WASHINGTON INSURANCE LAW LETTER™

A SURVEY OF CURRENT INSURANCE LAW AND TORT LAW DECISIONS

edited by William R. Hickman

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AN AIRY ILL WIND

FACTS:

The U.S. District Court in Seattle asked the Washington Supreme Court in Olympia whether ***Safeco v. Butler*** applies if a liability insurer fails to provide a defense in bad faith. Also, if ***Butler*** applies, what is the remedy?

By a vote of 6-3, the court answered that ***Butler*** applies, and the remedy is coverage by estoppel.

HOLDINGS:

(1) The tort of bad faith has been recognized by this court. This cause of action acknowledges that the business of insurance affects the public interest and that an insurer has a duty to act in good faith.

(2) The tort of bad faith recognizes that traditional contract damages do not provide an adequate remedy for a bad faith breach of contract because an insurance contract is typically an agreement to pay money, and recovery of damages is limited to the amount due under the contract plus interest.

(3) In order to establish bad faith, an insured is required to show the breach was unreasonable, frivolous, or unfounded. Bad faith will not be found where a denial of coverage or a failure to provide a defense is based upon a reasonable interpretation of the insurance policy.

(4) The duty to defend arises whenever a lawsuit is filed against the insured alleging facts and circumstances arguably covered by the policy.

(5) The key consideration in determining whether the duty to defend has been invoked is whether the allegation, if proven true, would render the insurer liable to pay out on the policy. It is not the other way around.

(6) The general rule regarding damages for an insurer's breach of contract is that the insured must be put in as good a position as he or she would have been had the contract not been breached. The existence of bad faith removes us from the general rule. The bad faith requires us to set aside the general rules regarding harm and contract damages because insurance contracts are different.

(7) An insurer's bad faith breach of the duty to defend a claim against an insured raises a rebuttable presumption that the insured has been harmed by the breach.

(8) When an insured has been harmed by the insurer's bad faith breach of the duty to defend a claim against the insured, the insurer is estopped from denying coverage for the claim.

COMMENT:

This is a terrible opinion. It is a product of speculation piled on speculation with overlaid fuzzy thinking.

Even worse than those shortcomings is the fact that this opinion will remove countless thousands of dollars from the pockets of Washington policyholders.

Finally, we must point out that the real message in this case is that the court has made a 180° shift in attitude in the 12 years since ***Tank v. State Farm***. At that time, the court expressed its trust in the defense bar saying that it was permissible for an insurer to defend a policy holder under a reservation of rights. If the company provided that defense in bad faith, something terrible would happen. In ***Butler***, the court said that the terrible thing would be coverage by estoppel. This was appropriate because when the company had exclusive control of the defense under a reservation, there was a potential for mischief, and harm would be presumed.

However, in this case, the court now says that even when the company has nothing to do with the defense, harm will be presumed. Nonsense!

GUEST COMMENT:

From Ashley, **Defense Obligations and the Tort of Bad Faith, XIV Bad Faith Law Report** #4 (May 1998), we find these comments as to this opinion:

"[C]ompletely misguided."

"This reasoning makes no sense."

"The reasons supporting the presumption of harm and estoppel to deny coverage in ***Butler*** are missing from [this case]."

"This holding [on remedy] makes even less sense [than the holding on liability]."

"[This case] is not an unredeemed disaster. At least Chief Justice Durham and Justices Dolliver and Alexander had the sense to appreciate the distinctions between ***Butler*** and [this case]."

"Three cheers for Chief Justice Durham."

Kirk v. Mt. Airy Ins. Co., 134 Wn.2d 558, 951 P.2d 1124 (1998)

DOWN AND DIRTY

FACTS:

In 1978, Bill opened a landfill in a wetland in Fife. Bill's trucking company hauled slag and wood waste from log yards to the landfill. The landfill was closed in 1980 when regulations were adopted prohibiting landfills in wetlands. Bill continued to dump in the landfill anyway. He stated that it was to contour the land.

Testing in 1982 revealed that arsenic was leaching out of the landfill. In 1987, Bill received a cleanup order from the state. After that, Bill was sued in a lawsuit to resolve who would pay for the cleanup. The court found that Bill was personally liable for 7%, that his trucking company was liable for another 7%, and that neither of them had any liability prior to 1981.

Bill sought coverage from his insurance companies. One of the insurers filed a lawsuit to resolve the coverage questions. All of the insurers except Northern settled prior to trial. Northern's policies were in effect from 1980 to 1984.

Before trial, the court decided that the costs would be allocated equally on a pro rata per year basis between Bill and Northern. The allocation period would be January 1, 1981 until April 29, 1987, the date Bill received the cleanup order.

The jury found that Bill and his trucking company expected damage at the landfill as of June 1982. The court held that Northern was obligated under its 1980-1982 policies, but not under its 1982-1984 policies. Northern was therefore liable for two-sevenths of the cleanup costs. Bill was responsible for the remaining five-sevenths.

Bill appealed, and the Court of Appeals reversed. It held that the policy language was ambiguous, that Northern would have to pay for 100% of the cleanup costs.

Northern asked the Supreme Court to look at the case. The Supreme Court agreed to do so, and then it agreed with the Court of Appeals.

HOLDINGS:

(1) The occurrence in this case is the continuing damage caused by the leaching.

(2) When damage occurs during a policy period, that policy is triggered.

(3) Once a policy is triggered, that policy remains on the risk for continuing damage.

(4) When damage is continuing, all triggered policies provide full coverage.

(5) The event that triggers coverage does not define the scope of coverage. Although the question of trigger and the question of allocation are separate, the rationale used to trigger the policy often points to the proper method of apportioning coverage between triggered policies.

(6) When dealing with uninsured years, for allocation purposes, we are dealing with years that would be triggered if a policy were applicable in that year. No policies after June 1982 would have been triggered in this case because of the occurrence and pollution exclusion clauses. ***We are not dealing with uninsured years. We are not addressing the issue of allocation in the context of an uncovered claim.***

(7) Northern's argument that it can be held liable only for property damage occurring during the policy period is misguided, since it addresses only which policies are triggered, not whether costs should be allocated.

(8) *Gruol Constr. Co. v. Insurance Co. of N. Am.*, 11 Wn. App. 632, 524 P.2d 427 (1974), stands for the proposition that all insurers on the risk during the time of ongoing damage have a joint and several obligation to provide full coverage for all damages.

(9) The issue before us is: Once a policy is triggered by continuous damage, is damage covered under that triggered policy after the policy has expired or after damage is expected?

(10) The policy language is ambiguous. If Northern intended solely to be liable on a pro rata basis, it could have included that language in its policies.

(11) Once a policy is triggered, the policy language requires the insurer to pay all sums for which the insured becomes legally obligated, up to the policy limits. Once coverage is triggered in one or more policy periods, those policies provide full coverage for all continuing damage, without any allocation between insurer and insured.

(12) This rule does not apply to situations where the insured continues to exacerbate the pollution damage. The known risk doctrine would apply in those cases and would preclude coverage during a policy period in which the insured continued to knowingly pollute.

COMMENT:

The opinion plays word games with the notion of what is "uninsured." At first, the court says that coverage extends into "uninsured" periods. Then later it says it is not dealing with an "uninsured" period. In explaining the apparent contradiction, the court distinguishes "uninsured" years which would have been triggered if there were policies, with years which are "uninsured" because the insured expects the damage so that there is no insurance to trigger. The court's distinction suggests that its no-allocation rule does not apply to cases where there are uninsured years that would have been triggered had there been insurance. The end of the trigger period would be marked by the date when there was no longer any occurrence because the insured expected the damage.

The no-allocation rule the court adopts appears to apply only to damage that continues or occurs ***after*** the policy is triggered. It would not seem to apply to damage that may occur ***prior*** to the policy period. This would be consistent with the court's statement that trigger and allocation are not the same issue. However, policyholder attorneys have latched onto the opinion as standing for the proposition that a triggered policy also covers damage that occurred ***prior to the policy period***.

The dissent points out that no rule of apportionment may be needed where there is evidence presented which provides a basis for the trier of fact to apportion damages.

It also notes that the majority's no-allocation rule may apply only where there is a single continuing occurrence, and not where pollution is caused by multiple occurrences.

GUEST COMMENT:

From Amicus Lloyds brief filed in support of motion to reconsider:

> "The Court's Opinion Places Washington at the Extreme Radical Fringe of Anti-Insurer States on Pollution Coverage."

"With the decision in this case, the majority has firmly established Washington as the single most anti-insurer state in the entire country on pollution coverage issues."

American National Fire Ins. Co. v. B & L Trucking, 134 Wn.2d 413, 951 P.2d 250 (1998)

FOSTERING A PROFIT

FACTS:

Jody hit Naoma with his bicycle. Jody was a foster child living with the McCabes. Naoma sued Jody.

Because Jody was a resident of the McCabes' household, he was an insured under their homeowners policy. That policy provided that it did not apply to bodily injury arising out of business pursuits.

The company noted that the McCabes had been collecting in excess of $20,000 a year for more than 10 years from their foster parenting and denied coverage because of the business pursuits exclusion.

PROCEDURE:

Jody assigned his claim to Naoma who sued the company. Both sides moved for summary judgment.

The court ruled for the company and Naoma appealed. The Court of Appeals reversed, saying there was an issue of fact as to whether collecting $20,000 a year indicated the foster home was run for profit.

The Supreme Court affirmed.

HOLDINGS:

(1) An insurance policy must have meaning to the average individual. The policy language must be interpreted the way it would be understood by the average person.

(2) Exclusions from coverage of insurance are contrary to the fundamental protective purpose of insurance and will not be extended beyond their clear and unequivocal meaning. Exclusions should also be strictly construed against the insurer.

(3) Because the term "business pursuit" is undefined, it should be given its "plain, ordinary and popular" meaning. In order to determine the plain, ordinary, and popular meaning of "business pursuit," we may look to both legal and standard dictionaries.

(4) ***Black's Law Dictionary*** provides a precise definition of the term "business pursuit."

(5) The legal definition of "business pursuit," the standard dictionary definition of "pursuit," and the policy's definition of "business" all contemplate that the insured's activity be profit motivated in order to earn a "livelihood" or to be the insured's "profession or occupation."

(6) In order to constitute a business pursuit, the foster home must (1) be conducted on a regular and continuous basis, and (2) be profit motivated. It is not necessary that profit be the *sole* motivation in operating the foster home. Nor is it necessary that the foster home be the major source of livelihood. All that is required is that the activity be regular and continuous and that a profit motive exist in conducting the activity. Compensation may be used as a method of establishing profit motive but it does not establish, per se, a profit motive exists.

COMMENT:

I am sure that the rest of the Washington residents who have homeowners policies will be overjoyed to learn that their premium will be based on the kind of risk of loss that arises from the operation of a foster home.

Stuart v. American States Ins. Co., 134 Wn.2d 814, 953 P.2d 462 (1998)

"TRUTH! WHAT IS TRUTH?"

FACTS:

Johnson said he had been injured in a work-related accident and suffered "cognitive impairment" such that he was totally disabled.

His employer was of the view that Johnson had a cognitive predisposition not to work, *i.e.*, malingering. Three doctors testified that Johnson was malingering.

Johnson testified that after the injury, he had barely enough money to live on, and he did not have as much money as he used to for buying things.

The fact of the matter was that Johnson was receiving more while injured than when working.

HOLDINGS:

The Supreme Court held that the trier of the fact could not be told that Johnson was receiving more when off work than he earned when working.

COMMENT:

As the dissent noted: "[T]he majority's rule hobbles the truth-finding function of the court."

Johnson v. Weyerhaeuser Co., 134 Wn.2d 795, 953 P.2d 800 (1998)

A .38 SPECIAL NO FAULT

FACTS:

Mark dropped in early one morning to his Seven-11. Another early morning patron asked him for his wallet. Mark declined.

The patron asked a second time. Mark declined again.

The patron shot Mark in the gut. The patron took the wallet.

PROCEDURE:

Mark sued Seven-11 for failing to keep the premises safe.

Seven-11 answered, denied negligence, and affirmatively pled that any fault had to be apportioned with the conduct of the shooter.

Mark moved to strike that, arguing that the shooter's shooting was not really "fault." The trial court did not agree, ruling that the comparative fault statute required the court to compare the fault of everyone who was involved in the shooting.

The Supreme Court reversed saying that intentional acts are not included within the meaning of "fault" for purposes of the allocation of fault statute.

HOLDINGS:

(1) The plain language of the allocation of fault statute evidences a legislative intent that liability not be apportioned to intentional tortfeasors.

(2) Intentional acts or omissions are not in any measure negligent or reckless.

(3) The Legislature did not intend an entity who commits an intentional tort to be considered at fault for purposes of the comparative fault statute.

COMMENT:

> "When I use a word, … it means just what I choose it to mean — neither more nor less."

Charles Lutwidge Dodgson, Through the Looking Glass, ch. 6.

Welch v. The Southland Corp., 134 Wn.2d 629, 952 P.2d 162 (1998)

SEX, SLIDES, AND THE CONCRETE MOTEL

FACTS:

The Haugen family went inner tube sledding at Kirk's Lodge. Mom bought all the tickets and signed an acknowledgment of risk.

Kirk's Lodge printed warnings on its tickets, ticket booth, and sledding hill, notifying patrons they were sledding at their own risk. Each day, Kirk's Lodge offered three safety presentations.

Dad and Kid neither heard the presentations nor read the warning signs.

After dark, Dad and Kid made one last trip down the run. Tim, a Kirk's Lodge employee, stood at the bottom, searching for his cigarette lighter. Dad and Kid saw Tim. They yelled for him to watch out, but failed to avoid the collision. Dad and Kid both received treatment at the hospital. Neither suffered permanent injury.

The Haugens filed an action against Kirk's Lodge for damages.

Six months after the accident, Mom and Dad separated. Dad started a six-month affair with a prostitute. In her deposition, the prostitute discussed Dad's active life-style, including playing sports, dancing, and frequent sex.

At trial, Kirk's Lodge called the prostitute as a witness. Dad wanted to discredit the prostitute by testifying he had filed a criminal complaint against her at the end of their relationship. He also wanted to reveal she had threatened him with physical harm if he were to testify against her.

The court admitted this evidence. However, the court excluded portions of her testimony where she discussed having been incarcerated as a result of charges Dad had filed against her.

HOLDINGS:

(1) Evidence of the prostitute's incarceration was properly excluded as irrelevant. Evidence presented about charges filed against the prostitute and her threats of physical harm sufficiently demonstrated her bias to the jury.

(2) To meet their burden of proof, the Haugens had to establish Kirk's Lodge owed them a duty of care, breached that duty, the breach proximately caused their injuries, and they suffered damages as a result. As a defense, Kirk's Lodge argued assumption of risk.

(3) There are four types of assumption of risk: (A) express, (B) implied primary, (C) implied reasonable, and (D) implied unreasonable. This case involves implied primary risk.

(4) To establish implied assumption of risk, Kirk's Lodge had to show Dad and Kid subjectively understood the presence and degree of risk involved with inner tubing and voluntarily chose to accept that risk. If the jury believed Dad and Kid assumed the risk of dangers related to inner tube sledding, Kirk's Lodge owed them no duty and would be relieved of all liability.

(5) The appellate court found the trial court did not err in instructing the jury about assumption of risk. Both Dad and Kid were aware they could crash into others while inner tubing.

COMMENT:

The kind of case which leaves you at a loss for words.

Haugen v. Lazy K Enterprises, No. 15049-6-III, slip op. (Wash. App. Mar. 19, 1999)

DEATH OF A DETECTIVE

FACTS:

Donald was living with his grandmother when the County Sheriff busted in. Although the search produced no illicit substances, the lead detective learned that Donald kept over $100,000 cash in the safe.

One month later, the detective returned with a stocking mask over his head and gun drawn. He forced his way into the home, pushed Donald on the floor, and used a rope to tie a pillowcase around Donald's head. The detective demanded Donald tell him the safe combination. Donald refused. The detective doused lighter fluid over Donald, and punched and kicked him until he lost consciousness.

The detective shoved Grandma into the living room. He forced a cloth in her mouth and threatened to shoot her. Grandma also refused to reveal the combination. He pricked her with a syringe filled with lighter fluid.

During the assault, Donald's girlfriend escaped from the home. She called the police. They arrived to find the detective pouring lighter fluid on Donald. The police shot and killed the detective.

At trial, a jury held the detective's estate and the County liable, awarding $850,000. The court granted the County's motion for judgment as a matter of law and amended the judgment rendering the detective's estate completely liable for the award.

The detective's insurer, Blue Ridge, filed a declaratory action that it had no duty under the detective's homeowner's policy to defend or indemnify the detective's estate. The district court granted summary judgment in favor of Blue Ridge.

HOLDINGS:

(1) The judgment in the underlying action did not stem from an "occurrence." The facts establish that the detective deliberately and intentionally assaulted, battered, and attempted to rob. There is no evidence to indicate pricking Grandma with a syringe was accidental. Without showing accidental conduct, plaintiffs could not meet the policy's definition of occurrence.

(2) The court did not address whether the policy's explicit exclusion for liability arising from bodily injury which is "expected or intended by the insured" would have precluded coverage under the detective's homeowner's policy.

COMMENT:

Clearly this was not your run-of-the-mill detective.

Blue Ridge Ins. Co. v. Stanewich, No. 96-55839, 1998 U.S. App. LEXIS 7853 (9th Cir. April 24, 1998)

FOR IT'S NO WAY *NEVERS*; NO NO *NEVERS* NO MORE

FACTS:

Nevers sued Fireside. The matter was sent to mandatory arbitration. On the day of the arbitration, Fireside raised some jurisdictional issues. The arbitrator continued the hearing and directed both parties to submit briefs addressing the jurisdictional issues.

Fireside submitted a brief. Nevers never did. On April 4, 1994, the arbitrator issued an award in Fireside's favor based on the fact that Nevers did not submit a brief. The award was filed on April 5, 1994.

On April 25, twenty days later, Nevers filed a request for a trial de novo, mailing a copy to Fireside's counsel. The request was ***not*** accompanied by proof of service.

The Arbitration Director ruled that Nevers had waived the right to trial de novo by failing to participate in the arbitration.

The trial court stated that the real issue was whether the trial de novo request was timely filed and served. The trial court concluded that neither was accomplished within the twenty days following the arbitrator's ruling.

Nevers moved for reconsideration. The motion was denied. The trial court said that (1) the trial de novo request was timely filed; (2) service of the request was not accomplished; (3) no proof of service was on file; (4) no explanation exists for failure to serve by April 25; (5) the rule requires both service and filing to be accomplished by the twentieth day; and (6) compliance is "jurisdictional" in the sense that the court is without authority to extend the deadline.

Nevers appealed. The Court of Appeals reversed. Fireside appealed. The Supreme Court reversed the Court of Appeals.

Nevers conceded that he had not strictly complied with the rule. However, he argued that he had substantially complied with the rule: he filed his trial de novo request on the 20th day; he mailed a copy of the request on the 20th day; he did not file proof of service.

HOLDINGS:

(1) Timely filing of the request for trial de novo is mandatory.

(2) Timely filing of proof of service of the request is mandatory.

(3) The six Court of Appeals judges who permitted a trial de novo when there was substantial compliance were wrong.

(4) Strict compliance is consistent with the Legislature's intent. The primary goal of mandatory arbitration is to "reduce congestion in the courts and delays in hearing civil cases."

(5) Substantial compliance would subvert the Legislature's intent "by contributing, inevitably, to increased delays in arbitration proceedings."

COMMENT:

The ***Nevers*** decision creates bad law. It disrupts the consistent application of the rules and creates an undue, unfair, and irrational burden on litigants who are trying to exercise their right to a jury trial.

Either a request was served and filed within 20 days or it was not. Requiring that the ***proof of service be filed within 20 days*** is an arbitrary veneration of form over substance.

The ***Nevers*** decision goes beyond the facts before it. The court stated that ***timely filing of proof of service*** was required. Nevers never did file a proof of service timely or otherwise. His omission was failure to ***timely serve the request***.

The ***Nevers*** court tries to use legislative intent to justify its result. The ***Nevers*** court says that anything less than strict compliance with the filing requirements would subvert the Legislature's intent "by contributing, inevitably, to increased delays in arbitration proceedings." The statement makes no sense. It is a non sequitur. By the time a party is filing a request for trial de novo, the arbitration proceeding has ended. There would be no delay. If the request is timely filed and the request is timely served, the trial de novo can proceed. Filing a proof of service within 20 days adds nothing.

We have 22 ***Nevers*** appeals going now. It is ironic that a decision which the author said would reduce congestion in the courts has had precisely the opposite effect.

Nevers v. Fireside, 133 Wn.2d 804, 947 P.2d 721 (1997)

REED McCLURE HONORS WILLIAM R. HICKMAN FOR 30 YEARS OF SERVICE

SEATTLE, WA - On May 15, 1998, The Reed McClure law firm honored William R. "Bill" Hickman for 30 years of dedicated service. Hickman joined Reed McClure (then Reed McClure & Moceri) in 1968 after receiving his J.D. from Columbia University and his B.S. from Seattle University. He was named shareholder in 1971.

A Fellow in the American Academy of Appellate Lawyers and a recognized expert in the area of insurance coverage, Hickman's practice emphasizes appellate work and insurance coverage matters. During the past 30 years, he has handled more than 400 appeals in state and federal courts, which have generated over 200 published opinions. From 1985 through 1996, he chaired Reed McClure's Appellate Practice Group. The growth of this practice area over the past 15 years can be directly attributed to Hickman's continued leadership and strategic vision.

"By establishing Reed McClure's Appellate Group, Bill laid the foundation for what has developed into a nationally-recognized, top-flight practice," said William Holder, who joined Reed McClure in 1967, one year prior to Hickman. "Over the past 30 years, Bill has solidly positioned himself at the forefront of insurance law, recognized by his peers for his outstanding service while greatly valued by his colleagues for his continued dedication to the growth and success of Reed McClure."

Since 1975, Hickman has edited the award-winning *Washington Insurance Law Letter*, a publication which reviews recent developments in insurance and tort law. Hickman has also been a columnist for *Insurance Week* since 1988.

Since founding the Seattle Track Club in 1976, Hickman has been actively involved in track and field events throughout the Pacific Northwest. A nationally-certified master level track and field official, Hickman was named *Official of the Year* by the Pacific Northwest Track and Field Officials Association in 1996, and was recognized in 1997 by the Age Group Council of PNTF for his 20 years of service to the youth of Western Washington.

At the national level he is a member of the USA Track & Field Rules Committee, and serves on its Doping Appeals Board.

COMMENT:

Now, weren't those some lovely things for the firm to be saying about Your Editor! But it has surely been a wonderful 30 years.

REED McCLURE

ATTORNEYS AT LAW

is pleased to announce that

MARILEE ERICKSON

was recently named Vice President of the King County Bar Foundation (KCBF). KCBF is a charitable foundation that funds pro bono programs in King County and scholarships for minority law students.

Ms. Erickson is a Reed McClure Shareholder and Chair of the firm's Appellate Practice Group.