// WASHINGTON INSURANCE LAW LETTER™

A SURVEY OF CURRENT INSURANCE LAW AND TORT LAW DECISIONS

edited by William R. Hickman

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THIS NEWSLETTER IS PROVIDED AS A FREE SERVICE for clients and friends of the Reed McClure law firm. It contains information of interest and comments about current legal developments in the area of tort and insurance law. This newsletter is not intended to render legal advice or legal opinion, because such advice or opinion can only be given when related to actual fact situations.

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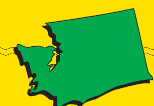


TAKING A REALLY BIG BITE OUT OF CRIME

FACTS:

Mr. Tran operated a pager/cell phone business in addition to being an engineer at Boeing. In late August 1992, he told the Seattle Police his business had been burglarized. He told the police that it looked "normal" with nothing out of place. He did not know if anything was missing.

The next day, he reported the burglary to his carrier, State Farm. He claimed property damage, loss of inventory, loss of personal property, and loss of business income. In an interview, he told State Farm that he had first noticed that his display pager and display phone were gone. Also gone were a TV set, copy machine, VCR, modem, laser printer, pagers, and surveillance camera.

State Farm sent Mr. Tran an inventory form and told him to fill it out and send it back, together with documents that described or placed a value on the items on the form.

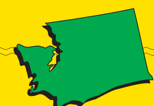
Ten weeks, and four phone calls later, Mr. Tran returned the form. It listed the property he said was taken. There was no documentation.

Over the next five weeks, State Farm called Mr. Tran five times. Mr. Tran did not respond. State Farm sent him two letters. Mr. Tran did not respond.

Four months after the loss, State Farm got Mr. Tran on the phone. They set up a meeting. He did not show up. His lawyer sent State Farm a letter complaining that State Farm did not "act promptly."

State Farm hired a lawyer. He wrote to Mr. Tran's attorney requesting the documents within the next two weeks. He also said there would be an EUO after the documents were provided. There was no response and no production. State Farm visited Mr. Tran's business four times. It was always closed. State Farm's attorney wrote three letters to Mr. Tran's attorney asking for the documents. After a month, Mr. Tran's attorney told State Farm that he would produce the documents after he met his client. He also said they reserved the right to sue State Farm for bad faith.

Six months after the loss, Mr. Tran supplied some papers. There were no business financial records and no documentation for some of the items allegedly stolen.



Seven months after the loss, Mr. Tran allowed State Farm to inspect the scene of the alleged burglary.

Nine months after the loss, Mr. Tran's EUO was conducted. He refused to answer questions about his financial condition, refused to produce tax returns or financial documents, and told a story which was at variance with what he told the police.

State Farm's lawyer wrote to Mr. Tran's lawyer requesting follow-up information from the EUO. There was no response.

Eleven months after the loss, State Farm advised Mr. Tran that his claim was being denied because he had breached the cooperation clause by failing to provide the requested information in connection with the investigation.

PROCEDURE:

Over a year later, Mr. Tran sued State Farm. State Farm moved for summary judgment based on the undisputed facts, indicating that it had been unable to complete its investigation and therefore had been unable to determine whether or not there ever had been a loss, and if so, how much. The superior court granted the motion, and dismissed the case.

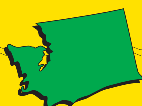
On appeal, the Court of Appeals held as a matter of law that Mr. Tran's failure to produce was a breach of the cooperation clause. But the court reversed for a trial on the question of whether State Farm had been prejudiced by the lack of cooperation. State Farm petitioned the Supreme Court to review, arguing that Mr. Tran's failure to cooperate created prejudice as a matter of law. The Supreme Court agreed, reversed the Court of Appeals and dismissed the case against State Farm.

HOLDINGS:

(1) Insureds may forfeit their right to recover under an insurance policy if they fail to abide by provisions in the policy requiring them to cooperate with the insurer's investigation of their claim.

(2) The insurer's requests for information must be material to the circumstances giving rise to liability on its part. ***Pilgrim v. State Farm Fire & Cas. Ins. Co.***, 89 Wn. App. 712, 950 P.2d 479, 483 (1997).

(3) Information is material when it "concerns a subject relevant and germane to the insurer's investigation as it was then proceeding" at the time the inquiry was made.



(4) State Farm had legitimate reasons for broadening its investigation to include a motive for fraud. It is abundantly clear that Tran failed to provide State Farm with any documentation at the time he made his initial claim. He later failed to provide supporting documentation for all of the items that he claimed were stolen. State Farm had difficulty obtaining a meeting with Tran to discuss his claim and arrange for a view of the premises where the burglary was alleged to have occurred. Tran inexplicably withdrew his claim for some items that he initially indicated were stolen. He withdrew his claim for lost business income, apparently believing that this would relieve him of his obligation to provide State Farm with his financial records. Finally, Tran provided the police and State Farm with differing stories. In light of these circumstances, the possibility of fraud was distinct. Tran's financial records became relevant and material to State Farm's consideration of his claim.

(5) Tran's tax returns were not privileged. The tax returns had relevance to his personal finances, and the condition of his business.

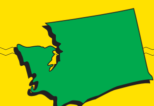
(6) The insurance policy gave State Farm the right to question Tran about "any matter" relating to his claim, including his "books and records," and to "examine and audit" his "books and records." He refused to turn over the requested financial information and declined to answer questions regarding his personal or business finances.

(7) His failure to cooperate, "constitutes a breach of the cooperation clause as a matter of law."

(8) An insured's breach of a cooperation clause releases the insurer from its responsibilities if the insurer was actually prejudiced by the insured's breach. Interference with the insurer's ability to evaluate and investigate a claim may cause actual prejudice. However, prejudice is an issue of fact and will seldom be established as a matter of law. The insurer has the burden of proving that it has suffered prejudice from its insured's breach.

(9) State Farm relies on ***Pilgrim v. State Farm Fire & Cas. Ins. Co.***, 89 Wn. App. 712, 950 P.2d 479 (1997), as support for its contention that its inability to complete an investigation of the facts underlying Tran's claim prejudiced it as a matter of law. The court in ***Pilgrim*** determined that the insured breached the cooperation clause by refusing to provide its insurer with financial records made relevant by the suspicious nature of the insureds' claim. We are in accord with ***Pilgrim***.

(10) Tran's refusal to submit the requested financial information, an act which breached the cooperation clause and impeded State Farm's ability to investigate the claim, caused prejudice.



(11) The business of insurance companies is, after all, to provide coverage for the legitimate claims of the parties it insures. If insurers are inhibited in their effort to process claims due to the uncooperativeness of the insured, they suffer prejudice. If we were to reach any other result, we would be encouraging insureds to not cooperate and to submit fraudulent claims.

(12) Because, in the final analysis, it is uncontroverted that Tran's intransigence prevented State Farm from completing a legitimate investigation in order to determine whether or not coverage should be provided, it follows that State Farm suffered prejudice.

(13) We hold that an insurer suffers prejudice, as a matter of law, when its insured fails to provide it with the financial records reasonably needed in order to complete an investigation into the question of whether the insured's claim was fraudulent.

COMMENT:

We have gone into detail as to the facts and the law of this case because of its incredible importance. This court, unlike the Court of Appeals and some other courts around the country, recognized that when an insured's intransigence prevents an insurer from completing a legitimate investigation, the insurer is faced with the dilemma of a ***Hobson's*** choice:

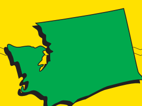
(1) Deny the suspected fraudulent claim without an adequate investigation and get sued for bad faith, breach of claims handling regulations, and Consumer Protection Act violations; or

(2) Violate public policy by paying a suspected fraudulent claim.

This opinion will serve to restore a modicum of balance to insured-insurer relationships.

Reed McClure represented State Farm in this case.

Tran v. State Farm Fire & Cas. Co., ___ Wn.2d ___, 961 P.2d 358 (1998)



RIVER OF THE LIVING DEAD

FACTS:

Joel worked for the city as a park maintenance supervisor. His job was to maintain the grass, shrubbery and trees for several city properties, including the Flint River Cemetery.

The Flint River flooded in 1994. The flood waters lifted several hundred caskets from the cemetery and carried caskets and corpses away from the cemetery.

Unfortunately for Joel, his co-supervisors were on vacation at the time, so Joel found himself solely responsible for the cleanup. Joel went home, got his personal boat, and began collecting the bodies.

Over a five-day period, he went after the floating caskets and tied them to trees to prevent the caskets from floating down the river. For the first three days, Joel worked 22 hours without a rest.

Manually lifting the bodies into the boat turned out to be difficult work because the corpses often came apart in the recovery process. For example, the head of a corpse broke away and landed in Joel's lap.

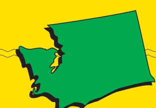
Joel continued to work for the city after he and three other employees recovered 400 caskets and 18 corpses. However, Joel began to have vivid nightmares. These nightmares involved dead and decaying bodies rising from the water to attack him. The nightmares were so real that once he dreamt he shot at one of the corpses, but awoke to find he had grabbed a gun from under his bed and shot his chest of drawers.

A psychiatrist diagnosed Joel with posttraumatic stress disorder and prescribed medications. Joel was denied worker's compensation benefits because he did not suffer a physical injury. The Supreme Court of Georgia upheld the decision.

HOLDINGS:

(1) A purely psychological injury is not a compensable "injury" under Georgia's Workers Compensation Act.

(2) A psychological injury is only compensable if it arises naturally and unavoidably from an accident in which a compensable physical injury was sustained.



COMMENT:

If Joel had pulled a muscle or skinned a knee in the process of scooping up the floating bodies, he would have been able to recover full worker's compensation benefits. As a conscientious employee, he suffered a severe injury from a macabre situation that was clearly in the course of his employment.

Abernathy v. City of Albany, 269 Ga. 88, 495 S.E.2d 13 (1998)

THE GOOD, THE BAD, AND THE MUD

FACTS:

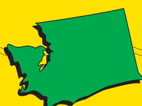
Coventry was building an apartment in Renton. It erected a retaining wall. The rains came. The hill turned to mud, and the mud flowed down onto the retaining wall. The wall did not retain. It collapsed. The mud and water flowed into the main construction site. There was substantial property damage. Work stopped.

Coventry submitted a claim to its insurer, American States, for loss of business. An adjuster investigated the project site, determined that the damage was to the retaining wall and denied the claim because Coventry's policy had an exclusion for damage to that structure. He did not investigate the cause of the damage or any loss of business coverage because he did not believe that Coventry had a claim for business loss. Nor did he investigate damage to the project other than the retaining wall. The adjuster also admitted that he only looked at two of the six forms that made up Coventry's policy before he denied coverage. He later testified that he never considered whether Coventry had a business loss claim even though it had some business loss coverage.

PROCEDURE:

Coventry sued, alleging breach of contract, bad faith, and a CPA violation. It was agreed that weather was the efficient proximate cause of the damage. The policy had an exclusion precluding coverage for any damage resulting from a landslide caused by weather conditions. The trial court ruled that the exclusion was applicable and dismissed the breach of contract claim. It then dismissed the bad faith and CPA claims concluding that they could not exist in the absence of coverage.

On appeal, Division I framed the issue as whether an insured may sue for bad faith or CPA violations when the insurer rightfully denies a claim under an exclusion, but fails to conduct



an adequate investigation, or violates the WAC during the investigation. The short answer was "no".

The Supreme Court granted review, and reversed for a trial at which Coventry would have to prove it had been, in fact, harmed by what the company did.

HOLDINGS:

(1) Coventry admits there was no coverage for the loss; American States admits, for purposes of its motion to dismiss, it acted in bad faith in investigating the loss.

(2) Insurance is affected by the public interest requiring that all persons be actuated by good faith in all insurance matters.

(3) As an element of every bad faith or Consumer Protection Act action, an insured must establish it was harmed by the insurer's bad faith acts.

(4) We reject the "no harm, no foul" rule in which bad faith is not actionable, as a matter of law, when there is no coverage.

(5) An insured may sue for bad faith investigations and violations of the Consumer Protection Act whether or not there is coverage.

(6) An insurer is not required to pay claims which are not covered by the contract or take other actions inconsistent with the contract. Of course, insurance companies, like every other organization, are going to make some mistakes. **As long as the insurance company acts with honesty, bases its decision on adequate information, and does not overemphasize its own interests, an insured is not entitled to base a bad faith or Consumer Protection Act claim against its insurer on the basis of a *good* faith mistake.**

(7) The implied covenant of good faith and fair dealing in the policy should necessarily require the insurer to conduct any necessary investigation in a timely fashion and to conduct a reasonable investigation before denying coverage. In the event the insurer fails in either regard, it will have breached the covenant and, therefore, the policy.

(8) To maintain an action based on an insurer's bad faith, the insured must prove it was harmed. There is no presumption of harm.

(9) Coverage by estoppel is not the appropriate remedy in the first-party context. Damages are limited to the amounts the insured incurred as a result of the bad faith investigation, as well as general tort damages.

COMMENT:

Another extremely important opinion. While no one in their right mind expected this court to embrace the "no harm, no foul" rule, the recognition of the concept of "good faith mistakes" is very welcome. The fact of the matter is that most mistakes made in claims handling are of the good faith variety.

Equally significant is the court's decision to rein in the concepts of presumed harm and coverage by estoppel. A fair amount of the opinion is devoted to explaining why these concepts apply to third-party situations but not to first-party. The impact of that analysis remains to be seen. For now, first-party coverage is on a playing field that is closer to level than it was before.

Reed McClure represented Amici Mutual of Enumclaw, USAA, State Farm, and PEMCO.

Coventry Associates v. American States Ins. Co., No. 65850-1, 1998 WL556296 (Wash. Sept. 3, 1998)

DUMB, DUMBER, DUMBEST

FACTS:

On New Year's Eve, Guglietti hosted a party. He got drunk. He got his parents' .38. He inserted one bullet. He pointed the gun at Doug. He pulled the trigger. Nothing.

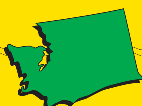
He pointed the gun at his own head, and pulled the trigger. Nothing. He put the gun away.

On New Year's Day, the party went on. Guglietti was now mixing dope with his alcohol. DiGeronimo, a friend, arrived. Guglietti got the gun. He pulled the trigger. He killed DiGeronimo.

Guglietti pled to voluntary manslaughter with a firearm. He got 10 years.

A wrongful death claim was made and tendered to the homeowner's carrier. In the face of an intentional and criminal act exclusion, the argument was made that DiGeronimo was negligent because he forgot the gun was loaded. The court did not agree:

> [The] characterization of Guglietti's action as being or premised on negligence trivializes his conduct. This is not a case in which a revolver was negligently mishandled and fired by mistake or inadvertence.



> Guglietti deliberately and intentionally pointed the revolver at DiGeronimo and deliberately and intentionally pulled the trigger. What is unknown is Guglietti's state of mind when he pulled the trigger. Presumably his purpose was not to injure DiGeronimo; nevertheless, he killed him after having placed on bullet in the revolver and firing twice without the bullet reaching the chamber. His conduct was with such disregard for human life that it could be considered to have been committed with implied malice and therefore have constituted second degree murder.

20th Century Ins. Co. v. Stewart, 63 Ca. App. 4th 1333, 74 Cal. Rptr. 2d 492 (1998)

EMOTIONAL DISTRESS IS NOT BODILY INJURY

FACTS:

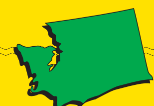
Daley was a deputy sheriff who stopped to assist a motorist. A Washington State Patrol trooper also stopped. As the officers were talking, another motorist came along and "clipped" Daley and "struck" the trooper. The trooper was killed. Daley suffered minor physical injuries and major emotional problems.

Daley collected the liability limits from the driver and then asked Allstate for UIM. Allstate was of the view that "bodily injury" did not include emotional damage resulting from witnessing the death of the trooper. The superior court judge agreed with Allstate.

Division III reversed, holding as a matter of law that Daley's emotional injuries were included within the term "bodily injury" in the UIM policy.

Allstate prepared a Petition for Review which demonstrated that Division III had embraced a position which was in conflict with basic insurance law concepts. The petition was granted. On May 12, 1998, the case was argued in the Temple of Justice.

Within two months out came an opinion which was an overwhelming reaffirmance of the rule that emotional distress is not bodily injury. We can now count on that rule for at least the next six to eight years.



HOLDINGS:

(1) A UIM claimant can recover UIM benefits for emotional distress if the emotional distress exists because of bodily injury sustained by the insured resulting from the accident.

(2) The overwhelming majority of courts interpret the phrase "bodily injury" to include claims for physical injury and to exclude claims for purely nonphysical or emotional harm.

(3) A UIM insurer is not required to pay all damages incurred by the claimant as the result of an act of a tortfeasor. The literal language of the UIM statute limits the obligation to pay for only those damages for "bodily injury" or "property damage."

(4) We shall not invoke public policy to override an otherwise proper contract even though its terms may be harsh and its necessity doubtful. Public policy, as a rule, is recognized by the courts of this state when the Legislature has acted, and not before.

(5) The term "bodily injury" is not ambiguous and does not include recovery for emotional distress.

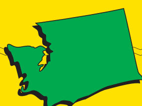
(6) A UIM insured cannot recover damages based on injuries to an uninsured person.

COMMENT:

A vindication for a plain reading of the UIM statutes, and the UIM policy language.

Reed McClure represented Allstate Insurance Company in this appeal.

Daley v. Allstate Ins. Co., 135 Wn.2d 777, 958 P.2d 990 (1998)



THAT'S NO ACCIDENT

FACTS:

Terri worked at Wal-Mart in the automotive department She often opened and closed the automotive store. One morning before the store opened, her supervisor raped her.

During the course of the rape, the supervisor pinned her to the wall and threw her onto the floor. She hurt her back and received treatment for her psychological problems and a skin rash.

The trial court granted Terri worker's compensation benefits for the injuries sustained at Wal-Mart. The Supreme Court of Oklahoma upheld the decision.

HOLDINGS:

(1) The rape was an accidental injury.

(2) The accidental nature of willful criminal conduct is viewed from the perspective of the injured worker, rather than the aggressor.

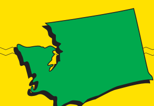
(3) The rape arose from employment because Terri's presence in Wal-Mart, by herself, before the store opened, put her in greater danger than those in the general public.

(4) Psychological or mental injuries are compensable if accompanied by physical injury.

COMMENT:

According to the court, rape is an accident. The inherent error in that statement shows how far the court was willing to go to compensate the victim of a horrible crime. Bad cases make bad law. This decision weakens the requirement of "accidental" injuries for the purpose of receiving worker's compensation benefits.

Wal-Mart Stores, Inc. v. Reinholtz, 955 P.2d 223 (Okla. 1998)



ARMAGEDDON—POSTPONED FOR NOW

FACTS:

Those of you who actually pay attention my rantings and ravings in this journal know that for some time I have been talking about a final showdown between the forces of good and evil. This time it was to take place in the context of the PIP subro claim which a plaintiff's insurer has. More specifically, the question was to be, is the plaintiff's attorney entitled to 1/3 of the PIP subro recovered from the defendant's liability carrier?

Now, some of you may ask, who cares? Not a bad question. The answer is the WSTLA attorneys care. The policyholders of Washington care. The reason they care is because we are talking about a $45 million pot of money which moves around among the insurance companies each year. In one case, State Farm, for example, may have provided PIP payments to the plaintiff, and will be seeking to recover them from the liability carrier, Safeco. In the next case, it may be Safeco which insures the plaintiff and will be seeking to recover its PIP payments, this time from State Farm. And so the money moves around and around.

But the WSTLA attorneys believe that they did all the work such that the liability carrier was willing to pay anything. For that effort and that result, they want a mere 1/3. In this case, that is 1/3 of $45 million: $15 million.

But if $15 million is removed from the pot each year, $15 million has to be added back. And who do you think will have to put up that short fall? Well, the policyholders, of course.

It was perceived that an answer to this conflict would be found in a case called ***Mahler v. Szucs,*** which was lurching its way through the system. And so it came to pass that on October 28, 1997, we joined together to do battle in the Temple of Justice. There were five WSTLA champions on one side, and me on the other side. And we did go at it to see whether WSTLA could lift $15 million from the policyholders' pockets. And it was a glorious battle.

Thus, it came as a bit of a shock, if not an anticlimax, to read on June 4, 1998, that the Supreme Court had eschewed the big, big question presented. Instead of learning once and for all whether WSTLA could get its hands on the money, what we got was a scholarly review and analysis of the rules of subrogation, and an extremely detailed analysis of the meaning of the words and sentences in the State Farm policy. Now, to many of you the words and sentences of the State Farm policy rank right up there just behind the Holy Writ. But to many of you who have seen fit to write your own language of subrogation, or write

no language of subrogation, what the Supreme Court said about State Farm's language is of limited usefulness. So, we shall share with you only those really fundamental pronouncements which transcend all policy language. Besides that, the damn opinion is 47 pages long, and there is no way in the world to summarize it.

HOLDINGS:

(1) Subrogation is an equitable doctrine for ensuring that a party who is responsible for a liability or obligation is made to answer for it.

(2) Subrogation has two features: (a) the right to reimbursement and (b) enforcement of the right. The right to reimbursement may arise by operation of law (termed legal or equitable subrogation) or by contract (termed conventional subrogation). The reimbursement right is enforced either as a lien against the subrogor's recovery from the responsible party or by the subrogee's stepping into the shoes of the subrogor and asserting the subrogor's rights against the responsible party.

(3) Subrogation, in an insurance context, enables an insurer to recover contractual payments made to an insured from the party responsible for the insured's loss.

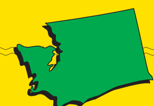
(4) By contract or on the basis of equitable principles, an insurer that has advanced insurance benefits to an insured for a loss caused by tortious conduct may have the right (a) to seek recovery from the tortfeasor in the name of the insured or (b) to reimbursement of the advance out of damages recovered by the insured from the tortfeasor.

(5) Damages obtained by an insured from a tortfeasor must fully compensate the insured before the insurer may claim any portion thereof as reimbursement for coverage advances it has made to the insured on the loss.

(6) Settlement between an insured and a third-party tortfeasor does not extinguish the insurer's subrogation right when the insured and the third-party tortfeasor were aware of the insured's subrogation right, the insurer did not consent to the settlement, and the third-party tortfeasor had additional assets.

(7) An insurer cannot have a right of subrogation against its own insured.

(8) An insurer that has advanced insurance benefits to an insured and then seeks to have the advance reimbursed out of the insured's recovery in a tort claim against the party responsible for the insured's loss may be required to pay its share of the legal expenses incurred by the insured in prosecuting the claim, notwithstanding the fact that the insurer



and the responsible party's insurer are both bound by an intercompany arbitration agreement governing disputes between insurers involving subrogation.

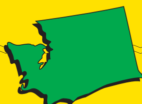
(9) Under the principle of equitable sharing, an insurer seeking reimbursement of insurance benefits advanced to an insured on a loss may be required to contribute to the insured's legal costs in successfully prosecuting a tort claim against the party responsible for the loss if the insured's recovery on the claim includes recovery of the insurer's subrogation interest, regardless of counsel's motivation in prosecuting the claim, the absence of an attorney-client relationship between counsel and the insurer, the presence or absence of consent to the action by the insurer, or the nature of the attorney-client agreement between counsel and the insured. So long as the insurer benefits from the recovery or has not been prejudiced by the insured's prosecution of the claim, neither the character of the recovery nor the reason why the claim was prosecuted is a reason the insurer should not be required to pay its fair share of the legal costs.

COMMENT:

What more is there to say? The showdown has not been canceled. Merely postponed. Since almost every carrier uses language different from State Farm's and different from each other, and State Farm may rewrite its language, the issue will arise again.

For right now, the best thing I can tell you is that I have located an expert on ***Mahler*** questions. He is Mike Rogers and he is in the office right next to me. So, if you are losing sleep over a ***Mahler*** question, drop Mike a line at "mrogers@rmlaw.com" or ring him up at 206/386-7053.

Mahler v. Szucs, 135 Wn.2d 398, 957 P.2d 632 (1998)



RES IPSA FAILS TO BREAK MUSTARD'S FALL

FACTS:

In July 1993, Darlene Mustard and her daughter went to lunch at Wendy's. As Darlene sat down in her chair, she felt the chair throw her to the right. Darlene caught herself with her right hand; thus, preventing herself from falling to the floor. As a result of preventing the fall, Darlene's hand felt numb. Later, pain and swelling developed.

Immediately after the incident, Darlene contacted Wendy's manager. According to Darlene, the manager checked the chair and pronounced it "definitely" wobbly.

The manager recalled examining the chair in her office, sitting in it, and wiggling it. Both she and another employee tried out the chair, and found it to be "fine." The chair was put back into service. Soon after Darlene called and complained of her injuries, the chair was marked and stored again.

The chairs in question had been purchased in 1985 and 1990. None of the chairs had been replaced. None had ever caused an injury. Wendy's employees upended the chairs every day for vacuuming and wiped them down twice daily. Employees were instructed to note in the manager's log if a chair needed servicing. There had been no reports of problems or repairs around the time of the incident.

PROCEDURE:

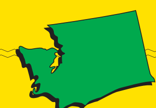
Darlene filed suit in 1996, claiming that Wendy's knew or should have known the dangerous condition created by the chair's defective condition.

The trial court found no merit in Darlene's claim, and prevented the case from going to trial. Darlene appealed to the Court of Appeals.

The Court of Appeals affirmed the trial court's decision, finding that the doctrine of res ipsa loquitur was inapplicable since plaintiff failed to show that the accident was of a kind that ordinarily did not happen in the absence of negligence.

HOLDINGS:

(1) To establish a claim for negligence, the plaintiff must present evidence to show (a) a duty owed by the plaintiff to the defendant; (b) a breach of that duty; (c) that there was a resulting injury; and, (d) that the resulting injury was proximately caused by the defendant's breach of his/her duty.



(2) Where plaintiff is a business visitor, the owner or occupier owes the invitee a duty of ordinary care to keep the premises in a reasonably safe condition. This means that the owner or occupier has a duty to inspect for dangerous conditions. Where dangerous conditions do exist, the owner has a duty to repair them or warn the invitee.

(3) Where a dangerous condition caused the injury, the owner or occupier is responsible only for those injuries the owner knew of or by the exercise of reasonable care should have discovered would create an unreasonable risk of harm.

(4) Alternatively, where plaintiff cannot establish that defendant breached the duty owed to plaintiff, the doctrine of "res ipsa loquitur" may be invoked. The doctrine of res ipsa loquitur recognizes that an accident may be of such a nature that its occurrence alone is sufficient to establish the defendant's negligence.

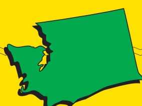
(5) In order for res ipsa loquitur to apply, the following elements must exist: (a) the accident or occurrence must be of a kind that ordinarily does not happen in the absence of someone's negligence; (b) the injury must have been caused by an agent or instrumentality under the exclusive control of the defendant; and (c) the plaintiff did not contribute to the injury-causing accident or occurrence.

(6) There are three ways to establish the first element of a res ipsa loquitur claim: (a) when the act causing injury is "palpably negligent," such as when a surgeon leaves a foreign object in a patient; (b) when general experience teaches us that the result would not be expected without negligence; or, (c) when experts in an "exotic field" provide proof that creates an inference of negligence. Whether one of these conditions exists is a determination to be made by judges applying their common experiences in life.

COMMENT:

Res ipsa loquitur is a "last ditch effort" to prove negligence. Where plaintiffs cannot establish that defendant breached his/her duty to plaintiff in a negligence claim, res ipsa loquitur is a way to circumvent that standard requirement. However, this case illustrates that plaintiffs will face a stricter standard in relying on the doctrine of res ipsa loquitur.

In a res ipsa loquitur case, plaintiff cannot just rest on his/her laurels. The court refused to apply res ipsa loquitur here because the injury could, very possibly, have been caused by the public. In the court's own words: "the fact that a person nearly falls as she sits down on a chair is not enough, in the absence of anything more, to permit the conclusion that there was negligence in inspecting the chair."



This was a good decision. Res ipsa loquitur is a doctrine to be invoked in peculiar and exceptional cases where the demands of justice make its application essential. However, the elements of a res ipsa loquitur claim must be met. This was hardly a case where the demands of justice required the application of res ipsa loquitur.

Mustard v. Pearce, No. 16831-0-III, slip op. (Wash. App. July 21, 1998)

WHAT YOU DON'T KNOW CAN REALLY HURT YOU

FACTS:

Kelly was hurt while she was a passenger on a motorcycle. She sued the driver of the car which hit her. That driver was covered by two policies with $125,000 total limits. Before that case came to trial, Kelly and the driver's liability carrier agreed to submit her claim to private binding arbitration. The arbitrator set Kelly's damages at $236,000.

Kelly then sought to recover from her UIM carrier, claiming that the UIM carrier was bound by the arbitration award. The UIM carrier took the position that it was not bound by an arbitration award arising from an arbitration to which it was neither invited nor a party.

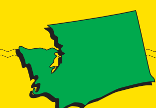
The superior court said the UIM carrier was bound by the award. The carrier appealed. Division III affirmed. The carrier petitioned. The Supreme Court affirmed.

HOLDINGS:

(1) "SANDERS, J. Is an underinsurance motorist carrier bound by the results of an arbitration between its insured and the tortfeasor when the carrier did not participate but had notice and an opportunity to intervene in the action? Yes."

(2) An insurer will be bound by the "findings, conclusions and judgment" entered in the action against the tortfeasor when it has notice and an opportunity to intervene in the underlying action against the tortfeasor.

(3) Allstate argues ***Finney*** should be overruled because privity does not exist between the third-party tortfeasor's carrier and the UIM carrier to justify the application of collateral estoppel. Allstate is correct that the requisites of collateral estoppel are absent; however, while the courts recognize technical privity is absent, they nevertheless apply estoppel principles, concluding there is a sufficient identity of interests between the UIM insurer and the tortfeasor.



(4) The benefits of joining the UIM insurer and tortfeasor in a single action outweigh any conflict between an insurer and insured as well as the injection of insurance into the trial.

(5) The **Finney** rule binds an insurer to a judgment against the tortfeasor only if the insurer had been afforded notice and an opportunity to intervene in the underlying action.

COMMENT:

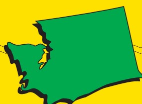
This case will certainly change the dynamics of an auto tort case. I can see the judge introducing the players to the jury:

> Ladies and Gentlemen. Here we have the plaintiff and his attorney. They will try to convince you it was all the defendant's fault, and the plaintiff is hurt bad.
>
> And here we have the defendant and her attorney. They will try to convince you it was all the plaintiff's fault, and he is not hurt as bad as he says.
>
> And that guy sitting over in the corner by himself, well, he is the attorney for the plaintiff's insurance company. Although his client insures the plaintiff, he will be trying to convince you it was all the plaintiff's fault, and he is not hurt as bad as he says he is.

However, more than introducing a second defense attorney into each trial, I am offended by the court's application of a double standard for insurance companies and its knowing evisceration of the rule of collateral estoppel. For a party to be bound by what goes on in some other action four requirements must be met:

> (1) the issue decided in the prior adjudication must be identical with the one presented in the second; (2) the prior adjudication must have ended in a final judgment on the merits; (3) the party against whom the plea is asserted was a party or in privity with a party to the prior adjudication; and (4) application of the doctrine must not work an injustice.

Barr v. Day, 124 Wn.2d 318, 325, 879 P.2d 912 (1994).



In this case, three of the four required elements were missing. There was no "final judgment" because an unconfirmed arbitration award is not a judgment. The court acknowledged there was no privity. Application of the doctrine to a private, secret arbitration is not just an injustice, it is a denial of due process.

Reed McClure represented Allstate in this case.

Fisher v. Allstate Ins. Co., ___ Wn.2d ___, 961 P.2d 350 (1998)

STIPULATING AWAY COVERAGE

FACTS:

Rodney brought his gun to school. He shot Chris.

Chris sued Rodney and his mother, alleging battery, negligence, and negligent failure to supervise.

Rodney's homeowner's carrier agreed to defend under a reservation of rights, but started a declaratory judgment action contending there was no coverage because of the intentional acts exclusion.

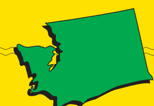
Without the consent of the carrier, Rodney and his mother settled with Chris. They stipulated to a $200,000 judgment and assigned their rights to Chris. Rodney and his mother stipulated that they had been negligent.

The trial court entered a summary judgment of coverage. The Court of Appeals reversed, holding that an insured being defended under a reservation of rights is not free to settle with the claimant. If the insured does so, then the company is relieved of all obligations under the policy.

COMMENT:

This result will come as an unpleasant surprise to those policyholders' attorneys who specialize in unilateral stipulated judgments when there is a coverage dispute.

American Reliance Ins. Co. v. Perez, 712 So.2d 1211 (Fla. App. 1998)



MINIMIZING THE BITE OF THE MILLENNIUM BUG
BY MARILEE C. ERICKSON

FACTS:

Computer experts have estimated that, if not corrected in time, 90 percent of all business applications may fail as a result of the "year 2000 problem." The bite of the so-called "millennium bug" is a direct result of computer systems' inability to recognize the year 2000 (or Y2K) when abbreviated as "00." Most computers were programmed to use two digits rather than four to identify a year. For example, the year 1998 is, in many cases, entered, stored, sorted, and calculated as "98." The year 2000, therefore, will be abbreviated as "00." These digits will leave computers confused as to whether the year is 1900 or 2000.

A computer's inability to correctly process "00" may affect such operations as sorting, comparing, indexing, and computing information. For example, a credit card that expires in April 2001 might appear, in January 2000, as having been invalid for 99 years. These functions form the basis of most, if not all, systems and programs. It is projected that, as we approach the millennium, systems may crash and applications may fail to operate properly. Systems may even corrupt data over time. As a result, data may become completely invalid, causing suspension of day-to-day information processing critical to standard business operations, including automated bill-processing and inventory-tracking systems. The problem will affect both traditional computer programs and operations of embedded systems, such as microprocessors used to run everything from telephones to traffic lights. Unfortunately, until the problem occurs, we will not be able to determine the extent of its bite. Two things, however, are certain:

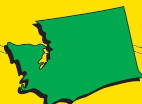
(1) Every business will be affected; and

(2) The date will indeed come.

In the meantime, businesses should act now to reduce the impact of the millennium bug.

CONDUCTING A Y2K ASSESSMENT:

While it is imperative that all organizations modify their own systems to guarantee Y2K preparedness compliance, it is equally critical that any organization's Y2K plan confirm and ensure the compliance of all vendors, suppliers, and other companies upon which its day-to-day operations rely. No matter how prepared a company is for the Y2K problem, if a critical supplier has not taken the necessary precautions, the company still may fall prey to the Y2K bite.



A. REVIEW TECHNOLOGY TO DETERMINE COMPLIANCE:

The first and most critical step in undertaking a Y2K assessment is to conduct a technology review to determine the level of compliance from a computer systems standpoint. In conducting this review, a business should thoroughly identify the systems critical to continuing operations. Test these systems first and ensure any compliance issues are resolved, then move on to other systems. HVAC, lighting, security, timekeeping, accounting, control, and electrical systems, all of which may be microprocessor-controlled, should be tested. If a company's in-house systems personnel can not perform this testing, a reputable Y2K consultant should be hired.

B. LEGAL REVIEW TO MINIMIZE EXPOSURE:

Businesses also should conduct a legal audit to determine if existing agreements preassign responsibility to fix the problem. This review will aid in minimizing a company's legal exposure. Below are areas in which legal liability may arise and critical issues to consider when conducting a Y2K legal audit.

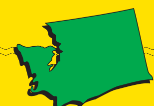
1. CONTRACTS WITH CUSTOMERS:

Failing to properly address Y2K problems impacts a company's operations and may also hurt customers who rely on that company. Businesses should review key contracts with customers to ensure they include sufficient disclaimers and liability provisions. Additionally, if a company is aware of potential problems, it may want to notify customers in advance and work with them to prepare a plan to deal with potential problems. A company may reduce its liability by demonstrating diligent efforts to resolve potential problems before they arise.

Customers may request that a company sign Y2K certification letters concerning preparedness. Before doing so, an attorney should carefully review such letters to ensure the implications for liability are fully understood.

2. CONTRACTS WITH VENDORS:

If a company relies on suppliers of goods and services, it may request Y2K certification letters from its suppliers. However, these letters do not fix the problem, they merely attempt to allocate liability. A better option is to anticipate that suppliers or subcontractors may not become compliant, alert them to the problem, work with them to determine a solution, and take the legal steps necessary to ensure that they have done so.



Company management should talk to suppliers about their compliance to ensure the suppliers' inaction will not affect operations. The manager should also check contracts to see how another's nonperformance might be legally excused or limited; if appropriate, place vendors on legal notice that their noncompliance will not excuse performance; and review any long-term exclusivity provisions in vendor contracts. If suppliers are unable to demonstrate compliance in advance, there may be legal justification to switch to another supplier. Preventing the problem up front is better than attempting to recover damages later.

AN OUNCE OF PREVENTION . . .

The discussion above is an abridged overview of the anticipated impact of the Y2K problem. The bug will bite. The nature and extent of the bite depends on each business' susceptibility. Each business has its own vulnerabilities that should be tested to ensure operational needs are met. Taking proactive steps now will minimize liability and losses later.

For further information regarding the legal issues arising from the millennium bug or to discuss how to conduct a preventative legal review for your organization, contact Reed McClure's Y2K Practice Group: Brian Schuster at 206/386-7008 or bschuster@rmlaw.com, or Marilee Erickson at 206/386-7047 or merickson@rmlaw.com.