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A SURVEY OF CURRENT INSURANCE LAW AND TORT LAW DECISIONS

edited by William R. Hickman

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IMPORTANT MESSAGE TO ALL OUR FRIENDS AND READERS

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We are moving close to our goal of eliminating the hard-copy, postal service version of the Insurance Law Letter. Beginning with the Fall 2001 edition, we will post the Law Letter on our firm web page (www.rmlaw.com) and e-mail you to let you know it has been posted.

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THEM DAMN RABBITS!

FACTS:

Candy and her daughters, Cheryl and Kathryn, kept rabbits. Their neighbors, Milton and Margie, took serious exception to them. Milton complained to the planning department, to the mayor, to the city manager, and to the police. He said those rabbits caused insomnia and high blood pressure.

One Friday afternoon, Candy and her daughters were stacking wood near the common fence. Margie poked a stick through the fence in an effort to knock over the wood pile. Then she turned the sprinkler on the girls.

Suddenly, Milton burst from his house and stormed directly onto Candy's property firing his handgun. Candy was hit once and Cheryl twice. Candy and Kathryn retreated to their house. Milton pursued. He shot Candy twice more as she called 911. Candy sought refuge in the bathroom and prevented Milton from getting to Kathryn. Milton retreated to his home where he killed himself with his other gun. Candy and Cheryl died.

Milton and Margie had a "deluxe" homeowner's policy. It said the company would pay "all sums arising from an accidental loss" which an insured becomes legally obligated to pay as damages because of bodily injury.

The policy also expressly excluded coverage for any bodily injury which may reasonably be expected to result from the intentional or criminal acts of an insured person.

The insurance company filed a declaratory judgment action to get a court ruling that the policy meant exactly what it said. The trial court summarily ruled that there was no coverage. The Court of Appeals affirmed. And then the Supreme Court granted a petition for review! But the court ultimately held that this double homicide was not covered.

HOLDINGS:

(1) Interpretation of the terms of an insurance policy is a matter of law.

(2) Courts interpret insurance contracts as an average insurance purchaser would understand them and give undefined terms in these contracts their plain, ordinary, and popular meaning.

(3) In Washington, legal technical meanings have never trumped the common perception of the common man.

(4) The proper inquiry is not whether a learned judge or scholar can, with study, comprehend the meaning of an insurance contract, but instead whether the insurance policy contract would be meaningful to the layperson.

(5) A criminal act exclusion does not apply to all acts technically classified as crimes, but only to serous criminal conduct done with malicious intent, from evil nature, or with a wrongful disposition to harm or injure other persons or property.

(6) We hold that the average insurance purchaser would reasonably apply the policy's criminal act exclusion to Milton's conduct.

(7) Because the criminal acts exclusion applies, we do not need to review the "accidental loss" provision or the "intentional acts"exclusion.

COMMENT:

I do not find it a very favorable reflection on our society that there would be any question as to the viability of a criminal acts exclusion in a liability policy. One justice (since departed) took the majority to task for its analytical approach to the coverage question. While an "analytical approach" is better than the approach used in some earlier cases, he felt that over analysis in this case created a potential for future misunderstandings. In his view:

No average purchaser of liability insurance would be confused by the issues in this case. Milton King committed a heinous criminal act and did so volitionally.

We can take this occasion to note that there has been a dramatic change in the composition of our supreme court. Within the last 12 months we have added three new faces to the court. The author of this "analytical" opinion is one of them. The fact that she chose to quote, without attribution, the nonsense about trumping the common man's common perception is a bit disconcerting. However, her 10 years as a superior court judge should give her a balanced insight into insurance problems.

Another new face brings judicial experience of slightly different variety to the big bench. She was for 19 years the district court judge in Western Clallam County. She also served as Chief Judge for the Quileute Tribe and for the Lower Elwha S'Klallam Tribe.

The third new face was raised in Wapato. But more recently he was in Seattle where he was a president of the bar association, a president of WSTLA, and a member of the Board of Governors of ATLA. He has been one of the shining stars of the plaintiff's bar. He undoubtedly took a pay cut to be a member of the court. We will be watching to see how well he transitions out of his role as an advocate and into his new role as a decisionmaker.

Allstate Ins. Co. v. Raynor, 143 Wn.2d 469, 21 P.3d 707 (2001).

MUCH ADO ABOUT NOTHING

FACTS:

Coventry suffered property damage after a mudslide. Its insurer did a poor investigation and denied coverage. The dispute ended up in the Supreme Court where the court held there was no coverage, but that Coventry was entitled to recover the damages it had incurred because of the poor investigation. *Coventry Assocs. v. American States Ins. Co.*, 136 Wn.2d 269, 961 P.2d 933 (1998).

When they got back to the trial court, Coventry was not content to seek what the Supreme Court had said it could seek. It sought damages for the benefits it said should have been paid under the policy, and the lost value of the apartment complex. The trial court said, "No dice". The only damages you can pursue are the damages the Supreme Court said you can pursue: the direct and consequential expenses incurred in assuming the burden of investigation.

Since Coventry had no evidence that it sustained any damage because of the poor investigation, the trial court dismissed the case. Coventry appealed. The Court of Appeals affirmed.

HOLDINGS:

(1) Because the trial court's order is an interpretation of the Supreme Court's order, it is a legal determination that we review de novo.

(2) Where, as here, a court gives unmistakable instructions that a case be remanded for trial on a specific issue, that issue alone shall be tried.

(3) The Supreme Court expressly held that coverage by estoppel was not the appropriate remedy for the bad faith investigation. The Supreme Court's opinion required exclusion of evidence of potential policy benefits and the lost value of Coventry's property.

(4) The trial court properly declined to consider evidence presented by Coventry on issues outside of the Supreme Court's remand.

COMMENT:

There is a certain irony in that while Coventry made a major change in Washington insurance law, ultimately all it did was cost its insurer a great deal of litigation expense because Coventry could never prove that it had been damaged by the insurer's conduct.

Coventry Assocs. v. American States Ins. Co., 2001 Wash. App. LEXIS 1454 (July 2, 2001).

A SMALL SERIES

FACTS:

Valley had a business policy. It provided coverage of $50,000 for each occurrence of property loss caused by employee dishonesty. An occurrence was all loss or damage involving a single act or series of related acts.

Valley also had a payroll manager who left a bit to be desired. She managed to direct over $100,000 to herself, $50,000 to one employee and $40,000 to another employee.

When Valley found out what was going on, it put in a claim for three occurrences of employee theft. The insurance company felt that the employees' acts constituted a series of related acts, which meant one occurrence.

Valley sued the insurer. The trial court dismissed. Valley appealed and the Court of Appeals affirmed, holding that one series of related acts had occurred.

HOLDING:

(1) Because an insurance policy is a contract between two parties, appellate courts apply the rules of contract interpretation and construction in discerning the meaning and effect of insurance policies. Interpretation of an insurance policy is a matter of law.

(2) When interpreting an insurance policy, we consider the policy as a whole, giving the kind of reasonable and sensible construction to it that the average person purchasing insurance would give.

(3) A series of related acts is a succession of logically or causally connected acts, linked by time, place, opportunity, pattern, and method.

(4) In this case one series of related acts occurred,. Although three employees profited from the embezzlement, the loss would not have occurred but for the acts of the payroll manager. The other two employees had no independent access to the funds.

COMMENT:

One of these rare occurrences when we actually see the court apply a "reasonable and sensible construction."

Valley Furniture & Interiors v. Transportation Ins. Co., 2001 Wash. App. LEXIS 1413 (July 2, 2001).

COVERAGE FOR THE BOOMERANG KID

Up here in the beautiful Pacific Northwest we all tend to get along. Even our judges get along most of the time. So it comes as a bit of a surprise to come across a coverage case that generates three different opinions from the three judges.

FACTS:

Blake was 24 years old and living with his mother. Roy, the mother's boyfriend, also lived with Blake's mother. Roy had an auto policy that insured a "member of the family who is a resident of the household."

Blake was hurt in an auto accident. He looked for UIM coverage in Roy's policy. The UIM insurer said Blake was not a member of the family.

The trial court agreed that Blake was not a member of the family. On appeal, the lead opinion concluded:

> We conclude that the average purchaser of insurance wouldn't understand the word "family" to include the emancipated 24-year-old son of a woman with whom the insured lived.

The second majority opinion was written to demonstrate that the dissent was wrong to use such a "very broad definition of member of the family". This opinion concluded:

> Because I believe that the average purchaser of this policy in 1994 would have understood this phrase to mean only individuals related to the insured by blood, affinity, or law, and not to roommates or good friends living together, I join the majority in affirming the trial court.

The dissent is a unique piece of work. It goes on for some 37 pages. He cites to dictionaries, Washington Supreme Court opinions, and an anthropological text. He points out that "pie" in Spanish means "foot", while in English it does not. He notes that the lead opinion is internally inconsistent, while the concurrence "rules by ipse dixit."

COMMENT:

I have spent considerable time trying to draw a lesson out of this. Ultimately I concluded that "family" is a very unique word (not unlike the situation with "beauty" and the beholder's eye), which obtains its particular meaning not only from the context presented but also from the

experiences of the observer. But its ephemeral form notwithstanding, the word must still be used because there is no better word. The burden shifts to the court to put on its thinking cap and ascertain the meaning which would be used by the "average purchaser of insurance." The dissent, its 37 pages ostensibly to the contrary notwithstanding, is nothing more than an example of the rule: this word has more than one meaning, therefore there is coverage.

Matthews v. Penn-America Ins. Co., ____Wn. App. _____, 25 P.3d 451 (2001).

THE UNSUBJECTED MOTOR HOME

FACTS:

George had a homeowner's policy with Farmers. He also had a 1972 Sundi motor home. It was not registered for use on the public highway.

In November 1997, George and his neighbor, Howard, worked on the engine. Howard stood in front of the motor home. George turned the key. The motor home ran over Howard.

The homeowner's policy provided that there was no coverage for bodily injury arising out of the use of a motor vehicle owned or operated by an insured. *Motor vehicle* was defined to be a motorized land vehicle. But a motor vehicle did not include a motorized land vehicle used only on an insured location and not subject to motor vehicle registration.

Farmers denied coverage. George sued it. The trial court granted Farmers' summary judgment. The Court of Appeals (2 - 1) reversed saying there was coverage.

HOLDINGS:

(1) In construing the language of an insurance policy, the policy should be given a fair, reasonable, and sensible construction as would be given to the contract by the average person purchasing insurance.

(2) Exclusionary clauses are narrowly construed for the purpose of providing maximum coverage for the insured.

(3) Ambiguous insurance clauses should be construed against the drafter, particularly when the insurer is attempting to exclude coverage.

(4) The purpose of insurance is to give protection and it can be presumed that such was the

intent of the parties. Exclusions are contrary to this basic intent and thus should not be extended beyond their clear and unequivocal meaning.

(5) During the policy period, the motor home was always on the insured location.

(6) The motor home was not subject to registration during the coverage period because it was not being driven on the public highways of this state.

(7) There is coverage and George can proceed with his bad faith claim against Farmers.

COMMENT:

The dissenting judge pointed out that the author of the majority opinion did not understand the meaning of the phrase "subject to."

All in all, a most distressing opinion in as much as the company had made it crystal clear to even the most casual observer that its homeowner's policy did not cover the motor home.

George v. Farmers Ins. Co., ___Wn. App.___, 23 P.3d 552 (2001).

OTTO'S 9MM PERSUADER

FACTS:

Otto's wife left him for a guy she met at the bowling alley. Otto wanted to persuade her to come back**.** So Otto went to Shoot 'N Sports and purchased a 9mm semi-automatic persuader. He then went to the other guy's house to indicate his extreme displeasure with the course of events. He utilized his persuader to make his points.

Net Result: Otto kills wife; Otto kills Otto; Otto wounds the other guy.

The other guy sues Otto's estate alleging negligence and battery. As to negligence, the allegation was that Otto did not know how to use the gun, may have been simply trying to frighten people, and negligently fired his gun in the direction of the other guy.

Otto's liability carrier defended under a reservation and filed a declaratory action. The trial court entered summary judgment for the liability carrier.

On appeal, the Utah supreme court said the facts clearly established that the shooting was

intentional. Thus, there was no duty to pay. But as to the duty to defend, the court said it could not answer that as no one had put in the policy language dealing with the duty to defend.

COMMENT:

At first blush this appears to be an eminently silly opinion. If the facts are so clear that a ruling as a matter of law can be made as to duty to pay, then why waste other policyholders' money in defending Otto? But as the court points out, if you are asking for summary judgment on duty to defend, you should put the terms of the defense agreement into evidence.

Another interesting aspect to this opinion is the court's statement that if the duty to defend is dependent on whether there is a "covered claim or suit", then extrinsic evidence would be relevant to a determination of whether a duty to defend exists. In most instances, the duty to defend is determined exclusively by the allegations of the complaint.

Fire Ins. Exch. v. Estate of Therkelsen, 2001 UT 48; 2001 Utah LEXIS 84 (2001).

A HUSTLER ON THE DOCKS

FACTS:

Harry was a longshoreman. On the dock he drove a "hustler." This thing has two wheels in front, four in back, and a hydraulic lift. It was not designed for operation on public roads. Early one morning, Bob, who was trespassing on the dock, hit the hustler with his car and injured Harry.

After tapping Bob's liability policy limits, Harry asked his own carrier for UIM. It turned him down on the basis the hustler was a motor vehicle available for his regular use. The primary problem with this position was that the policy definition of motor vehicle excluded a vehicle designed for use primarily off public roads.

This was the company's argument: throughout the policy, capital letters are used to denote defined terms; the term "motor vehicle" appears in the regular use exception in lower case letters; therefore the policy definition does not apply.

The court, pointed out that the average purchaser of insurance would have had zero clue that the definition of a word in the policy changed depending upon whether the word was capitalized or not.

The best thing that could be said for the company's argument was that it created an ambiguity. But ambiguity is resolved in favor of coverage.

COMMENT:

A rather ingenious argument. The trial court agreed with it. However, the fact is in ascertaining the meaning of words in a policy, we cannot have them changing meanings right before our eyes.

Getz v. Progressive Specialty Ins. Co., 106 Wn. App. 184, 22 P.3d 835 (2001).

THERE IS A JUDGE DOWN IN TEXAS

Texas has given us many colorful judges. Judge Roy Bean, "the Law West of the Pecos," comes to mind. He used his saloon as a courthouse; he sold booze during court proceedings. He once commented: "I know the law . . . . I am its greatest transgressor."

And we should not forget Isaac "Hanging Judge" Parker who in 21 years on the bench sentenced 172 people to hang. As to him it is said his sentencing lectures were more sadistic than were the criminals.

We thought those days were gone until we discovered federal district court judge Samuel B. Kent. He holds court in the Galveston Division of the Southern District of Texas. Now somewhere along the line His Honor had an epiphany, the scales dropped from his eyes, and he realized that most of what lawyers submit to the courts can accurately be described in words not used in polite society. To call it dross is probably a compliment.

Now I suspect that several other members of the bench have reached a similar conclusion. But unlike Judge Sam Kent they, for whatever reasons, have not been moved to share this insight with the world. And so let me fill up the remaining pages of this issue with generous quotations from his most recent opinion, *Bradshaw v. Unity Marine Corp.*, ____F. Supp. 2d.____, (S.D. Tex. 2001):

> Before proceeding further, the Court notes that this case involves two extremely likable lawyers, who have together delivered some of the most amateurish pleadings ever to cross the hallowed causeway into Galveston, an effort which leads the Court to surmise but one plausible explanation. Both attorneys have obviously entered into a secret pact—complete with hats, handshakes and cryptic words—to draft their pleadings entirely in crayon on the back sides of gravy-stained paper place mats, in the hope that the Court would be so charmed by their child-like efforts that their utter dearth of legal authorities in their briefing would

go unnoticed. Whatever actually occurred, the Court is now faced with the daunting task of deciphering their submissions. With Big Chief tablet readied, thick black pencil in hand, and a devil-may-care laugh in the face of death, life on the razor's edge sense of exhilaration, the Court begins.

* * * *

Defendant begins the descent into Alice's Wonderland by submitting a Motion that relies upon only one legal authority. The Motion cites a Fifth Circuit case which stands for the whopping proposition that a federal court sitting in Texas applies the Texas statutes of limitations to certain state and federal law claims.... That is all well and good— the Court is quite fond of the *Erie* doctrine; indeed there is talk of little else around both the Canal and this Court's water cooler. Defendant, however, does not even cite to *Erie,* but to a mere successor case, and further fails to even begin to analyze why the Court should approach the shores of *Erie.* Finally, Defendant does not even provide a cite to its desired Texas limitation statute. A more bumbling approach is difficult to conceive—but wait folks, There's More!

Plaintiff responds to this deft, yet minimalist analytical wizardry with an equally gossamer wisp of an argument, although Plaintiff does at least cite the federal limitations provision applicable to maritime tort claims. . . . Naturally, Plaintiff also neglects to provide any analysis whatsoever of why his claim versus Defendant Phillips is a maritime action. Instead, Plaintiff "cites" to a single case from the Fourth Circuit. Plaintiff's citation, however, points to a nonexistent Volume "1886" of the Federal Reporter Third Edition and neglects to provide a pinpoint citation for what, after being located, turned out to be a forty-page decision. Ultimately, to the Court's dismay after reviewing the opinion, it stands simply for the bombshell proposition that torts committed on navigable waters (in this case an alleged defamation committed by the controversial G. Gordon Liddy aboard a cruise ship at sea) require the application of general maritime rather than state tort law. *See Wells v. Liddy,* 186 F.3d 505, 524 (4th Cir.1999) (What the ...)?! The Court cannot even begin to comprehend why this case was selected for reference. It is almost as if Plaintiff's counsel chose the opinion by throwing long range darts at the Federal Reporter (remarkably enough hitting a nonexistent volume!).

* * * *

After this remarkably long walk on a short legal pier, having received no useful guidance whatever from either party, the Court has endeavored, primarily based

> upon its affection for both counsel, but also out of its own sense of morbid curiosity, to resolve what it perceived to be the legal issue presented. Despite the waste of perfectly good crayon seen in both parties' briefing (and the inexplicable odor of wet dog emanating from such) the Court believes it has satisfactorily resolved this matter. Defendant's Motion for Summary Judgment is GRANTED.

COMMENT:

And lest you think the judge was kidding when he said he liked these attorneys, this is what he said back in June 2001 in denying a motion to transfer in *Labor Force Inc. v. Jacin Toport Corp.,* 2001 WL 640675 (S.D. Tex.): "Defendant's counsel is determined to be disqualified for cause from this action for submitting this asinine tripe."

REED MCCLURE IS PLEASED TO ANNOUNCE

MATTHEW R. KIFFIN HAS JOINED THE FIRM AS A PRINCIPAL.

Matthew R. Kiffin brings to Reed McClure his experience as an in-house insurance defense trial attorney for a large insurance company. Having done defense work for 13 years, he concentrates his practice on insurance defense litigation with emphasis on defense of personal injury cases. Mr. Kiffin is a 1982 graduate of Suffolk University Law School.

RYAN G. FOLTZ JOINS THE FIRM AS AN ASSOCIATE.

Ryan G. Foltz joined the Reed McClure law firm in July 2001. His practice will focus on insurance defense, coverage, and general litigation. Mr. Foltz is a 2000 graduate of Seattle University School of Law, *cum laude.*

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