WASHINGTON INSURANCE LAW LETTER™

A SURVEY OF CURRENT INSURANCE LAW AND TORT LAW DECISIONS

edited by William R. Hickman

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TAKING ANOTHER BITE OUT OF CRIME

FACTS:

The Pilgrims reported a theft of $15,000 in personal property. The police found no evidence of forced entry.

The Pilgrims reported to their homeowner's carrier, State Farm, that $148,000 worth of material had been stolen.

State Farm wondered how they could have sustained a loss of such magnitude given their annual income and fixed expenses. The company sought personal financial information which would prove or disprove the suspicion that the claim was fraudulent. The policy required the Pilgrims to furnish the requested records and documents. The Pilgrims refused.

State Farm denied the claim for breach of the cooperation clause.

The Pilgrims sued. The Superior Court held that the Pilgrims' refusal to cooperate defeated coverage. Division I of the Court of Appeals affirmed.

HOLDINGS:

(1) The policy requires that the Pilgrims cooperate with State Farm by providing it with requested records and documents as often as it reasonably requires. Such clauses are enforceable. They deter fraud, and facilitate proper adjusting decisions by insurers.

(2) Such clauses have long been included in insurance policies and the Washington State Legislature also recently required insurers to do more to root out fraud.

(3) An insurer can require an insured to provide answers to material requests, ***i.e.***, matters concerning a subject reasonably relevant and germane to the insurer's investigation as it was proceeding at the time it made the demand.

(4) An insured does not need to supply information unrelated to the policy or investigation of the claim. The standard by which an insured's conduct is measured is substantial compliance.

(5) During the process of compiling and evaluating the Pilgrims' claim, State Farm became aware of facts justifying a detailed investigation. These facts included the enormous discrepancy between the amount of the claim given to police and the subsequent claim filed with State Farm, the absence of forced entry, and the existence of a prior claim with one identical fact.

(6) An insured's income and financial condition are undoubtedly relevant to an investigation of whether he filed a fraudulent clam.

(7) No reasonable juror could conclude that the Pilgrims substantially cooperated in the production of relevant, reasonable, requested financial documents. With the exception of their W-2's, they produced nothing. And they refused to authorize third parties to disclose relevant financial information to State Farm. Their substantial failure to cooperate constitutes a breach of the cooperation clause as a matter of law.

(8) The purpose of cooperation clauses is to "prevent the insurer from being prejudiced by the insured's actions." Absent prejudice, an insurer is not discharged from the obligation to pay on a valid claim.

(9) To establish prejudice, the insurer must show "concrete detriment … together with some specific harm to the insurer caused thereby."

(10) State Farm was prejudiced by its inability to complete its investigation if it denied the claim. Without access to financial documents, State Farm could not evaluate the validity of the Pilgrims' claim. It could not decide whether the claim was covered, much less prepare a defense to the inevitable suit by the Pilgrims if it denied coverage. It could not satisfy its statutory duty to ferret out fraud.

(11) The Pilgrims' refusal to disclose relevant financial information prejudiced State Farm as a matter of law.

COMMENT:

In the first sentence of this really significant opinion, the writing judge put his finger on the critical center of the case when he said the case concerns the cooperation clause, and ***"the legislature's recent efforts to diminish fraud in the making of insurance claims."*** (Emphasis added.)

The Supreme Court will take a look at this problem area in a suspicious loss case called *Tran v. State Farm*, which will be argued February 10, 1998.

Our little summary does not do justice to this opinion, which anyone engaged in antifraud activities must read.

Pilgrim v. State Farm Fire & Cas. Co., No. 38549-6-I, unpublished slip op. (Wash. App. Sept. 22, 1997).

WOODMAN SPARE THAT TREE

FACTS:

Castello did hire Hayes to go onto his land and to fill in his ravine. And Hayes went onto the property of good neighbor Wilson, and he did wantonly remove her trees, and her shrubbery and her fence. And then he did the same for neighbors Birchler and Lang.

And the neighbors were sorely annoyed, and did cry out in a loud voice, "Oh what is the state of this land when one's own shrubbery is not safe."

But there did dwell in that land called King, a wise judge and a wise jury composed of 12 good persons and true. And the jury did speak with one voice: damages are $17,000, $17,000, and $13,250. And the wise Judge saw that and said: "Good, now I am going to triple that up to $141,750." And the jury went on to say: "$2000 a piece in damages for making the neighbors upset." The judge did not triple that.

And the despoilers of the shrubbery did seek redress in a higher court located in a great tall structure of glass and steel in the center of the business district in the city of Seattle in the land of King. But those judges were unmoved.

And so the shrubbery despoilers took their plea to the most high temple of justice located far to the south in the town of Olympia in the land called Thurston. And five of the most high justices did tell the despoilers to come closer for it does sound as if you present an interesting issue. But after hearing from the despoilers' advocate the nine high justices did speak, for once, with a single voice and they did say to the despoilers: "you lose."

HOLDINGS:

(1) RCW 64.12.030 creates a punitive damages remedy, trebling damages for injury to, or removal of, trees, or shrubs, when a person trespasses on the land of another. This treble damage remedy is only available when the trespass is "willful."

(2) The purpose of the statute: to punish trespassers, to prevent careless or intentional removal of trees and vegetation from property, and to roughly compensate landowners for their losses

(3) The measure of damages in a case involving injury to or destruction of residential/ornamental trees or shrubs is the restoration or replacement cost for the vegetation.

(4) The timber trespass statute sounds in tort. Trespass is an intentional tort.

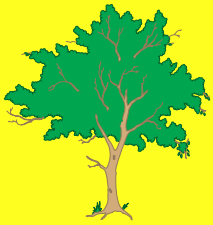
(5) The recovery of emotional distress damages in cases of intentional torts is consistent with the modern rule.

(6) Emotional distress damages are recoverable under RCW 64.12.030 for an intentional interference with property interests such as trees and vegetation.

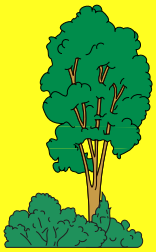
COMMENT:

The high justice from West Seattle wrote a scholarly, dry, and dare we say, boring opinion on a topic that cried out for a lighter touch. Perhaps even a bit of whimsy would have loosened up the troops. So many allusions were left unrecorded. My God, folks, there is a reason this state is called The Evergreen State! We love our trees.

Anyway, to fill in what the opinion left out, let me share with you a few well-penned words:



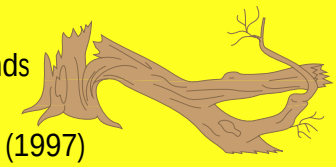
Woodman, spare that tree!
Touch not a single bough!
In youth it sheltered me,
And I'll protect it now.
Morris, (1830)



I think that I shall never see
A poem lovely as a tree …
Poems are made by fools like me,
But only God can make a tree.
Kilmer, (1917)

I think that I shall never see
A billboard lovely as a tree.
Indeed, unless the billboards fall
I'll never see a tree at all.
Nash, (1933)

I think that I shall never see
An opinion lovely as a tree
However, unless clear cutting ends
I'll never see a tree again.
Hickman (1997)



Birchler v. Castello Land Co., Inc., 133 Wn.2d 106, 942 P.2d 968 (1997).

NO COVERAGE; NO BAD FAITH

FACTS:

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

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

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

On appeal, Division I framed the issue as whether an insured may sue for bad faith or CPA violations when the insurer rightfully denies a claim under an exclusion, but fails to conduct an adequate investigation, or violates the WAC during the investigation. The short answer is "no".

HOLDINGS:

(1) To establish a breach of the duty of good faith, a party must prove that the defendant acted unlawfully and in violation of public policy.

(2) Procedural errors in handling a specific claim do not support an action for bad faith because the errors do not harm the insured or the public interest, as would be the case where company policies or actions are unlawful.

(3) The ***Butler*** decision does not authorize bad faith or CPA claims in the absence of coverage.

(4) An insured may not bring a bad faith or CPA claim based on procedural errors or shortcomings in an insurer's investigation unless the insurer wrongfully denies the claim or the errors harm the insured.

(5) To permit actions for bad faith in the absence of a wrongful denial of coverage, unlawful or oppressive acts, or actual harm would be unduly burdensome on the insurer and on the consumer, who would ultimately pay for the insurer's exposure to litigation and potential liability for minor procedural errors in every claim.

(6) In this case there are no facts, actual or hypothetical, which would permit recovery. The trial court properly dismissed the bad faith claim and the CPA claims when it had determined that there was no coverage.

COMMENT:

An extraordinary opinion. This is not just because it recognizes the inherent silliness of the proposition that there can be bad faith when there isn't coverage, but because it recognizes the fact that every time some court hands down some goofy coverage opinion it is the other policyholders who will ultimately get the bill.

Coventry Assocs. v. American States Ins. Co., 86 Wn. App. 845, 939 P.2d 1245 (1997).

KNOWN LOSS DOCTRINE

FACTS:

The "known loss doctrine" or the "loss in progress rule" is a concept which gets mentioned a lot, and used very little. This fall the Washington Supreme Court dealt with it in a first-party property coverage case and came to these conclusions.

HOLDINGS:

(1) The "known loss" doctrine (also known as the "known risk" or "loss-in-progress" doctrine) may be applied to nullify coverage for a loss to an insured's own property if the insured subjectively knew, at the time of purchasing the policy, that the loss was likely to occur.

(2) Whether an insured subjectively knew at the time of purchasing the insurance that a loss was likely to occur is a question of fact.

(3) Known risk doctrine applies in first-party as well as third-party cases.

(4) Known loss doctrine could not be applied based on existence of prior loss alone. Existence of loss prior to effective date of policy in form of damage was not determinative in itself in deciding whether insured knew or should have known of likelihood of future damage as to bar recovery.

Whether the insured had requisite knowledge of the likelihood of future damage as a defense to the insured's claim is normally question of fact for fact-finder.

Hillhaven Properties Ltd. v. Sellen Const. Co., Inc., 948 P.2d 796 (Wash. 1997).

LIABILITY FOREVER

Of the strange cases which come before the Supreme Court, this is right up there at the top. Here a Pierce County judge ruled that there was no statute of limitation on actions against an estate of a decedent if the decedent (1) had liability insurance for the incident giving rise to the claim and (2) died prior to the running of the 3-year statute of limitation.

The story began in August 1991 when Bill and Rex were involved in a car crash. Rex died a year later from unrelated causes. In August 1994, Bill filed suit against Rex. It was not served.

In February 1995, Bill's lawyer had another lawyer appointed personal representative of Rex's estate, and then served him with a summons and complaint. The estate appeared and moved to dismiss, pointing out that it had been served more than three years after the accident. Bill argued that there was no applicable statute of limitation to be applied to his claim. The trial court agreed with Bill's argument that there was no statute of limitation because that is what Division I has said in *Auguston v. Graham*, 77 Wn. App. 921, 895 P.2d 20 (1995).

The Supreme Court granted direct review of the denial of the motion for summary judgment. The issue framed by the Court was whether the Legislature intended that there be no statute of limitation applicable to an insured claim against the estate of a tort-feasor who died before the 3-year statute expired.

The Court concluded that the trial judge's result was "unlikely and absurd." It also overruled *Auguston*. The Court noted:

(1) If the Legislature had intended that there be no statute of limitation it would have said so.

(2) No civilized society could lay claim to an enlightened judicial system which puts no limits on the time in which a person can be compelled to defend against claims.

COMMENT:

WSTLA argued that while the concept of liability for eternity "may seem unusual" it was by no means "absurd". Only one justice signed on to that.

PERSONAL COMMENT:

Rex's estate was represented on appeal by Pam Okano of Reed McClure's appellate team.

Young v. Est. of Snell, No. 64165-0, 1997 WL 786838 (Wash. Dec. 24, 1997).

CLEAR, CLEARER, CLEAREST

FACTS:

Cline was insured by Farmers. He was injured in an auto accident. He got the tort-feasor's liability limits of $208,415 and $24,000 in PIP from Farmers. But he wanted more.

So they went to UIM arbitration. Two of the three arbitrators issued an award that said: "The award … was $275,000." (Everyone felt this opaque statement represented the calculation of total damages proximately caused by the accident.)

Cline then filed a RCW 7.04 proceeding to obtain confirmation of the arbitration award. The superior court judge ruled that it was "clear" that Farmers was not entitled to the benefit of the $24,000 offset for the PIP benefits paid.

Farmers appealed to the Court of Appeals which ruled that it was "clear" that Farmers was entitled to the PIP offset.

Well, with everything being that clear, the Supreme Court accepted review so it could clear up the conflicting clarity. And the Supreme Court did find (well six of them did find)

that the answer was "clear": Neither the trial court nor the Court of Appeals had jurisdiction to answer the question of offset.

HOLDINGS:

(1) The rights of the parties to an arbitration are prescribed RCW 7.04. When parties have agreed by contract to arbitrate a dispute, the contract and arbitration submittal define and circumscribe the issues that may be arbitrated.

(2) In an action to confirm an arbitration award, judicial review is strictly limited to determining whether the award is within the court's jurisdiction and whether, on the face of an award, any of the grounds specified for vacating, modifying, or correcting the award is present; if none is, the court must confirm the award by reducing it to judgment.

(3) The court has no authority to enter judgment on matters collateral to the limited review authorized by statute or to determine if additional amounts should be awarded. Nor may the court conduct a trial de novo or search the four corners of the award to discern the parties' intent.

(4) An arbitration clause in an underinsured motorist policy permits the parties to arbitrate disputes over liability and damages; not disputes over insurance coverage.

(5) In an action under RCW 7.04.150 to confirm an arbitration award, the court may not rule on any issues not submitted to arbitration.

(6) An issue of coverage is for a court to decide and is not a proper subject for arbitration.

(7) When the amount of a proposed money judgment to be entered in an action to confirm an arbitration award remains in dispute because an ancillary issue not submitted to arbitration has yet to be resolved, the court should confirm the result of the arbitration in declaratory judgment form and render monetary judgment only to the extent that a sum may be determined absent resolution of the ancillary issue.

(8) The burden of demonstrating that there is an unresolved coverage dispute is on the insurer.

(9) The parties must resolve the remaining PIP offset coverage dispute by agreement or in a separate action.

COMMENT:

A rather anticlimactic, if not ignominious, conclusion to what the court said was a "fascinating question." It is also of some concern that while this case was argued in February 1997, it took the court nine months to issue an opinion saying it could not answer the question presented.

Three justices dissented making several points:

(1) The majority is wrong.

(2) Farmers is clearly entitled to the PIP offset.

(3) The court had jurisdiction over the parties; it had jurisdiction over the subject matter; and, it had jurisdiction to answer the PIP offset question, and enter a net judgment.

Price v. Farmers Ins. Co., 946 P.2d 388 (Wash. 1997).

MOMMIE DEAREST FOILED AGAIN …

FACTS:

Tammy got money from her mother, Nan, to pay for custody litigation. Nan became bitter when she realized Tammy's ex-husband's father was also financing the litigation. Nan asked Dennis, Tammy's then husband, to "murder or get somebody to murder" Tammy's ex-father-in-law and his attorney.

Dennis contacted Sheriff Suggs, who in turn told the North Carolina Bureau of Investigation. A special agent acted the part of a hit man and videotaped Nan requesting their murder and agreeing to pay $5,000 per body. She paid a $300 retainer.

Nan was found guilty of solicitation to commit murders and sentenced to nine years in prison. The would-be victims filed suit against Nan for intentional infliction of emotional distress. Nan turned to State Farm. Coverage was denied.

HOLDINGS:

Nan's insurer has no duty to defend or to provide coverage for emotional distress resulting from her murder plot. Nan's policy contains an express exclusion for bodily injury the insured expected or intended to inflict upon another.

COMMENT:

About the time we think we have seen about every silly claim imaginable, here comes one just a bit goofier than all the others.

Eubanks v. State Farm Fire and Cas. Co., 485 S.E.2d 870, rev. denied, 493 S.E.2d 452 (N.C. Ct. App. 1997).

MIGRANT WORKERS EXCLUSION DOES NOT STAND UP

FACTS:

Ramiro had driven four others from Oregon to Yakima in search of apple-picking jobs. They found no work; they did find booze. The accident occurred on the way home when Ramiro crashed head-on into Jose's truck. One died; others were severely injured. Ramiro admitted he had been drunk and pleaded guilty to vehicular assault and vehicular homicide.

Ramiro's insurer denied coverage because of a migrant workers exclusion. The exclusion provided:

> This coverage does not apply to bodily injury … if your covered auto is used to transport … migrant workers ….

The insurer also denied coverage because the car was being used to commit a felony.

The trial court agreed coverage should be denied based on the "migrant worker" exclusion but denied the insurer's motion for summary judgment based on the policy's "felony exclusion."

Division III tossed out both exclusions.

HOLDINGS:

(1) The migrant worker exclusion violates public policy in Washington. There is no increased risk of an accident simply because migrant workers are passengers in the car, and the provision disproportionately affects Hispanics.

(2) The migrant worker exclusion is ambiguous. The clause would deny coverage whenever a migrant worker rode as a passenger in the car regardless of purpose or destination.

(3) The felony exclusion is unenforceable in the context of an auto accident. Policies contain a felony exclusion to deny insurance for intentional infliction of injury. Victims should recover for a driver's unintentional actions although they are felonious.

(4) The felony exclusion is ambiguous. The term "commission of a felony" should apply only to intentional criminal acts. Ramiro acted recklessly, but did not deliberately commit a felony.

COMMENT:

Why are we not surprised at this result ? Did someone really think that a migrant workers exclusion phrased as this was would be upheld in an auto policy in Washington?

Mendoza v. Rivera-Chavez, 88 Wn. App. 261, 945 P.2d 232 (1997).

AND NOW FOR SOMETHING COMPLETELY DIFFERENT – PART II

FACTS:

Clyde and Betty Ross owned two automobiles, an AMC Eagle and a Chevrolet Monte Carlo. Clyde worked in Libby, Montana, while Betty maintained their family home in Spokane. He drove home most weekends in the couple's Eagle. Betty Ross drove the couple's Monte Carlo.

Clyde had purchased the Eagle in Montana. It was registered and licensed in Montana. The title listed Clyde as the owner.

Mr. and Mrs. Ross purchased one UIM policy. It covered the Chevrolet. After Mrs. Ross was involved in an accident in the Eagle, they sought the UIM protection they had not purchased.

In the superior court certain facts were stipulated to:

1. "Betty L. Ross … owned … the 1980 AMC Eagle involved in this accident."

2. Before the 1980 AMC was totaled … it was available for the regular use of Betty L. Ross …"

The UIM dispute turned on ownership and availability. There would be no UIM coverage if ***either*** of these situations exist:

1. Betty Ross owned the car;

OR

2. The car was available for Betty Ross's regular use.

COURT OF APPEALS HOLDINGS:

(1) Mr. Ross is not Mrs. Ross's spouse.

(2) Mrs. Ross did not own the Eagle.

(3) The Eagle was not available for Mrs. Ross's regular use.

(4) There is UIM coverage.

SUPREME COURT HOLDINGS:

(1) An insurance policy is given a fair, reasonable, and sensible construction as would be given by the average purchaser of insurance.

(2) An insurance policy is construed as a whole so as to give force and effect to each clause.

(3) Clear and unambiguous insurance policy language is enforced as written and may not be judicially modified or construed to create an ambiguity where none exists.

(4) An exclusionary clause in an insurance contract is construed most strictly against the insurer only with respect to ambiguities in its language.

(5) A legally married couple maintaining a full-time family residence in one state and a job-related temporary residence in another state, where one of them stays on weekdays, are "spouses" for purposes of an insurance policy that defines "spouse" as the insured's husband or wife "while living with the insured."

(6) Stipulated facts generally are binding on the parties and the court.

(7) A motor vehicle is "owned" by both spouses even though title to the vehicle is registered in the name of one spouse only.

(8) For purposes of an insurance policy excluding coverage for a named insured while operating a vehicle owned or available for the regular use of the insured or the insured's spouse, "regular use" does not depend upon the reason the vehicle is used.

(9) There is no UIM coverage.

COMMENT:

As was noted by Justice Alexander, in light of the stipulation that Mrs. Ross owned the car, the Court of Appeals' conclusion that she did not own the car "is inexplicable."

PERSONAL COMMENT:

Your Editor represented State Farm.

Ross v. State Farm Mut. Auto. Ins. Co., 132 Wn.2d 507, 940 P.2d 252 (1997).

THE SKI RELEASE RELEASE

FACTS:

Joyce bought some new ski boots. The ski shop adjusted Joyce's ski bindings for use with the new boots. She read and signed a release which provided in part:

> "I understand that the ski-boot-binding system will not release at all times or under all circumstances, nor is it possible to predict every situation in which it will release, and is therefore no guarantee of my safety. I therefore release the ski shop … from any and all liability for damage and injury to myself … resulting from negligence, the selection, adjustment and use of this equipment, accepting myself the full responsibility for any and all such damage or injury which may result."

Joyce fell while skiing. The bindings did not release. She injured her knee. She sued the ski shop alleging negligent adjustment of the bindings.

The trial court summarily dismissed the case.

Joyce appealed. The Court of Appeals affirmed.

HOLDINGS:

(1) Express assumption of risk is based on contract and involves an agreement by one party to relieve another party of the duty to use reasonable care.

(2) Express assumption of risk bars a claim resulting from risks actually assumed by the plaintiff; implied primary assumption of risk bars a claim resulting from specific known and appreciated risks.

(3) Implied reasonable or unreasonable assumptions of risk, involving a voluntary choice to encounter risks created by the negligence of another, are forms of contributory negligence and do not bar recovery.

(4) The agreement Joyce signed was an express release.

(5) An express assumption of risk applies to the risks actually assumed by a plaintiff. The release is to be strictly construed.

(6) Joyce expressly assumed the risk of injury resulting from the adjustment of her equipment.

COMMENT:

The only kernel of disappointment in a very well done opinion was the panel's refusal to characterize this claim as frivolous. It is a demeaning commentary on our society that individuals are not held responsible for their actions. Here Joyce, as a part of her transaction, read and signed an agreement with the ski shop wherein she said she understood that the binding system would not always work and there would be no guarantee of safety. She then released "The ski shop … from any … liability for … injury to [herself] … resulting from negligence, the selection, adjustment and use of this equipment." She said she accepted "the full responsibility for any … injury."

That was the agreement she made with the ski shop. She breached that agreement when she sued the ski shop. She should have been held responsible for the damages caused by that breach.

Johnson v. NEW, Inc., 948 P.2d 877 (Wash. App. 1997).

DO YOU KNOW WHERE YOUR CHILD RESIDES?

FACTS:

Mark and Jane got divorced. Their three children stayed with Mark every other weekend, one night a week, for a week at Christmas, and four weeks in the summer.

One month after the divorce, seventeen-year old Anne, used Dad's car to drive her twelve-year old sister back to Mom's house. Anne was involved in an accident. Her sister, Susan, died.

Mark's insurer denied UIM coverage because Susan was not a "resident" of Mark's household. The Superior Court agreed with Mark's insurer and granted summary judgment. The Court of Appeals reversed

HOLDINGS:

(1) Susan was a resident of her father's household. Under the parenting plan, she would have spent 140 days per year with her father, indicating Mark was involved in raising her.

(2) There is no "bright line" test for determining whether children of divorced parents are "residents" of a particular parent's household.

(3) The inquiry in each case is factual. The court must determine whether the child regularly spends time in the household in question, such that there exists a continuing expectation of the child's periodic return on intervals regular enough that the household is the child's home during the time the child is there, as opposed to a place of infrequent and irregular visits..

COMMENT:

The opinion reviewed the several cases which have examined the question of UIM coverage for the children of separated parents. The court noted that it had recently held that a child of divorced parents, each of whom maintained a home for the child, was "living with" her father at the time the child ran the mother's car off the road while returning with her mother from a vacation. ***Wolf v. League General Ins. Co***., 85 Wash. App. 113, 931 P.2d 184 (1997).

Adams v. Great Amer. Ins. Cos., 87 Wn. App. 883, 942 P.2d 1087 (1997).

BOYS WILL BE BOYS

FACTS:

Aleck and a couple of his good buds went on an afternoon drinking spree. As a chaser, they wrote the word "Foo" into the University of Illinois stadium's Astroturf with lighter fluid. Then they ignited it.

The fire caused $600,000 damage. Aleck's parents filed a claim under their homeowners' insurance policy.

The trial court held that the homeowners carrier did not have to defend Aleck's parents because the damage resulting from his actions was expected or intended. Aleck's parents appealed, claiming Aleck had no intention of burning the field to a crisp.

HOLDINGS:

An insurer has no duty to defend or to cover Aleck's extracurricular activities. Aleck expected or intended some fire damage even though things got a little hotter than he had anticipated.

COMMENT:

The opinion said it all in the first sentence: "Sometimes common sense prevails even in the law."

Nationwide Ins. v. Board of Trustees of the Univ. of Illinois, 116 F.3d 1154 (7th Cir. 1997).

DOUBLE DIPPING DISALLOWED

FACTS:

Victoria was a passenger in a car involved in a two-car accident. Safeco insured the driver of the car in which she rode. Safeco paid Victoria $2,302 in personal injury protection (PIP) benefits for her injuries.

The other driver's insurer settled Victoria's claim for the driver's policy limit, $20,000.

Safeco wanted its PIP money back. It argued Victoria would be overcompensated if allowed to keep the PIP benefits as well as the settlement.

Victoria sued Safeco, alleging bad faith, breach of contract, and violation of the Consumer Protection Act. The Superior Court granted Safeco's motion for summary judgment. It ruled Safeco could maintain its claim against Victoria until an arbitrator set the actual amount of her damages. Division I affirmed.

HOLDINGS:

(1) In equity the rule is that an insurer is entitled to reimbursement of benefits paid where the insured recovers payment for the same loss from a tort-feasor.

(2) The principle is that an injured party is entitled to be made whole but should not be allowed duplicate recovery.

(3) Under both the contract and equity Safeco holds a subrogation interest in any recovery Victoria might make from the tort-feasor.

(4) Safeco holds an interest in Victoria's settlement to the extent of benefits Safeco paid. The extent of that interest cannot be determined until the value of Victoria's claim has been determined by an arbitrator.

COMMENT:

A nice, clear layout of an area which is generally more misunderstood than understood.

Roberts v. Safeco Ins. Cos., 87 Wn. App. 604, 941 P.2d 668 (1997).

FULL LIABILITY SET OFF

FACTS:

Remedios was driving along on I-5. Sang's truck stalled. Margery collided with Sang's truck, pushing it into Remedios' car.

Sang had no insurance. Margery had $300,000 liability with Safeco, Remedio's had UIM coverage with Allstate.

Remedios sued Sang & Margery, and demanded UIM arbitration with Allstate. The arbitrators determined that Sang and Margery were each 50% at fault and that Remedios' damages were $60,000. Allstate pointed out that Margery's liability limits were greater than Remedios' damages, and thus there was no UIM exposure.

A lawsuit was filed to sort it out. Remedios settled with Safeco for $54,000. The trial court ruled in favor of Allstate. Remedios appealed, claiming he was entitled to either $30,000 or $6,000. The Court of Appeals said he was entitled to nothing.

HOLDINGS:

(1) The UIM statute covers damages by both non-insured and underinsured vehicles. The intent is that UIM insurance supplement but not supplant liability insurance. Liability insurance is primary; UIM insurance is secondary.

(2) A UIM arbitration constitutes an "adjudication of liability," equivalent to a judgment, for UIM coverage purposes.

(3) The arbitrators determined that the claimant was without fault and that the two tort-feasors were at fault. Thus, Sang and Margery are jointly and severally liable.

(4) Once applicable, a liability policy is applicable to the extent of its limits, and not merely to the extent of whatever payment the liability insurer negotiated with the injured claimant.

(5) Allstate can offset the full limit of Margery's liability policy because Sang and Margery were jointly and severally liable.

COMMENT:

About 6 years ago, a WSTLA speaker announced that UIM litigation was coming to an end because the courts had answered all the questions about UIM. Not only was he not a prophet then, he is probably still in error.

Allstate Ins. Co. v Batacan, No. 20035-0-II, 1997 WL 778873 (Wash. App. Dec. 19, 1977).

CRIMINAL ACTS EXCLUDED

FACTS:

Jim shot Ardis. He was charged and convicted of second-degree assault. That was reversed, and he plea bargained to second-degree reckless endangerment.

Ardis sued Jim. They both said the shooting was accidental. Jim was insured by Allstate. His policy had an exclusion for bodily injury which may reasonably be expected to result from the intentional or criminal acts of an insured person.

Allstate filed suit contending that the exclusion applied. The trial court granted summary judgment for Allstate. The Court of Appeals affirmed holding that the exclusion applied to any act for which a criminal violation might result. The Supreme Court granted review and affirmed with four justices holding that the term "criminal acts" covers both intentional and unintentional crimes and three justices holding that the term covers only those intentional and unintentional crimes that are "serious."

HOLDINGS:

(1) The insurance contract must be viewed in its entirety; a phrase cannot be interpreted in isolation. When construing the policy, the court should attempt to give effect to ***each*** provision in the policy.

(2) An ambiguity exists only if the language on its face is fairly susceptible to two different but reasonable interpretations.

(3) If the language in an insurance policy is clear and unambiguous, the court must enforce it as written and cannot modify the contract or create ambiguity where none exists.

(4) The claimed ambiguity does not exist. As used in Allstate's exclusionary clause, the phrase "criminal acts" does not distinguish between intentional and unintentional crimes. The language is unambiguous, and it clearly encompasses Jim's criminal act of reckless endangerment. The court must enforce the policy as written.

(5) Our reading of the phrase "criminal acts" is supported by nearly every jurisdiction in our country which has examined that phrase.

(6) It is not against public policy to allow an insurer to exclude coverage for injuries resulting from the unintentional but criminal acts of the insured.

COMMENT:

Extraordinarily well analyzed and well-written opinion. It is disappointing that only four members of the Court subscribed to the totality of the well-balanced majority opinion. A source of greater distress is in the fact two members of the Court would require all the Allstate policyholders to pay the bill for Jim's shooting of his guest.

Allstate Ins. Co. v. Peasley, 131 Wn.2d 420, 932 P.2d 1244 (1997).

AND THERE GOES ACID DOWN THE DRAIN

FACTS:

Santa Clara manufactured circuit boards in Redmond. In the course of the manufacturing process Santa Clara used acidic chemicals. It had a permit from Metro to dump its industrial waste into the municipal sewer system. The permit required Santa Clara to treat the wastes, to monitor the pH level, and to not dump anything with a pH below 5.5.

Over a 6-year period Santa Clara dumped waste with a pH less than 5.5 over 100 times, occasionally going below 2.5. Metro repeatedly notified Santa Clara of its violations, warning that it would be liable for any sewer pipe damage caused by the dumping.

After a TV inspection of the sewer revealed extensive pipe damage caused by the acid dumping, and after Santa Clara went bankrupt, Redmond sought to recover the damages from Santa Clara's CGL carrier.

The seven policies at issue provided coverage for " property damage … caused by an occurrence." "Occurrence" was defined to be "an accident, including continuous or repeated exposure to conditions, which results in … property damage neither expected nor intended from the standpoint of the insured."

The trial court ruled that as a matter of law there was no coverage. Division One of the Court of Appeals affirmed.

HOLDINGS:

(1) An insurance policy is construed as a whole and should be given a fair, reasonable, and sensible construction as would be given to the contract by the average person purchasing insurance.

(2) Undefined terms should be given their plain, ordinary, and popular meaning. For that reason, the ordinary meaning of undefined terms in an insurance policy may be ascertained using a standard English dictionary.

(3) If the language of an insurance contract is clear and unambiguous, a court must enforce it as written and may not modify the contract or create ambiguity where none exists.

(4) Damage is the result of an occurrence only when that damage was neither expected nor intended.

(5) Once Metro notified Santa Clara that sewer damage could occur from acidic discharges, Santa Clara had sufficient information to allow it to anticipate that sewer damage was likely to occur if it continued to discharge heavily acidic wastes into Redmond's sewers.

(6) The damage to Redmond's sewer pipes cannot reasonably be said to have been unexpected. It was therefore not an "occurrence."

COMMENT:

A wonderful, clear-cut, to-the-point, no-nonsense, opinion. It is tragic that it did not come out ten years ago, before others in the judiciary handed the insurance industry the bill for cleaning up after the industrialization of America.

City of Redmond v. Hartford Acc. & Indem. Ins. Co., 88 Wn. App. 1, 943 P.2d 665 (1997).

A LEAKY BOX

FACTS:

In November 1993 Dorothy was buried. In November 1994 Dorothy was dug up pursuant to the discovery program in a malpractice case. At that time it was discovered that the casket had leaked.

All of Dorothy's relatives sued the funeral parlor. The funeral parlor had had $3,000,000 in insurance. But it had been canceled in January 1994. The policy applied to bodily injury that occurred during the policy period. The insurance company pointed out that the injuries sustained by the family members occurred after the policy ended.

The funeral parlor argued that any wrongful conduct occurred while the policy was in force.

The court said there was no coverage.

HOLDINGS:

(1) The general rule is that the time of the occurrence of an accident within the meaning of an indemnity policy is not the time when the wrongful act was committed, but the time when the complaining party was actually damaged.

(2) It is immaterial when the event which caused the injury took place; the deciding factor is when the injury occurred.

Valiant Ins Co. v. Hamilton Funeral Services Centers, 926 F. Supp 127 (W.D. Ark. 1996).

With Sorrow, We Announce the Untimely Death of Our Partner,

ROGER L. STOUDER
1944-1997

Roger possessed the best qualities you seek in a lawyer and in a partner: loyalty, expertise, and high ethical standards.

Our firm and our profession were enhanced by his presence. We will miss him greatly.