "Judges have a terrible anxiety about being thought to base their opinions on guesses, on their personal views. To allay that anxiety, they rely on the aparatus of precedent and history, much of it extremely phony. I do think judges can and should get away with a lot more candor, so that the public sees what a court is--not geniuses, or even particularly erudite people, but just lawyers trying to give some reasonable ground for their opinions."

More recently Judge Posner has been selected to mediate the Microsoft antitrust case.

# CONFIRMING OR CONFOUNDING ARBITRATION?

FACTS:

Dexter had a car accident with an uninsured motorist. Dexter carried UIM and PIP coverage with State Farm. State Farm paid $10,000 in PIP benefits to Dexter.

Dexter and State Farm could not agree on the value of his UIM claim, so it was submitted to arbitration. The arbitrator awarded $55,000, including $10,000 for medical specials.

The State Farm UIM provisions provided, in part: "Any amount paid or payable for damages under the first party benefits coverage will not be paid again as damages under this coverage."

State Farm offset the $10,000 PIP already paid, and paid Dexter $45,000.

## PROCEDURE:

Nearly one year after receiving the $45,000, Dexter filed a motion to confirm the arbitration award and a request for entry of judgment against State Farm for the remaining $10,000.

The trial court entered an order confirming the arbitration award, and ordering judgment against State Farm for $10,000.

State Farm appealed.

## HOLDINGS:

(1) When an insurer shows that the amount of a proposed money judgment to be entered in confirming an arbitration award remains in dispute due to an issue that exceeded the scope of the arbitration, a trial court's authority is limited to confirming the award and rendering a monetary judgment in the undisputed amount.

(2) The amount that remains in dispute must be resolved by the parties or addressed in a separate declaratory judgment action.

(3) The insurer bears the burden of showing there is an unresolved coverage dispute that prevents entry of a money judgment in the full amount of the arbitration award.

(4) The affidavit of Dexter's attorney describing the dispute over the PIP payments, along with the fact that the confirmation award was only for $10,000, not $55,000, was sufficient to demonstrate a coverage dispute that prevents full resolution of all issues.

## COMMENT:

In most UIM cases an arbitration will allow resolution of two issues: (1) fault and (2) damages. When additional issues are present, it will be up to the insurer to show there is a further coverage dispute.

If the parties cannot agree concerning the coverage dispute, then a separate declaratory judgment action becomes necessary to resolve the coverage issue. As policy language that provides for a PIP offset is expressly permitted by Washington case law, *(see Keenen v. Industrial Indemnity Ins. Co. of the Northwest*, 108 Wn.2d 314, 738 P.2d 270 (1987)), it would seem that most of these issues should be resolved short of bringing a separate action.

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*Silver v. State Farm Mutual Auto Ins. Co.,* 96 Wn. App. 31, 978 P.2d 518 (1999)

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# I HURT MORE THAN THAT

## FACTS:

Carroll and Peterson were involved in an accident. It was Carroll's fault. Carroll carried $250,000 liability limits with Farmers. Peterson was insured by Safeco, including Personal Injury Protection (PIP) coverage. Safeco paid $3,997.64 under PIP.

Peterson sued Carroll, and eventually settled his claim for $20,000. Peterson signed a release and hold harmless and agreed to indemnify Carrol and Farmers from any subrogation claim by Safeco.

Despite the fact that he settled for $230,000 less than Carroll's liability limit, Peterson claimed he had not been fully compensated for his loss, and asked Safeco to set aside its subrogation interest.

## PROCEDURE:

After Safeco declined, Peterson sued. He sought a declaration that his settlement with Carroll did not fully compensate him, and that he did not have to reimburse his insurer (Safeco) for its PIP payments.

Safeco counterclaimed seeking the full amount of its subrogated interest, asserting Peterson violated the policy by fully releasing Carroll.

## HOLDINGS:

(1) When an insured settles with a tortfeasor for less than the tortfeasor's liability policy limits, with knowledge of his obligation to pay attorney fees and of the insurer's subrogation interest in the settlement, the insured may not avoid reimbursing the insurer for its subrogated interest by claiming that the settlement did not fully compensate him.

(2) Courts need not address whether a settlement did not fully compensate the insured, such that the duty to reimburse the insurer for its subrogated interest would not arise, until the insured has exhausted those assets readily accessible through the tortfeasor's liability policy.

(3) An insured does not prejudice an insurer's subrogation rights by settling with and releasing a tortfeasor for an amount less than the tortfeasor's policy limits when the settlement creates a fund from which the insurer can be reimbursed.

(4) When an insured's settlement with a tortfeasor benefits the insurer by creating a common fund from which the insurer can seek reimbursement, the insurer must pay a proportionate share of the attorney fees incurred by the insured.

COMMENT:

The moral of this story is not to waste the court's time by arguing you were not "fully compensated" for your loss when you have settled for $230,000 below the tortfeasor's liability policy limit!

The court also follows *Mahler v. Szucs,* 135 Wn.2d 398, 957 P. 2d 632, 966 P.2d 305 (1998), in finding the insurer must pay a proportionate share of the attorney fees incurred by the insured, despite Safeco's instructions to the insured and his attorney not to settle the PIP portion of the claim.

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*Peterson v. Safeco Ins. Co.,* 95 Wn. App. 254, 976 P.2d 632 (1999)

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# THAT'S NO ACCIDENT

FACTS:

Joseph sexually abused three little girls from his neighborhood. He converted a basement shower stall into a "cubbyhole" with blankets, a pillow, and a light for the girls.

Unbeknownst to Joseph, two of the girls peeked out of the cubby and watched Joseph molest another one of the girls.

The police caught Joseph. But Joseph committed suicide.

Representatives of the minor girls sued Joseph's estate and his homeowner's insurer for negligent infliction of emotional distress. His insurance policy covered personal injury damages caused by an

occurrence, defined in the policy as an accident. The plaintiffs claimed that the observation from the cubbyhole was an accident, since he supposedly did not intend for the girls to watch the abuse.

HOLDINGS:

(1) Intent to injure can be inferred as a matter of law if a sex abuser's allegedly negligent acts are an integral part of a continuous pattern of sexual abuse.

(2) Since the child witnesses were nearby, and it was neither unforeseen nor unexpected that the children would witness the abuse, the court inferred that Joseph intended to injure them as a matter of law. Therefore, the incident was not an "accident" or "occurrence" under the insurance policy.

COMMENT:

Thus, with the exception of the United States Court of Appeals for the Ninth Circuit, American courts remain steadfast in the view that sexual abuse of a minor is not an accident, is not an occurrence, and is not insured.

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*American Economy Ins. Co. v. Estate of Wilker,* 96 Wn. App. 87, 977 P.2d 677 (1999)

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# DON'T TICKLE WITH POLICY EXCLUSIONS

FACTS:

Patsy had an auto policy with Colonial. The policy covered damages caused by any "insured person" which result from "ownership, maintenance, or use" of Patsy's car.

The term "insured person" included Patsy, a relative or resident using her car, or any other person using her car, if they had Patsy's permission.

The policy contained an exclusion. It stated:

> No coverage is provided by this policy while the insured car is being driven by any person under the age of twenty-five (25) unless that person is **named in the policy** or on the application for this insurance.

Sheree Tickle, Patsy's 22-year-old daughter, was driving Patsy's car, with Patsy's permission, when she was involved in a two-car accident. The owners of the second car involved in the accident, filed a lawsuit against Patsy and Tickle. Patsy and Tickle sought to bring Colonial into the action, claiming Colonial was required to provide liability insurance coverage for the accident.

Colonial asked the court to make a determination that it had no obligation under the policy to provide coverage since Tickle was a driver less than 25 years of age not named in the policy. Patsy and Tickle argued that Tickle was a "named insured" covered under the policy and that the exclusion was, therefore, not applicable to Tickle.

The trial court found in Patsy and Tickle's favor. The Court of Appeals reversed.

## HOLDINGS:

(1) An insurance policy should be read to give it a fair, reasonable, and sensible construction.

(2) Courts will enforce an unambiguous policy as written.

(3) An insurance policy exclusion is ambiguous if, on its face, its language is fairly susceptible to two different, but reasonable interpretations.

(4) An insurance policy exclusion should not be interpreted as to render its exclusions superfluous and nonsensical where such exclusions are within the terms and contemplation of the parties.

(5) Tickle is not named in either the policy or the application. She is not a "named insured" under the policy.

(6) Because Tickle is not a "named insured," the policy exclusion is applicable to her. Coverage is excluded. Interpreting the policy's exclusion in favor of Patsy and Tickle would render the exclusion superfluous.

## COMMENT:

My goodness, it has been years since I saw one of these under 25 exclusions. I did not know anyone still used them. The appellate court's decision not to publish this opinion indicates it believes that the law is very clear.

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*Colonial Ins. Co. v. Tickle,* No. 23718-1-II (Wash. App. Oct. 15, 1999)

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# NUMBER CRUNCHING

## FACTS:

James was injured in a car accident by an uninsured motorist. His policy with Mutual of Enumclaw provided $10,000 in PIP coverage and $100,000 in UIM coverage.

Enumclaw paid James $10,000 PIP. After UIM arbitration, James was awarded $74,617.40.

However, Enumclaw only paid James $64,617.40 because the UIM provision in his insurance contract included a clause offsetting the UIM damages by any amount paid under PIP coverage. So, Enumclaw subtracted the $10,000 PIP award from the $74,617.40 UIM award and came up with $64,617.40 as James' total award.

James filed suit to challenge the offset clause.

## HOLDINGS:

(1) The purpose behind the UIM and PIP statutes is to allow an injured party to receive the same amount of damages he would have received had the tortfeasor been insured.

(2) If the tortfeasor in this case had been insured, James would have been entitled to $10,000 in PIP from Enumclaw and $64,617.40 from the tortfeasor's insurance company, assuming his total damages were $74,617.40. Enumclaw would have received $10,000 from the other insurance company through subrogation. Accordingly, James received the same amount from his insurer that he would have received had the tortfeasor been insured.

(3) The offset clause is enforceable. It is consistent with the underlying purpose of the UIM and PIP statutory benefits. There is no express conflict between the contract and the statute.

## COMMENT:

The Court of Appeals stuck by their guns (or calculators) and refused to be swayed by James' argument to reexamine all Washington precedent in light of RCW 48.22.085, which requires that minimum PIP benefits be offered in all automobile liability insurance policies.

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*Wood v. Mutual of Enumclaw Ins. Co.,* ____ Wn. App. ____, 986 P.2d 833 (1999).

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# RUNNING INTO YOURSELF, COMING AND GOING

## FACTS:

State Farm sued the Abrams law firm. It alleged that the law firm had violated RICO. It was asserted that the firm took part in a "Sudden Stop Accident Scheme," in which street level organizers recruited folks to stage accidents by intentionally slamming on their brakes to cause a sudden rear-end collision.

The street level people would then send participants to health care providers who would generate phony diagnoses and bills for unnecessary or nonexistent tests and treatment, and to attorneys who would pursue the fraudulent claims. State Farm alleged it had paid out over $3 million in phony claims.

The firm tendered the defense of the State Farm suit to the firm's business liability insurer. That turned out to be State Farm. State Farm declined to defend the firm in the State Farm suit. The firm sued State Farm. The trial court said there was no coverage and the appellate court agreed.

## HOLDINGS:

(1) An insurer's duty to defend, which is much broader than its duty to indemnify, is generally determined by comparing the allegations of the underlying complaint against the insured to the language of the insurance policy.

(2) If the facts alleged in the underlying complaint fall potentially within the policy's coverage, the insurer is obligated to defend its insured.

(3) This is true even if the allegations are groundless, false, or fraudulent.

(4) In determining the insurer's duty to defend, the allegations in the underlying complaint must be liberally construed in favor of the insured.

(5) If the duty to defend exists, the insurer's duty to indemnify cannot be determined until the underlying action has been adjudicated. If, however, a court determines that the insurer has no duty to defend, it may simultaneously determine that the insurer has no duty to indemnify.

(6) The professional services exclusion negates any duty to defend or duty to pay because the essential claim is that the firm provided legal services and is potentially liable for the damages caused by the performance of legal professional services.

COMMENT:

There is a certain irony in the fact that State Farm ended up suing one of its own insureds for insurance fraud. However, the fact is State Farm is committed to aggressively stomping out insurance fraud. Two examples here in Washington are *State Farm Fire & Cas. Co. v. Huynh*, 92 Wn. App. 454, 962 P.2d 854 (1998); *Tran v. State Farm Fire & Cas. Co.*, 136 Wn.2d 214, 961 P.2d 358 (1998).

Of course, it should not be overlooked that most of the Washington judiciary saw the widespread impact of insurance fraud early on.

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*Abrams v. State Farm Fire & Cas. Co.,* 306 Ill. App. 3d 545, 714 N.E.2d 92 (1999)

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# NO UNREASONABLE UIM

FACTS:

David, Betty, Marilyn, and her children rented a car at SeaTac Airport from National Car Rental Systems. They purchased rental car liability insurance from National and a $1 million supplemental liability insurance policy from Philadelphia Indemnity. They had an accident with an uninsured driver.

National admitted that it was liable under the primary policy for the statutory minimum of up to $50,000 for UIM benefits. National and Philadelphia successfully argued that the $1 million supplemental liability coverage was not susceptible to UIM claims.

HOLDING:

(1) Philadelphia's policy is a supplemental, or excess policy, which is excluded from the UIM statute. Specifically, "[t]he coverage required to be offered under this chapter is not applicable to . . . policies which apply only as excess to the insurance directly applicable to the vehicle insured."

(2) The insurance policy is clear and precise in its language. It provides only excess coverage.

(3) The appellants argue that the clerk at National told them they had "full" coverage and thus, despite the plain language of the policy, Philadelphia and National are estopped from utilizing RCW 48.22.030(2)'s exemption for excess policies.

(4) The general rule for equitable estoppel in insurance cases is that while an insurer may be estopped by its conduct or its knowledge or by statute, from insisting upon a forfeiture of a policy, under no conditions can the coverage or restrictions on the coverage be extended by the doctrine of waiver or estoppel.

(5) If the appellants did rely on the "full" coverage statement, it was unreasonable. The appellants' misplaced reliance cannot expand clear language in the policy.

COMMENT:

At first it does seem a bit odd that the excess policy did not provide excess UIM. But when we see that it took the dissenting judge eight pages of argument to make her point, then it becomes clear that the statute and the policy are clear.

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*Diaz v. National Car Rental Sys.*, 96 Wn. App. 142, 977 P.2d 1258 *rev. granted*, (1999)

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# A SMALL GLIMPSE INTO THE FUTURE

For those of you who thought that the past 10 years were a bit rough on the insurance industry, wait till you see what is just over the horizon as we stumble into the new millennium. Set out below are the issue statements on cases in the Supreme Court. Some of these have already been argued, some will be argued soon, and some have not been set yet. A few were argued once but have been reset for argument because the court was deadlocked on what to do.

## INSURANCE—HOMEOWNERS INSURANCE--EXCLUSIONS--INTENTIONAL OR CRIMINAL ACTS

Whether an "intentional or criminal acts" exclusion in a homeowners insurance policy may apply when the insured is not charged with or convicted of a crime, or when the insured suffers from mental incapacity not amounting to legal insanity.

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*Allstate Ins. Co. v. Raynor,* 93 Wn. App. 484 (1999) **NOT YET SET.**

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## INSURANCE--UNDERINSURED MOTORIST--OPERATOR--DEFINITION

Whether an automobile passenger who causes an accident by grabbing the steering wheel is an "operator" of the vehicle for purposes of underinsured motorist coverage.

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*North Pacific Ins. Co. v. Christensen,* 95 Wn. App. 447 (1999) **NOT YET SET**.

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## INSURANCE--AUTOMOBILE INSURANCE--CONSTRUCTION OF POLICY--"MOTOR VEHICLE ACCIDENT"

Whether personal injury protection for injuries "caused by a motor vehicle accident" covers an insured who falls from a footstool used to exit a camper.

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*Tyrrell v. Farmers Ins. Co.,* 94 Wn. App. 320 (1999). **(1/13/00)**

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## INSURANCE--AUTOMOBILE INSURANCE--FELONY EXCLUSION--PUBLIC POLICY--AMBIGUITY

Whether an automobile insurance policy exclusion for use of the vehicle "in the commission of any felony" is ambiguous or against public policy.

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*Mendoza v. Rivera-Chavez; Leader Nat'l Ins. v. Rivera-Chavez,* 88 Wn. App. 261 (1997) **(Rehearing 2/15/00)**.

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## INSURANCE--CONSUMER PROTECTION--ACTS OF INSURER--DENIAL OF COVERAGE--DENIAL LETTER--ESTOPPEL

Whether WAC 284-30-380 precludes an insurer in judicial proceedings from disputing coverage on the basis of a policy provision or exclusion not cited in the insurer's initial denial letter.

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*Hayden v. Mutual of Enumclaw Ins. Co.,* 95 Wn. App. 563 (1999) (See other issue under Insurance—Duty to Defend). **(2/17/00).**

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## INSURANCE--DUTY TO DEFEND--TEST--EVIDENCE OUTSIDE ALLEGATIONS OF COMPLAINT

Whether evidence outside the allegations of a complaint may be considered in determining whether the complaint triggers an insurer's duty to defend.

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*Hayden v. Mutual of Enumclaw Ins. Co.,* 95 Wn. App. 563 (1999) (See other issue under Insurance—Consumer Protection). **(2/17/00).**

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## INSURANCE--PROPERTY AND LIABILITY INSURANCE--ENVIRONMENTAL CLEAN-UP COSTS

Whether, in this action over property and liability insurance coverage of environmental clean-up costs for manufacturing and waste disposal sites, the trial court (applying Pennsylvania law) correctly

ruled on issues regarding the enforceability of suit limitation and pollution exclusion provisions in various of the policies, the allocation of damages to covered and noncovered periods, and the availability of a defense that damages were known by the insured and not fortuitous.

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*Aluminum Co. of America v. AETNA Cas. & Surety Co.,* et al. **(Reset 1/27/00).**

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## INSURANCE--UNDERINSURED MOTORIST--DEFAULT JUDGMENT OBTAINED BY INSURED--EFFECT ON INSURER--NOTICE

Whether a UIM insurer is bound by a default judgment entered against the uninsured tortfeasor, where the insured had notified his insurer that a lawsuit had been filed against the tortfeasor but not that it had been served.

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*Lenzi v. Redland Ins. Co.* **(2/17/00).**

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## LIMITATION OF ACTIONS--INSURANCE--ACTION AGAINST PROPERTY INSURER--ACCRUAL OF CAUSE

Whether a cause of action against an insurer under an all-risk property insurance policy accrues when the property damage occurs or when the insurer denies coverage.

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*Schwindt v. Commonwealth Ins. Co.,* 94 Wn. App. 504 (1999) **(1/13/00)**.

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## INSURANCE--EXCLUSIONS--POLLUTION EXCLUSION--PERSONAL INJURIES

Whether a pollution exclusion in a commercial liability insurance policy applies to claims for personal injuries sustained in the accidental discharge of diesel fuel on the insured's business premises.

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*Kent Farms, Inc. v. Zurich Ins. Co.,* 93 Wn. App. 414 (1998) **(9/21/99).**

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## INSURANCE--HEALTH CARE INSURANCE--MANDATORY BENEFITS--"ALTERNATIVE PROVIDERS"

Whether defendant health care insurance company has unlawfully excluded from some of its health insurance policies certain benefits mandated by the "Alternative Provider Statute," RCW 48.43.045.

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*Hoffman v. Regence Blue Shield,* Certification from U.S. District Court, Western District of Wash. **(11/18/99).**

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## INSURANCE--EXCESS INSURANCE--ENVIRONMENTAL CLEANUP COSTS

Whether appellant insurer's excess insurance policy for comprehensive general liability contains a general aggregate limit, whether it provides coverage for the insured's environmental cleanup liability based on site contamination by entities other than the insured during the policy period, and whether the insurer is entitled to setoffs for portions of the insured's settlements with other insurers.

*Weyerhaeuser Co. v. Commercial Union Ins. Co.* **(6/08/99)**.

## INSURANCE -- BAD FAITH CLAIM AGAINST INSURER -- SUMMARY JUDGMENT

Whether evidence of an insurer's low settlement offers, use of an expert witness originally retained by an insured, destruction of a file, and misrepresentations of policy limits was sufficient to preclude summary judgment dismissal of the insured's bad faith claim against the insurer.

*Ellwein v. Hartford Accident & Indemnity Co. 95 Wn. App. 419 (1999)*

## INSURANCE -- UNDERINSURED MOTORIST -- RENTAL CAR POLICY -- "SUPPLEMENTAL LIABILITY INSURANCE POLICY" -- PRIMARY OR EXCESS COVERAGE

Whether, for purposes of determining the level of underinsured motorist coverage, the "supplemental liability insurance policy" brokered by a rental car company is properly deemed to be excess coverage, in light of the terms on which the company offered its basic or primary coverage.

*Diaz v. National Car Rental Systems, Inc. 96 Wn. App. 142 (1999)*

# REED MCCLURE'S NEW ASSOCIATES

We are pleased to announce that Randy L. Baldemor, Julie M. Florida, and Diana S. Shukis have joined the firm as associates.

## RANDY L. BALDEMOR

Mr. Baldemor is a 1999 graduate of the University of Washington School of Law. He received a B.A. from the University of Florida in 1995. While attending law school, he was the Student Bar Association president and Pacific Rim Law and Policy Journal editor.

Prior to joining Reed McClure, Mr. Baldemor was a clerk for the Hon. Judge Charles Mertel, King County Superior Court. Mr. Baldemor practices corporate, real estate, and insurance law. He is a member of the Washington State Bar Association and an associate with the firm.

## JULIE M. FLORIDA

Ms. Florida joins Reed McClure after receiving her J.D. from the University of Indiana School of Law in 1999. She was a managing editor of the Federal Communications Law Journal, 1998~1999. Ms. Florida graduated with a B.A., *cum laude*, in Communication from Washington State University in 1996.

Ms. Florida's professional experience includes interning with the Consumer Unit at KIRO-TV News and a position as a contract legal research assistant. Ms. Florida practices business, corporate, and health care law. She is a member of the Washington State Bar Association and an associate with the firm.

## DIANA S. SHUKIS

Ms. Shukis graduated with a J.D. from the University of Oregon School of Law in 1999, and was a visiting student at the University of Washington School of Law during her final year. She graduated with honors from Michigan State University in 1994, with a B.A. in International Studies.

Prior to joining Reed McClure, Ms. Shukis was a legal intern at University of Washington Student Legal Services, a law clerk at the Oregon Department of Justice, an assistant team leader at Electronic Data Systems, and a commercial loan clerk at Republic Bank. Ms. Shukis is involved with the litigation, appellate, and employment law practices at the firm. She is a member of the Washington State Bar Association and an associate at Reed McClure.