WASHINGTON INSURANCE LAW LETTER™

A SURVEY OF CURRENT INSURANCE LAW AND TORT LAW DECISIONS

EDITED BY WILLIAM R. HICKMAN

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A MALICIOUS GUN CASE

FACTS:

Around 1 a.m. Truong and 10 or 15 of his buddies were socializing in a Seattle park. Hall and one of his buds drove up. They began making derogatory comments toward Truong and his group. Words were exchanged.

Hall stepped back and said, "Tough guy, hmm?" Hall then pulled a gun, and put it up alongside Truong's head. There was a struggle and Truong ended up shot in the head.

Hall entered an Alford plea and was convicted of first degree assault. Hall, as a member of his grandparents' household, was an insured under their State Farm homeowners policy. The policy covered bodily injury caused by an occurrence, but did not cover bodily injury which was expected or intended or which was the result of willful and malicious acts.

Truong sued Hall. Hall assigned his rights to Truong, and everyone sued State Farm. The case was tried to a jury, which found that there was an occurrence, the bodily injury was not intended, and the bodily injury was the result of willful and malicious acts.

The trial court then dismissed the claim against State Farm and the Court of Appeals affirmed, noting that the jury could have found that the injuries resulted from malicious acts leading to an accidental shooting.

HOLDINGS:

(1) Exclusions are strictly construed but meaning must be given to each exclusion in the context of the entire policy.

(2) The general insuring agreement extends coverage only to accidents. For the malicious acts exclusion to have meaning, it must apply to some unintended and accidental injuries.

(3) State Farm presented sufficient evidence for the jury to conclude that while Hall did not intend to pull the trigger, his malicious acts provoked the struggle during which the gun went off.

COMMENT:

State Farm was represented in this case by Reed McClure's Michael S. Rogers.

Hall v. State Farm Fire & Cas. Co., ___ Wn. App. ___, 36 P.3d 582 (2001).

WHICH COURT IS "SUPREME"?

FACTS:

Dennis owned a place in the country. He decided to put in a horse track. After clearing and grading the land, the neighbors sued Dennis for damaging the environment.

Dennis got a lawyer, who got the suit dismissed on procedural grounds. The neighbors sued again. Dennis tendered to Allstate, which inspected, investigated, and denied coverage.

Dennis sued Allstate. On summary judgment, the trial court said there was a duty to defend, and that Allstate owed defense costs from the time of tender. The court dismissed the Consumer Protection Act and bad faith claims.

On appeal, the Court of Appeals adopted the minority rule as to pre-tender defense costs and, in essence, said the Supreme Court did not mean what it said the last time it discussed bad faith. It also reinstated the Consumer Protection Act and bad faith claims.

HOLDINGS:

(1) An insurer that reserves the right and duty to defend an insured generally is obliged to defend any suit against the insured in which facts are alleged that, if proved, would render the insurer liable under the policy. The triggering event is the filing of a complaint alleging a covered claim.

(2) The insurer's wrongful refusal of an insured's tender of defense of a covered claim constitutes a breach of the contract.

(3) When an insurer breaches its contractual obligation to defend the insured, the insured is entitled to be put in as good a position as if the breach had not occurred.

(4) An insurer that breaches its duty to defend against a covered claim must indemnify the insured for fees and costs incurred in defending the claim **before and after it was tendered** to the insurer unless the insurer was actually and substantially prejudiced by the lateness of the tender, or other policy defenses preclude such indemnification. The issue of prejudice is a question of fact.

(5) An insured claiming bad faith must show that the insurer's action was unreasonable, frivolous, or unfounded.

(6) An insured may not base a bad faith claim against its insurer on a good faith mistake if the insurer acted with honesty, based its decision on adequate information, and did not overemphasize its own interests.

(7) An insurer defending an insured's claim of bad faith is not entitled to a summary judgment if there exists a question of material fact regarding whether the insurer's position was "fairly debatable" or its actions reasonably justified.

(8) An insurer's failure to conduct a reasonable investigation into a claim against an insured is actionable as a claim for bad faith.

(9) A bad faith claim against an insurer requires proof of resulting harm.

COMMENT:

The opinion itself is a veritable treasure trove of Washington insurance case law. It would be entitled to a Super OTW gold star except that it reaches the remarkable conclusion that the company's duty to pay defense costs start prior to the time the company is given the opportunity to defend. That piece of *ipse dixit* logic would really curl Mr. Spock's ears.

But that was just a warm-up for what was to come. Last year in *Ellwein v. Hartford*, 142 Wn.2d 766, 776, 15 P.3d 640 (2001), the Supreme Court said an insurer is entitled to summary judgment dismissal of a bad faith claim unless the insured shows there was no reasonable basis for the insurer's action. But in this opinion the Court of Appeals refusal to follow that clear statement in *Ellwein,* stating that the Supreme Court could not have meant what it said.

I imagine the Supreme Court will be given the opportunity to clarify whether it said what it meant, and meant what it said.

Griffin v. Allstate Ins. Co., 108 Wn. App. 133, 29 P.3d 777 (2001).

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* Appellate

UNLOADING THE LOADED GUN

FACTS:

Mike and Dennis spent the day out tramping around looking for unarmed animals to shoot. Having accomplished nothing, Dennis put his loaded rifle on a backpack, and attached both to the front of an ATV with a bungee cord. When the hunters got back to camp, he began removing the rifle and backpack by unhooking the bungee cord. One of the bungee cords snapped back, hooked the trigger, and discharged the rifle. Mike was severely injured.

Mike sought UIM coverage under his auto policy. The trial court and the Court of Appeals agreed that there was UIM coverage.

HOLDINGS:

(1) Interpretation of an insurance policy is a question of law. In construing an insurance contract, we will give the policy "a fair, reasonable, and sensible construction consistent with the understanding of an average person purchasing insurance."

(2) The UIM coverage applies when there has been bodily injury caused by an accident arising out of the use of an underinsured highway vehicle.

(3) The ATV was a highway vehicle. The unloading of the ATV was a "use."

(4) An accident "arises out of the use" of a vehicle if "the vehicle itself or permanent attachments to the vehicle causally contributed in some way to produce the injury." The phrase "arising out of" means "originating from," "having its origin in," "growing out of," or "flowing from."

(5) It is not necessary that the use of the vehicle be the proximate cause of the accident. "It is only necessary that there be a causal connection between the use and the accident."

(6) Dennis' use of the ATV causally contributed to Mike's injuries. Dennis was attempting to unhook one end of a bungee cord from the ATV when it snagged the trigger, discharging the rifle that caused the injury.

COMMENT:

The opinion contains an extremely comprehensive collection of Washington gun cases. Along that line we may note *Taliaferro v. Progressive Ins. Co.* 2001 Ala. LEXIS 421 (Nov. 16, 2001), where the Alabama Supreme Court said, " 'The transportation of firearms is an ordinary and customary use of a motor vehicle, especially pickup trucks.' " We are told this also applies in North Carolina.

McCauley v. Metro. Prop. & Cas. Ins. Co., ___ Wn. App. ___, ___ P.3d ___ (Dec. 24, 2001), 2001 Wash. App. LEXIS 2786.

CHECKING OUT THE GROCERIES

FACTS:

Sara stepped into the checkout aisle of the grocery store. She also stepped onto a piece of lettuce, slipped, and hurt herself.

She sued the store. The trial court dismissed the case. The Court of Appeals reversed, holding that a checkout aisle of a grocery store where customers are responsible for unloading their own groceries is a self-service area, and thus the owner is charged with knowledge of reasonably foreseeable risks inherent in the self-service area.

HOLDINGS:

(1) Customers were responsible for unloading their grocery items from their grocery carts onto the conveyor belt at the checkout stand. In this process it is not unusual for items, such as grapes and blueberries, to fall on the floor.

(2) The grocer had a duty to exercise reasonable care to protect Sara, a business invitee, from harm. But to trigger this duty, Sara needed to show that the grocer had actual or constructive notice of the unsafe condition, unless the injury occurred in a self-service area of the store.

(3) This narrow "self-service" exception applies where a proprietor's business incorporates a self-service mode of operation and this mode of operation inherently creates an unsafe condition that is reasonably foreseeable in the area where the injury occurred.

(4) Where this exception applies, the law charges the proprietor with actual knowledge of the "foreseeable risks inherent in such a mode of operation."

(5) By requiring customers to unload their grocery items at the checkout area, a task once performed by checkers, the grocer has created a self-service area.

COMMENT:

Textbook example of how the common law grows and grows fueled by new factual permutations. It is also a reminder to the retail trade that there will be a price to pay every time they try to shift their overhead back to the customer.

O'Donnell v. Zupan Enters., 107 Wn. App. 854, 28 P.3d 799 (2001).

BUSINESS PURSUITS EXCLUSION

FACTS:

Lloyd operated a mobile home park. Within the park was a recreational building. Russell rented a house from Lloyd which was located adjacent to the park. One evening Russell was discovered seriously injured at the bottom of the stairs in the recreational building. He could not remember how he came to be there.

Lloyd had a homeowners policy but did not have a commercial liability policy. He tendered Russell's suit to the homeowners carrier, which denied because of the "business pursuits" exclusion. The trial court and the Court of Appeals upheld the exclusion.

HOLDINGS:

(1) Insurance policy language is interpreted the way it would be understood by the average person. In interpreting exclusions, Washington courts have held that exclusions from coverage are contrary to the fundamental purpose of insurance and will not be extended beyond their clear and unequivocal meaning. Exclusions are strictly construed against the insurer.

(2) The test to determine whether an activity is a business pursuit is found in *Stuart v. American States Ins. Co.*, 134 Wn.2d 814, 822, 953 P.2d 462 (1998). Under that test, in order to constitute a business pursuit, the activity must (1) be conducted on a regular and continuous basis, and (2) be profit motivated. It is not necessary that the profit be the sole motivation of the pursuit, nor the major source of the livelihood for the owners.

(3) The building was an amenity for Lloyd's tenants, such as Russell.

(4) It is inescapable that Russell was at the recreational building on that night because he was a tenant of Lloyd.

COMMENT:

Nothing much to add to this succinct opinion except to ask rhetorically why was Lloyd running a 7-acre mobile home park without a commercial policy. Accolades to the court for resisting the temptation to mutilate the homeowners policy to make up for what Lloyd did not purchase.

Torgerson v. N. Pac. Ins. Co., ___ Wn. App. ___, 34 P.3d 830 (2001).

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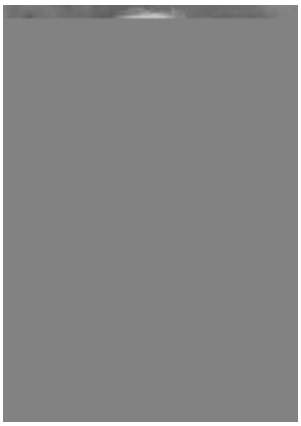

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* Insurance Defense
* Personal Injury: Malpractice
* Personal Injury: Products Liability

THE ART OF THE DEAL

FACTS:

Lockwood sued Volm, alleging unfair competition, tortious interference, breach of fiduciary duty and conspiracy. Volm had a couple of CGL policies which might apply: one from Fidelity and one from North River. Fidelity denied but North River defended. After years of hemorrhaging defense money ($2,000,000 to be exact), the companies got together with the claimant's attorney and hammered out a deal.

The deal was the companies paid plaintiff $1.5 million and plaintiff agreed to file an amended complaint that would not have any covered claims in it. In addition, plaintiff agreed that it would credit $1.5 million against any judgment it might obtain against Volm. (Volm had only $1 million in coverage.)

The trial court approved the deal. However, the Chicago-based 7th Circuit had a cow, indicating that this deal was the greatest affront to civilized behavior in the Midwest since Mrs. O'Leary's cow kicked over the lantern.

HOLDING:

(1) We have difficulty imagining a more conspicuous betrayal of the insurer's fiduciary duty to its insured.

(2) It is true that if in the course of litigation the covered claims fall out of the case through settlement or otherwise, the insurer's duty to defend its insured ceases.

(3) The insured cannot prevent the insurer from settling covered claims for an amount that protects the insured from having to pay anything on those claims out of his own pocket, merely because the settlement, by giving the insured all that he contracted for, will terminate the insurer's duty to defend the entire suit.

(4) The deal is also defeated by the principle that the duty to defend depends on the facts alleged rather than on the pleader's legal theory.

(5) The duty to defend is broader than the duty to indemnify. The duty is broader because it "is triggered by arguable, as opposed to actual, coverage."

COMMENT:

Now, did you get all that? The company paid policy limits plus half a million and got all the covered claims against the policyholder dismissed. And as to the non-covered claims, the policyholder got a built-in, up-front credit of $1.5 million on those.

In short, the policyholder got about $3 million in mileage out of its $1 million policy. And for this a Chicago judge calls it a "conspicuous betrayal" of the policyholder. You gotta just love those ivory tower judges.

Lockwood Int'l, B.V. v. Volm Bag Co., 273 F.3d 741 (7th Cir. 2001).

IT WAS A COLD AND DRIZZLY DAY

FACTS:

"It was a cold [and] drizzly day." Dawn went shopping at G.I. Joe's. As she walked in, she saw the pavement was wet. As she walked out, she slipped at a point where the pavement was "cold and wet." Her husband said he could see ice underneath an eighth inch of water.

Dawn sued G.I. Joe's. The trial court dismissed and the Court of Appeals affirmed.

HOLDINGS:

(1) To prevail on a negligence action, Dawn must establish: (a) existence of a duty owed, (b) breach of that duty, (c) resulting injury, and (d) proximate cause between the breach and the injury.

(2) As the premises owner, G.I. Joe's owed a duty of ordinary care to maintain the parking lot in a safe condition for its business invitees. This duty of care would have extended to the icy patch on which Dawn slipped only if G.I. Joe's knew or should have become aware of the alleged danger condition. Thus, to survive summary judgment, Dawn had to show that G.I. Joe's had actual or constructive notice of the unsafe condition in the store parking lot.

(3) To prove constructive notice, Dawn had to show that the specific unsafe condition had existed long enough such that, with the exercise of ordinary care, G.I. Joe's could have discovered and removed it.

(4) Here, Dawn presented evidence that the area where she fell was icy and covered by one-eighth inch of water at the time of her slip and fall. But she presented no evidence as to how long this condition had existed.

(5) The record fails to show that G.I. Joe's had actual or constructive notice of the icy condition in the parking lot or that this condition was unreasonably dangerous and foreseeable.

COMMENT:

Always nice to read a straightforward application of the law to the facts.

Morris v. G.I. Joe's, Inc., ___Wn. App.___, ___ P.3d ___ (Dec. 7, 2001), 2001 Wash. App. LEXIS 2667.

BAD FAITH SETTLEMENT

FACTS:

Dorthea was being laid to rest. It had been raining — a lot.

There was at least three feet of rainwater in the bottom of the grave. As Dorthea's casket was being lowered into the grave, it tilted and sank. The gravediggers were less than enthused about trying to reattach the casket. They figured they might end up in the grave as well.

Eventually, the casket was pulled out. But then it was discovered that the seal on the casket left a bit to be desired. Dorthea's body was "reconditioned" and she was shipped off for burial elsewhere. Dorthea's children, being greatly upset by all this, sued the graveyard for emotional distress. The graveyard tendered to the carrier, which denied: (1) no occurrence; (2) professional exclusion; (3) late report.

The children and the graveyard cut a deal in the amount of $500,000. The graveyard agreed to pay $30,000 and assigned its rights to the children. The children were to pay one third of what they recovered from the insurance company or $30,000, whichever was less. The $30,000 deal was to be secret. The "$500,000 settlement" was to be publicized.

The trial court ruled that the company had coverage for the events in the cemetery, but it was liable only for the $30,000. The appellate division affirmed.

HOLDINGS:

(1) The settlement agreement between the children and the graveyard was not binding on the insurer. The circumstances surrounding the agreement demonstrate collusion and bad faith. The $500,000 judgment is vacated.

(2) A settlement may be enforced only if it is reasonable in amount and entered into in good faith. The insured has the initial burden of going forward with proof of these elements. The insurer has the ultimate burden of persuasion as to these elements.

COMMENT:

If the company had denied on the basis that a pure emotional distress claim does not involve bodily injury, it might have escaped liability altogether.

Pasha v. Rosemount Mem. Park, 344 N.J. Super. 350, 781 A.2d 1119 (2001).

READ THE RELEASE

FACTS:

While skiing down "Debbie's Gold" at Alpental, Frank encountered some unmarked "bump/jumps" and "half-pipe" walls. He fell down and hurt himself.

Frank sued the ski area operator. The operator pointed out that Frank's reduced priced ski pass came with a liability release. Frank said he never read it. The trial court dismissed Frank's claim. The Court of Appeals affirmed, finding that the release was not inconspicuous and was not against public policy.

HOLDINGS:

(1) Washington has recognized the right of parties "expressly to agree in advance that the defendant is under no obligation of care for the benefit of the plaintiff, and shall not be liable for the consequences of conduct which would otherwise be negligent."

(2) These exculpatory agreements are generally enforceable, subject to three exceptions. **First**, inconspicuous releases are unenforceable. **Second**, releases cannot limit liability for acts falling "greatly below the standard established by law for protection of others." **Third**, releases must not violate public policy.

(3) The plain language of the clause leaves no doubt of its intent to release the operator from liability for all personal injuries resulting from its negligent operation of the ski area.

(4) A person who signs an agreement without reading it is bound by its terms as long as there was "ample opportunity to examine the contract in as great a detail as he cared, and he failed to do so for his own personal reasons."

(5) The release is clearly entitled "LIABILITY RELEASE & PROMISE NOT TO SUE. PLEASE READ CAREFULLY!" The words "RELEASE" and "HOLD HARMLESS AND INDEMNIFY" are set off in capital letters throughout the agreement. The release was sufficiently conspicuous.

(6) Under the *Wagenblast* factors (110 Wn.2d 845 (1998)), the release does not violate public policy.

COMMENT:

It sure is nice to see that one of my very old cases is still good law: *Hewitt v. Miller*, 11 Wn. App. 72, 521 P.2d 244, *rev. denied*, 84 Wn.2d 1007 (1974).

Chauvlier v. Booth Creek Ski Holdings, ___ Wn. App. ___, 35 P.3d 383 (2001).

NO CONTROL; NO DUTY

FACTS:

Mitchell got sued for discrimination. It retained four law firms to defend it. After five months, Mitchell told Aetna about the lawsuit. Aetna said it would defend under a reservation, and appointed defense counsel.

Mitchell's lawyers told defense counsel to butt out.

At about the same time Mitchell got sued by an ex-employee who claimed she had been fired for refusing to discriminate. That suit was tendered to Aetna, which agreed to defend under a reservation and appointed defense counsel. Aetna got a coverage opinion from defense counsel who concluded there was no coverage. Aetna ignored the opinion and continued to defend.

The first lawsuit settled a few months later, and the second one a year later. Mitchell sued Aetna claiming that Aetna had breached its enhanced obligation of good faith by getting a coverage opinion from defense counsel. The trial court ruled that Aetna did everything wrong and awarded $2.25 million compensatory damages and $2 million punitive. The Alabama Supreme Court ruled that Aetna did nothing wrong and threw it all out.

HOLDING:

(1) When an insurance company undertakes a defense pursuant to a reservation of rights, it does so under an "enhanced obligation of good faith" toward its insured in conducting such a defense.

(2) This enhanced obligation is fulfilled by meeting specific criteria. **First**, the company must thoroughly investigate the cause of the insured's accident and the nature and severity of the plaintiff's injuries. **Second**, it must retain competent defense counsel for the insured. Both retained defense counsel and the insurer must understand that only the insured is the client. **Third**, the company has the responsibility for fully informing the insured not only of the reservation-of-rights defense itself,

but of all developments relevant to this policy coverage and the progress of this lawsuit. Information regarding progress of the lawsuit includes disclosure of all settlement offers made by the company. **Finally**, an insurance company must refrain from engaging in any action which would demonstrate a greater concern for the insurer's monetary interest than for the insured's financial risk.

(3) Mitchell controlled all aspects of the first suit. Aetna and defense counsel were not allowed to participate. Aetna had no duty to act under an enhanced obligation of good faith.

(4) Aetna did control the defense of the second lawsuit, and had an enhanced duty.

(5) Aetna resolved the doubts about the duty to defend in favor of its insured.

(6) Seeking a coverage opinion which it ignored did in no way demonstrate a greater concern for the company's monetary interest than for the policyholder's financial risk.

(7) Aetna did not breach its enhanced duty.

COMMENT:

Ordinarily we do not pay much attention to cases out of Alabama. However, we must remember that Alabama is one of the few states that has expressly embraced the notion of the enhanced obligation of good faith set forth in *Tank v. State Farm*, 105 Wn.2d 381, 715 P.2d 1133 (1986).

Aetna Cas. & Sur. Co. v. Mitchell Bros., Inc., 2001 Ala. LEXIS 177 (May 18, 2001), *reh'g denied*, 2001 Ala. LEXIS 311 (Sept. 7, 2001).

A SEARCH FOR COVERAGE

FACTS:

Bill and Leslie were at home. They were discussing new rental terms for the rental property which they owned in another town. The discussion deteriorated into a dispute, and the dispute escalated. Leslie pulled a gun. After Bill took her gun away, Leslie got a golf club and sought to drive Bill.

Finally, a call to 911 brought the discussion to a close. Leslie was hauled off to jail. She did not like the strip search performed by a deputy. The deputy who did the search sued for defamation.

Bill and Leslie had insurance on the rental property. They tendered their defense to that insurer. The tender was denied. After Bill and Leslie shelled out almost $30,000 to defend and settle the defamation case, they sued the insurer.

The trial court and the Court of Appeals said there was no coverage.

HOLDINGS:

(1) An insurance company has a duty to defend a lawsuit against its insured if there is a potential for coverage. The insured need only show the underlying claim may fall within the policy coverage. When there is no potential for coverage, there is no duty to defend.

(2) It made no difference that the company did not investigate before denying coverage.

(3) To trigger a duty to defend, there must be a causal connection between the insuring agreement and the slanderous statements. The strip search and the defamation were not causally related to ownership of the rental property.

(4) Where an occurrence is clearly not included in the insuring agreement, it need not also be excluded.

(5) There being no potential for coverage, there was no duty to defend.

COMMENT:

The author opened the opinion by noting that the argument for coverage was "based on a series of supposedly connected events that would make even Mrs. Palsgraf recoil." (*See Palsgraf v. Long Island R. Co.*, 248 N.Y. 339, 162 N.E. 99 (1928).)

Turner v. State Farm Fire & Cas. Co., 92 Cal. App. 4th 681, 112 Cal. Rptr. 2d 277 (2001).

THE PRIMARY IS PRIMARY IS PRIMARY

FACTS:

As the cost of defending lawsuits continues to increase, the tendency of a primary carrier is to look for someone to share the pain. For example, a primary carrier with a $1 million limit looking at a reasonably good $10 million claim begins to think that the excess carrier with the $9 million limit should pay its share of the defense costs. Sometimes the primary will just walk away from the defense knowing that the excess will not leave the policyholder to twist in the wind.

Neither of these, nor related actions, have been well received. In Washington, the court has invoked "equitable subrogation" as the vehicle by which an excess carrier can pursue a recalcitrant primary carrier. Although the court would not recognize a direct duty of reasonable care running from the primary to the excess, *Truck Ins. Exch. v. Century Indem. Co.*, 76 Wn. App. 527, 887 P.2d 455

(1995), it has held that the excess can sue the primary for a CPA violation. *First State Ins. Co. v. Kemper Nat'l Ins. Co.*, 94 Wn. App. 602, 611, 971 P.2d 953, *rev. denied*, 138 Wn.2d 1009 (1999).

This past fall, in answering a certified question from the 10th Circuit, the Oklahoma Supreme Court took the occasion to write an up-to-date comprehensive review of the topic. It said:

(1) An excess insurer has no duty to participate in defense costs until the limits of the primary policy are exhausted.

(2) Equitable subrogation does not require an excess insurer to participate in the cost of a policyholder's defense prior to exhaustion of the primary limits, even though the claim exceeds the primary limits.

After reviewing cases from around the country, the court said:

"Most courts reject the argument ... that if a claim against the insured is for a sum greater than the primary coverage the excess insurer should be required to participate in the defense even though the primary policy is not exhausted. They recognize that insurance policies are governed by general principles of contract interpretation, and find that since the duty of an excess insurer to participate in the insured's defense is triggered only by exhaustion of the primary policy, a holding that the excess carrier must pay because the claim is greater than the primary coverage would be contrary to the policy's provisions, and the court would be reallocating risks that the parties had freely agreed to and had been compensated to assume."

United States Fid.& Guar. Co. v. Federated Rural Elec. Ins. Corp., 2001 OK 81, 2001 Okla. LEXIS 101 (2001).

MORE THAN ILLEGAL, IT WAS CRIMINAL

FACTS:

Susan drank several beers ("possibly" more than 10). She took a Valium. She got in her car and drove off to feed her cats. When she got there, they weren't. She parked in front of Schurtz's house. She got out, with her Glock, which she always carried, and walked into Schurtz's house. He was asleep. He awoke and jumped out of bed. This frightened Susan. She shot Schurtz.

Susan was charged with attempted murder. She entered a *nolo* plea to assault and admitted personal use of a firearm. Having filed for bankruptcy, the only thing she had left was her homeowners policy when Schurtz sued her. The carrier agreed to defend under a reservation. The policy had an exclusion for bodily injury caused by a criminal act.

Susan admitted liability for injuries caused by her negligence. Schurtz dismissed his intentional tort claim.

The trial court ruled there was no coverage and the Court of Appeals agreed.

HOLDING:

(1) An "illegal act" exclusion cannot reasonably be given meaning under established rules of insurance contract construction. (*Citing SAFECO v. Robert S.*, 26 Cal. 4th 758, 766 (2001).)

(2) A clear "criminal acts" exclusion will be given effect.

(3) There is no dispute that Susan committed a criminal act. Susan and Schurtz can redefine the facts of the shooting all they want but it is undisputed that Susan was convicted of a felony.

(4) The criminal act exclusion is independent of the intentional act exclusion.

COMMENT:

An interesting case, not just because the three judges wrote four opinions, but because of the well-defined distinction between illegal acts and criminal acts.

20th Century Ins. Co. v. Schurtz, 92 Cal. App. 4th 1188, 112 Cal. Rptr. 2d 547 (2001).

REVIEWING ARBITRATION AWARDS

FACTS:

William was injured when the car he was riding in hit an abandoned uninsured vehicle in the middle of I-5. William sought UIM payments through the driver's policy. The matter was arbitrated, and the arbitrator made an award for medical specials, past wage loss, and general damages.

William was not satisfied, and he filed a motion to vacate the award. The trial court refused. But the Court of Appeals reversed, saying, "The arbitrator's letter is internally inconsistent."

COMMENT:

Ordinarily we would not pay much attention to an opinion reviewing an arbitration award. But here, the basis for the vacation was comments in the "letter." The only thing that the court can review is the award. The award does not include the arbitrator's reason for the award. *Barnett v. Hicks*, 119 Wn.2d 151, 156, 829 P.2d 1087 (1992). Here the court reviewed the evidence presented to the arbitrator. But the reviewing court is not supposed to consider the evidence presented to the

arbitrator. *Price v. Farmers Ins. Co.*, 133 Wn.2d 490, 496-97, 946 P.2d 388 (1997). The reviewing court is not to be concerned with the reasons for the arbitrator's decision, but only with whether the face of the award is limited to the issue that was presented for arbitration.

The only issue presented for arbitration in William's case was how much was he damaged. The arbitrator's award was $19,060.54. That should have been the end of the line.

It is apparent that everyone would have been saved a great deal of time, energy, and money if the arbitrator had just set out the dollar award, and provided no explanation whatsoever.

Tolson v. Allstate Ins. Co., 108 Wn. App. 495, 32 P.3d 289 (2001).

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WILLIAM ROBERT HICKMAN

May 14, 1968. On that date Bill Hickman started his first appeal. From two cases in 1 Wash. App. to the present Bill has handled more civil appeals than any Washington lawyer. He is a fellow in the American Academy of Appellate Attorneys. He was an editor of the Washington Appellate Deskbook. His dual fields of appellate and coverage have led to his involvement in such significant cases as Tank, Tran and Mahler. Since 1975 Bill has edited the Washington Insurance Law Letter. He serves as a track official and has worked at the Olympic Games, the Pan Am Games and the Goodwill Games. He is a member of the International Amateur Athletic Federation Anti-Doping Commission. Bill graduated from Seattle U. (1964) and Columbia (1967).

* Appellate

FOLLOW UP FOLLOW UP

Back in the Summer 2000 issue (Vol. XXIV, No. 1, p. 13), we reported on a truly awful opinion: *Winters v. State Farm*. 99 Wn. App. 602, 994 P.2d 881 (2000). Therein a PIP insurer which did not share in the PIP insured's recovery from an underinsured tortfeasor still had to pay a share of the legal expenses for recovering its PIP interest. The Supreme Court granted review but affirmed. The majority's analysis was wrapped up in one sentence: "As between the insured and insurer, we balance their interests and decide that the insurer should pay." Translation: We do not care what the policy says; we do not care what the case law says; we are a great court of equity.

Winters v. State Farm, 144 Wn.2d 869, 31 P.3d 1164 (2001).

And in the Fall 2000 issue (Vol. XXIV, No. 2, p. 28), we discussed the *Fluke* case, which held that a punitive damage award arising out of the covered tort of malicious prosecution was covered by a CGL policy. *Fluke v. Hartford*, 102 Wn. App. 237, 7 P.3d 825 (2000). That also went up to the Supreme Court on a petition and (surprise!) they affirmed.

In a 9-0 opinion, the court held:

1. We have never invoked public policy to narrow coverage and we have no intention of starting now.

2. A CGL policy covers all damages including punitive.

3. Coverage for malicious prosecution does not violate Washington public policy.

Fluke Corp. v. Hartford Accident & Indem. Co., ___ Wn.2d ___, 34 P.3d 809 (2001).

And now let's go way back to 1986 to a coverage case we handled: *Castle & Cooke v. Great American Ins. Co.*, 42 Wn. App. 508, 711 P.2d 1108, *rev. denied, 105 Wn. 2d 1021 (1986)*. That case had been generated by an employment law class action lawsuit that had been filed in March 1974: *Atonio v. Wards Cove*. What brings this all to mind is that in December 2001 the 9th Circuit filed what it called the "final chapter in a long saga." The "long saga" was the *Atonio* lawsuit. It has been kicking around the U.S. District Courts, the 9th Circuit Court of Appeals, the U.S. Supreme Court, and the U.S. Congress for 27 years. There have been 94 significant rulings in this matter. It may not be the most long-lived litigation, but it is the longest that we have been connected with.

Atonio v. Wards Cove Packing Co., Inc., ___ F.3d ___ (9th Cir. 2001), 2001 U.S. App LEXIS 27187.

QUICKLY, QUICKLY, QUICKLY

Cases in which law firms are parties always generate a certain perverse interest.

The recent case involving the defunct Bogle & Gates firm is no exception. Here Bogle worked for a couple of years without getting paid. When it got around to suing, the client said , "Tough. Your claim is barred by the three-year statute on oral contracts." The terms of engagement letter sent by Bogle did not name this client. The Court of Appeals upheld the dismissal because of the inadequate writing. Then to add insult to injury, the court held that the client was entitled to attorney fees because the contract that Bogle had not been able to prove did have an attorney fee provision.

Bogle & Gates, P.L.L.C. v. Holly Mountain Resources, 108 Wn. App. 557, 32 P.3d1002 (2001).

The Davis Wright firm did a bit better. It convinced the court that, notwithstanding the elaborately written terms of engagement letter, its former client's malpractice claim did not come within the six-year statute for written contracts and was barred by the three-year statute for oral contracts. And just to show that it had a sense of balance, the court held that Davis Wright's claim for fees came within the six-year statute and thus was not barred.

Davis v. Davis Wright Tremaine, LLP, 103 Wn. App. 638, 14 P.3d 146 (2000).

No sooner had we finished writing the foregoing than Division One issued two New Year's Eve opinions. In the first the Schwabe firm missed a one-year deadline for filing a lawsuit. Five years later, the dismissal of that claim was upheld on appeal. Two years and ten months later, the client sued Schwabe. The trial court dismissed the claim as being time barred. The Court of Appeals reinstated the claim, adopting the continuous representation doctrine. As such, the three -year statute is tolled during the attorney's continuous representation of the client in the same matter. The court said this is a very limited rule. It does not apply if the client got a new lawyer for the appeal, and it applies only to the representation in the matter out of which the malpractice claim arose.

Janicki Logging & Constr. Co. v. Schwabe, Williamson & Wyatt, P.C., ___ Wn. App. ___, ___ P.3d ___ (Dec. 31, 2001), 2001 Wash. App. LEXIS 2813.

The lawyer did a little better in the second case. Here the client fired the lawyer and the lawyer sued for his fee. The trial court dismissed the case because the lawyer waited two years and eleven months to sue, and seven more months to serve. The Court of Appeals reinstated the claim because

the three-year statute of limitations was extended by virtue of letters written by the client acknowledging the obligation.

Fetty v. Wenger, ___ Wn. App. ___, ___ P.3d ___ (Dec. 31, 2001), 2001 Wash. App. LEXIS 2812.

Before a bank sues on a loan, you would think it would have a good copy of the loan document. That was the problem Seafirst discovered when it moved for summary judgment. So then, the other side moved for summary judgment and since the only thing Seafirst had was an illegible copy, the court dismissed its suit. Ten days later, Seafirst, having found a legible copy, moved for reconsideration. The trial court said, "Too late." The Court of Appeals agreed, saying that "substantial justice" would not be served by excusing Seafirst's inaction.

Bank of Am. NW, N.A. v. Camtek Micro Sys. Campbell, 2001 Wash. App. LEXIS 1080 (May 18, 2001).

And then there was old Henry Andreessen who took his sense of humor with him to the great beyond. About six months before he died, he gave his neighbor, Dave Martin, a note which said, "I, Henry Andreessen, sold Dave Martin land and everything for One Dollor (sic)." After Henry passed on, Dave wanted the 50-acre farm. But that note was not worth the paper it was written on. First, it was not a will because in Washington, a will has to be attested to by two witnesses. Second, it was not a deed because it did not contain a legal description and because Henry's signature was not acknowledged. Too bad, Dave.

Martin v. Groeneveld, 2001 Wash. App. LEXIS 2802 (Dec. 28, 2001).

Another fellow who came up short with his piece of paper was Barry. He hired a marine surveyor to check out a boat he was thinking about buying. After the surveyor said the boat was in good condition, Barry bought the boat. Eighteen months later Barry discovered concealed dry rot in the ship. Seven months and $40,000 later, Barry sued the surveyor. The surveyor pointed out that his contract with Barry excluded liability unless the customer gave notice of a claim within 90 days of the work, and filed suit within six months of completion of the work. The Court of Appeals upheld the exclusion.

Syrett v. Reisner McEwin & Assos., 107 Wn. App. 524, 24 P.3d 1070 (2001).

Courttv.com brings to our attention the sad case of Judge Oliver in Cook County. He got kicked off his bench after he admitted using his chambers as a love nest with his court reporter. He denied that he grabbed and kissed four female prosecutors. He said the four ladies conspired against him because they did not like his drug rulings.

And in Maryland, their Supreme Court (called the Court of Appeals) held that a lady who enlisted a friend to shoot her had not committed suicide. That freed up $1.3 million in life insurance proceeds under a policy with a "suicide" exclusion.

Fister v. Allstate Life Ins. Co., 783 A.2d 194, (Md. 2001).

We note a cry for sanity from a federal judge in New York: "Dante should have reserved a special place in hell for lawyers who file unwarranted orders to show cause on the eve of a holiday." Not being able to send the lawyer to hell, the judge hit him for $9,017 as a Christmas present he will not forget.

Chatham v. Fid. & Deposit Co., 2001 U.S. Dist. LEXIS 17205 (S.D.N.Y. Oct. 18, 2001).

We can only briefly relate the strange case of Dr. Dick. This is because the court said the parties knew the facts so it did not need to enlighten the casual reader. It appears that Dr. Dick botched a vasectomy. However, while that may be too delicate a subject for our readers, what got the attention of our Tulsa correspondent was that plaintiff Mike got an award of over $600,000 for past and future economic loss. Go figure.

Stickney v. Dick, 2001 U.S. App. LEXIS 26825 (10th Cir. Dec. 17, 2001).

Some of our colleagues in the appellate bar and on the appellate bench take themselves very, very seriously. In reading their material, one can draw the inference that they see themselves as on a mission that they see as being a cross between a search for the Holy Grail and a quest for the Ark (Noah's or the Covenant's). They forget that an appeal is just the next step in the dispute resolution method we adopted as an alternative to hitting each other with clubs. Occasionally, someone comes along and gives this Golden Calf a good swift kick in the behind. And the winner for 2001 for an opinion written in 2000, but only recently discovered, is Pennsylvania Superior Court Judge Eakin. He disposed of an appeal with 59 rhymed couplets. Here are five examples:

> The car was coming much too close, something inside told her so;
> the next thing Mrs. Zangrando knew, a poodle flew over her shoulder.

To appellee this was nothing short of an unmitigated disaster;
the wingless Angel'd taken flight and ascended quickly past her.

In this brace of miniature poodles, neither one wide nor tall,
one may have been named Autumn, but 'twas Angel took the fall.

The impact could have killed the pup but Angel would survive;
a doctor of the veterinary kept the dog alive.

The bill for Angel's treatment, though, was anything but small,
and appellee felt that in the end, appellant should pay it all, . . .

And then the editor at Lexis picked up the baton with this description of the "Procedural Posture.":

Appellant driver challenged Court of Common Pleas
of Allegheny County (Pennsylvania) ruling, on his knees

begging for new trial, claiming it was error
to award veterinary bills for attending to the care

of appellee's little doggie that appellant's car did "dent"
propelling Angel through the air, though not with mean intent.

Zangrando v. Sipula, 2000 PA Super. 196, 756 A.2d 73 (Pa. Super. 2000).

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