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No. 81160-1

BY RONALD R. CARPENTER

SUPREME COURT OF THE STATE OF WASHINGTON

CLERK

CORNHUSKER CASUALTY INSURANCE
COMPANY,

Plaintiff - Appellee,

v.

CHRIS KACHMAN and DEBBIE KACHMAN, husband and wife; ROCKERIES INC.,
a Washington corporation; and BROOKS SAMPLES, individually and as Personal
Representative of the Estate of Leanne Samples,

Defendants - Appellants

CERTIFICATION FROM THE UNITED STATES
COURT OF APPEALS
FOR THE NINTH CIRCUIT
NO. -06-35106

APPELLANT'S REPLY BRIEF

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I. INTRODUCTION

The Ninth Circuit Court of Appeals found that RCW 48.18.290 is ambiguous and referred the question of how the statute should be interpreted to this Court. Much of Cornhusker's brief begs the question, because Cornhusker virtually ignores the "deliver" prong of the statute and continues to argue that the statute is unambiguous, focusing solely on the term "mail." Appellant Samples concedes that certified mail can be considered a form of "mail" – but certified mail is also a form of "delivery."

The question here is, given the ambiguity as to whether certified mail falls under the "mail" or "actual delivery" prong of the statute, how should the statute be interpreted? Cornhusker spends much of its brief arguing that certified mail is a form of "mail," but that is not the question. Certified mail *could* fall under the "mail" prong of the statute, given its ambiguity, but the question here is where *should* certified mail fall? Should forms of mail, such as registered and certified mail, that require actual delivery of the mail to a person in order to be delivered, fall under the "mailing" or the "actual delivery" prong of RCW 48.18.290?

Because certified mail requires that someone be physically present and sign for the item for it to be delivered, the legislative intent underlying

the statute, logic, and common sense all favor an interpretation that places certified mail under the “actual delivery” prong of the statute.

If the Court adopts Cornhusker’s interpretation of the statute, there will be more insureds driving on Washington’s roads whose insurance has been canceled without their knowledge. There will be more innocent victims like Leanne Samples who are injured or killed by uninsured tortfeasors.

If the Court construes the statute such that “mail” is limited to regular mail and certified mail falls under the “delivery” prong because it is, in fact, a form of personal delivery, insureds will be more likely to receive notice of cancellation, whether the notice is sent by regular mail or personally delivered to them.

Cornhusker simply ignores the significant differences between regular mail and certified mail. It is not a close question which interpretation best carries out the legislative intent of providing insureds with notice of cancellation so that they can take steps to maintain their existing policies or obtain other insurance.

II. REPLY TO CORNHUSKER’S REPRESENTATIONS OF FACT

Cornhusker makes the astonishing claim that certified mail is “equivalent to or better than regular mail” (*Cornhusker’s Response Brief*

at p.26) and that because the recipient receives two notices that certified mail is being held at the Post Office, certified mail “actually increases the likelihood of notice of the certified cancellation letter over regular mail.” *Cornhusker’s Response Brief* at p.33. Cornhusker’s claim that certified mail is somehow superior to regular mail in terms of its probability of being delivered is contrary to logic, common sense, and the facts in this case.

Of the five notices of cancellation sent by Cornhusker to Rockeries before the policy was cancelled, Cornhusker admits that two were returned undelivered – a delivery success rate of only 60% for certified mail. *Cornhusker’s Response Brief* at p.46 (admitting that August and September 2004 notices were returned undelivered). Additionally, one of two notices sent to Rockeries by certified mail after the policy was cancelled was returned to Cornhusker undelivered. Three out of five certified mailings sent by Cornhusker to Rockeries in 2004 were returned undelivered – a 40% success rate for certified mail in 2004. ER 106-107 (*Supplemental Declaration of Maureen Falecki* at ¶¶ 2 & 4) and ER 109, 111; ER 29-30 (*Declaration of Jackie Perry* at ¶¶ 12 & 17); SUPP. ER 32-33.¹ The evidence before the Court of the low delivery rate for certified

¹ Going back further in time and looking at a period of four years, Cornhusker admits that Rockeries received only 8 of 11 certified letters –

mail does not support Cornhusker's claim that certified mail is more likely to provide notice to insureds than regular mail. And we know why Cornhusker mentions these prior notices of cancellation – they would rather seek to prejudice the Court than to face the issues before the Court.

The only reason for an insurer to use certified mail -- and the only way in which certified mail is "better" than regular mail -- is that certified mail creates a paper trail for the benefit of the sender. Aside from that single benefit, regular mail is clearly superior:

- Regular mail is less expensive than certified mail, which requires payment of additional fees.
- Regular mail is easier to send than certified mail, which requires filling out additional paperwork that must be submitted to the Post Office.
- Regular mail is more likely to be delivered to the recipient than certified mail, because regular mail is deposited in the recipient's mailbox whether they are home or not. Certified mail is delivered only if the recipient is at home and available to sign for the letter at the time that delivery is attempted. If the recipient is at a dentist appointment, at the grocery store, on vacation, having lunch with a friend, at work, in the shower, using the bathroom, or if there is a gate at the recipient's driveway, the certified mail will never leave the hands of the postal carrier and will not be delivered.

Cornhusker also claims that "mailing the notice to Rockeries by certified mail did nothing to prevent Rockeries from receiving the notice."

a delivery rate of 73%, far below the delivery rate of regular mail. *Cornhusker's Response Brief* at p.7.

Cornhusker's Response Brief at p.4. In fact, the evidence indicates that the Post Office would not deliver certified mail to Rockeries' address because there is a gate at the Kachmans' driveway, and mail carriers will not open gates to deliver certified mail. ER 100 (*Second Declaration of Paula Oates* at ¶ 4). Cornhusker's use of certified mail therefore prevented the very person they hired, the mail carrier, from leaving the notice of cancellation in Rockeries' mailbox (as would have occurred if the notice had been sent by regular mail) and prevented Rockeries' from receiving the notice.²

III. ARGUMENT

A. Cornhusker's discussion of statutes in other states, and cases interpreting them, is irrelevant.

Cornhusker cites several out-of-state cases holding that certified or registered mail fall under the term "mail" in statutes calling for notice to be provided by "mail." Appellant Samples agrees that RCW 48.18.290 *could* be interpreted such that certified mail falls under the term "mail"

² Cornhusker attempts to distinguish *Fichtner v. State Farm Fire & Cas. Co.*, 148 Misc. 2d 194, 560 N.Y.S. 94 (Sup. Ct. Cattaraugus Cty. 1990) on the basis that there is no evidence in this case that Cornhusker's choice to use certified mail prevented Rockeries from receiving the notice. *Cornhusker's Response Brief* at p.23. But as set forth above, there is evidence in this case that Cornhusker's use of certified mail prevented Rockeries from receiving the notice. If Cornhusker had sent the notice by regular mail, it would have been delivered to the Kachmans' mailbox, and they would have received it.

because the statute is ambiguous. The cases cited by Cornhusker are consistent with Appellant Samples' position in this regard.

But the analysis does not end there. The statutes in many other states specifically allow for the use of certified mail or only provide for notice to be provided by "mail"³ and do not offer the option of "mail" or "delivery." RCW 48.18.290, unlike the statutes in these other states,⁴ provides the options of "mail" or "delivery," and is ambiguous as to where certified mail falls between those options. Cases from other states interpreting statutes with different language are not helpful in answering this question.

³ See, e.g., *Raptis v. Safeguard Ins.*, 163 N.W.2d 835, 837, 838 (Mich. 1968) (Michigan statute provided for notice to be provided by "mailing to the insured"; notice of cancellation sent by registered mail was actually delivered to the insured's residence); *Gerard v. Massachusetts Bonding & Ins. Co.*, 203 A.2d 279, 285 (N.H. 1964) (policy called for providing notice by "mailing" it to the insured); *Hill v. Gulf Oil Corp.*, 105 S.E.2d 625, 626 (1958) (lease required notice to be "mailed").

⁴ See, e.g., M.S.A. § 67A.18 (Minn.) (statute expressly calls for written notice to be provided by "registered or certified mail"); C.G.S.A. § 38a-343 (Conn.) (statute expressly allowed use of "registered mail or certified mail or by mail evidenced by a certificate of mailing, or delivered by the insurer to the named insured"); K.S.A. § 40-3118 (Kan.) (statute authorized mailing of notice of termination by "certified or registered mail or United States Post Office certificate of mailing").

B. No Washington case has decided whether certified mail falls under the “actual delivery” or “mailing” prong of RCW 48.18.290.

Cornhusker relies on *Tremmel v. Safeco Ins. Co.*, 42 Wn. App. 684, 713 P.2d 155 (1986) and *Wisniewski v. State Farm*, 25 Wn. App. 766, 609 P.2d 456 (1980), both of which involved regular mail, not certified mail,⁵ for the proposition that proof of delivery is not required when a notice of cancellation is sent by mail. But there is no discussion of certified mail in either of those cases.

This case does not involve regular mail. Cornhusker could have sent the notice of cancellation to Rockeries by regular mail, but it did not choose to do so. Instead it chose certified mail for its own purpose of creating a paper trail.

Cornhusker’s reliance on *Tremmel* and *Wisniewski* for its argument that proof of receipt is not required to establish effective notice of cancellation when the notice is mailed, does not make sense when notice of cancellation is sent by certified mail. The whole point of certified mail is that it produces proof of receipt if it is delivered to the recipient. When

⁵ In addition to involving regular mail, rather than certified mail, *Tremmel* involved a different statute than the one at issue in this case. *Tremmel* involved RCW 48.18.291, which provided for notice of cancellation to be provided by “mailing written notice.” *Tremmel*, 42 Wn. App. at 686, fn.1. The issues of statutory interpretation with respect to whether certified mail falls under the “delivery” or “mailing” prongs of RCW 48.18.290 were not addressed in *Tremmel*.

certified mail does not produce proof of receipt, by definition it is ineffective to provide notice to the recipient. The implicit assumption in Cornhusker's reasoning is that certified mail is delivered in the same manner as regular mail. That assumption is obviously invalid, as the facts of this case demonstrate.

As the Indiana Supreme Court held in *Conrad v. Universal Fire & Casualty Ins. Co.*, 686 N.E.2d 840 (Ind. 1997), the general rule cited by Cornhusker – that proof of mailing is sufficient to establish notice to the insured – assumes that *regular mail* is used as the means of “mailing.” Because of the significant differences between regular mail and certified mail, the *Conrad* court concluded that certified mail did not comply with the policy requirement for “mailing” notice of cancellation to the insured. *Conrad*, 686 N.E.2d at 843.

Cornhusker's citation to *Collins v. Lomas & Nettleton Co.*, 29 Wn. App. 415, 628 P.2d 855 (1981), is not persuasive on the issues presented here. The *Collins* court's analysis of whether certified mail complied with the “mailing” requirement of CR 5(b)(2)(A) consists of a single paragraph. There is no discussion of the differences between certified and regular mail. There is no discussion of the fact that certified mail will not be delivered if someone has a gate at their driveway, as was the case here. Nor was there any evidence that the sender of the certified mail had

previously sent certified mail to the recipient that had been returned undelivered, as was the case here.

Additionally, the *Collins* court made no reference to CR 5(g), which states, “Whenever the use of ‘registered’ mail is authorized by statutes relating to judicial proceedings or by rule of court, ‘certified’ mail, with return receipt requested may be used.” This language suggests that certified mail is equivalent to registered mail, but there is no similar provision equating certified mail with regular mail. The court also made no reference to CR 5(b)(2)(A)’s presumption that service by mail “shall be deemed complete upon the third day following the day upon which they are placed in the mail, unless the third day falls on a Saturday, Sunday or legal holiday”⁶ While it is reasonable to apply a three-day period for presuming delivery of regular mail, it makes no sense to deem delivery of certified mail complete within three days because delivery of certified mail is dependent upon someone being personally available to sign for the mail or going to the Post Office to retrieve the mail.

The issue in *Collins* was simply whether serving a motion by certified mail complied with CR 5 and due process requirements. The

⁶ It is possible that CR 5(g) and the presumptive 3-day period for delivery of mail were added to CR 5 after the time *Collins* was decided. CR 5 has been amended six times since 1981. The court rules pamphlet does not indicate the substance of each amendment.

Collins court did not analyze the Legislature's use of the terms "mail" and "certified mail" in different statutes or the legislative intent and public policy considerations underlying notice of cancellation provisions in the insurance code.

It is not surprising that the *Collins* court's analysis of the certified mail issue was superficial, because it was not essential to the court's holding. The *Collins* court held that the trial court erred in failing to vacate the dismissal of the plaintiffs' complaint and remanded the case for further proceedings. The plaintiffs therefore prevailed on appeal, even though they lost on the service of process issue. The discussion of the service of process issue was dicta.

In re Marriage of McLean, 132 Wn.2d 301, 937 P.2d 602 (1997), is also distinguishable from the issue in this case. *McLean* involved a child support proceeding, which involved different public policy considerations than an insurance cancellation statute does. The statute involved in *McLean* also specifically called for the use of certified or registered mail.

The facts of *McLean* actually underscore the significant difference in how certified mail and regular mail are delivered. Ten years after a divorce decree, a mother filed a petition to modify the father's child support obligation. The petition was sent to the father by certified mail, as

required by the applicable statute. After two attempts at delivery, the certified mail was returned undelivered to the mother's attorney. The mother's attorney then sent a copy of the return of service to the father by regular first class mail, which, unlike the certified mail, was not returned. *Id.* at 304. Once again, the regular mail was delivered, but the certified mail was not.

The *McLean* court made specific reference to public policy considerations in reaching its decision:

Among the circumstances which a court should consider in determining what constitutes proper notice, the individual interest at stake should be weighed against the important state interest involved.

McLean, 132 Wn.2d at 313. The Court noted that the father had a significant property interest in having to pay increased child support, and that the state had a significant interest in the welfare of children and in having an efficient and inexpensive method for serving notice that the petitioning parent can use. The Court also noted that the petition to modify the child support obligation was a continuation of the original dissolution proceeding, and that the father should have expected proceedings to modify his child support obligations from time to time. The public policy considerations underlying the statute in *McLean* balanced the rights of the parent paying child support against the custodial

parent's interest in having an efficient process for seeking an adjustment in child support and the welfare of children in this state.

Here, the public policy considerations strongly favor an interpretation of RCW 48.18.290 that places certified mail under the "delivery" prong. RCW 48.18.290 is primarily intended to benefit and protect insureds and the general public, not insurers. The primary public policy concern underlying RCW 48.18.290 is that insureds receive notice of cancellation for their own benefit and for the protection of the general public, not that there be a detailed paper trail establishing what efforts the insurer made to provide notice. Cornhusker's failed use of certified mail to provide notice to Rockeries resulted in Rockeries operating a vehicle on public roadways without insurance, in violation of Washington law, and insurance benefits being unavailable to an innocent third party whose wife was killed as a result of Rockeries' negligence. In *McLean*, the failed use of certified mail resulted in a father being ordered to pay increased child support after paying the same amount for ten years.

Finally, the *McLean* court noted that there was no claim by the father that the mother had any reason to believe that he would not receive a mailing sent to his address. *McLean*, 132 Wn.2d at 314. Here, of course, there is evidence that Cornhusker knew that certified mail sent to the Kachmans' address had been returned to Cornhusker undelivered a

few weeks before Cornhusker sent the certified letter at issue in this case, and there was a gate at the Kachmans' driveway which, when closed, prevented postal carriers from delivering certified mail.

It is undisputed that the purpose of RCW 48.18.290 is to provide insureds with notice of cancellation so that they can take measures to protect themselves (and the public who may be injured by their negligent conduct) by paying the premium due or by obtaining other insurance coverage. *Olivine v. United Capitol Ins. Co.*, 147 Wn.2d 148, 162, 52 P.3d 494 (2002); *Taxter v. Safeco Ins. Co.*, 44 Wn. App. 124, 126, 721 P.2d 972 (1986); ER 130:24 – 131:3; *Cornhusker's Response Brief* at p.34. It is also undisputed that, when certified mail is used as a method of delivery, the Post Office makes two attempts at delivery and then returns the item to the sender if delivery is not successful. *Cornhusker's Response Brief* at p.45. By sending the notice of cancellation by certified mail, Cornhusker expressly directed the Post Office to attempt delivery twice and, if unsuccessful, to return the letter to Cornhusker within 15 days. *In re Marriage of McLean*, 132 Wn.2d 301, 308, n.3, 937 P.2d 602 (1997). There is no material difference between what happened here and the situation in *American Automobile Ins. Co. v. Watts*, 67 So. 758 (Ala. App. 1914), where the insurer sent notice by registered mail, with

directions to the Post Office to return the notice if not delivered within five days.⁷

There is nothing in RCW 48.18.290 saying that the insurer can direct the Post Office to withhold delivery of mail if no one is present to sign for it. There is nothing in RCW 48.18.290 saying that an insurer can require the insured to go to the Post Office between 9:00 a.m. and 5:00 p.m. on a weekday to retrieve a notice of cancellation. But that is exactly what happened here as a result of Cornhusker's decision to send the notice of cancellation by certified mail.

Cornhusker's reliance on the fact that two notices were allegedly left in the Kachmans' mailbox indicating that the Post Office was holding a certified letter, for the proposition that the Kachmans somehow should have known that Rockeries' insurance policy was going to be cancelled, is not supported by the evidence. The notices allegedly left by the Post Office would have indicated that the certified letter was from "Berkshire," not "Cornhusker," and would have stated that it could be picked up at the Post Office Monday through Friday, between 9:00 a.m. and 5:00 p.m. See ER 100 (*Second Declaration of Paula Oates* at ¶¶ 6-7) and ER 107, 111

⁷ *In re Marriage of McLean*, 132 Wn.2d 301, 308, n.3, 937 P.2d 602 (1997), cited by Cornhusker, indicates that certified mail is returned to the sender if not picked up within 15 days – only 10 days longer than the delivery period for the registered mail found to be inadequate notice of cancellation in *Watts*. *Cornhusker's Response Brief* at p.45.

(*Supplemental Declaration of Maureen Falecki* at ¶ 4 & Exhibit C). There is no evidence that Rockeries' owners would have known that "Berkshire" was the same entity as "Cornhusker."

This Court should be guided by the purpose and public policy underlying RCW 48.18.290, the evidence in this case, and the weight of authority from other jurisdictions, not by Cornhusker's interpretation of cases that do not discuss or analyze the issue of whether certified mail should be considered a form of personal delivery or a form of mail for purposes of RCW 48.18.290.

C. The fact that other Washington statutes equate certified mail and personal delivery indicates that certified mail should be placed under the "delivery" prong of RCW 48.18.290.

Appellant Samples' position is supported by the numerous Washington statutes that equate certified mail and personal delivery by providing that certified mail can be used in place of personal service. *See Cornhusker's Response Brief* at p.28, fn. 8 (Cornhusker's description of statutes cited by Appellant Samples, most of which offer the alternative of personal service or certified mail to provide various types of notice).⁸

⁸ *See also Eze v. Gonzales*, 478 F.3d 46, 47 (1st Cir. 2007) ("Under 8 C.F.R. § 103.5a(a)(2), the general regulations concerning immigration, personal service includes both "[d]elivery of a copy personally" and "[m]ailing a copy by certified or registered mail." Neither form of service is considered superior. *Id.* Indeed, there is little practical difference in the

Cornhusker claims that these “statutes are not in any way relevant to or instructive of what is meant by ‘mailed’ in RCW 48.18.290” (*Cornhusker’s Response Brief* at p. 29), but the fact that the Legislature equated certified mail and registered mail with personal delivery in these other statutes strongly suggests that RCW 48.18.290 should be interpreted such that certified mail falls under the “delivery” prong.

D. The Court should reject Cornhusker’s invitation to re-write the statute to allow an insurer to force an insured to retrieve a notice of cancellation.

Cornhusker claims that the burden was on the Kachmans to go to the Post Office and retrieve the certified mail. *Cornhusker’s Response Brief* at p. 4 (“The insured should not be rewarded for refusing to pick [] up its certified mail or arrange for its delivery.”); *id.* at p.36 (“Rockeries should not be rewarded for its failure to pick up its certified mail.”).

RCW 48.18.290 requires that notice be provided by “mail” or by “delivery.” It does not say that the notice can be left at the Post Office (or any other location) and that the insurer can force the insured to retrieve the notice or that the insurer can force the insured to “arrange for delivery” of the notice. The burden to accomplish delivery is on the insurer and cannot be shifted to the insured. The Court should reject Cornhusker’s invitation

two forms of service. Certainly, personal delivery is at least as likely as delivery by certified mail to ensure that notice is received.”).

to re-write the statute to allow insurers to shift responsibility for obtaining delivery of the notice to the insured.

E. The legislative intent clearly favors Appellant Samples' interpretation.

Cornhusker describes the legislative intent underlying RCW 48.18.290 as follows:

While the Legislature no doubt desired to provide insureds with notice of a cancellation and the opportunity to find insurance elsewhere, it also did not want to force insurers (and their policyholders) to provide free insurance to people who fail to pay premiums and then make it difficult to track them down to deliver a premium notice.

Cornhusker's Response Brief at p.34. The problem with Cornhusker's argument is that it was *Cornhusker*, not its insured, that chose to "make it difficult to track [the Kachmans] down" to deliver the notice. Cornhusker could have provided notice by regular mail and would not have had to worry about tracking the Kachmans down to obtain personal delivery. Instead, Cornhusker chose to provide notice by a form of personal delivery, and thereby took upon itself the task of tracking the Kachmans down. That was a choice that Cornhusker made – it was not forced to use certified mail as the method for delivering the notice of cancellation. The legislative intent underlying the statute – to provide insureds with notice of cancellation and an opportunity to pay the premium or find insurance elsewhere – clearly favors Appellant Samples' position.

F. An unrebuttable presumption of receipt does not make sense for certified mail.

State v. Bazan, 79 Wn. App. 723, 904 P.2d 1167 (1995), is the only Washington case that has analyzed the differences between certified mail and regular mail in any depth. Other cases either fail to recognize or gloss over the differences between certified mail and regular mail. *Bazan* acknowledged the presumption of delivery applicable to regular mail but refused to apply that presumption to certified mail because of the differences in how regular mail and certified mail are delivered. While *Bazan* was a criminal case rather than an insurance case, the court's analysis of the differences between regular mail and certified mail are equally applicable here. The evidence in this case amply demonstrates the problems with certified mail in comparison to regular mail as a means of providing notice of cancellation to insureds.

Cornhusker spends a significant portion of its brief discussing whether proof of receipt is required when notice of cancellation is sent by certified mail. The question of whether proof of receipt should be required is largely answered by how the Court resolves the question of whether certified mail should fall under the "mail" or "delivery" prong of the statute. If it falls under the "delivery" prong, then proof of receipt is required. If it falls under the "mail" prong, then the Court can either

extend the *Wisniewski/Tremmell* line of cases to certified mail, or can carve out an exception for certified mail and hold that the use of certified mail only creates a *rebuttable* presumption of delivery.

Appellant Samples agrees that a presumption of delivery makes sense for regular mail because regular mail has such a high probability of being delivered. Certified mail, however, has a much lower probability because delivery is dependent on (1) someone being physically present at the address to sign for the letter, or (2) someone going to a Post Office during business hours to retrieve the item. Because of the significant differences in how regular mail and certified mail are delivered, the un rebuttable presumption of receipt that has been applied to regular mail does not make sense for certified mail.

Cornhusker does not dispute the fact that only two of the five certified letters sent by Cornhusker to Rockeries in 2004 were actually delivered to Rockeries – a 60% failure rate for certified mail. *See Appellant's Opening Brief* at pp.24-25. Given these facts, it does not make sense to apply the line of cases holding that proof of mailing is sufficient to establish notice when certified mail is used. If the statute is interpreted such that certified mail falls under the “mail” prong, the presumption of delivery should be rebuttable. If the insured proves that

the certified letter containing the notice of cancellation was not received, then the attempt at cancellation should fail.

Even if this Court accepts Cornhusker's interpretation of the statute, the Court should not apply the rule that proof of mailing is all that is required when an insurer sends notice of cancellation by certified mail. If the Court accepts Cornhusker's interpretation of the statute, the Court should clarify that the use of certified mail raises a rebuttable presumption of delivery, and that proof of non-delivery will rebut that presumption and render the use of certified mail ineffective to provide notice of cancellation.

At a minimum, the Court should hold that there are questions of fact as to whether Cornhusker complied with the statute because it is undisputed that (1) Rockeries did not receive Cornhusker's certified letter containing the notice of cancellation; (2) Cornhusker knew that a certified letter sent to Rockeries two months earlier was returned undelivered before it sent the second notice of cancellation by certified mail; and (3) the Post Office would not deliver certified mail to Rockeries because of the gate at the Kachmans' driveway.

G. The rule that an ambiguous provision in an insurance policy should be construed against the insurer is relevant to this case.

Cornhusker claims that the “rule for ambiguous policy language⁹ is irrelevant to the present case, in which the question is what the Washington Legislature meant when it instructed insurers to ‘mail’ cancellation notices.” *Cornhusker’s Response Brief* at p.17. The Ninth Circuit certified a question of statutory construction to this Court. However, the Ninth Circuit stated that this Court could go beyond the certified question if the Court believes it is necessary to do so.¹⁰ Even if the Court finds that Cornhusker complied with RCW 48.18.290, the Court could find the policy language to be ambiguous; construe the policy language against Cornhusker; and hold that the cancellation was ineffective because Cornhusker’s failed use of certified mail did not comply with the policy.¹¹ For example, in one of the cases cited by

⁹ “When a policy is fairly susceptible of two different interpretations, that interpretation most favorable to the insured must be applied, even though a different meaning may have been intended by the insurer.” *Ames v. Baker*, 68 Wn.2d 713, 717 (1966).

¹⁰ *Order Certifying Question to the Washington Supreme Court* at p.1526 (“We do not intend our framing of this question to restrict the Washington State Supreme Court’s consideration of any issues that it determines are relevant.”).

¹¹ The policy provides as follows regarding cancellation by Cornhusker:

Cornhusker, *Powell v. Lititz Mut. Ins. Co.*, 419 F.2d 62, 66 (5th Cir. 1970), the court noted that an attempt at cancellation of an insurance policy may be ineffective pursuant to the terms of the policy, even though it is effective under the applicable statute.

The rules of statutory construction and public policy favor Appellant Samples' interpretation of RCW 48.18.290. The law governing the construction of insurance policies also favors Appellant Samples' position when the language of the policy is analyzed. This Court could rule in favor of Appellant Samples on either (or both) basis.

IV. CONCLUSION

RCW 48.18.290 does not say that an insurance company can require an insured to go to the Post Office or any other location to pick up a notice of cancellation. Cornhusker is attempting to add such a requirement to the statute. Cornhusker states that its insured, Rockeries, failed to pick up the certified mailing from the Post Office, but what really happened is that the insurer, Cornhusker, failed to deliver it.

We may cancel this policy by *mailing or delivering* to the first Named Insured . . . written notice of cancellation . . . to the last mailing address known to us, at least:

- a. 10 days before the effective date of cancellation if we cancel for nonpayment of premium

ER 34 (emphasis added).

There are significant differences between certified mail and regular mail in terms of how they are delivered, as demonstrated by the facts of this case.

- Regular mail is delivered to a mailbox. Regular mail would have been far more likely to provide actual notice to Rockeries.
- Certified mail is only delivered to a *person* who signs for it. The Eatonville Post Master described certified mail in terms of personal delivery. ER 63:1-7 (*Declaration of Paula Oates* at ¶ 3).

The legislative purpose underlying RCW 48.18.290 is to provide insureds with notice of cancellation to give them an opportunity to pay the premium due to keep the existing policy in effect or obtain other insurance. The legislative intent underlying RCW 48.18.290 would be defeated by an interpretation that places certified mail under the “mailing” prong of the statute, requiring only proof of mailing for cancellation to be effective. Because certified mail is only delivered if someone is present to sign for it, it is a form of personal delivery and therefore requires proof of delivery under RCW 48.18.290 to be effective.

The legislative purpose, public policy, weight of authority from other jurisdictions, logic, and principles of statutory construction all support Appellant Brooks Samples’ interpretation of RCW 48.18.290. This Court should answer the certified question “No.”

DATED this 9th day of April, 2008

Ray W Kahler

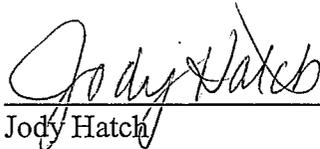
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CERTIFICATE OF SERVICE

I hereby certify that on April 9, 2008, I served the following documents: (1) **Appellant's Reply Brief** and (2) **Certificate of Service**, on counsel below by the method(s) indicated and addressed as follows:

Attorney for Cornhusker Casualty Insurance Company Irene Margret Hecht KELLER ROHRBACK 1201 3 RD Ave Suite 3200 Seattle, WA 98101-3052 Tel: 206-623-1900	<input checked="" type="checkbox"/> U.S. Mail <input type="checkbox"/> Fax <input type="checkbox"/> Legal messenger <input type="checkbox"/> Electronic Delivery
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Executed at Hoquiam, Washington this 9th day of April, 2008.



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