WASHINGTON INSURANCE LAW LETTER™

A SURVEY OF CURRENT INSURANCE LAW AND TORT LAW DECISIONS

edited by William R. Hickman

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YOUR SHARE IS $200.00

FACTS:

Tom had a personal articles protection policy with State Farm. He said he lost his Rolex and his diamond. He said he had left them in a bag in the overhead compartment on a plane.

Tom gave the company a recorded statement and a proof of loss. State Farm said it wanted an EUO. Tom did not reply. State Farm asked again. Tom did not reply. State Farm asked a third time, Tom did not reply.

PROCEDURE:

Tom sued State Farm claiming breach of contract, unfair claims handling, bad faith, and Consumer Protection Act. State Farm moved for dismissal. The Superior Court dismissed Tom's case finding that Tom had failed to submit to an EUO which was a contractual condition precedent to filing suit.

Tom appealed. The Court of Appeals affirmed. The Supreme Court denied further review.

HOLDINGS:

(1) An EUO is a condition precedent to filing suit regardless of reasonableness.

(2) A recorded interview is not equivalent to an EUO.

(3) No substantial compliance existed when an insured did not submit to an EUO or produce documents upon reasonable request.

(4) Under the plain language of this policy, an EUO is a condition precedent to filing suit. Tom's refusal to submit to the EUO was a breach of the policy.

COMMENT:

A landmark opinion from Division I! Insurance fraud is running rampant in our land. $120,000,000,000.00 in 1995. In the area of property and casualty insurance, the bill for insurance fraud is $20,000,000,000.00. And who is paying that bill? No, it is not the insurance companies. They get that bill for fraud and they turn around and split it up among all the honest policyholders. That is you and me, partner. We are the ones who pay the bill. We pay it in our homeowner's premiums; we pay it in our auto premiums; we pay it in our health insurance premiums. Every year you and I are paying $200.00 in added premium money to cover the cost of fraud in property and casualty insurance. The national average cost per household for insurance fraud is $966.00.

Now in our society we always want to identify someone to blame. So who or what is to blame? The morally challenged? Those who look upon an insurance policy as a lottery ticket? Those with a misguided sense of entitlement? Those looking for something for nothing?

While we cannot do much about those folks, there is in our midst a group who can and should be doing a lot more to take a bite out of insurance fraud. This is the judiciary. Hopefully, more opinions like ***Downie*** will result in some new Terms of Engagement for the war on insurance fraud.

Downie v. State Farm Fire & Casualty Co., 84 Wn. App. 577, 929 P.2d 484, rev. denied, 132 Wn.2d 1003 (1997).

WHAT YOU DON'T KNOW CAN 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.

HOLDINGS:

The UIM carrier's failure to intervene in the tort suit, once it learned of it, meant that the UIM carrier was bound by the arbitration award even though the arbitration was held without the UIM carrier's knowledge.

COMMENT:

This is the kind of opinion that really makes you wonder. But let us look just at the talk about "binding" the UIM insurer with the arbitration award. In law, you can be "bound" by something that is res judicata or by collateral estoppel, also known as "issue preclusion."

The latter one prevents relitigation of an issue after the party estopped has had a full and fair opportunity to present its case. In other words, you are "bound" by the result after you have had a full and fair opportunity to present your side of the case. It is just a bit difficult to see how the UIM insurer had a full and fair opportunity to present its case since it was not a party to the litigation and was not told about the arbitration.

But leaving that point, for there to be collateral estoppel, 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).

Now, number two catches our attention. Why? Because an arbitration award is not a judgment.

There being no judgment, there is no issue preclusion, and the UIM insurer is not bound by anything.

A Petition for Review is pending in the Supreme Court.

Fisher v. Allstate Ins. Co., 85 Wn. App. 594, 933 P.2d 1094 (1997).

ANOTHER REAL HEAD SCRATCHER

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.

HOLDINGS:

The court first concluded that Washington tort law would allow Daley to recover for his emotional injuries. The fact that these injuries were primarily caused by witnessing the death of a non-family member was "unimportant." Daley was entitled to recover in tort for the emotional damage because he was placed in peril.

Turning to the UIM coverage question, the court distinguished several Washington cases so as to say that Daley's physical injury entitled him to recover for the emotional distress of seeing the trooper die. All of that was included within the term "bodily injury" as a matter of law.

The court recognized that part of the emotional injury could be a consequence of Daley's own physical injury, and part could be a consequence of his witnessing the trooper's death. However, it refused to allow Allstate the opportunity to demonstrate this factual difference. Instead, it rolled over this factual issue to find coverage for everything as a matter of law.

As to the ***E-Z Loader Boat Trailers, Inc. v. Travelers Indem. Co.***, 106 Wn.2d 901, 726 P.2d 439 (1986), case from the Supreme Court, which said "bodily injury" does not include emotional distress, Division III said it did not apply.

GUEST COMMENT:

My partner, Pam Okano, a lady rarely given to emotional reaction, had these preliminary comments about the opinion:

Suppose that the insured simply suffered bruises and abrasions as he leapt to get out of the way of the vehicle. He would be entitled to recover for severe emotional injuries even though his physical injuries were quite minor which would not, in and of themselves, have led to the emotional problems.

As I read this opinion, he would be entitled to coverage for the emotional problems, even if the carrier were able to prove that he would have suffered the emotional trauma even had he not been physically injured. The carrier will have a difficult time proving this. But it should be entitled to try. This opinion will have ramifications beyond UIM.

A Petition For Review to the Supreme Court is pending.

Daley v. Allstate Ins. Co., 86 Wn. App. 346, 936 P.2d 1185 (1997).

NO REPAIR; NO PAYMENT

FACTS:

The Dombrosky house was damaged in a fire. The home was covered by a homeowner's policy that limited settlement to the actual cash value of the damage until repair or replacement was completed.

An appraisal panel found that the additional cost for complying with new building code requirements would be $10,000. The Dombroskys never repaired or replaced the structure. The insurer paid the claim based on the actual cash value of the damage.

The Dombroskys bought an RV, moved to Arizona, and sued the insurer, alleging breach of contract, negligence, insurance bad faith, outrage, and violations of the Consumer Protection Act.

All of their claims were dismissed on summary judgment. The Court of Appeals affirmed the dismissal.

HOLDINGS:

(1) The language of the contract limited the Dombroskys' settlement to the actual cash value of the property because there was no evidence of repair or replacement of the structure.

(2) The insurance company did not waive the right to rely on the limitation in the policy by demanding an appraisal award because the award and a letter from the insurance company specifically reserved all rights and defenses.

(3) The insurance company was not equitably estopped from relying on the loss settlement provisions because there was no evidence of inconsistent statements by the insurance company.

(4) The Dombroskys were not entitled to recover the additional costs mandated by building codes because the policy provided only for replacement cost for "equivalent construction."

(5) The claim under the CPA was dismissed because the Dombroskys failed to show any unfair or deceptive acts by the insurance company and because a reasonable basis for denial of an insured's claim constitutes a complete defense to any claim of bad faith or CPA violation.

(6) The claims for negligence, outrage, and negligent infliction of emotional distress were dismissed for lack of evidence.

COMMENT:

Certainly, one of the best coverage opinions of the year whether viewed from clarity of presentation or application of substantive law.

Of the multitude of issues clearly and skillfully handled in this Division II opinion, none is better than the disposal of the ***Starczewski*** dictum about coverage for compliance with building codes. Following ***Roberts v. Allied Group Ins. Co.***, 79 Wn. App. 323, 901 P.2d 317 (1995), the court reiterated that building code expense is not recoverable.

Dombrosky v. Farmers Ins. Co., 84 Wn. App. 245, 928 P.2d 1127, rev. denied, 131 Wn.2d 1018 (1997).

HOLISTIC APPROACH TO ERISA

FACTS:

Great-West contracted to provide stop-loss coverage for BSI's self-funded ERISA health plan. Elaine, a BSI employee, discovered she had a rare blood disorder requiring expensive treatment. BSI determined that Elaine's treatment was covered under its health plan. But when Great-West got the bills, it refused to pay its share for Elaine's treatment.

BSI sued Great-West for breach of contract and bad faith.

The trial court ruled in favor of BSI, holding that BSI had sole authority to determine eligibility under the health plan. The Court of Appeals reversed, denying Great-West's argument that BSI's suit was preempted by ERISA, but ruling that Great-West had standing to challenge BSI's eligibility determination.

HOLDINGS:

(1) ERISA did not preempt BSI's suit because:

(a) The suit did not involve interpretation of ERISA health plan provisions affecting ERISA law.

(b) Mere mention of ERISA health plan in complaint does not warrant preemption.

(c) ERISA does not govern relationship between insurer and reinsurer.

(2) Great-West had standing to challenge BSI's coverage determination where Great-West was contractually obligated to reimburse BSI if benefits were paid "under the provisions" of the health plan.

COMMENT:

The foregoing summary hardly does justice to the opinion which handles the ERISA can of worms. Of all the nonsense to come out of the Other Washington, ERISA is near the top. Perhaps because Division I chose "to apply a holistic approach to ERISA preemption" the opinion makes some sense.

Behavioral Sciences Institute v. Great-West Life, 84 Wn. App 863, 930 P.2d 933 (1997).

A RELEASE IS NOT WORTH THE PAPER IT IS WRITTEN ON

FACTS:

Sungeeta Jain was injured when the car her mother was driving rolled in June of 1986. The accident left Sungeeta paraplegic. Sungeeta was considered a named insured under her father's State Farm policy. This policy included coverage for bodily injury liability, PIP, and UIM.

Sungeeta's attorney settled her claims for $325,000.00, the maximum allowed under the liability and PIP coverages. At that time her attorneys did not pursue UIM benefits because the State Farm policy excluded vehicles "insured under the liability coverage of this policy" from UIM coverage.

Sungeeta signed a final written settlement agreement releasing State Farm from any further liability under the policy.

Five months after Sungeeta signed the written settlement agreement, the Washington Supreme Court decided ***Tissell v. Liberty Mutual Ins. Co.***, 115 Wn.2d 107, 795 P.2d 126 (1990), which held that clauses which excluded the policyholder's own vehicle from the definition of underinsured vehicle were void when they operated to deny UIM recovery to the named insured.

Sungeeta then sued State Farm to void the prior written settlement agreement, to void the UIM exclusionary clause, and to require State Farm to pay her UIM benefits.

Her attorneys argued that under ***Bradbury v. Aetna Cas. & Sur. Co.***, 91 Wn.2d 504, 589 P.2d 785 (1979), ***Tissell*** should be applied retroactively. ***Bradbury*** allows an otherwise valid release between insurers and insureds to be made void by a later court decision, unless the insurer reasonably and justifiably relied upon the prior state of the law.

The United States District Court certified the question of retroactivity to the Washington Supreme Court.

The option of overruling ***Bradbury*** was not before the Supreme Court. State Farm argued that it reasonably and justifiably relied on the pre-***Tissell*** state of the law.

The Supreme Court held ***Tissell*** should be applied retroactively, voiding the release signed by Sungeeta.

HOLDINGS:

(1) Decisional law handed down after a final settlement agreement is signed may be retroactively applied to void that agreement if the insurer did not reasonably and justifiably rely upon the state of the law before the decision was rendered.

(2) Insurer has not reasonably and justifiably relied upon the state of the law if, at the time the settlement agreement was signed, the law was unsettled.

COMMENT:

The days of retroactively sticking it to insurance companies under ***Bradbury*** may be numbered. First, the majority (five Justices) points out early on in its opinion that they were not asked to overrule ***Bradbury***. Second, the concurring opinion, (two Justices) while agreeing with the majority in answering the question certified to it, expresses reservations as to whether ***Bradbury*** should continue to be the law of Washington. Finally, the dissent (two Justices) calls ***Bradbury*** a shortsighted decision which should be overruled.

The dissent points to the strong public policy in upholding the finality of releases. What's the point in settling claims short of litigation if new law may allow the party to void the release?

The dissent also states that their decision in ***Bradbury*** was effectively overruled by the United States Supreme Court in ***James B. Beam Distilling Co. v. Georgia***, 501 U.S. 529, 111 S. Ct. 2439, 115 L. Ed. 2d 481 (1991). That case held: "Retroactivity in civil cases must be limited by the need for finality[;] . . . a new rule cannot reopen the door already closed." The majority ignores this.

Finally, keep in mind that this super retroactive rule applies only in the world of insurance and is applied only against insurance companies. If our local giants, Boeing or Microsoft, settle a claim, pay some money, and get a release, that claim is over, finished, kaput. It does not matter if the Supreme Court changes the rule of the law the next day, the next week, the next year, that claim is dead, dead, dead. Some folks in Olympia sure got a jaundiced view of Equal Justice Under Law.

Jain v. State Farm Mut. Auto. Ins. Co., 130 Wn.2d 688, 926 P.2d 923 (1996).

NO FREE UIM

FACTS:

Vilaiphone was a passenger in a car involved in an accident. The car was insured by Financial Indemnity Company (FIC). The FIC policy excluded UIM coverage for passengers who were not related to the insured by blood, marriage, or adoption.

Vilaiphone was not related to the insured. Vilaiphone made a claim for UIM benefits anyway. The claim was denied. Vilaiphone sued. FIC got it dismissed on summary judgment. Vilaiphone appealed and the Court of Appeals affirmed the dismissal.

HOLDINGS:

(1) Vilaiphone was not an "insured person" under the policy.

(2) Guest passengers who do not own or lease a car, and thus cannot purchase their own UIM coverage, are a potentially unprotected category of guest passengers.

(3) Exclusion of UIM coverage for guest passenger who was not an "insured person" under owner's policy was not void as against public policy.

(4) UIM statute does not require protection of passengers who do not qualify as an "insured" under the policy.

(5) An insurance company is not required to provide UIM coverage for free.

COMMENT:

From the "Lack of Originality" department, the court describes plaintiff's argument as being "virtually identical" to one the Supreme Court rejected over 20 years earlier.

Division I's reminder that there is no free UIM should be required reading among the appellate judiciary.

Financial Indemnity Co. v. Keomaneethong, 85 Wn. App. 350, 931 P.2d 168 (1997).

VENUE NOT AN ELEMENT OF INSURANCE FRAUD

FACTS:

James Hickman (no relation) bought a Ford Mustang with financing from Seafirst Bank. James stopped making payments. James moved to Hawaii. James left the Mustang in Washington with his former roommate.

James gave the keys to a friend who was visiting him in Hawaii and told the friend he could "drive it off a cliff."

The Mustang was taken from the former roommate's apartment, reported stolen, and later recovered, totaled. The key was in the ignition.

A jury found James guilty of the crime of insurance fraud.

On appeal Hickman (James) claimed that based on the jury instructions the state needed to prove the act occurred in Snohomish County. He argued the evidence at trial was insufficient to prove that element of the crime. He did not raise this argument at trial.

The Court of Appeals affirmed the conviction.

HOLDINGS:

(1) An appellate court may decline to review a nonconstitutional challenge, raised for the first time on appeal.

(2) The State is not required to prove beyond a reasonable doubt a fact that is not an element of the crime.

(3) Venue is not an element of the crime of insurance fraud under RCW 48.30.230 and need not be proven beyond a reasonable doubt.

COMMENT:

In case there is any confusion, Your Editor is NOT related to the defendant. It is refreshing that the court declined to add an element to the insurance fraud statute (RCW 48.30.230) that our legislature deemed unnecessary. It's important to keep the prosecution of insurance fraud as easy as possible.

State v. Hickman, 84 Wn. App. 646, 929 P.2d 1155 (1997).

REIMBURSEMENT OF RESERVED DEFENSE COSTS

FACTS:

Knapp bought title insurance from Commonwealth. Later, someone contested Knapp's title to the land.

Commonwealth agreed to defend Knapp under a reservation of rights. Commonwealth's reservation of rights letter specifically reserved the right to later seek attorneys' fees and costs if it was later determined that there was no coverage.

Knapp lost the title dispute. He lost the coverage dispute. Commonwealth asked to be reimbursed for all attorneys' fees and costs incurred on behalf of Knapp.

HOLDINGS:

An insurer is entitled to reimbursement for the cost of defending the insured when: (1) The court concludes that there was no duty to defend; and (2) The insurer has clearly told the insured of its desire to reserve its right to later seek reimbursement of attorneys' fees and costs. As stated by the court:

> Under these circumstances, the Court finds it appropriate to determine that Knapp's silence in response to Commonwealth's reservations [sic] of rights letter, and subsequent acceptance of the defense provided by Commonwealth, constitutes an implied agreement to the reservation of rights.

COMMENT:

This decision follows a small majority of jurisdictions that have addressed the issue of an insurer's right to reimbursement for defense costs. ***See Gossard v. Ohio Casualty Group of Insurance Companies***, 39 Cal. App. 4th 450, 35 Cal. Rptr. 2d 190 (1994) (allowing reimbursement); ***Gotham Ins. Co. v. GLNX, Inc.***, No. 92 Civ. 6415, 1993 U.S. Dist. LEXIS 10891 (S.D.N.Y. Aug. 6, 1993) (allowing reimbursement); ***Worcester Ins. Co. v. Dairyland Ins. Co.***, 555 A.2d 1050 (Me. 1989) (holding that a finding that coverage does not exist does not retroactively relieve an insurer of its duty to defend).

Given the horrendous cost of funding many reserved defenses, we can expect to see more insurers conditioning a defense upon a reimbursement agreement.

Knapp v. Commonwealth Land Title Ins. Co., Inc., 932 F. Supp. 1169 (D. Minn. 1996).

OBJECTIVE TEST FOR "REASONABLE BELIEF"

FACTS:

Gae was involved in an accident while driving her husband's company car. Claim was made for UIM benefits. Company denied claim because policy excluded anyone "using a vehicle without a reasonable belief that the person is entitled to do so."

Gae and husband Si sued.

Si admitted he understood the policy did not cover non-employees unless they were conducting company business. His wife was not conducting company business.

The wife admitted that her husband had told her she was not expressly allowed to drive the company car. However, she believed he could allow her to drive it when he chose to.

Trial court found for Gae based on her subjective belief she was entitled to drive the car. The Court of Appeals affirmed, but adopted an objective test.

HOLDINGS:

(1) Objective standard applies to determine reasonableness of motorist's belief he is authorized to drive car, for purposes of "reasonable belief" exclusion.

(2) Coverage is excluded under this clause if the driver (a) knew he was not entitled to drive the vehicle, or (b) if he claimed he believed he was entitled to drive the vehicle, but was without reasonable grounds for such a belief or claim.

(3) In determining if the driver's belief was objectively reasonable, the court will consider five factors:

(a) Whether the driver had express permission to use the vehicle;

(b) Whether the driver's use of the vehicle exceeded the permission granted;

(c) Whether the driver was legally entitled to drive under the laws of the applicable state;

(d) Whether the driver had any ownership or possessory right to the vehicle; and

(e) Whether there was some form of relationship between the driver and the insured that would have caused the driver to believe that he or she was entitled to drive the vehicle.

COMMENT:

Now we have bright-line, two-step, five-factor, objective test to determine how the ever popular reasonable person would have acted under the same circumstances. The analytical approach to a very troublesome exclusion is a vast improvement over where we were before.

Wooh v. Home Ins. Co., 84 Wn. App. 781, 930 P.2d 337 (1997).

OLYMPIC STEAMSHIP STILL OFF COURSE

FACTS:

Leingang was injured in an auto accident. He had health care insurance through Pierce County Medical (PCM) and UIM coverage with Farmers. The PCM policy excluded benefits to the extent of any UIM payment. PCM paid Leingang's medical bills, but maintained it had the right to be reimbursed by Farmers.

PROCEDURE:

Leingang sued PCM seeking a declaratory judgment that PCM was not entitled to any UIM funds. Leingang also alleged tortious interference and violations of the Consumer Protection Act.

The trial court upheld the policy exclusion and granted summary judgment in favor of PCM. Following the Supreme Court's invalidation of such policy exclusions in ***Brown v. Snohomish County Physicians Corp.***, 120 Wn.2d 747, 845 P.2d 334 (1993), the parties stipulated to a reversal by the Court of Appeals.

Leingang then sought attorneys' fees incurred in the declaratory judgment under ***Olympic S.S. Co., Inc. v. Centennial Ins. Co.***, 117 Wn.2d 37, 811 P.2d 673 (1991) (***Olympic Steamship***).

The trial court awarded Leingang ***Olympic Steamship*** fees and summary judgment on his Consumer Protection cause of action. PCM prevailed on all other claims.

The Supreme Court affirmed the ***Olympic Steamship*** attorneys' fees. However, finding no evidence of unfair or deceptive actions, reversed the trial court's order on the Consumer Protection claims.

HOLDINGS:

(1) Under ***Olympic Steamship***, fees may be recovered where insurer compels insured to assume the burden of legal action to obtain full benefit of insurance contract. Showing of bad faith not necessary.

(2) An insured is entitled to attorneys' fees under ***Olympic Steamship*** and ***Dayton v. Farmers Ins. Group, 124 Wn.2d 277, 876 P.2d 896 (1994)*** if the insured litigates a coverage dispute, but not if the issue is merely a dispute over the value of a claim.

(3) Coverage dispute includes both cases in which the issue of coverage is disputed and cases in which the extent of the benefit provided by an insurance contract is at issue.

(4) Acts performed in good faith under existing law do not constitute unfair conduct in violation of the Consumer Protection Act.

(5) Denial of coverage, although incorrect, does not constitute unfair trade practice where it is based on reasonable conduct of insurer.

(6) PCM did not violate the Consumer Protection Act by relying on UIM exclusion that was ultimately determined to be unenforceable, where PCM was relying on a reasonable interpretation of existing law to contend that exclusion was valid.

COMMENT:

The majority and the dissent differed as to the meaning of the ***McGreevy*** opinion. There is a bit of irony there since ***McGreevy*** was intended to be the opinion that would end all questions about ***Olympic Steamship***. While the majority said ***McGreevy*** may have caused "some confusion," the dissenting justice, who wrote ***McGreevy***, said the majority was shirking its duty, was reading the materials in an overly technical manner, and was reaching an illogical conclusion.

Of more fundamental significance is the disparity of results under the legislatively created CPA, and the court-spawned ***Olympic Steamship***. The Legislature did what legislatures are supposed to do: it legislated. Specifically, it legislated as to when in an insurance dispute attorneys fees are to be awarded. Normally when the Legislature speaks to an area, the area

is deemed to be preempted and the court has no business mucking around in it. But that is precisely what the court did when it legislated its own rule on attorneys' fees in insurance disputes.

Leingang v. Pierce County Medical Bureau, Inc., 131 Wn.2d 133, 930 P.2d 288 (1997).

SUICIDE CLEANUP COVERED

FACTS:

An apartment tenant committed suicide with a shotgun. The landlord spent $5,020.15 cleaning up the aftermath.

The landlord made a claim under a Limited Peril policy which insured for direct physical loss caused by "explosion."

HOLDING:

Although the term "explosion" is not commonly used to describe a shotgun blast, reasonably intelligent persons could differ as to whether a shotgun blast could be described as an explosion. Thus, the provision covering "explosion" is ambiguous as applied to shotgun blasts. Because the "explosion" provision is ambiguous, the court must construe it against the insurer. The policy therefore covers the loss.

COMMENT:

At first glance, this appears to be the usual coverage opinion. But the dissenting justice rips the facade off the majority opinion and reveals its fundamental flaw. To be ambiguous, the word "explosion" must be capable of being understood in more than one sense. The majority never identifies a second possible meaning for "explosion" because, when taken in its ordinary sense, it is not capable of more than one meaning.

Weisman v. The Green Tree Ins. Co., 447 Pa. Super. 549, 670 A.2d 160 (1996).

QUICKLY, QUICKLY, QUICKLY

Chronicling a new level of nastiness is a case out of Indiana. When Harold passed on, his widow (and number two wife), Maud, got into a dispute with the daughter from his first marriage. A settlement was reached which allowed the daughter to take care of Harold's grave.

The next Memorial Day, Harold's mother and sister come to the graveyard and discover that Harold has been dug up, and is missing, along with the headstone the daughter paid for. Well, come to find out that old Maud, who also ran the cemetery, had had Harold dug up and moved and he was now in a new grave marked with a used monument engraved with someone else's name.

The court held that such conduct was not covered under Maud's mortician's malpractice endorsement.

Stevenson v. Hamilton Mut. Ins. Co., 672 N.E.2d 467 (Ind. App. 1996).

Lynal became upset over neighbor Brian's childish act of shooting bottle rockets across Lynal's property. So Lynal lobbed a cherry bomb onto Brian's front porch. Brian did not see it. Just then his wife, Beverly, comes out and picks it up. It blows up. Beverly and Brian sued Lynal.

The Utah Court of Appeals holds that the intentional tossing of a cherry bomb was no occurrence, and thus no coverage.

Fire Ins. Exchange v. Rosenberg, 930 P.2d 1202 (Utah App. 1997).

Linda kidnapped Rita Jo. She bound and gagged her, put her in the front seat of Rita Jo's car, put the seat belt around her, poured gasoline on the car and Rita Jo. Then she tossed in a match.

After recovering an $87,500.00 judgment against Linda, Rita Jo put in a UIM claim to her carrier. The Oklahoma Court of Appeals said there was no UIM because the injury did not

arise out of the use of the vehicle, the use was not auto related, and Linda was not an operator of the vehicle.

Whitmire v. Mid-Continent Cas. Co., 928 P.2d 959 (Okla. App. 1996).

Mike was out driving his pickup early one morning in Hardin County, Tennessee. The road was unlighted and it was foggy. Mike lost control on a curve, ran off the road, hit a tree, and died. His blood alcohol level was 0.26.

Mike was covered under a group accidental death policy issued by Met Life to his employer. Met Life denied accidental death payment because Mike died as a consequence of drinking and driving, and intentionally self-inflicted injury.

The Honorable Judge Todd of the Eastern Division of the Western District of Tennessee upheld that determination saying that in Tennessee bodily injury as a result of drinking and driving is not accidental. "[T]he hazards of drinking and driving are widely known and widely publicized." It is clearly foreseeable that driving while drunk may result in death.

Fowler v. Metropolitan Life Ins. Co., 938 F. Supp. 476 (W.D. Tenn. 1996).

Carolyn and her husband, Fredie, were riding their bikes when along came Ruth. Ruth's car hit Fredie. Carolyn saw her husband get hit, saw his head smack into the windshield, and saw him fall to the pavement.

Ruth's insurer asserted that there was only one injured party (Fredie) and that Carolyn's family bystander claim for negligent infliction of emotional distress was derivative.

The Montana Supreme Court joined a half dozen other jurisdictions holding that a family member bystander with an emotional distress claim is a second injured person whose claim is independent.

Treichel v. State Farm Mut. Auto. Ins. Co., 930 P.2d 661 (Mont. 1997).