

RECEIVED  
SUPREME COURT  
STATE OF WASHINGTON

No. 78667-4

2007 FEB 27 P 3:28

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

CLERK

KEVIN SHERRY,

Plaintiff/Respondent,

vs.

FINANCIAL INDEMNITY COMPANY,

Defendant/Petitioner.

FILED  
SUPREME COURT  
STATE OF WASHINGTON  
2007 MAR - 6 P 3:17  
CLERK

BRIEF OF AMICUS CURIAE  
WASHINGTON STATE TRIAL LAWYERS ASSOCIATION  
FOUNDATION

Debra L. Stephens  
WSBA No. 23013  
6210 E. Lincoln Ln.  
Spokane, WA 99217  
(509) 465-5702

Bryan P. Harnetiaux  
WSBA No. 5169  
517 E. 17th Avenue  
Spokane, WA 99203  
(509) 624-3890

On Behalf of  
Washington State Trial Lawyers Association Foundation

## TABLE OF CONTENTS

I.	IDENTITY AND INTEREST OF AMICUS CURIAE	1
II.	INTRODUCTION AND STATEMENT OF THE CASE	1
III.	ISSUES PRESENTED	3
IV.	SUMMARY OF ARGUMENT	4
V.	ARGUMENT	5
A.	Jurisdiction Should Lie To Resolve The PIP Reimbursement Issue By Ch. 7.24 RCW Declaratory Relief Incident To A Confirmation Proceeding.	5
1.)	Background Regarding Confirmation Proceedings Under Former RCW 7.04.150, And The Holdings In <i>Dayton</i> And <i>Price</i> .	5
2.)	The Declaratory Judgment Act, Ch. 7.24 RCW, Allows The Superior Court To Exercise Its Inherent Authority To Provide Declaratory Relief Incident To A Confirmation Proceeding.	8
B.	Under The <i>Thiringer</i> “Made Whole” Rule, A PIP Insurer Cannot Consider An Insured’s Comparative Fault In Determining Entitlement To Reimbursement Of No-Fault PIP Benefits.	11
1.)	PIP Reimbursement Is Allowed To Prevent A Double Recovery When An Insured Is Fully Compensated For His Loss; Full Compensation Is Not Measured By The Amount The Insured May Be “Legally Entitled To Recover” Under UIM Coverage.	12
2.)	An Insured’s Comparative Fault Does Not Prevent Him From Being An “Innocent Automobile Accident Victim” Under The <i>Thiringer</i> Rule.	17

3.)	The Value Of No-Fault PIP Coverage Would Be Undermined By Allowing Consideration Of An Insured's Fault In Determining Entitlement To PIP Reimbursement.	19
-----	--	----

VI.	CONCLUSION	20
-----	------------	----

APPENDIX

## TABLE OF AUTHORITIES

### Cases

<u>Barney v. Safeco Ins. Co.</u> , 73 Wn. App. 426, 869 P.2d 1093 (1994), <i>overruled on other grounds</i> , <u>Price v. Farmers Ins. Co.</u> , 133 Wn.2d 490, 946 P.2d 388 (1997)	13
<u>Britton v. Safeco Ins. Co. of Am.</u> , 104 Wn.2d 578, 707 P.2d 125 (1985)	15
<u>Brown v. Snohomish Cy. Phys. Corp.</u> , 120 Wn.2d 747, 845 P.2d 334 (1993)	14,15,20
<u>Christman v. General Constr. Co.</u> , 2 Wn. App. 364, 467 P.2d 867, <i>review denied</i> , 78 Wn.2d 994 (1970)	18
<u>Cook v. USAA Cas. Ins. Co.</u> , 121 Wn. App. 844, 90 P.3d 1154 (2004)	17
<u>Cooper &amp; Co. v. Anchor Sec. Co.</u> , 9 Wn.2d 45, 113 P.2d 845 (1941)	17
<u>Dayton v. Farmers Insurance Group</u> , 124 Wn.2d 277, 876 P.2d 896 (1994)	6-8,11
<u>Detweiler v. J.C. Penney Cas. Ins. Co.</u> , 110 Wn.2d 99, 751 P.2d 282 (1988)	8
<u>Godfrey v. Hartford Cas. Ins. Co.</u> , 142 Wn.2d 885, 16 P.3d 617 (2001)	9
<u>Hamm v. State Farm Mut. Auto. Ins. Co.</u> , 151 Wn.2d 303, 88 P.3d 395 (2004)	passim
<u>Keenan v. Industrial Indem.</u> , 108 Wn.2d 314, 738 P.2d 270 (1987), <i>overruled on other grounds</i> , <u>Price v. Farmers Ins. Co.</u> , 133 Wn.2d 490, 946 P.2d 388 (1997)	12-15,17
<u>Little v. Catania</u> , 48 Wn.2d 890, 297 P.2d 255 (1956)	10

<u>Mahler v. Szucs,</u> 135 Wn.2d 398, 957 P.2d 632, 966 P.2d 305 (1998)	12-14,20
<u>Maziarski v. Bair,</u> 83 Wn.App. 835, 924 P.2d 409 (1996)	19
<u>Munden v. Hazelrigg,</u> 105 Wn.2d 39, 711 P.2d 295 (1985)	10,11
<u>Price v. Farmers Ins. Co.,</u> 133 Wn.2d 490, 946 P.2d 388 (1997)	passim
<u>Safeco Ins. Co. v. Woodley,</u> 150 Wn.2d 765, 82 P.3d 660 (2004)	12,15,16,20
<u>Sayan v. United Serv. Auto. Ass'n,</u> 43 Wn. App. 148, 716 P.2d 895 (1986)	16
<u>Sherry v. Fin. Indem. Co.,</u> 132 Wn.App. 355, 131 P.3d 922 (2006), <i>review granted,</i> 158 Wn.2d 1025 (2007)	passim
<u>Thiringer v. American Motors Ins. Co.,</u> 91 Wn.2d 215, 588 P.2d 191 (1978)	passim
<u>Tolson v. Allstate Ins. Co.,</u> 108 Wn. App. 495, 32 P.3d 289 (2001)	16
<u>Walker v. Munro,</u> 124 Wn.2d 402, 879 P.2d 920 (1994)	9
<u>Washburn v. Beatt Equip. Co.,</u> 120 Wn.2d 246, 840 P.2d 860 (1992)	16
<u>Winters v. State Farm,</u> 144 Wn.2d 869, 31 P.3d 1164 (2001)	13,14,15,17,20
<u>Young v. Riley,</u> 59 Wn.2d 50, 365 P.2d 769 (1961)	10

**Rules and Statutes**

2005 Laws Ch. 433	6
Ch. 7.04 RCW	2,6
Ch. 7.04A RCW	6
Ch. 7.24 RCW	passim
CR 57	6,11
CR 81	6,11
RCW 7.04.010	3,6
RCW 7.04.150	passim
RCW 7.04A.010	6
RCW 4.22.070	6,16
RCW 4.22.070(1)	16
RCW 7.24.010; .050	11
RCW 7.24.010; .146	11
RCW 7.24.120	11
RCW 48.22.030	6,13,19
RCW 48.22.030(1)	15-16
RCW 48.22.030(12)	18
RCW 48.22.085-.100	20
RCW 48.22.090(1)	18,19

## I. IDENTITY AND INTEREST OF AMICUS CURIAE

The Washington State Trial Lawyers Association Foundation (WSTLA Foundation) is a not-for-profit corporation organized under the laws of Washington, and a supporting organization of the Washington State Trial Lawyers Association (WSTLA). WSTLA Foundation, which operates the amicus curiae program formerly operated by WSTLA, has an interest in the rights of injured persons seeking legal redress in the civil justice system, including the rights of insureds.

## II. INTRODUCTION AND STATEMENT OF THE CASE

This case involves the interface between two distinct types of automobile insurance, Personal Injury Protection (PIP) and Underinsured Motorist (UIM) coverage, and when reimbursement for PIP benefits paid may be obtained from a UIM arbitration award. For purposes of this amicus curiae brief, the facts are drawn from the Court of Appeals opinion and the briefing of the parties. See Sherry v. Fin. Indem. Co., 132 Wn.App. 355, 131 P.3d 922 (2006), *review granted*, 158 Wn.2d 1025 (2007); Sherry Br. at 1-3; FIC Br. at 1-9; Sherry Reply Br. at 1; FIC Pet. for Rev. at 4-8; Sherry Ans. to Pet. for Rev. at 1-2; FIC Supp. Br. at 3-4.

Kevin Sherry (Sherry) was insured under an automobile insurance policy issued by Financial Indemnity Company (FIC), which included both PIP and UIM coverages. Sherry was injured in a car-pedestrian accident with a motorist who had no insurance. FIC paid \$10,000 in PIP medical benefits and \$4,600 in PIP wage loss benefits. Sherry and FIC

could not agree on his total damages caused by the automobile accident, and proceeded to arbitration on the UIM claim. The UIM arbitrator determined that Sherry's damages totaled \$143,127.92 (specifying \$53,127.92 special damages and \$90,000 general damages). The arbitrator further determined that Sherry was 70% at fault for the accident, reducing the amount he was legally entitled to recover under his UIM coverage to \$42,938.38, representing 30% of his total damages.

Sherry sought to confirm the arbitrator's award in superior court, pursuant to former RCW 7.04.150. Around the same time FIC asked the arbitrator, post-award, to determine its right to reimbursement of the PIP benefits. At the request of both parties the superior court, in conjunction with the confirmation proceeding, considered the issue of PIP reimbursement, notwithstanding its awareness of the holding in Price v. Farmers Ins. Co., 133 Wn.2d 490, 501-02, 946 P.2d 388 (1997), concerning the limited scope of an arbitration confirmation proceeding under Ch. 7.04 RCW. See Sherry Supp. Br. at 2-3. It concluded that FIC was entitled to a full offset of PIP payments against the UIM award, less a pro rata share of Sherry's attorney fees. See Sherry, 132 Wn. App. at 359-60.

The Court of Appeals reversed. Preliminarily, it held that the superior court had jurisdiction to pass upon the PIP offset issue, concluding the court had provided declaratory relief under its general jurisdiction in conjunction with the RCW 7.04.150 confirmation

proceeding. Id. On the merits, the Court of Appeals held that FIC was not entitled to an offset because Sherry was not fully compensated for his damages, as required by Thiringer v. American Motors Ins. Co., 91 Wn.2d 215, 588 P.2d 191 (1978), in light of the reduction in the UIM recovery due to his comparative fault. Sherry at 362-71. It concluded:

PIP payments are not based on fault of the insured; they are payable regardless of the insured's fault, and the application of the fault concept appropriate in UIM coverage is not applicable for determining offsets for PIP payments. The rule we announce in interpreting the coverage for "at-fault" insureds is that the insurer cannot offset PIP payments until the insured has been fully compensated for the total damages. Because Sherry was not fully compensated, the trial court erred in its determination that FIC was entitled to an offset ....

Id. at 370-71 (footnote omitted).

FIC petitioned for review by this Court, which was granted. The order granting review directed the parties to file supplemental briefs "addressing the issue of whether the trial court had jurisdiction to offset the arbitration award under former RCW 7.04.150." See Order (January 3, 2007).

### III. ISSUES PRESENTED

1. In conjunction with a confirmation proceeding under RCW 7.04.010, does the superior court have the inherent authority to provide declaratory relief regarding whether the UIM arbitration award is subject to PIP reimbursement?
2. For purposes of determining an insurer's entitlement to reimbursement of no-fault PIP benefits from a UIM arbitration award, may a reduction in the insured's UIM recovery due to comparative fault be taken into account?

#### IV. SUMMARY OF ARGUMENT

##### *Re: Jurisdiction to Consider PIP Reimbursement*

A proceeding to confirm an arbitration award under RCW 7.04.150 does not invoke the general jurisdiction of the superior court, and an insured's entitlement to PIP reimbursement cannot be resolved in such a proceeding. The issue must be resolved in a civil action invoking the general jurisdiction of the court, such as a declaratory judgment action under Ch. 7.24 RCW. However, the PIP reimbursement issue may be resolved *incident to* a confirmation proceeding, where the superior court has the inherent authority to append declaratory relief to a confirmation proceeding. Given the nature of Washington's declaratory judgment act, the mandated liberal construction of this act, and the interests of judicial economy, the Court should uphold the superior court's exercise of its inherent authority under the circumstances presented here.

##### *Re: PIP Reimbursement*

It is a fundamental tenet of Washington insurance law that an insurer is not entitled to recoup first-party PIP benefits paid to its insured unless and until the insured has received full compensation for his damages from a responsible third party and/or UIM coverage. This is the so-called "made whole" rule that has grounded this Court's jurisprudence since Thiringer v. American Motors Ins. Co., 91 Wn.2d 215, 588 P.2d 191 (1978). Once a full recovery has occurred, an insured may contractually

be obligated to reimburse prior PIP payments so as to prevent a double recovery.

No potential for a double recovery exists when an insured receives less in UIM coverage than the total damages caused by the automobile accident, whether due to inadequate insurance, an immune tortfeasor or a reduction in recovery due to comparative fault. In any of these situations, the insured does not receive a full recovery, much less a double recovery, and the predicate for the insurer's right to reimbursement is not satisfied. It is irrelevant whether the insured received all that he was "legally entitled to recover" under the tort-based principles governing UIM coverage, if he otherwise suffered losses that remain uncompensated.

Application of the equitable made whole rule does not require a fault-free insured. The reference in Thiringer to protection of "innocent" accident victims speaks to the general principle of the law favoring adequate indemnification for such victims. This notion of innocence may also address the insured accident victim's corresponding obligation not to prejudice the insurer's rights. Under Thiringer "innocent" does not equate to "non-negligent."

Lastly, to allow a PIP insurer to recover its payments based on the insured's negligence, when the insured has not obtained a full recovery, is at odds with the "no-fault" nature of PIP insurance. The insured has paid a separate premium for this no-fault coverage, and is entitled to the full benefit of his insurance.

## V. ARGUMENT

### A. Jurisdiction Should Lie To Resolve The PIP Reimbursement Issue By Ch. 7.24 RCW Declaratory Relief Incident To A Confirmation Proceeding.

#### 1.) Background Regarding Confirmation Proceedings Under Former RCW 7.04.150, And The Holdings In *Dayton And Price*.

Confirmation proceedings under former Ch. 7.04 RCW do not involve the general jurisdiction of the superior court. See RCW 7.04.010 & .150; *Price v. Farmers Ins. Co.*, 133 Wn.2d 490, 498, 946 P.2d 388 (1997).<sup>1</sup> Instead, in a confirmation proceeding:

The jurisdiction of the superior court is limited by the nature of the special statutory proceeding to resolve only those questions properly submitted to the arbitrators and costs; so as to reduce to judgment only such matters properly submitted to arbitration and as the parties may otherwise agree.

*Id.*, 133 Wn.App. at 498 (footnote omitted).

On two separate occasions, this Court held that issues related to an underlying UIM arbitration award, but falling outside the arbitration clause, could not be resolved in a confirmation proceeding under RCW 7.04.150. See *Dayton v. Farmers Insurance Group*, 124 Wn.2d 277, 876 P.2d 896 (1994); *Price v. Farmers Ins. Co.*, *supra*.

In *Dayton*, the insured sought an award of attorney fees in the confirmation proceeding. The underlying UIM award did not include a

---

<sup>1</sup> Ch. 7.04 RCW has been superseded by Ch. 7.04A RCW, effective January 1, 2006. See 2005 Laws Ch. 433 (codified as RCW 7.04A.010 *et seq.*). Former RCW 7.04.010 & .150 are reproduced in the Appendix for the convenience of the Court, as are current versions of the following statutes and court rules referenced elsewhere in this brief: RCW 4.22.070; RCW 7.24.010, .050, .120, .146; RCW 48.22.030, .085, .090, .095, .100; CR 57 & CR 81.

component for attorney fees. This Court held the superior court “exceeded its authority” in awarding attorney fees. Dayton, 124 Wn.2d at 278. It concluded the court did not have the collateral authority to go behind the face of the arbitration award and determine whether additional amounts were appropriate. Id. at 280. The Court did not comment upon the method by which this related issue could be resolved. Id.<sup>2</sup>

In Price the Court was asked once again to allow the superior court to resolve an issue related to the underlying UIM arbitration in a confirmation proceeding governed by RCW 7.04.150. This time the insurer sought PIP reimbursement by way of an offset against the UIM arbitration award, where the offset issue was not subject to arbitration. Price at 495-502. Once again the Court held the superior court was without jurisdiction to address this type of issue in the confirmation proceeding. Id. at 498, 501-02. The superior court was limited to addressing those issues subject to arbitration, or otherwise agreed upon by the parties. Id. at 498. In this instance the Court discussed how this related issue could be resolved:

The parties must either resolve the remaining PIP offset coverage dispute by agreement or commence a separate action under the superior court’s general jurisdiction to determine the amount and propriety of the claimed PIP offset and enter the corresponding monetary judgment.

---

<sup>2</sup> Notwithstanding this outcome-determinative jurisdictional holding, the Court discussed in *dicta* why an attorney fee award would not have been appropriate in any event. Id., 124 Wn.2d at 280-82.

Id. at 502; see also id. at 498 (noting availability of declaratory judgment action for resolving coverage issues, quoting Detweiler v. J.C. Penney Cas. Ins. Co., 110 Wn.2d 99, 113, 751 P.2d 282 (1988)).

Neither Dayton nor Price involved the situation in which the superior court issued declaratory relief *incident to* a confirmation proceeding. This is what happened in this case. The superior court did so with Price in mind, and the Court of Appeals upheld this approach, finding what occurred to be the functional equivalent of a declaratory judgment. See Sherry Supp. Br. at 2-3; Sherry, 132 Wn.App. at 361. The question for this Court, unanswered by Dayton or Price, is whether the superior court had the inherent authority to provide declaratory relief incident to conducting the confirmation proceeding.<sup>3</sup>

**2.) The Declaratory Judgment Act, Ch. 7.24 RCW, Allows The Superior Court To Exercise Its Inherent Authority To Provide Declaratory Relief Incident To A Confirmation Proceeding.**

---

<sup>3</sup> WSTLA appeared as amicus curiae in Dayton, but only addressed the attorney fees award issue. See Brief of Amicus Curiae Washington State Trial Lawyers Association (S.C. #60307-3), dated March 8, 1994. WSTLA also appeared as amicus curiae in Price. See Brief of Amicus Curiae Washington State Trial Lawyers Association (S.C. #64257-5), dated February 7, 1997. WSTLA addressed the jurisdictional issue in Price, urging that the PIP reimbursement dispute was not cognizable in a confirmation proceeding governed by RCW 7.04.150. It argued:

Where PIP offset is not subject to arbitration under the arbitration clause, a party may litigate this issue in a civil action invoking the general jurisdiction of the superior court. More particularly, an insured or insurer seeking resolution of a PIP offset dispute may bring a common law civil action sounding in contract or a declaratory judgment action under Chapter 7.24 RCW. Such an action can be orchestrated to resolve the offset issue in conjunction with a confirmation proceeding regarding a related arbitration award.

WSTLA Price Am. Br. at 10-11 (footnotes omitted). This amicus curiae brief did not address the issue presented here – whether declaratory relief under Ch. 7.24 RCW can be provided incident to a confirmation proceeding.

Under Price a PIP reimbursement question cannot be resolved in a confirmation proceeding governed by RCW 7.04.150. See 133 Wn.2d at 495-502. More generally, parties cannot agree to expand the jurisdiction of the superior court on review of an arbitration award. See Godfrey v. Hartford Cas. Ins. Co., 142 Wn.2d 885, 894-96, 16 P.3d 617 (2001) (and cases cited therein). Nonetheless, the Court of Appeals below upheld the superior court's authority to reach the PIP reimbursement issue in conjunction with the confirmation proceeding. See Sherry, 132 Wn.App. at 360-62. In so doing, it held:

Here, the parties acted as though they had brought a separate declaratory judgment to determine the PIP offset as required by *Price*. They fully litigated the issue, and the trial court rendered judgment. Because this action was resolved under the trial court's general jurisdiction, as a declaratory judgment, the issue was properly before the trial court.

Id. at 361. Essentially, the court regarded the request for declaratory relief as incident or adjunct to the confirmation proceeding. However, it did not explicate the declaratory judgment act, Ch. 7.24 RCW, or explore analogous cases in which a court was asked to append a claim subject to the general jurisdiction of the court to a proceeding where it otherwise had only limited jurisdiction.

Generally, case law in analogous areas suggests that a court cannot consider a claim requiring general jurisdiction in a special proceeding that involves only limited jurisdiction. See e.g. Walker v. Munro, 124 Wn.2d 402, 411, 879 P.2d 920 (1994) (refusing declaratory relief incident to an original proceeding in the Supreme Court for mandamus; mandamus

otherwise found unavailable under the circumstances); Little v. Catania, 48 Wn.2d 890, 893, 297 P.2d 255 (1956) (refusing to convert unlawful detainer proceeding involving limited jurisdiction into civil action involving court's general jurisdiction); Young v. Riley, 59 Wn.2d 50, 52-53, 365 P.2d 769 (1961) (disallowing, in unlawful detainer proceeding, assertion of a set-off or counterclaim). On the other hand, in Munden v. Hazelrigg, 105 Wn.2d 39, 45-47, 711 P.2d 295 (1985), this Court upheld the inherent authority of the superior court to convert an unlawful detainer action into a civil action for damages, once possession of the property ceased to be an issue. In upholding the superior court's actions, the Court concluded:

Justification for this collateral rule is readily apparent. Such a policy will promote judicial economy by preventing a multiplicity of lawsuits. Additionally, conversion of an unlawful detainer action to a civil suit spares the expense and inconvenience to all parties of maintaining two suits.

\* \* \*

In summary, we emphasize that by this holding we preserve the summary nature of a statutory unlawful detainer action. We merely adopt an adjunct to the general rule prohibiting claims unrelated to the issue of possession in unlawful detainer proceedings. We also note that the trial court has inherent power to fashion the method by which an unlawful detainer action is converted to an ordinary civil action. The court may require amended pleadings to convert the unlawful detainer to a civil suit.

105 Wn.2d at 46-47.

The sensibilities expressed in Munden should be taken into consideration in determining whether declaratory relief pursuant to Ch. 7.24 RCW may be an adjunct to an arbitration confirmation

proceeding. The question is whether Ch. 7.24 RCW permits such an approach. As previously indicated, Price did not address this issue.

There are indications the declaratory judgment act allows for such flexibility. First, there is no requirement that declaratory relief be sought in a free-standing action. See RCW 7.24.010, .050. Second, the act applies to both “actions” and “proceedings.” See RCW 7.24.010, .146. Third, the act is remedial and must be liberally construed, as “its purpose is to settle and to afford relief from uncertainty and insecurity with respect to rights, status and other legal relations ....” RCW 7.24.120. Lastly, CR 57 (re: declaratory judgments) and CR 81 (re: applicability of civil rules) would not appear to prohibit appending a request for declaratory relief to a confirmation proceeding. See Appendix.

The Court should uphold the superior court’s exercise of its inherent authority in awarding declaratory relief regarding PIP reimbursement, incidental or adjunct to the confirmation proceeding. Such a result is also in keeping with the principle of judicial economy, and otherwise leaves intact this Court’s holdings in Dayton and Price, refusing to expand the limited jurisdiction of the confirmation proceeding itself.

**B. Under The *Thiringer* “Made Whole” Rule, A PIP Insurer Cannot Consider An Insured’s Comparative Fault In Determining Entitlement To Reimbursement Of No-Fault PIP Benefits.**

1.) **PIP Reimbursement Is Allowed To Prevent A Double Recovery When An Insured Is Fully Compensated For His Loss; Full Compensation Is Not Measured By The Amount The Insured May Be “Legally Entitled To Recover” Under UIM Coverage.**

An insurer may contract with its insured to be reimbursed for payments made under PIP coverage if its insured recovers damages for PIP-covered losses from a responsible tortfeasor and/or UIM insurer, thereby preventing a double recovery. See Thiringer v. American Motors Ins. Co., 91 Wn.2d 215, 219-20, 588 P.2d 191 (1978); Keenan v. Industrial Indem., 108 Wn.2d 314, 317-18, 738 P.2d 270 (1987), *overruled on other grounds*, Price v. Farmers Ins. Co., 133 Wn.2d 490, 946 P.2d 388 (1997); Hamm v. State Farm Mut. Auto. Ins. Co., 151 Wn.2d 303, 309, 88 P.3d 395 (2004); see also Safeco Ins. Co. v. Woodley, 150 Wn.2d 765, 770, 82 P.3d 660 (2004) (noting PIP insurers “generally contract for a right to receive reimbursement of PIP benefits if an insured recovers from the tortfeasor, from a UIM carrier, or both”). Whether contractual provisions are framed in an automobile insurance policy in terms of a “non-duplication of benefits” clause under UIM coverage, a “subrogation” clause under PIP coverage, or otherwise, they are “valid only to the extent they serve as mechanisms to accomplish the PIP right to reimbursement.” Hamm, 151 Wn.2d at 311 n.4; see also Mahler v. Szucs, 135 Wn.2d 398, 417-18, 436, 957 P.2d 632, 966 P.2d 305 (1998).

An insurer’s contractual right to reimbursement arises only when it proves that the insured has made a full recovery, so that retaining PIP

benefits would amount to a double recovery. See Thiringer, 91 Wn.2d at 219-20; Keenan, 108 Wn.2d at 319; Mahler, 135 Wn.2d at 416-17; Hamm at 309; see also Winters v. State Farm, 144 Wn.2d 869, 876, 31 P.3d 1164 (2001) (noting “[w]hatever term is used, the insured must be fully compensated before the insurer may recoup benefits paid”). This is the so-called “made whole” rule first announced in Thiringer. See 91 Wn.2d at 219; Mahler at 417 (describing this as “full compensation for the insured” rule).<sup>4</sup>

The principal question in this case is what constitutes “full compensation,” in particular whether an insured who, by reason of comparative fault, receives less than (or none of) his established damages in a tort action or UIM proceeding, is deemed to have been “made whole.” FIC urges that once an insured receives all he is “legally entitled to recover” in a UIM proceeding governed by RCW 48.22.030, he has received full compensation, and must reimburse his PIP insurer for its prior payments. See FIC Br. at 17-19; FIC Supp. Br. at 13-14; see also Sherry, 132 Wn.App. at 365. This argument misapprehends the meaning of “full compensation” and conflates the distinct purposes of PIP and UIM coverages.

---

<sup>4</sup> The Thiringer “made whole” or “full compensation for the insured” rule is equitable in nature, and grounded in public policy. See Thiringer at 219-20; Mahler at 417-18. Accordingly, while it is necessary that an automobile insurer seeking reimbursement include a provision in its contract, see Barney v. Safeco Ins. Co., 73 Wn. App. 426, 869 P.2d 1093 (1994), *overruled on other grounds*, Price v. Farmers Ins. Co., 133 Wn.2d 490, 946 P.2d 388 (1997), it cannot enforce a provision that subverts the Thiringer doctrine. See Mahler at 417, 436; Winters at 876; Hamm at 309.

Full compensation, within the meaning of the Thiringer rule, contemplates that the insured has made a complete recovery of the losses he suffered as a result of an automobile accident. Various phrasings of this principle appear throughout the cases. The Court in Thiringer required that “the insured [be] fully compensated for his loss,” 91 Wn.2d at 219, and rejected the notion that reimbursement could be sought “if the insured recovers less than his total damages from [the responsible] party,” *id.* at 220. In Keenan, the Court reiterated that a reduction in PIP benefits is only permissible “if the insured received full compensation for his loss,” noting that the “key factor [is] the presence or absence of double recovery.” 108 Wn.2d at 319. Similarly, the Court in Brown v. Snohomish Cy. Phys. Corp., 120 Wn.2d 747, 754, 845 P.2d 334 (1993), emphasized that a PIP insurer’s reimbursement right arises only as to the “*excess* which the insured has received from the wrongdoer, remaining after the insured is fully compensated for his loss... .” (quoting Thiringer at 219; emphasis added). It concluded that full compensation requires recovery of “general damages and other special damages ... .” *Id.* at 757.

More recent cases confirm that the focus of the “made whole” rule is on the actual losses suffered by the insured, not the recovery he is able to obtain in a tort action or UIM proceeding. In Mahler, the Court described Thiringer as announcing a “full compensation for the insured” rule. 135 Wn.2d at 417. The Court repeated the “full compensation” requirement in Winters, stating that a PIP insurer’s right to reimbursement

is dependent upon the insured having first received full compensation for his loss. 144 Wn.2d at 876, 879, 881, 882. In Hamm, the Court focused on the “overlap” that often exists between PIP and UIM coverages, noting:

If the insured subsequently *recovers the total amount of her damages* from another source (the tortfeasor, her UIM carrier, or both), the PIP coverage becomes redundant. Therefore, when the insured *receives full recovery*, the PIP carrier may seek reimbursement from its insured for the PIP benefits it previously paid. See Winters, 144 Wn.2d at 876 (“the insured must be fully compensated before the insurer may recoup benefits paid”).

151 Wn.2d at 309 (emphasis added); see also Woodley at 770 (noting PIP and UIM coverages overlap when UIM covers “the medical expenses, loss of income, and other damages that are also covered by PIP”). This focus on the potential for *redundancy* of PIP and UIM coverages underscores that the Thiringer rule operates only to prevent double recovery. See Keenan at 319; Brown at 755; Hamm at 309.

Throughout this Court’s jurisprudence, there is no suggestion that “full compensation” for purposes of PIP reimbursement is the equivalent of what an insured is “legally entitled to recover” under UIM coverage. Rather, this latter concept is drawn from the UIM statute, RCW 48.22.030(1), establishing the predicate for payment of UIM benefits within a *fault-based* framework, insofar as the UIM insurer stands in the shoes of an at-fault tortfeasor. See Britton v. Safeco Ins. Co. of Am., 104 Wn.2d 578, 581, 707 P.2d 125 (1985); Hamm at 308.

Notably, even within the tort liability framework, there is a clear distinction between a plaintiff’s “total damages” and the amount he is

entitled to recover from an at-fault entity. See e.g. RCW 4.22.070(1) (noting “[j]udgment shall be entered against each defendant ... in an amount which represents that party’s proportionate share of the claimant’s total damages”). Thus, both the UIM statute, RCW 48.22.030(1) and the proportionate liability scheme in RCW 4.22.070 contemplate that an injured person may not be legally entitled to recover all (or any) of his total damages. See e.g. Sayan v. United Serv. Auto. Ass’n, 43 Wn. App. 148, 716 P.2d 895 (1986) (holding insured not “legally entitled to recover” UIM benefits for injuries caused by negligent, but immune uninsured motorist); Washburn v. Beatt Equip. Co., 120 Wn.2d 246, 297, 840 P.2d 860 (1992) (explaining proportionate liability under RCW 4.22.070 includes risk that plaintiff may obtain less than full recovery). Whatever the reason an insured’s recovery falls short - whether due to inadequate insurance, a judgment-proof or immune tortfeasor or a reduction in his recovery in proportion to his fault - absent full compensation he is not made whole. In such situations the insured will not obtain a full recovery, much less a double recovery.<sup>5</sup>

---

<sup>5</sup> FIC argues that Tolson v. Allstate Ins. Co., 108 Wn. App. 495, 32 P.3d 289 (2001), supports PIP reimbursement here so long as Sherry recovers all that he is legally entitled to based on the UIM proceeding. See FIC Br. at 13-15; FIC Supp. Br. at 16. This is incorrect. The Court of Appeals’ reasoning in Tolson was based on the premise that the insured had made a full recovery of his losses due to the automobile accident. See Tolson, 108 Wn. App. at 499-500. Here, the Court of Appeals determined that Sherry’s losses due to the automobile accident far exceeded his UIM recovery. See Sherry, 132 Wn. App. at 368.

Nonetheless, Tolson is troubling, and should be disapproved to the extent it holds that medical expenses the PIP insurer determined were related to the accident must be reimbursed from UIM payments, even though they were not duplicated in the UIM recovery. See 108 Wn. App. at 499. PIP and UIM coverages overlap only where they provide *redundant benefits*. See Hamm at 309; Woodley at 770. There may be available remedies for a PIP insurer that erroneously pays medical expenses unrelated to an

2.) **An Insured's Comparative Fault Does Not Prevent Him From Being An "Innocent Automobile Accident Victim" Under The *Thiringer* Rule.**

FIC argues that the Thiringer "made whole" or "full compensation" rule does not apply to an at-fault insured. See FIC Br. at 15-17; FIC Supp. Br. at 13-15. It seizes upon the sentence in Thiringer stating, "[t]his rule embodies a policy deemed socially desirable in this state, in that it fosters the adequate indemnification of *innocent* automobile accident victims." 91 Wn.2d at 220 (citation omitted; emphasis added). This sentence must be read in context. The "rule" the Court describes as socially desirable focuses on fully indemnifying an insured accident victim for his loss, subject only to reimbursement for any "excess" amount representing a double recovery. See id. at 219.<sup>6</sup>

The notion of innocence referenced in Thiringer may also be seen as requiring that the insured act in a way that does not prejudice the insurer. See 91 Wn.2d at 218-21. This is consistent with the recognition that the subrogation principles underlying the Thiringer rule are equitable in nature. See id. at 220; see also Cooper & Co. v. Anchor Sec. Co., 9

---

accident. See Keenan at 318 n.1 (suggesting PIP insurer that overpays may seek restitution). However, an insurer should not be allowed to recoup no-fault benefits by offsetting UIM benefits, simply because it provides both coverages. See Winters at 882 (noting "[t]he insured should not be worse off simply because he or she purchased two coverages from the same insurer").

<sup>6</sup> The Court of Appeals below additionally referenced Cook v. USAA Cas. Ins. Co., 121 Wn. App. 844, 848, 90 P.3d 1154 (2004), in which Division I of the court observed that "Washington courts have applied the Thiringer rule only when a third party is liable to the insured." See Sherry at 369. While the court below appropriately distinguished Cook on the ground that, here a third party was liable to Sherry, there is a more fundamental distinction. In Cook, the insureds received the full benefit of the first-party casualty insurance they purchased. In contrast, Sherry will not receive the benefit of the no-fault PIP coverage he purchased if FIC's reimbursement claim is recognized in the absence of

Wn.2d 45, 71-73, 113 P.2d 845 (1941) (explaining equity requires party to act with “clean hands”). Indeed, the one case FIC references regarding this notion of innocent conduct involved whether equitable estoppel applied under the circumstances. See FIC Br. at 17 (citing Christman v. General Constr. Co., 2 Wn. App. 364, 467 P.2d 867 (holding equitable estoppel only available to “innocent party”), *review denied*, 78 Wn.2d 994 (1970)). FIC offers no authority that equitable doctrines are only available to parties that are fault-free under tort law. “Innocent” in this context cannot be equated with “non-negligent.”

Nor is the inquiry here about whether the insured “garners the sympathy” of the Court, or must be held “accountable” for his negligence. See e.g. FIC Supp. Br. at 14-15. PIP is no-fault insurance, and clearly anticipates coverage in situations in which an insured is injured due in part (or wholly) to his own negligence. See RCW 48.22.090(1) (authorizing limitation on PIP coverage as to person who “intentionally causes injury to himself or herself”); cf. RCW 48.22.030(12) (providing a person is “not entitled to [UIM] coverage if the insurer can demonstrate that the covered person intended to cause the damage for which [UIM] coverage is sought”; describing purpose of UIM statute to protect “innocent victims of motorists of underinsured motor vehicles”).<sup>7</sup>

---

Sherry having made a full recovery. See Sherry at 368 (showing, based on determination of Sherry’s damages and UIM recovery, that he was not made whole).

<sup>7</sup> The reference in RCW 48.22.030(12) to “innocent victims” reinforces the view that a negligent insured may still be an innocent victim, insofar as UIM coverage, like PIP coverage, remains available unless the insured *intentionally* causes his or her own injury or damages. This language was added to the UIM statute subsequent to the events in this

Surely FIC does not contend that, had Sherry been found 100% at fault for the automobile accident, he would have been required to reimburse all previously paid PIP benefits because he received what he was “legally entitled to recover” in the UIM proceeding –*i. e.* nothing. He should be in no worse position where he bears 70% fault. To the extent FIC invokes the “public policy to hold people accountable for their own negligence,” FIC Supp. Br. at 14, this is not a policy of the PIP statutes. See RCW 48.22.090(1) (allowing exclusion of PIP only for intentionally caused injuries); see also Maziarski v. Bair, 83 Wn.App. 835, 845, 924 P.2d 409 (1996) (rejecting PIP reimbursement claim, and noting that PIP insurer could properly contract to pay benefits without regard to fault).

Where fault matters, as in the UIM context or a tort action, Sherry is accountable for his own negligence, and the reduction in his recovery based on his percentage of fault reflects this principle. The Court should not conflate the PIP and UIM worlds in order to elevate a public policy of “accountability” to the exclusion of the strong public policy underlying PIP coverage and the made whole rule. See Thiringer at 219-20.

**3.) The Value Of No-Fault PIP Coverage Would Be Undermined By Allowing Consideration Of An Insured’s Fault In Determining Entitlement To PIP Reimbursement.**

One additional public policy consideration remains. PIP coverage provides no-fault benefits for certain immediate losses following an

---

case. See Appendix (current RCW 48.22.030); FIC Br. at 1 (noting accident date of April 4, 2001).

automobile accident. By statute it must be offered as an optional automobile insurance coverage, see RCW 48.22.085-.100, and an insured pays a separate premium for this coverage. See Winters at 882. This Court has emphasized that, insofar as PIP and UIM are distinct coverages, an insured should receive the full benefit he is entitled to under each. See Winters at 882; Woodley at 772; Hamm at 311-12; Thiringer at 220.

The value of PIP as no-fault coverage would be undermined if an insurer were allowed to recoup its payments while its insured remained uncompensated for medical costs, wage loss or other covered losses, because of his comparative fault. To the same extent that an insured's fault is irrelevant to the payment of PIP benefits, it should be irrelevant in determining entitlement to PIP reimbursement.<sup>8</sup>

## VI. CONCLUSION

The Court should follow the reasoning advanced in this brief and resolve this appeal accordingly.

DATED this 27<sup>th</sup> day of February, 2007.

\_\_\_\_\_  
\*  
DEBRA L. STEPHENS

\_\_\_\_\_  
\*  
BRYAN P. HARNETIAUX

On Behalf of WSTLA Foundation

\*Brief transmitted for filing by e-mail; signed original retained by counsel.

---

<sup>8</sup> FIC seems to suggest that applying the Thiringer "made whole" rule without consideration of an insured's fault-based UIM recovery will adversely impact PIP premium rates, implying that current rates are based on this analysis. See FIC Supp. Br. at 15, 17. This argument should be disregarded, as FIC has presented no evidence regarding how premium rates are actually calculated. Cf. Brown at 757-58 (criticizing insurer's argument regarding increased cost of health coverage in absence of evidence to this effect); Mahler at 422-23 n. 13 (rejecting argument that pro rata fee sharing will increase PIP rates, as unsupported by the record).

## APPENDIX

### RCW 4.22.070

#### Percentage of fault -- Determination -- Exception -- Limitations.

(1) In all actions involving fault of more than one entity, the trier of fact shall determine the percentage of the total fault which is attributable to every entity which caused the claimant's damages except entities immune from liability to the claimant under Title 51 RCW. The sum of the percentages of the total fault attributed to at-fault entities shall equal one hundred percent. The entities whose fault shall be determined include the claimant or person suffering personal injury or incurring property damage, defendants, third-party defendants, entities released by the claimant, entities with any other individual defense against the claimant, and entities immune from liability to the claimant, but shall not include those entities immune from liability to the claimant under Title 51 RCW. Judgment shall be entered against each defendant except those who have been released by the claimant or are immune from liability to the claimant or have prevailed on any other individual defense against the claimant in an amount which represents that party's proportionate share of the claimant's total damages. The liability of each defendant shall be several only and shall not be joint except:

(a) A party shall be responsible for the fault of another person or for payment of the proportionate share of another party where both were acting in concert or when a person was acting as an agent or servant of the party.

(b) If the trier of fact determines that the claimant or party suffering bodily injury or incurring property damages was not at fault, the defendants against whom judgment is entered shall be jointly and severally liable for the sum of their proportionate shares of the claimants [claimant's] total damages.

(2) If a defendant is jointly and severally liable under one of the exceptions listed in subsections (1)(a) or (1)(b) of this section, such defendant's rights to contribution against another jointly and severally liable defendant, and the effect of settlement by either such defendant, shall be determined under RCW 4.22.040, 4.22.050, and 4.22.060.

(3)(a) Nothing in this section affects any cause of action relating to hazardous wastes or substances or solid waste disposal sites.

(b) Nothing in this section shall affect a cause of action arising from the tortious interference with contracts or business relations.

(c) Nothing in this section shall affect any cause of action arising from

the manufacture or marketing of a fungible product in a generic form which contains no clearly identifiable shape, color, or marking.

[1993 c 496 § 1; 1986 c 305 § 401.]

**NOTES:**

**Effective date -- 1993 c 496:** "This act is necessary for the immediate preservation of the public peace, health, or safety, or support of the state government and its existing public institutions, and shall take effect July 1, 1993." [1993 c 496 § 3.]

**Application -- 1993 c 496:** "This act applies to all causes of action that the parties have not settled or in which judgment has not been entered prior to July 1, 1993." [1993 c 496 § 4.]

**Preamble -- Report to legislature -- Applicability -- Severability -- 1986 c 305:** See notes following RCW 4.16.1

### **RCW 7.04.010. Arbitration authorized**

Two or more parties may agree in writing to submit to arbitration, in conformity with the provisions of this chapter, any controversy which may be the subject of an action existing between them at the time of the agreement to submit, or they may include in a written agreement a provision to settle by arbitration any controversy thereafter arising between them out of or in relation to such agreement. Such agreement shall be valid, enforceable and irrevocable save upon such grounds as exist in law or equity for the revocation of any agreement.

The provisions of this chapter shall not apply to any arbitration agreement between employers and employees or between employers and associations of employees, and as to any such agreement the parties thereto may provide for any method and procedure for the settlement of existing or future disputes and controversies, and such procedure shall be valid, enforceable and irrevocable save upon such grounds as exist in law or equity for the revocation of any agreement.

[Enacted by Laws 1943, ch. 138, §1. Amend by Laws 1947, ch. 209, §1.]

### **RCW 7.04.150 Confirmation of award by court**

At any time within one year after the award is made, unless the parties shall extend the time in writing, any party to the arbitration may apply to the court for an order confirming the award, and the court shall grant such an order unless the award is beyond the jurisdiction of the court, or is vacated, modified, or corrected, as provided in RCW 7.04.160 and 7.04.170. Notice in writing of the motion must be served upon the adverse party, or his attorney, five days before the hearing thereof. The validity of an award, otherwise valid, shall not be affected by the fact that no motion is made to confirm it.

[Enacted by Laws 1943, ch. 138, §15. Amended by Laws 1982, ch. 22, §2.]

### **RCW 7.24.010**

#### **Authority of courts to render.**

Courts of record within their respective jurisdictions shall have power to declare rights, status and other legal relations whether or not further relief is or could be claimed. An action or proceeding shall not be open to objection on the ground that a declaratory judgment or decree is prayed for. The declaration may be either affirmative or negative in form and effect; and such declarations shall have the force and effect of a final judgment or decree.

[1937 c 14 § 1; 1935 c 113 § 1; RRS § 784-1.]

### **RCW 7.24.050**

#### **General powers not restricted by express enumeration.**

The enumeration in RCW 7.24.020 and 7.24.030 does not limit or restrict the exercise of the general powers conferred in RCW 7.24.010, in any proceeding where declaratory relief is sought, in which a judgment or decree will terminate the controversy or remove an uncertainty.

[1985 c 9 § 2. Prior: 1984 c 149 § 3; 1935 c 113 § 5; RRS § 784-5.]

### **RCW 7.24.120**

#### **Construction of chapter.**

This chapter is declared to be remedial; its purpose is to settle and to afford relief from uncertainty and insecurity with respect to rights, status and other legal relations; and is to be liberally construed and administered.

[1935 c 113 § 12; RRS § 784-12.]

### **RCW 7.24.146**

#### **Application of chapter -- Validation of proceedings.**

This chapter shall apply to all actions and proceedings now pending in the courts of record of the state of Washington seeking relief under the terms of the uniform declaratory judgments act [this chapter]; and all judgments heretofore rendered; and all such actions and proceedings heretofore instituted and now pending in said courts of record of the state of Washington, seeking such relief, are hereby validated, and the respective courts of record in said actions shall have jurisdiction and power to proceed in said actions and to declare the rights, status and other legal relations sought to have been declared in said pending actions and proceedings in accordance with the provisions of said chapter. This chapter does not apply to state agency action reviewable under chapter 34.05 RCW.

[1989 c 175 § 39; 1937 c 14 § 2; RRS § 784-17.]

**RCW 48.22.030**

**Underinsured, hit-and-run, phantom vehicle coverage to be provided -  
- Purpose--Definitions -- Exceptions -- Conditions -- Deductibles --  
Information on motorcycle or motor-driven cycle coverage --  
Intended victims.**

(1) "Underinsured motor vehicle" means a motor vehicle with respect to the ownership, maintenance, or use of which either no bodily injury or property damage liability bond or insurance policy applies at the time of an accident, or with respect to which the sum of the limits of liability under all bodily injury or property damage liability bonds and insurance policies applicable to a covered person after an accident is less than the applicable damages which the covered person is legally entitled to recover.

(2) No new policy or renewal of an existing policy insuring against loss resulting from liability imposed by law for bodily injury, death, or property damage, suffered by any person arising out of the ownership, maintenance, or use of a motor vehicle shall be issued with respect to any motor vehicle registered or principally garaged in this state unless coverage is provided therein or supplemental thereto for the protection of persons insured thereunder who are legally entitled to recover damages from owners or operators of underinsured motor vehicles, hit-and-run motor vehicles, and phantom vehicles because of bodily injury, death, or property damage, resulting therefrom, except while operating or occupying a motorcycle or motor-driven cycle, and except while operating or occupying a motor vehicle owned or available for the regular use by the named insured or any family member, and which is not insured under the liability coverage of the policy. The coverage required to be offered under this chapter is not applicable to general liability policies, commonly known as umbrella policies, or other policies which apply only as excess to the insurance directly applicable to the vehicle insured.

(3) Except as to property damage, coverage required under subsection (2) of this section shall be in the same amount as the insured's third party liability coverage unless the insured rejects all or part of the coverage as provided in subsection (4) of this section. Coverage for property damage need only be issued in conjunction with coverage for bodily injury or death. Property damage coverage required under subsection (2) of this section shall mean physical damage to the insured motor vehicle unless the policy specifically provides coverage for the contents thereof or other forms of property damage.

(4) A named insured or spouse may reject, in writing, underinsured coverage for bodily injury or death, or property damage, and the requirements of subsections (2) and (3) of this section shall not apply. If a named insured or spouse has rejected underinsured coverage, such

coverage shall not be included in any supplemental or renewal policy unless a named insured or spouse subsequently requests such coverage in writing. The requirement of a written rejection under this subsection shall apply only to the original issuance of policies issued after July 24, 1983, and not to any renewal or replacement policy. When a named insured or spouse chooses a property damage coverage that is less than the insured's third party liability coverage for property damage, a written rejection is not required.

(5) The limit of liability under the policy coverage may be defined as the maximum limits of liability for all damages resulting from any one accident regardless of the number of covered persons, claims made, or vehicles or premiums shown on the policy, or premiums paid, or vehicles involved in an accident.

(6) The policy may provide that if an injured person has other similar insurance available to him under other policies, the total limits of liability of all coverages shall not exceed the higher of the applicable limits of the respective coverages.

(7)(a) The policy may provide for a deductible of not more than three hundred dollars for payment for property damage when the damage is caused by a hit-and-run driver or a phantom vehicle.

(b) In all other cases of underinsured property damage coverage, the policy may provide for a deductible of not more than one hundred dollars.

(8) For the purposes of this chapter, a "phantom vehicle" shall mean a motor vehicle which causes bodily injury, death, or property damage to an insured and has no physical contact with the insured or the vehicle which the insured is occupying at the time of the accident if:

(a) The facts of the accident can be corroborated by competent evidence other than the testimony of the insured or any person having an underinsured motorist claim resulting from the accident; and

(b) The accident has been reported to the appropriate law enforcement agency within seventy-two hours of the accident.

(9) An insurer who elects to write motorcycle or motor-driven cycle insurance in this state must provide information to prospective insureds about the coverage.

(10) An insurer who elects to write motorcycle or motor-driven cycle insurance in this state must provide an opportunity for named insureds, who have purchased liability coverage for a motorcycle or motor-driven

cycle, to reject underinsured coverage for that motorcycle or motor-driven cycle in writing.

(11) If the covered person seeking underinsured motorist coverage under this section was the intended victim of the tortfeasor, the incident must be reported to the appropriate law enforcement agency and the covered person must cooperate with any related law enforcement investigation.

(12) The purpose of this section is to protect innocent victims of motorists of underinsured motor vehicles. Covered persons are entitled to coverage without regard to whether an incident was intentionally caused. A person is not entitled to coverage if the insurer can demonstrate that the covered person intended to cause the damage for which underinsured motorists' coverage is sought. As used in this section, and in the section of policies providing the underinsured motorist coverage described in this section, "accident" means an occurrence that is unexpected and unintended from the standpoint of the covered person.

(13) "Underinsured coverage," for the purposes of this section, means coverage for "underinsured motor vehicles," as defined in subsection (1) of this section.

[2006 c 187 § 1; 2006 c 110 § 1; 2006 c 25 § 17; 2004 c 90 § 1; 1985 c 328 § 1; 1983 c 182 § 1; 1981 c 150 § 1; 1980 c 117 § 1; 1967 c 150 § 27.]

#### NOTES:

**Reviser's note:** This section was amended by 2006 c 25 § 17, 2006 c 110 § 1, and by 2006 c 187 § 1, each without reference to the other. All amendments are incorporated in the publication of this section under RCW 1.12.025(2). For rule of construction, see RCW 1.12.025(1).

**Severability -- 1983 c 182:** "If any provision of this act or its application to any person or circumstance is held invalid, the remainder of the act or the application of the provision to other persons or circumstances is not affected." [1983 c 182 § 3.]

**Effective date -- 1981 c 150:** "This act shall take effect on September 1, 1981." [1981 c 150 § 3.]

**Effective date -- 1980 c 117:** "This act shall take effect on September 1, 1980." [1980 c 117 § 8.]

**RCW 48.22.085**

**Automobile liability insurance policy -- Optional coverage for personal injury protection -- Rejection by insured.**

(1) No new automobile liability insurance policy or renewal of such an existing policy may be issued unless personal injury protection coverage is offered as an optional coverage.

(2) A named insured may reject, in writing, personal injury protection coverage and the requirements of subsection (1) of this section shall not apply. If a named insured rejects personal injury protection coverage:

(a) That rejection is valid and binding as to all levels of coverage and on all persons who might have otherwise been insured under such coverage; and

(b) The insurer is not required to include personal injury protection coverage in any supplemental, renewal, or replacement policy unless a named insured subsequently requests such coverage in writing.

[2003 c 115 § 2; 1993 c 242 § 2.]

**NOTES:**

**Severability -- Effective date -- 1993 c 242:** See notes following RCW 48.22.005.

**RCW 48.22.090**

**Personal injury protection coverage -- Exceptions.**

An insurer is not required to provide personal injury protection coverage to or on behalf of:

- (1) A person who intentionally causes injury to himself or herself;
- (2) A person who is injured while participating in a prearranged or organized racing or speed contest or in practice or preparation for such a contest;
- (3) A person whose bodily injury is due to war, whether or not declared, or to an act or condition incident to such circumstances;
- (4) A person whose bodily injury results from the radioactive, toxic, explosive, or other hazardous properties of nuclear material;
- (5) The named insured or a relative while occupying a motor vehicle owned by the named insured or furnished for the named insured's regular use, if such motor vehicle is not described on the declaration page of the

policy under which a claim is made;

(6) A relative while occupying a motor vehicle owned by the relative or furnished for the relative's regular use, if such motor vehicle is not described on the declaration page of the policy under which a claim is made; or

(7) An insured whose bodily injury results or arises from the insured's use of an automobile in the commission of a felony.

[2003 c 115 § 3; 1993 c 242 § 3.]

**NOTES:**

**Severability -- Effective date -- 1993 c 242:** See notes following RCW 48.22.005.

**RCW 48.22.095**

**Automobile insurance policies -- Minimum personal injury protection coverage.**

Insurers providing automobile insurance policies must offer minimum personal injury protection coverage for each insured with benefit limits as follows:

- (1) Medical and hospital benefits of ten thousand dollars;
- (2) A funeral expense benefit of two thousand dollars;
- (3) Income continuation benefits of ten thousand dollars, subject to a limit of two hundred dollars per week; and
- (4) Loss of services benefits of five thousand dollars, subject to a limit of two hundred dollars per week.

[2003 c 115 § 4; 1993 c 242 § 4.]

**NOTES:**

**Severability -- Effective date -- 1993 c 242:** See notes following RCW 48.22.005.

**RCW 48.22.100**

**Automobile insurance policies -- Personal injury protection coverage - - Request by named insured -- Benefit limits.**

If requested by a named insured, an insurer providing automobile liability insurance policies must offer personal injury protection coverage for each

insured with benefit limits as follows:

- (1) Medical and hospital benefits of thirty-five thousand dollars;
- (2) A funeral expense benefit of two thousand dollars;
- (3) Income continuation benefits of thirty-five thousand dollars, subject to a limit of seven hundred dollars per week; and
- (4) Loss of services benefits of fourteen thousand six hundred dollars.

[2003 c 115 § 5; 1993 c 242 § 5.]

**NOTES:**

**Severability -- Effective date -- 1993 c 242:** See notes following RCW 48.22.005.

RULE 57  
DECLARATORY JUDGMENTS

The procedure for obtaining a declaratory judgment pursuant to the Uniform Declaratory Judgments Act, RCW 7.24, shall be in accordance with these rules, and the right to trial by jury may be demanded under the circumstances and in the manner provided in rules 38 and 39. The existence of another adequate remedy does not preclude a judgment for declaratory relief in cases where it is appropriate. The court may order a speedy hearing of an action for a declaratory judgment and may advance it on the calendar.

RULE 81  
APPLICABILITY IN GENERAL

(a) To What Proceedings Applicable. Except where inconsistent with rules or statutes applicable to special proceedings, these rules shall govern all civil proceedings. Where statutes relating to special proceedings provide for procedure under former statutes applicable generally to civil actions, the procedure shall be governed by these rules.

(b) Conflicting Statutes and Rules. Subject to the provisions of section (a) of this rule, these rules supersede all procedural statutes and other rules that may be in conflict.

