WASHINGTON INSURANCE LAW LETTER™

A SURVEY OF CURRENT INSURANCE LAW AND TORT LAW DECISIONS

edited by William R. Hickman

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THE LADDER DIDN'T DO IT

Legal opinions dealing with "products-completed operations insurance" while not as rare as hen's teeth, certainly are not ubiquitous. (Always wanted to use that word.) Thus, when one comes along with a clear fact pattern and a succinct legal analysis, it should be shared. This is all the more true when the opinion says the trial judge was 180° wrong in resolving the coverage question. So while the opinion was not "published," remember you heard about it here.

FACTS:

Let us look at the facts. First, we have Wing, which manufactures ladders. It had an insurance policy covering "products/completed operations" from Liberty. That policy did not cover Wing's premises or operations. It covered injuries occurring away from Wing's own premises and arising from its products. Specifically, the provision at issue was a vendor's endorsement which covered injuries arising from Wing's products distributed or sold in the regular course of the vendor's business.

Next, we have Advanced. It was a vendor of Wing's ladders. Advanced had a CGL policy with Allstate. The policy provided coverage for both premises and operations as well as products-completed operations.

One day, Jim went to Advanced to buy a Wing ladder. An employee offered to give Jim some training on the use of the ladder. He extended the ladder to its full 19 feet. Jim climbed to the top. The ladder collapsed. Jim was injured

Jim threatened to sue Advanced. Advanced tendered the claim to both Liberty and Allstate. Liberty investigated and denied the tender. Allstate investigated and determined that the accident was caused by the negligence of the employee who failed to properly set up the ladder.

Allstate settled with Jim for $1,000,000.00. Then it sued Liberty to recover the settlement amount alleging that Liberty's coverage was primary. The trial judge ruled that Liberty's policy covered Jim's claim. The Court of Appeals said "we disagree," pointing out that the Wing/Liberty "products-completed operations insurance" was designed to protect manufacturers against injuries caused by defects in their products. Jim's injury arose not out of any defect in Wing's product but from the negligent operations of the vendor, i.e., Advanced.

HOLDINGS:

1. Wing's policy with Liberty was not for general commercial liability. It included only products-completed operations coverage.

2. Products-completed operations insurance policies are designed to protect manufacturers against injuries caused by defects in their products.

3. CGL policies offer greater protection than the more limited products-completed operations policy.

4. In the CGL context, an injury need only arise out of "an occurrence" to be covered.

5. In the products-completed operations context, the injury must arise out of a defect in the insured's product.

6. Even if we interpreted "arising out of" as in CGL policies to mean "originating from," "having its origin in," "growing out of," or "flowing from," we would find no coverage. Because the vendor's negligence was the exclusive cause of the fall, Jim's injury did not originate from, grow out of, or flow from Wing's ladder.

7. The ladder was merely the conveyance through which the vendor's negligence caused injury. Though a ladder was involved, Jim's injuries originated from, grew out of, and flowed from the vendor's negligence, not the ladder.

8. Because Jim's injuries did not arise out of a defect in Wing's ladder, they are not covered by Liberty's products/completed operations policy.

COMMENT:

The opinion cites a couple of authorities that would be useful in researching this topic: *Goodwin v. Wright*, 100 Wn. App. 631, 635-36 (2000); *Transport Indemnity Co. v. Sky-Kraft, Inc.,* 48 Wn. App. 471 (1987).

Allstate Ins. Co. v. Liberty Surplus, 2010 WL 598766 (Wash. App. Feb. 22, 2010).

WHEN ONCE IS NOT ENOUGH

Megan and Jeff were in a relationship. He came to visit. He picked up a kitchen knife. He began stabbing himself and Megan. He stabbed Megan 24 times, using a second knife when the first one broke.

Megan filed an action against Jeff "sounding in negligence." She alleged that Jeff had a variety of mental and psychiatric disorders and did not know what he was doing when he stabbed her 24 times.

Jeff's insurer was of the view that the exclusion for injury arising out of sexual molestation, corporal punishment, or physical abuse applied, and negated its duty to defend and its duty to pay.

The trial court said that Jeff's actions clearly constituted physical abuse, and ruled in favor of the insurer. Megan appealed, arguing that the exclusion did not preclude coverage because Jeff "did not intend or expect to harm her when he stabbed her 24 times with two knives." The Court of Appeals affirmed, saying the "only plausible interpretation" is that the exclusion applies.

HOLDINGS:

1. Construction of an insurance contract presents a question of law.

2. An insurance policy is to be interpreted by the same general rules that govern the construction of any written contract.

3. In determining whether the terms of an insurance policy are clear and unambiguous, courts will not torture words to import ambiguity where the ordinary meaning leaves no room for ambiguity.

4. Any ambiguity in a contract must emanate from the language used in the contract rather than from one party's subjective perception of the terms.

5. Any ambiguity in the terms of an insurance policy must be construed in favor of the insured because the insurance company drafted the policy.

6. Stabbing a victim 24 times with two knives was "physical abuse" within the meaning of exclusion in homeowners policy.

COMMENT:

We note that the Connecticut court follows the same rules of construction as a Washington court. I certainly hope that the same result would occur here.

And for you readers who have decried the lack of "sex and violence" in recent issues, this one is for you.

Merrimack Mutual Fire Ins. Co. v. Ramsey, 117 Conn. App. 769, 982 A.2d 195 (2009).

UNDERSTATEMENT 101

After reviewing a Kansas District Court opinion on the question of bad faith denial of coverage, the FC&S Bulletin (a publication for those in the insurance business) noted: "Bad faith claims against insurers are troublesome and can be expensive for both insureds and insurers."

Such claims can certainly be troublesome and expensive for the company. However, I have never seen a bad faith claim that was troublesome and expensive for the policyholder. The Insurance Code requires that both the insured and the insurer be motivated by good faith. This would be a good time to recall the words of RCW 48.01.030:

> The business of insurance is one affected by the public interest, requiring that all persons be actuated by good faith, abstain from deception, and practice honesty and equity in all insurance matters. Upon the insurer, the insured, their providers, and their representatives rests the duty of preserving inviolate the integrity of insurance.

It is a good time to recall these words since it is most difficult to recall a single case where the court has recognized a duty of good faith on the part of the insured.

Also, we note the court-created attorney fee rule of *Olympic Steamship* runs only in one direction.

NO SUBRO AGAINST INSURED

FACTS:

S.S. Eq. leased a combine to Andrew for $250,000 to be paid in five annual $50,000 payments. At the end of the lease, the combine was to be returned to S.S. Eq. S.S. Eq. then transferred all of its interest and title to the lease to Agricredit. The lease required Andrew to insure the combine with American States. The policy payees were Agricredit and Andrew.

In the second year of the lease, the combine caught fire and was repaired by S.S. Eq. In the third year, more repair work was done by S.S. Eq. A month later, the combine was destroyed in a fire that started in a bearing. American States paid out $250,000 to Andrew and Agricredit.

Andrew sued S.S. Eq. for negligent repair to the combine. American States substituted in as a plaintiff asserting its subrogation rights on behalf of both Andrew and Agricredit.

S.S. Eq. argued that it was the owner of the combine and the party for whom the insurance existed and thus could not be sued. The trial court agreed, ruling that S.S. Eq. was both the owner and the tortfeasor.

The Court of Appeals reversed saying that the records did not show that S.S. Eq. had a beneficial interest in the policy.

HOLDINGS:

1. It is well settled that an insurance company cannot pursue a subrogation claim against its own insured.

2. S.S. Eq. claims that despite the assignment of all its interests in the contract and the combine to Agricredit, it still retains those interests. We do not agree.

3. At the time of the alleged tort, and again at the time of the loss, S.S. Eq. was essentially a third party to the lease agreement.

4. S.S. Eq. was not a named insured, nor did it have any insurable interest in the combine or the contract.

5. Agricredit can sue S.S. Eq. for the latter's alleged negligence. As subrogee, American States can maintain that same action.

COMMENT:

Remember the rule is that an insurance company cannot pursue a subrogation claim against its own insured. However, as the business transaction in this case illustrates, figuring out who or what is "its own insured" can get a little complicated.

For reasons that escape me, this opinion was not published. It should have been, as it does a marvelous job of explaining the somewhat less than clear Washington case law on the subject: *General Ins. Co. v. Stoddard Wendle Ford Motors,* 67 Wn.2d 973 (1966); *Rizzuto v. Morris*, 22 Wn. App. 951, *rev. denied*, 92 Wn.2d 1021 (1979); *Johnny's Seafood Co. v. City of Tacoma*, 73 Wn. App. 415 (1994).

American States Ins. Co. v. S.S. Eq., Inc., 2010 WL 27471 (Wash. App. Jan. 7, 2010)

FLASH!!

Just as we were going to press, the Washington Supreme Court, after 17 months of meditation, released its long anticipated duty to defend/bad faith opinion in the Alea London case. Given that the majority opinion was written by the former president of WSTLA, the end result is not surprising.

However, the devil is in the details. The details indicate that if any court anywhere in the U. S. of A. has said there was a duty to defend under marginally similar circumstances, then you must defend in Washington. In short, the law of South Carolina is now the law of Washington. Ditto for South Dakota, Mississippi, Alabama, Montana, etc., etc…

In the conclusion the majority stated that the company's refusal to defend "based upon an arguable interpretation of its policy was unreasonable and therefore in bad faith."

We will revisit this opinion in the Warm Winter 2010 issue.

American Best Food, Inc. v. Alea London, Ltd., 2010 WL 963933 (Wash. Mar. 18, 2010)

JASON E. VACHA

PRACTICE

Mr. Vacha practices general civil litigation, appellate litigation, insurance coverage (including litigation of bad faith and extra-contractual claims) and insurance defense.

EDUCATION

University of Washington School of Law, J.D.

Gonzaga University, B.A., History, cum laude.

BACKGROUND

Mr. Vacha was raised in Spokane, Washington. He is admitted to practice in the State of Washington and the United States District Court for the Western District of Washington.

CLERKSHIP

Law Clerk to the Honorable Elaine Houghton, Chief Judge, Washington

State Court of Appeals, Division II, Tacoma, WA 2003-2004.

KEEP THE COURT OPEN

An article in the September 1, 2009, issue of the New York Times points up another consequence of the death of the print media, i.e., newspapers. For the last 40 years, well-funded newspapers have fought to keep court proceedings open to the public. Such conduct was considered a matter of civic responsibility. But, as the number of papers declines, and the survivors are looking to cut costs, not incur them, who is going to pick up the cause of the open courtroom? The bloggers? It is not likely we will see many individuals stepping up to hire lawyers with the expertise to present the case on behalf of the people. We are pleased to note that a Seattle paper was recently in the Supreme Court arguing to open public defender billing records. The file containing the records was ordered sealed, and the order sealing the file was also sealed.

While complaining about the courtroom door being closed, we should note that the U.S. Court of Appeals for the 9th Circuit recently kicked a hole in one particularly annoying procedure: allowing parties to proceed as "John Doe" or "Jane Doe" or something similar. [*Doe v. Kamehameha Schools,* 596 F.3d 1036 (9th Cir. 2010)] The purpose was to allow the party to utilize the court system anonymously. That is just wrong. The public has the right to not only know what is going on in the court room, but to know who is utilizing the court room. The Washington Constitution provides: "Justice in all cases shall be administered openly, and without unnecessary delay." Art. 1, § 10.

I fear I shall never understand what part of "all cases" and "openly" some folks have such a problem with.

A STATUTE OF REPOSE

Division III issued, but did not publish, an opinion dealing with the RCW 4.16.310 statute of repose. Now, right off the bat, remember a statute of repose differs from a statute of limitation. A statute of limitation bars a plaintiff from bringing a claim that has already occurred after a certain specified period of time. A statute of repose terminates a right of action after a specific time, even if the injury has not yet occurred.

In this case, Roy hired F&M which hired Gutter to rebuild two cold storage warehouses. The work was completed by October 24, 1997. Six years and five days later, a windstorm damaged the warehouse roofs.

The Court of Appeals held that the six-year statute of repose (RCW 4.16.030-.310) barred the claim. In other words, Roy's claim against F&M and Gutter was barred five days before the storm caused the damage.

Roy Farm, Inc. v. F&M Constr. Co., 2010 WL 92530 (Wash. App. Jan. 12, 2010).

A DEFAULT ORDER vs. A DEFAULT JUDGMENT

Over the years, one source of confusion has been the difference between a "Default" and a "Default Judgment." A recent published opinion out of Division III does a good job of indicating the difference and why you should care.

FACTS:

Barbara worked for ICT. She slipped and fell on a patch of motor oil in a parking lot that ICT leased from University. She sued them both for failing to maintain the lot.

In May 2006, Barbara served ICT with a summons and complaint. No response. In July 2006, Barbara moved for an order of default. In August 2006, the court entered an order of default. Barbara mailed a copy of the order to ICT. No response.

In April 2007, Barbara settled with and dismissed University. She then moved for a default judgment against ICT. In November 2007, a $313,000 default judgment was entered against ICT. Barbara mailed that to ICT in November 2008.

In December 2008, ICT appeared and moved to vacate the default order and the default judgment. Its excuse was that its registered agent sent the summons and the default order to the wrong ICT employee. The trial judge found this to be inexcusable. She refused to vacate either the order or the judgment.

On appeal, the Court of Appeals said she was correct on the default but wrong on the default judgment. The default judgment was vacated, but the order of default was affirmed.

HOLDINGS:

1. The general rule is: "once a defendant has been adjudged to be in default, [it] is not entitled to notice of subsequent proceedings."

2. That is, unless more than one year has passed since service of the summons.

3. A plaintiff must give notice to a nonappearing defendant when the plaintiff seeks a default judgment more than one year after service of the summons. ICT was entitled to notice.

4. ICT appeared more than two years after being served with a summons because its own registered agent failed to forward the summons to its legal department. That was not excusable neglect.

COMMENT:

Clear, concise layout of the law everyone thinks they understand.

Brooks v. University City, Inc., 154 Wn. App. 474, 225 P.3d 489 (2010).

JUST CONSENTING ADULTS

FACTS:

Liz voluntarily checked herself into the hospital for treatment of alcohol dependency. While a resident, Liz and one of the nurses entered into a sexual relationship. After she left the hospital, the relationship ended. Liz complained to the hospital about the relationship. The nurse was suspended.

A year later, Liz sued the hospital contending that it owed her a duty to protect her from such sexual activity. The trial judge dismissed her case, having concluded that the nurse's conduct was not reasonably foreseeable. By a 2-1 vote, the Court of Appeals said that Liz was not a "vulnerable adult", that the nurse's actions were not legally foreseeable, and the hospital had no duty to protect Liz from the actions of a third party.

HOLDINGS:

1. An essential element in any negligence action is the existence of a legal duty which the defendant owes to the plaintiff.

2. As a general rule, a person has no legal duty to prevent a third party from intentionally harming another.

3. Courts have recognized two types of "special relationships" that are exceptions to this general rule. A duty arises where, "(a) a special relation exists between the [defendant] and the third person which imposes a duty upon the [defendant] to control the third person's conduct, or (b) a special relation exists between the [defendant] and the other which gives the other a right to protection."

4. "The duty to protect another person from the intentional or criminal actions of third parties arises where one party is 'entrusted with the well being of another.'"

5. Liz was not completely impaired. She voluntarily admitted herself to the hospital and engaged in consensual sexual acts with the nurse.

COMMENT:

Always surprising and reassuring to see adults held responsible for the consequences of their choices, good or bad. A different result would be called for if, as the plaintiff was in *Niece v. Elmview Group Home*, 131 Wn.2d 39 (1997), completely impaired and totally helpless.

Kaltreider v. Lake Chelan Community Hospital, 153 Wn. App. 762, 224 P.3d 808 (2009).

INSURANCE LAW SEMINAR

Reed McClure's Eleventh Insurance Law Seminar will be held Wednesday, May 26, 2010 at the Cedarbrook Lodge in SeaTac, Washington. It will review recent developments in Insurance Law, including such topics as "Unintended Acceleration", the "IFCA", tort law updates, liquor liability, and the decline of western civilization as we know it.

Registration is at 7:30 a.m. with the program starting at 8 a.m. and going to 3:30 p.m.

For a copy of the brochure with detailed information, please contact Carrie Stancliff at (information@rmlaw.com), 206-292-4900; Fax 206-223-0152.

WILLIAM R. HICKMAN

William R. Hickman is "Of Counsel" with the firm. After 41 years with Reed McClure, Mr. Hickman limits his practice to consulting on civil appeals, conducting arbitrations, acting as an expert witness, and writing the Law Letter.

Mr. Hickman has been involved in over 500 appellate proceedings involving a wide spectrum of civil litigation. He was a fellow in the American Academy of Appellate Lawyers.

Mr. Hickman is a member of the Commercial Panel of the American Arbitration Association, and is also a public arbitrator in the FINRA Dispute Resolution Program. He was named a "Washington Super Lawyer" in 2001, 2003, 2005, 2006, 2007, 2008, and 2009. He can be reached at whickman@rmlaw.com.

Remember, selected back issues of the Law Letter are available on our web site at www.rmlaw.com . . . and

Pam Okano's
Coverage Column is available at www.wdtl.org/
(see Coverage Uncovered).

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REED MCCLURE ATTORNEYS

EARLE Q. Bravo ..... ebravo@rmlaw.com 206/386-7165
MICHAEL N. Budelsky ..... mbudelsky@rmlaw.com 206/386-7008
MARILEE C. Erickson..... merickson@rmlaw.com.....206/386-7047
DANIELLE M. Evans..... devans@rmlaw.com.....206/386-7185
ANAMARIA Gil..... agil@rmlaw.com 206/386-7061
WILLIAM R. Hickman..... whickman@rmlaw.com 206/386-7011
MICHAEL G. Howard..... mhoward@rmlaw.com.....206/386-7012
CHRISTOPHER J. Nye..... cnye@rmlaw.com 206/386-7022
PAMELA A. Okano..... pokano@rmlaw.com 206/386-7002
JOHN W. Rankin, Jr..... jrankin@rmlaw.com.....206/386-7029
MICHAEL S. Rogers..... mrogers@rmlaw.com 206/386-7053
EARL M. Sutherland..... esutherland@rmlaw.com 206/386-7045
JASON E. Vacha..... jvacha@rmlaw.com 206/386-7017

WHERE TO FIND US:

REED McCLURE
TWO UNION SQUARE
601 Union Street, Suite 1500
Seattle, WA 98101-1363

OUR TELEPHONE NUMBERS:

main: 206.292.4900
fax: 206.223.0152

www.rmlaw.com