WASHINGTON INSURANCE LAW LETTER™

A SURVEY OF CURRENT INSURANCE LAW AND TORT LAW DECISIONS

EDITED BY WILLIAM R. HICKMAN

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THE EASEMENT RUNS THROUGH THE MIDDLE OF THE HOUSE

FACTS:

By and large, we do not pay much attention to title insurance cases. First, there are few of them. Second, the policies are not intended to defend your title; they defend the title company's search.

But one came along here recently which caught our attention for several reasons. First was the classic fact pattern. Old Frank owned a piece of land next to a lake. He got permission from the county to subdivide it into three lots: A; B; C. Now, lots A and B were on the lake, which means C wasn't. So old Frank drew up a "pedestrian easement" benefiting C and burdening B so C could get to the lake. It was intended to run along the property line between A and B.

Six years later, someone did a survey. Turns out that the easement ran through the middle of the house on lot B, which reminds us of the old Rusty Draper song, "The railroad comes through the middle of the house since the company bought the land." One never-to-be-forgotten stanza was:

> They let us live in the front of the house
> They let us live in the back
> But there ain't no living in the middle of the house
> 'Cause that's the railroad track

But I digress. As you would expect, Frank's little boo-boo generated some litigation. We are not told how the real case turned out as the one we are examining deals with the owner of lot A and his mistaken belief that his title insurance policy on lot A should protect him from the owner of lot C's attempt to carve the easement out of lot A. The superior court, the Court of Appeals, and all nine Supreme Justices agreed that lot A's title insurer had no duty to defend.

Which brings us to the other reasons for noting the case. First it is unanimous. Something almost unheard of in the Temple of Justice these days. Second, it is in favor of an insurance company. We can't remember the last time that occurred: "Longum tempus, et longus usus qui excidit memoria hominum." Third, it is written by WSTLA's former amicus brief writer. And finally, it is jam-packed with every conceivable Washington rule of insurance construction.

HOLDINGS:

1. The duty to defend is broader than the duty to indemnify.

2. The duty to defend is triggered if the insurance policy *conceivably covers* the allegations in the complaint, whereas the duty to indemnify exists only if the policy *actually covers* the insured's liability.

3. An insurer must defend unless it is clear from the face of the complaint that the claim is not covered by the applicable policy.

4. If it is not clear from the face of the complaint that the policy provides coverage, but coverage could exist, the insurer *must* investigate and give the insured the benefit of the doubt that the insurer has a duty to defend.

5. Where an insurer is unconvinced of its duty to defend, it may defend under a reservation of rights. Under a reservation of rights defense, "the insured receives the defense promised and, if coverage is found not to exist, the insurer will not be obligated to pay."

6. Generally, an insurer who reserves rights may bring a timely declaratory judgment action to determine coverage.

7. In interpreting an insurance contract, we look to the intent of the parties, which is ascertained from the language of the contract.

8. Construction that contradicts the general purpose of the contract or results in hardship or absurdity is presumed to be unintended by the parties.

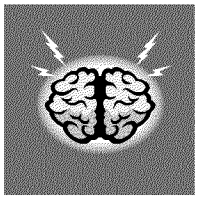
9. Language in an insurance contract is to be given its ordinary meaning, and courts should read the policy as the average person purchasing insurance would.

10. We strictly and narrowly construe insurance policy exclusions.

11. The result of lot C's suit may be a reformation of the lot A deed resulting in a burden to lot A, but that potential outcome is not covered by the lot A title insurance policy.

Campbell v. Ticor Title Ins. Co., 166 Wn.2d 466, 209 P.3d 859 (2009).

GRAY MATTER MATTERS



GRAY MATTER: BRAIN INJURY LITIGATION UPDATE

Anamaria Gil, Reed McClure
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CALIFORNIA COURT AFFIRMS EXCLUSION OF SPECT SCAN EVIDENCE OF BRAIN INJURY

The People vs. Joseph Hix, Unpublished decision: Cal.Rptr. 3d 2009, WL 242318 Los Angeles, CA, February 3, 2009.

FACTS:

Joe Hix stabbed one person with a pen and one person with a knife. He was convicted of murder and sentenced to 74 years in prison. Hix appealed his conviction claiming he was denied due process because the trial court prevented his expert, Daniel Amen, Ph.D., from testifying that:

- SPECT scan imaging showed decreased blood flow to the brain;
- Hix likely had a remote brain injury to the prefrontal cortex; and
- Hix's brain injury meant he did not harbor an intent to kill.

HELD:

The trial court did not err in concluding that SPECT scans are not generally accepted in the scientific community for diagnosing brain injury.

OTHER GREAT POINTS:

- The Court of Appeals rejected Hix's argument that there is a "strong trend" towards acceptance of SPECT testimony in other states.
- Dr. Amen acknowledged that anti-depressants, anti-psychotic medications, poor diet, negative thoughts, schizophrenia, ADHD, alcohol abuse and illicit drugs can cause an abnormal SPECT scan.

COMMENT:

- Single-Photon Emission Computerized Tomography (SPECT) is a type of nuclear imaging test that uses radioactive isotopes and a special camera to create 3-D images of how blood flows to tissues and organs.

· Daniel Amen is a well known proponent of SPECT scan imaging to identify brain trauma. He is the CEO and Medical Director of Amen Clinics, Inc., "Change Your Brain, Change Your Life" , amenclinics.com.

JURY DOES NOT BUY TEEN'S BRAIN INJURY CLAIM

Michael Pham vs. Ashlee Holman, King County Superior Court, Seattle, WA
Trial date: 2/17/2009

FACTS:

16-year-old Pham was a passenger in Holman's car. Holman failed to yield to another car, causing an accident. Pham claimed he hit his head on the dashboard and was knocked unconscious until after the ambulance arrived. Defendant Holman admitted liability.

INJURIES & DAMAGES:

Pham claimed the following injuries:

· Neck and back injuries; and

· Permanent mild traumatic brain injury with post-traumatic headaches, problems with mental processing speed, attention span, concentration, vertigo, and personality changes.

Pham had a 2-year gap in treatment, coincidentally starting up again about the time he filed his lawsuit.

TBI EXPERTS:

For the Plaintiff:

· Neuropsychologist Glen Goodwin, Ph.D.

· Neurologist, Stan Schiff M.D.

For the Defense:

· Neuropsychologist Fred Wise, Ph.D.

· Neurologist Lawrence Murphy, M.D.

THE MONEY:

Special damages claimed:

· Past and future medical: $10,291.87

· No lost wages

Award requested at trial:

- Plaintiff asked jury for $300,000
- Defendant asked jury for $15,450

Jury award: Verdict for Plaintiff Pham:

$ 10,291.87	Past and future medical expenses
$ 10,000.00	Pain and suffering
$ 0.00	Disability
$ 20,291.87	**Total Award**

ANAMARIA GIL:

Anamaria Gil is a Partner at the Reed McClure law firm. Ms. Gil has 16 years of litigation experience and has handled numerous claims involving allegations of traumatic brain injury. In 2008, Ms. Gil spoke at Reed McClure's Insurance Seminar on the subject of brain injury litigation. Her topic was entitled: "This is Your Brain on Litigation: Low Tech and High Tech Developments in Brain Injury Litigation." Ms. Gil may be reached at 206-386-7061 and agil@rmlaw.com.

ARBITRATION - THE NEW LITIGATION

When your editor got into this business back in 1968, arbitration was not favored. The simple fact was that if everyone took their disputes to arbitration, then the judges would be out of business. So, arbitration clauses were narrowly construed, and an arbitration award might not necessarily be the end of the line. But then, the waiting time to get a court date went from four months to years, and the judges could no longer slip out to play golf on Wednesday afternoons. That, together with the insurance companies' decision to use arbitration rather than a jury for UIM claims, and the states' decision to impose mandatory arbitration on smaller court cases made arbitration more appealing.

And so, we find ourselves presented with a small stack of appellate opinions which deal with arbitration questions. The first, *S&S Construction, Inc. v. ADC Properties, LLC*, _____ Wn. App. _____, 211 P.3d 415 (2009), ordered published July 21, 2009, contains a marvelous review of how exactly arbitration fits into our legal system, covering in particular, Washington's version of the Uniform Arbitration Act, RCW 7.04A.010, *et seq.*, and the rules of AAA. However, its most significant contribution was to squash the appellant's contention that the arbitrator must have been biased because he was prominent and experienced.

Shortly thereafter, in the unpublished *Shepler Construction, Inc.* v. *Leonard,* 2009 WL 2595548 (Wn. App. Aug. 24, 2009), we learned that the parties could waive an arbitration provision in a construction contract. The provision could be deemed waived by both parties when the parties pursued normal litigation for six years.

And most recently, in *Optimer Intern., Inc. v. RP Bellevue LLC,* ___ Wn. App. ___, ___ P.3d ___ (2009), we were surprised that a waiver of judicial review of an arbitration award is unenforceable because that is contrary to the Washington Arbitration Act, RCW ch. 7.04A. The statute applies retroactively to cover agreements entered into before the effective date of the statute.

It is apparent that arbitration is on a growth curve. The more arbitration matters which land in the court system, the more we will see the judges developing a common law of arbitration. Accordingly, it is imperative to read the new Arbitration Act, RCW ch. 7.04A. It is also useful to remember that "mandatory arbitration" is the product of statute, court rule, and court decisions and can produce some truly bizarre results. Mandatory arbitration is not the same as private contractual arbitration. *Mercier v. GEICO Indem. Co.,* 139 Wn. App. 891, 165 P.3d 375 (2007), *rev. denied,* 163 Wn.2d 1028 (2008).

A KEGGER IN THE WOODS

BACKGROUND:

A traditional rite of passage from high school into the real world was a kegger in the woods. A bunch of seniors would collect money, buy beer, and go off to somebody's barn for an evening of antisocial behavior. This was going on way back when your editor graduated from high school—1960. Of course, your editor did not participate in such shenanigans. One reason being that he was never invited.

FACTS:

Several members of the 1998 graduating class at Lake Washington planned to celebrate graduation with a kegger at a state park. They collected money and purchased six kegs of beer. That should provide the 100 attendees almost a gallon of beer apiece. You all recall there are eight pints in a gallon.

Glen arrived at the party. That was a problem. Glen was not a senior; he was a junior. Murray took serious exception to his presence. He hit Glen with a heavy glass beer mug. Glen got stitched up in the ER. However, four months later he went into a coma. He died after four years in "a persistent vegetative state." The cause of death was the head wound received at the kegger.

PROCEDURE:

Glen's mother sued the guys who arranged the party and the beer distributor who supplied the beer. Three of the party organizers were dismissed on summary judgment. (The alleged assailants and the beer distributor were left in the case.) The Court of Appeals accepted immediate review of the dismissal and affirmed. It held that in order to maintain a cause of action for assault caused by the negligent furnishing of alcohol to minors, the plaintiff must prove that the assailant had violent tendencies known to the furnishers.

HOLDINGS:

1. Under the common law, it is not a tort to provide intoxicating liquor to "ordinary able-bodied men," and in the absence of a statute, "there can be no cause of action against one furnishing liquor in favor of those injured by the intoxication of the person so furnished."

2. Our Supreme Court follows the common law rule and has recognized a common law duty not to furnish intoxicating liquor only when the person served is obviously intoxicated, in a state of helplessness, or in a special relationship to the furnisher of the intoxicants.

3. Criminal assault is "not within the general field of danger traditionally covered by the duty not to furnish intoxicating liquor to an obviously intoxicated person."

4. Criminal assault is not a foreseeable result unless the drinking establishment "had some notice of the possibility of harm from prior actions of the person causing the injury, . . ."

5. There is no evidence that those who planned the kegger were aware that any of the assailants had a propensity for violence.

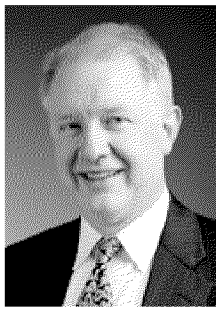
6. It is not enough to rely on the general notion that bad things happen when crowds of young people get very drunk together.

COMMENT:

The court was not willing to carve out a kegger exception to the common law rule. It adhered closely to the analysis set down by the Supreme Court in *Christen v. Lee*, 113 Wn.2d 479, 780 P.2d 1307 (1989).

Cameron v. Murray, _____ Wn. App. _____, P.3d _____ (2009).

EARL M. SUTHERLAND



SHAREHOLDER

PRACTICE:

Mr. Sutherland represents clients in a wide variety of complex civil litigation matters, including errors and omissions claims against and involving lawyers, as well as other professionals and securities act claims; insurance coverage disputes and "bad faith" litigation arising from a variety of insurance policies; premise liability, construction defect and products liability matters. He has over two decades of trial court experience.

Mr. Sutherland is admitted to practice in the state and federal courts of Washington and Alaska, and in the Court of Appeals for the Ninth Circuit.

EDUCATION AND BACKGROUND:

Mr. Sutherland was born in Lake Forest, Illinois, but early in his life traveled extensively and lived for a time in Sao Paulo, Brazil. His family then settled in the Portland, Oregon area, where he attended Reed College. He was a student at the University of Warwick in Coventry, England for a year before receiving his B.A. in History from Reed in 1978.

Mr. Sutherland received his J.D. from the University of Washington School of Law in 1981. Upon graduation, he moved to Anchorage where he practiced with the firm of Hughes, Thorsness, Gantz, Powell & Brundin, Alaska's largest law firm. Mr. Sutherland had been a partner there for over eight years when he accepted the position with Reed McClure that enabled Earl, his wife Nancy, and their three daughters to return to Seattle.

Mr. Sutherland is a member of the following professional organizations:

Defense Research Institute
Washington Defense Trial Lawyers
Washington State Bar Association
Alaska Bar Association

A BARE EXCLUSION

BEAR FACTS:

The bear hide wall mount in dispute was displayed on the living room wall in Starry's home. The hide was prepared as a rug, in a stretched-out fashion with the head and claws attached. A burglar, as it were, left the wall bare, as it wasn't. Starry filed a claim with his insurer, Horace Mann Insurance Co. to recover $5,000, the value of the bear hide mount, and for incidental damages to the home resulting from the unlawful entry.

Horace Mann, on the other hand, pointed to a $500 aggregate limitation for loss by theft of fur, which led the Alaska Supreme Court to present the case thus:

> Presented in the guise of a simple problem of insurance coverage, this peculiarly "Alaskan" controversy raises a profound, albeit hairy question: is a "bear hide wall mount" a "fur" within the scope of an insurance exclusionary clause? Differently stated, "When is a fur not a Fur?"

After examining customs regulations, fish and game laws, a workers comp statute, and an 1826 trade dispute from New York, the court concluded that a reasonable homeowner would not view the bear hide as a fur.

Starry v. Horace Mann Ins. Co., 649 P.2d 937 (Alaska 1982).

WALLA WALLA LUST

FACTS:

In 1991, 3D Tank installed three underground storage tanks for WWE, which needed them to store gasoline. Ten years later, in 2001, 8,000 to 10,000 gallons of gas leaked from one of the tanks. Back in 1991, 3D had a CGL policy with Great American.

The court very courteously told us what the question was: did property damage occur when the tank was improperly installed in 1991, or did property damage occur 10 years later in 2001 when the tank ruptured and leaked? And then it told us the answer: Property damage occurred when the tank leaked. Which meant: The Great American policy provided no coverage.

HOLDINGS:

1. The interpretation of an insurance policy is a question of law. The party asserting coverage bears the burden of proving the loss is a covered occurrence within the policy period. The insurer bears the burden of showing an exclusion applies.

2. Terms in an insurance policy are given their plain, ordinary, and popular meaning as they would be understood by the average purchaser, and exclusions in insurance policies are strictly construed against the insurer.

3. Washington case law requires damage that is continuing. That means the damage must occur first, followed by a continuing process. Here, the process started upon installation but property damage did not occur until the tank failed.

COMMENT:

An extraordinarily lucid coverage opinion. The analysis of the fundamental Washington case law on continuing damage was clear and to the point. (*Gruol Const. Co. v. INA*, 11 Wn. App. 632 (1974); *Villella v. PEMCO*, 106 Wn.2d 806 (1986); *American Nat'l Fire Ins. v. B&L Trucking*, 134 Wn.2d 413 (1998).) *Gruol* came out just at the start of the asbestos coverage disputes and may very well be the most cited Washington civil case. (For those of you who came in late, "LUST" stands for leaky underground storage tank.)

Walla Walla College v. Ohio Cas. Ins. Co., 149 Wn. App. 726, 204 P.3d 961 (2009).

RES IPSA DOCK

FACTS:

Tambra took a walk on the dock. After a couple steps, her left leg went through the dock all the way up to her hip. She suffered a hairline fracture of her tibia.

PROCEDURE:

Tambra sued the owner of the dock alleging that they knew or should have known about the dangerous condition of the dock and failed to remedy the dangerous condition. The trial court dismissed her case saying she had no evidence that the owner knew or should have known about a dangerous condition, and that res ipsa loquitur did not apply. The Court of Appeals held that res ipsa did apply, but Tambra still lost because she could not prove that the property owner had notice of an undiscoverable latent defect in the dock.

HOLDINGS:

1. In general, one who possesses land owes an affirmative duty to invitees to use ordinary care to keep the premises in a reasonably safe condition.

2. Possessors of land owe a duty to invitees to exercise reasonable care to discover dangerous conditions. But there is no liability for an undiscoverable latent defect.

3. The doctrine of res ipsa loquitur applies when: (1) an accident or occurrence producing injury is of a kind which ordinarily does not happen in the absence of someone's negligence, (2) the injuries are caused by an agency or instrumentality within the exclusive control of the defendant, and (3) the injury-causing accident or occurrence is not due to any voluntary action or contribution on the part of the plaintiff.

4. Res ipsa loquitur could not generate an inference that property owner had notice of an undiscoverable latent defect in wooden deck.

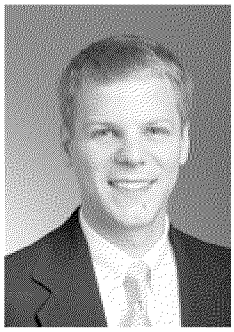
5. Landowners do not have an absolute duty to insure the safety of all invitees.

COMMENT:

All-in-all, a very straightforward premises liability case. Except for one thing: A 96-year-old Supreme Court opinion which, at first glance, would have allowed Tambra to get her claim to the jury. *Penson v. Inland Empire Paper Co.*, 73 Wash. 338 (1913). The court chose not "to extend Penson's generous application of res ipsa" since to do so would render property owners virtual insurers of the safety of all invitees.

Curtis v. Lein, 150 Wn. App. 96, 206 P.3d 1264 (2009).

MICHAEL N. BUDELSKY



ASSOCIATE

PRACTICE:

Mr. Budelsky practices in the areas of medical malpractice defense, insurance defense, employment law, general civil litigation, and appellate work.

EDUCATION:

University of Cincinnati College of Law, Cincinnati, OH, J.D., 1998
Dartmouth College, Hanover, NH, B.A., 1994

BACKGROUND:

Mr. Budelsky grew up in Cincinnati, Ohio, and went on to graduate from Dartmouth College. He worked for a year in Washington, D.C., as an intern for U.S. Representative Robert Portman. While in law school, Mr. Budelsky was a member of the Law Review and participated in a judicial externship with Federal District Court Judge Bertelsman.

Mr. Budelsky practiced in Cincinnati for five years, focusing primarily on employment law, civil rights law, and general civil litigation. Mr. Budelsky also argued numerous appeals before the Sixth Circuit and the Ohio Court of Appeals. Mr. Budelsky moved to Seattle in 2004 and became a member of the Washington Bar. Since then, he has focused his practice on medical malpractice defense, insurance defense, and appellate work.

BACK TO WOODSTOCK

FACTS:

Jeremy and Heidi attended a rock concert (an oxymoron). They got there early to secure a prime viewing spot. As the second act started, Reagan elbowed his way to the front, pushing himself and his wife in front of Heidi. Heidi tapped Reagan on the shoulder and asked him to move because she could not see over him. Reagan advised her that that was not his problem.

Reagan then began to push Heidi with his elbow. Heidi brought this to the attention of Jeremy. Jeremy advised Reagan to keep his hands off Heidi.

As Jeremy and Heidi attempted to get the attention of security, things began to deteriorate. Reagan turned around and punched Heidi in the face, knocking her to the ground. Reagan then did a leg sweep on Jeremy, and stomped on his legs, breaking his ankle.

Security finally arrived. Jeremy went to the hospital. Reagan went to jail.

PROCEDURE:

Jeremy and Heidi sued the concert venue, claiming that, because Reagan had been kicked out of the place before because of violent conduct, the venue owed them a duty to protect them from assault. The trial court dismissed on summary judgment. The Court of Appeals affirmed.

HOLDINGS:

1. Negligence exists if a defendant breaches a duty owed to a plaintiff resulting in injury to that plaintiff, and there is a proximate cause between the breach and the injury.

2. As a general rule, a person has no legal duty to protect another from the criminal acts of third parties.

3. An exception arises when a special relationship exists between the defendant and either the third party or the foreseeable victim of the third party's conduct.

4. Jeremy sought to prove that the defendant had prior knowledge of Reagan's violent history through a police report. The report was inadmissible because it was not properly authenticated.

5. An attorney's declaration is insufficient to authenticate a police report because counsel cannot testify to the authenticity of the report's contents based on personal knowledge.

Hambly v. Splitting Kings 2 LLC, 2009 WL 1317501 (Wn. App. May 12, 2009).

LIABILITY FOREVER; LIABILITY FOREVER!!!

FACTS:

Ronald developed mesothelioma as a result of exposure to asbestos over a 29-year period. This exposure was through his father, who worked as an insulator from 1948 to 1965. He would bring asbestos fibers home on his clothes. Ronald sued Saberhagen, the successor in interest to his father's employer, under theories of negligence and strict product liability.

Saberhagen sought partial summary judgment on the strict product liability claims, arguing that strict product liability did not exist at the time of the exposure. The trial court agreed and granted Saberhagen's motion for summary judgment. But the Court of Appeals reversed, holding that *Robinson v. City of Seattle,* 119 Wn.2d 34 (1992), requires retroactive application of strict product liability. The Washington Supreme Court affirmed, ruling that *Robinson* does require retroactive application of strict product liability.

HOLDINGS:

1. Ordinarily, a decision of a court of last resort overruling a former decision is retrospective as well as prospective in its operation, unless specifically declared by the opinion to have prospective effect only.

2. "Selective prospectivity" allows a court to apply a new rule of law to the litigants in the case announcing the new rule and to all litigants whose claims arise after that decision.

3. Judicial decisions may have retroactive, prospective, or selectively prospective application.

4. "Retroactive application" of a new rule of law applies a judicial decision both to the litigants before the court and all cases arising prior to and subsequent to the announcing of the new rule.

5. "Prospective application" of a new rule of law affects only those cases arising after the announcement of the new rule.

6. "Selective prospective application" of a new rule of law requires that a judicial decision is applied to the litigants before the court, but not to those whose causes of action arose before the announcement of the new rule.

7. Strict product liability applies retroactively to all claims against manufacturers and suppliers of products, regardless of whether those claims arose prior or subsequent to the Supreme Court's adoption of strict liability.

8. Ronald can bring a claim for strict product liability based on facts that transpired prior to the adoption of the strict product liability doctrine.

COMMENT:

This case is significant because defendants are now clearly vulnerable to lawsuits even where the plaintiff's theory of liability did not exist at the time of the injury. Cases where a cause of action may be brought long after the exposure to the tortious element may be particularly affected by this holding (such cases could include toxic tort and sex abuse cases, among others).

If the foregoing strikes you as unfair, that is because it is. Making actionable that which at the time it occurred was not actionable is mind-boggling.

Now, we should not overlook that, up to this point, the only industry which was subject to this super-retroactive liability was the insurance industry. (*Jain v. State Farm*, 130 Wn.2d 688 (1996).) But now, all the big Washington players (*e.g.*, Boeing, Weyerhaeuser, Microsoft) are subject to being sued for conduct which was not tortious when it occurred, but which is now tortious.

Lunsford v. Saberhagen Holdings Inc., 166 Wn.2d 264, 208 P.3d 1092 (2009).

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/newsletter.html . . . and

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

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