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SUPREME COURT
OF THE STATE OF WASHINGTON

NATIONAL SURETY CORPORATION,

Petitioner/Cross-Respondent,

v.

IMMUNEX CORPORATION,

Respondent/Cross-Petitioner.

ANSWER TO CROSS-PETITION FOR REVIEW

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ORIGINAL

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A. Identity Of Responding Party.

National Surety Corporation submits this answer to Immunex Corporation's cross-petition for review pursuant to RAP 13.4(d). This Court should deny the cross-petition because the Court of Appeals decision is wholly consistent with this Court's decision in *Kitsap County v. Allstate Ins. Co.*, 136 Wn.2d 567, 964 P.2d 1173 (1998).

B. Facts Relevant To Cross-Petition.

The relevant facts are summarized in National Surety's petition for review. As set out in the petition, Immunex allegedly submitted inflated AWP¹s to several publications that published the claimed AWP¹s without independent verification. These (inflated) published AWP¹s were then used to establish the reimbursement rates paid by health care benefit payors, and in some instance the co-payments made by patients insured by the payors. CP 405-06.

The difference between what Immunex and other drug manufacturers actually charged health care providers and what providers charged the reimbursing benefit payors based on the

¹ Drug manufacturers' "average wholesale price" (AWPs) are intended to be based on the actual wholesale prices paid by health care providers. AWP¹s are used to determine the rate at which health care providers will be reimbursed for the drugs. *National Surety Corp. v. Immunex Corp.*, 162 Wn. App. 762, 767 ¶ 3, 256 P.3d 439 (2011).

AWP was known as the "spread." The greater the spread, the greater the health care providers' profit, and the greater their incentive to purchase and dispense a manufacturer's drugs. ***National Surety Corp. v. Immunex Corp.***, 162 Wn. App. 762, 767 ¶ 3, 256 P.3d 439 (2011). This coverage dispute arises from Immunex's 2006 tender to National Surety of lawsuits brought between 1997 and 2005 against Immunex and many other drug manufacturers, mostly by states and counties, claiming that the defendant drug manufacturers had fraudulently overstated the AWP of prescription drugs, thereby increasing the cost of these drugs to plaintiff payors who reimburse health care providers for the cost of these drugs ("the AWP suits"). CP 361-62.

The complaints by plaintiff health care benefit payors against Immunex and the other drug manufacturer defendants in the AWP suits alleged a variety of claims, including RICO, state unfair trade and protection statutes, civil conspiracy, fraud, and breach of contract. See, e.g., CP 376, 492, 520-21. The AWP complaints did not allege that Immunex charged different prices to different classes of customers, but that its fraudulent statements to publishers allowed health care providers to do so. None of the AWP complaints alleged "discrimination," and none alleged that

Immunex had caused damage by selling drugs at different prices to differently-placed persons or entities. Instead, each complaint sought recovery based solely on the defendant drug manufacturers' fraudulent overstatement of AWP's. See, e.g., CP 377, 493-94, 523-24, 559, 579.²

The trial court granted National Surety partial summary judgment that it had no duty to defend the AWP lawsuits under its CGL policy providing coverage for personal injury "arising out of" the "offense" of "discrimination (unless insurance thereof is prohibited by law)." CP 1025; 162 Wn. App. at 770 ¶ 11. In this appeal, Division One affirmed, concluding in Part I of its opinion that National Surety had no contractual duty to defend the AWP suits because "the offenses alleged in the AWP complaints do not arise out of discrimination." 162 Wn. App. at 773 ¶ 20.

In reaching its decision, Division One followed the reasoning of this Court in *Kitsap County v. Allstate*, 136 Wn.2d at 580, that "to determine whether coverage exists, we must look to the type of offense that is alleged rather than the nature of the injury." 162 Wn. App. at 772 ¶ 18. Because the AWP claims, at their most

² The allegations in the AWP complaints that Immunex claimed triggered the duty to defend are each independently addressed in National Surety's response brief at 16-21.

expansive, could be read only to "result in," *not to* "arise out of" price discrimination, there could be no contractual duty to defend the AWP suits under National Surety's CGL policy. 162 Wn. App. at 773 ¶ 19.

National Surety petitioned for review of the lower courts' determination that National Surety could nonetheless be liable for Immunex's defense costs, including defense costs incurred by Immunex prior to its tender of the AWP suits to National Surety six years after Immunex was first sued, unless National Surety prevails at trial in establishing that it was prejudiced by the delayed tender. 162 Wn. App. at 782 ¶ 41. National Surety sought review only of Parts II through IV of Division One's published opinion holding that it may be liable for defense costs it was not contractually obligated to pay, including defense costs independently incurred by Immunex before tender. National Surety Petition 1, 20.

Immunex cross-petitions for review of Division One's decision that National Surety did not have a contractual duty to defend claims that did not "arise out of," but instead arguably "resulted in," discrimination.

C. Reasons Why This Court Should Deny Review Of The Cross-Petition.

1. This Court Should Deny The Cross-Petition Because The Court Of Appeals Decision Is Wholly Consistent With, And Compelled By, This Court's Decision In *Kitsap County v. Allstate*.

In *Kitsap County v. Allstate Ins. Co.*, 136 Wn.2d 567, 964 P.2d 1173 (1998), this Court considered whether insurers had an obligation to defend or indemnify Kitsap County from claims arising from allegations that "contaminants and foul odors" emanating from a waste disposal site formerly owned by the County on which plaintiffs' mobile home park was located and from a nearby privately-owned landfill where the County had processed municipal hazardous waste over a 30-year period. This Court concluded that the insurers had a contractual duty to defend claims under personal injury policies that provided coverage for "wrongful entry" or "other invasion of right of private occupancy," because "the parties who sued Kitsap County claimed that their damages arose from actions of the County which constituted a trespass and/or nuisance." *Kitsap County v. Allstate*, 136 Wn. 2d at 580.

Under policy provisions covering "wrongful eviction," however, the insurers had no duty to defend. Although some of the plaintiff mobile home park residents "indicated that they left the

property for health reasons, there was no assertion that they were ousted by intentional conduct of the County." *Kitsap County v. Allstate*, 136 Wn.2d at 593. Because the courts "must look to the type of offense that is alleged," 162 Wn. App. at 772 ¶ 18; 136 Wn.2d at 580 (emphasis added), not the nature of the alleged injury, this Court concluded in *Kitsap County* that there was no claim for potential coverage for the lawsuits under a definition of personal injury that included only "wrongful eviction." 136 Wn.2d at 594.

This Court's decision in *Kitsap County* has provided a readily-applied template for resolving coverage disputes in the years since it was promulgated. In *Cle Elum Bowl, Inc. v. North Pacific Ins. Co., Inc.*, 96 Wn. App. 698, 981 P.2d 872 (1999), *rev. denied*, 139 Wn.2d 1019 (2000), for instance, Division Three relied on *Kitsap County* to hold that there was no coverage for collapse of the roof of a building after the tenant insured allowed snow to accumulate because "the theory underlying the claim against the insured, not the nature of the alleged injury, determines whether personal injury coverage . . . applies." 96 Wn. App. at 707 (quoted 162 Wn. App. at 772 ¶ 18). Likewise, Division One noted in *Amazon.com Intern., Inc. v. American Dynasty Surplus Lines*

Ins. Co., 120 Wn. App. 610, 85 P.3d 974, *rev. denied*, 152 Wn.2d 1030 (2004), that “the advertising activities must cause the injury, not merely expose it This causal requirement is the reason most patent infringement claims do not constitute advertising injuries.” 120 Wn. App. at 618.

Division One in this case also correctly concluded that, under this Court’s reasoning in *Kitsap County*, the AWP suits do not assert claims that “arise out of” discrimination:

While it is true that some AWP complaints alleged that consumers of certain groups paid a higher price as a result of Immunex’s actions, the offenses originate not from discriminatory actions but from fraudulently inflating the AWP. Although the effect of that action might have impacted some consumers and providers more than others, that does not mean the offense originated from discrimination. The theories underlying the offenses are not that the consumers and providers paid higher prices as compared to others, but that the price itself was fraudulently inflated.

162 Wn. App. at 772 ¶ 19. Because any “discrimination” was the *result*, not the *origin*, of the AWP claims, there was no potential coverage under National Surety’s CGL policy.

The three other intermediate appellate court cases Immunex cites in its cross-petition at 11 also make clear that “arising out of” means “originating from,” “having its origin in,” growing out of,” or

"flowing from," *not* "resulting in" the covered claim. In ***Australia Unlimited, Inc. v. Hartford Cas. Ins. Co.***, 147 Wn. App. 758, 774 ¶ 34-35, 198 P.3d 514 (2008), the court held that the insured "sought damages originating from, growing out of, or flowing from [the insured's] advertising activities" by alleging that the insured copied the plaintiff's trade dress with the intent to trade on the plaintiff's goodwill. In ***Toll Bridge Authority v. Aetna Ins. Co.***, 54 Wn. App. 400, 404-05, 773 P.2d 906 (1989), an accident that occurred while a ferry was being unloaded "'originated from', 'grew out of', or 'flowed from' use or operation of the [ferry]."

In ***Avemco Ins. Co. v. Mock***, 44 Wn. App. 327, 329, 721 P.2d 34 (1986), on the other hand, a policy that excluded coverage for an accident "arising out of . . . starting an engine of your insured aircraft unless a pilot or mechanic is seated at the controls" did not cover an accident caused when the insured's aircraft unexpectedly moved after he started his aircraft while no pilot or mechanic was at the controls. The ***Mock*** court rejected the insured's argument that the policy provided coverage because the pilot was able to enter the cockpit before it collided with another plane. The accident *resulted in* a pilot being "seated at the controls," but "the collision

certainly *flowed from* the manner of starting the engine.” **Mock**, 44 Wn. App. at 329 (emphasis added).

Contrary to Immunex’s argument in its cross-petition at 13, this is not a matter of analyzing “only the *primary* theory of liability alleged in the AWP complaints.” (emphasis in original) Instead, as the Court of Appeals correctly realized, and as this Court held in **Kitsap County**, the contractual duty to defend requires “some causal relationship” between covered activities of the insured and the injury claimed. In the AWP suits, no claim, no matter how tangential, alleged “discrimination,” and none alleged that Immunex had caused damage by selling drugs at different prices to differently-placed persons or entities. Instead, each complaint sought recovery based solely on fraudulent overstatement of AWPs. Immunex thus misplaces its reliance as a basis for review on **American Best Food, Inc. v. Alea London, Ltd.**, 168 Wn.2d 398, 408 ¶ 11, 229 P.3d 693 (2010) (Cross-Petition 12), where the covered activity was negligent failure to protect the insured’s patron, and **Transmerica Ins. Group v. United Pac. Ins. Co.**, 92 Wn.2d 21, 27, 593 P.2d 156 (1979), *overruled on other grounds by State v. Olson*, 126 Wn.2d 315, 893 P.2d 629 (1995) (Cross-Petition 13), where the covered activity was “use” of an automobile.

Division One's decision in Part I of its opinion that the AWP claims were not potentially within the scope of coverage of National Surety's policy conflicts with no decisions of this Court or the Courts of Appeals because the AWP claims at their most expansive alleged that discrimination *resulted from* Immunex's fraudulent overstatement of drug prices, not that they *arose out of* discrimination.³ This Court should deny the cross-petition because the Court of Appeals decision is wholly consistent with, and compelled by, this Court's decision in *Kitsap County v. Allstate* and there are no grounds for review of Part I of the Court of Appeals decision under RAP 13.4(b)(1) or (2).

2. This Court Should Deny The Cross-Petition Because The Scope Of The Contractual Duty To Defend Raises No Issue Of Substantial Public Interest.

As set out in National Surety's petition for review at 14-19, whether an insurer that has no contractual duty to defend may be

³ If this Court does accept review of the cross-petition, National Surety reserves its rights to also argue that there was no potential coverage on the grounds that the AWP complaints did not arise from the "offense of discrimination" and that the type of market-based price differentiation alleged by Immunex to be the basis for the claims is not the type of "discrimination" covered by National Surety's CGL policy. See National Surety Response Brief at 11-15, 22-33; *Mylan Laboratories Inc. v. American Motorists Ins. Co.*, 226 W.Va. 307, 700 S.E.2d 518 (2010); *Federal Ins. Co. v. Stroh Brewing Co.*, 127 F.3d 563 (7th Cir. 1997).

obligated to pay an insured's defense costs under the good faith duty to defend is an issue of substantial public interest that this Court should address under RAP 13.4(b)(4). Immunex presents no cogent reason why the scope of an insurer's contractual duty to defend, which has been clearly articulated in this Court's decision in ***Kitsap County v. Allstate*** and consistently applied by the Courts of Appeals thereafter, presents similar issues of substantial public interest.

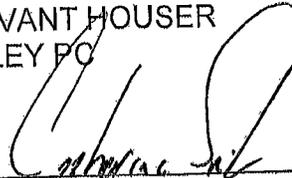
Once Immunex tendered the AWP claims, National Surety offered to provide its insured a defense under a reservation of rights. 162 Wn. App. at 768 ¶ 6. There is no "public interest" in imposing a contractual duty to defend lawsuits that an insurer has not contracted to defend. See National Surety Petition 8-12. Immunex's argument for review on this basis suggests a profound misunderstanding of the nature of the good faith duty to defend imposed by ***Woo v. Fireman's Fund Ins. Co.***, 161 Wn.2d 43, 164 P.3d 454 (2007) and ***American Best Food, Inc. v. Alea London, Ltd.***, 168 Wn.2d 398, 229 P.3d 693 (2010). RAP 13.4(b)(4) provides no basis for review of the coverage decision in Part I of the Court of Appeals opinion.

D. Conclusion.

This Court should grant National Surety's petition for review and deny Immunex's cross-petition for review.

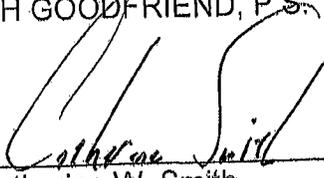
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DECLARATION OF SERVICE

The undersigned declares under penalty of perjury, under the laws of the State of Washington, that the following is true and correct:

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DATED at Seattle, Washington this 22nd day of November, 2011.


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Attached for filing in .pdf format is the Answer to Cross-Petition for Review, in *National Surety Corporation v. Immunex Corporation*, Cause No. 86535-3. The attorney filing this document is Catherine W. Smith, WSBA No. 9542, e-mail address: cate@washingtonappeals.com.

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