

64344-4

64344-4

No. 64344-4

COURT OF APPEALS FOR DIVISION I
STATE OF WASHINGTON

REBECCA RIEBE,

Appellant,

v.

JENNIFER L. WEST AND CHRISTOPHER P. THOMAS, Wife and
Husband, and the Marital Community Composed Thereof

Respondent,

and,

NATIONWIDE INSURANCE COMPANY,

Intervenor.

**RESPONSE BRIEF OF INTERVENOR
NATIONWIDE INSURANCE COMPANY
TO APPELLANT'S BRIEF**

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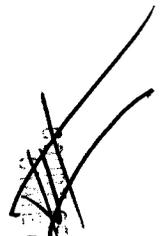

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I. INTRODUCTION

Appellant Rebecca Riebe wants this court to disregard long standing and firmly established principles of Washington law concerning election of remedies and res judicata under the guise of *Hamilton v. Farmers Ins. Co. of Wash.*, 107 Wn.2d 721, 733 P.2d 213 (1987) and *Olympic S.S. Co. v. Centennial Ins. Co.*, 117 Wn.2d 37, 52, 811 P.2d 673 (1991). Through twisted logic and strained reading of existing case law designed to protect insureds in the UIM context, Appellant is attempting to force her insurer to defend and be bound in multiple forums, allowing her to unilaterally select the most profitable outcome. This is not what *Hamilton* and its progeny stand for, rather, this is simply a case about unbridled greed and forum shopping.

Not only is the Appellant insisting that she can simultaneously litigate her damages in multiple venues, she is characterizing her insurer's objection to Appellant's procedural misstep as a "coverage dispute" in an obvious attempt to hold *Olympic Steamship* fees over her insurer's head. This is not a coverage dispute. As the record demonstrates, Nationwide has never denied Appellant her UIM benefits under the policy, but rather is seeking a fair determination of a procedural dispute. Nationwide has simply requested that Appellant elect a remedy: (1) proceed in the trial court against the defendant tortfeasor and Nationwide; or (2) proceed

against Nationwide in binding arbitration. Appellant cannot, as she falsely maintains, litigate against Nationwide in both venues and then force Nationwide to pay the most lucrative judgment.

Following Appellant's flawed logic, forcing Nationwide to participate and be bound in both arbitration and a trial contradicts years of longstanding principles of res judicata. Moreover, ordering Nationwide to pay Appellant *Olympic Steamship* fees in connection with this procedural objection would preclude any defendant from ever raising legitimate procedural disputes concerning UIM, arbitration, or any other insurance provisions that require court interpretation.

II. STATEMENT OF THE CASE

Appellant Rebecca Riebe was involved in an automobile accident on March 25, 2008. CP 5. Riebe filed suit on June 17, 2009 against Jennifer West, the driver involved in the accident, and Christopher Thomas, the owner of the vehicle. CP 4. Defendants West and Thomas have \$250,000 in underlying insurance limits. CP 16, 32. Appellant believes that her claim will exceed the \$250,000 underlying limits as she has placed Nationwide, her own automobile and UIM carrier, on notice of a potential UIM arbitration. CP 16, 32. In response, Nationwide moved, without opposition by any party, to intervene in the underlying action. CP 32. In fact, counsel for Nationwide was advised before filing its motion to

intervene that no party would object. CP 32, 41, 46-47. On July 23, 2009, this Court granted Nationwide's Uncontested Motion to Intervene. CP 32, 41, 43-44.

Per the automobile insurance policy between Nationwide and the Appellant, Ms. Riebe is entitled to UIM benefits as follows:

INSURING AGREEMENT

A. We will pay compensatory damages which an "insured" is legally entitled to recover from the owner or operator of an "underinsured motor vehicle" because of:

1. "Bodily injury" sustained by an "insured" and caused by an "accident."

D. "Underinsured motor vehicle" means a land motor vehicle or trailer of any type:

1. To which no liability bond or policy applies at the time of the "accident."

2. To which a liability bond or policy applies at the time of the "accident" but the amount paid under that bond or policy to an "insured" is not enough to pay the full amount the "insured is legally entitled to recover as damages.

CP 32-33, 41, 45.

Despite the fact that Nationwide is a party to the pending lawsuit, the Appellant attempted to take two bites of the apple by forcing Nationwide to arbitrate her UIM claim in private, binding arbitration. CP 33. Appellant was essentially asking Nationwide to litigate the issue of

her damages in two separate forums, while maintaining that Nationwide would also need to participate and be bound in the underlying tort action. CP 33. Nationwide moved to dismiss Appellant's demand for arbitration. CP 31-39. Appellant opposed Nationwide's motion because she incorrectly believes that she can bind Nationwide to the judgment from the trial court or the arbitration award, choosing the most lucrative amount. (Appendix A:1-10.) Appellant also erroneously contends that this is a "coverage dispute" and that she is entitled to *Olympic Steamship* attorneys' fees. *Id.* at 9-10. However, this is clearly a procedural issue and Nationwide has never denied Appellant's right to UIM benefits under her policy. CP 55, 58. The trial court granted Nationwide's motion to dismiss the arbitration based on the res judicata and waiver. CP 60-61. On October 7, 2009, the trial court denied Appellant's motion for reconsideration. CP 77-78.

III. ISSUES PRESENTED FOR REVIEW

(1) Whether an insured can simultaneously force her insurer to defend and ultimately be bound by two separate awards from two separate forums that arise out of the same claim.

(2) Whether an insured is entitled to attorneys' fees under *Olympic Steamship* when the insurer never denied coverage nor refused a claim, but rather raises a legitimate procedural dispute.

IV. ARGUMENT

The trial court's decision was a sound and logical interpretation of Washington's UIM statute and caselaw. The trial court correctly thwarted Appellant's attempt to force Nationwide to defend and be bound in two separate venues by granting Nationwide's motion to dismiss Appellant's demand for arbitration.

As this court is aware, under the *Finney-Fisher* rule, Nationwide had no choice but to intervene or be bound by any excess judgment in the underlying tort action. In *Fisher v. Allstate Insurance Co.*, 136 Wn.2d 240, 246, 961 P.2d 350 (1998), the Washington Supreme Court upheld the Court of Appeals decision in *Finney v. Farmers Insurance Co. of Washington*, 21 Wn. App. 601, 617-618, 586 P.2d 519 (1978), which ruled that an insurer will be bound by the findings, conclusions, and judgment entered in an action against the tortfeasor when the insurer has notice and an opportunity to intervene. *Fisher* further holds that if suit is filed by the insured against the tortfeasor and the insurer declines to intervene, it will be bound by the resulting judgment. *Fisher*, 136 Wn.2d at 252.

Therefore, Nationwide had no choice but to intervene in the underlying action. Appellant conceded this and made no attempt to prevent Nationwide from joining the underlying suit. With respect to her UIM claim, Appellant can either chose to litigate her damages in

arbitration or in the underlying action, but not both. Her attempts to force Nationwide to defend her damages at trial and in arbitration and to hold Nationwide to the highest award clearly violates the principles of res judicata.

A. Res Judicata Prevents the Appellant from Litigating Her Damages Twice.

Not surprisingly, Appellant completely failed in her appellate brief to address the doctrine of res judicata, suggesting that UIM law is not subject to those principles. Res judicata refers to the preclusive effect of judgments, including the relitigation of claims and issues that were litigated or might have been litigated in a prior action. *Loveridge v. Fred Meyer, Inc.*, 125 Wn.2d 759, 763, 887 P.2d 898 (1995) (quoting Philip A. Trautman, Claim and Issue Preclusion in Civil Litigation in Washington, 60 WASH. L. REV. 805, 805 (1985)). This safeguards the need for finality when actions are settled. *Schoeman v. N.Y. Life Ins. Co.*, 106 Wn.2d 855, 862, 726 P.2d 1 (1986). Whether res judicata bars an action is a question of law that is reviewed de novo. *Kuhlman v. Thomas*, 78 Wn. App. 115, 120, 897 P.2d 365 (1995).

An action is barred by the doctrine of res judicata when the issue was or could have been raised in earlier litigation in which there was identity of (a) subject matter, (b) cause of action, (c) persons and parties,

and (d) quality of persons. *Schoeman*, 106 Wn.2d at 858. Among the factors that courts consider are: (1) whether both proceedings arise out of the same facts, (2) whether the proceedings involve substantially the same evidence, and (3) whether the rights and interests established in the first proceedings would be impaired or destroyed by completing the second proceeding. *Kelly-Hansen v. Kelly-Hansen*, 87 Wn. App. 320, 330, 941 P.2d 1108 (1997).

Not only is it contrary to res judicata principles to force Nationwide to litigate Appellant's damages twice, but the potential for inconsistent results is high. Appellant dismisses this argument and declares it simply irrelevant:

That those issues may be resolved differently in any subsequent trial against the third party tortfeasor is **irrelevant**. A final arbitration award determines the arbitration disputes, and an underinsurer will not benefit from more favorable determinations which might be made in subsequent tort litigation.

Appellant's Brief at 10. (emphasis added). Ironically, Appellant is seeking just that; she wants to benefit from the most favorable determination, be it in arbitration or at trial. To adopt the Appellant's reasoning would be saying that res judicata does not apply to UIM law and that Appellant can force Nationwide to defend her damages in trial court even after a judgment is rendered in arbitration.

B. Appellant's Reliance on *Hamilton* to Reap Parallel Remedies is Improper.

In the unlikely event that this Court holds that res judicata does not apply to UIM law, Appellant has waived her right to arbitrate unless she agrees that Nationwide's obligation is extinguished after the arbitration award is rendered. Appellant has refused to do so. It is undisputed that the subject policy between Nationwide and Ms. Riebe entitles her to request arbitration to resolve disputes concerning her UIM benefits. Nationwide has never disputed such a right. Nationwide contests, procedurally, whether Appellant can litigate her damages twice.

For example, under Appellant's logic, as set forth on page 17 of her brief, she alleges that she may collect against Nationwide from an arbitration award that exceeds the tortfeasor's liability limits. However, she further claims that if she does not totally exhaust the Nationwide UIM limits at arbitration, she can then proceed at trial against both the defendant tortfeasor and intervenor Nationwide.

Appellant relies on *Hamilton v. Farmers Ins. Co. of Wash.*, 107 Wn.2d 721, 733 P.2d 213 (1987) to support her theory that she can recover against Nationwide twice. Appellant's reliance on *Hamilton* is flawed. The *Hamilton* court permitted the plaintiffs to compel arbitration against their UIM insurer while the underlying litigation was pending against the

tortfeasor, but the insurer was not a party to the underlying lawsuit. Appellant is attempting to broaden the holding in *Hamilton* to suggest that an insured can litigate her damages against her UIM insurer in both binding arbitration and at trial and that her UIM insurer will be bound by both verdicts.

Hamilton is clearly distinguishable from the present matter. The *Hamilton* court ruled that an insured may invoke the UIM process without ever having initiated, much less concluded, a lawsuit against the tortfeasor. *Hamilton*, 107 Wn.2d 727. However, the *Hamilton* court did not consider whether an insured can invoke a binding UIM arbitration against the insurer while simultaneously litigating the same issues in an underlying tort action in which the insurer is a party. Moreover, *Hamilton* clearly does allow an insured to force her insurer to defend and be bound in multiple forums allowing her to select the most profitable outcome. In short, Appellant cannot hide behind *Hamilton* to mask her improper attempts to reap the benefit of parallel remedies, as this would amount to an unfair windfall.

C. Appellant is Not Entitled to *Olympic Steamship* Fees.

As mentioned above, Nationwide was forced to intervene to prevent an excess judgment to which it would be bound in the trial court. Appellant refused to concede that Nationwide could only be bound by one

judgment. As such, Nationwide finds itself litigating Ms. Riebe's damages twice, and under Appellant's logic, being bound by the most excessive verdict. This is hardly a dispute about coverage, rather it is a procedural dispute which the trial court correctly decided. Appellant is clearly not entitled to *Olympic Steamship* fees under this scenario.

Appellant devotes over four pages of her brief to collect attorneys' fees for a motion that she has brought to dispute the trial court's proper determination of law concerning a procedural issue. Appellant's request for fees is disingenuous; she cannot show that Nationwide is refusing coverage. In fact, what the record does show is that Appellant refuses to admit that her insurer cannot be bound by multiple awards. Appellant is using *Olympic Steamship* to muddy the waters and to prevent her insurer from legitimately objecting to forum shopping. As Nationwide has repeatedly maintained, this is not a coverage dispute and Nationwide has not denied UIM benefits to Appellant.

Under *Olympic Steamship*, an insured may recoup her fees incurred "because an insurer refuses to defend or pay the justified action or claim of the insured, regardless of whether a lawsuit is filed against the insured." *Olympic S.S. Co. v. Centennial Ins. Co.*, 117 Wn.2d 37, 52, 811 P.2d 673 (1991). Appellant erroneously claims this matter presents a

“coverage dispute” and thus she should be awarded *Olympic Steamship* fees. *Appellant’s Brief*, pg. 16.

However, as the record demonstrates, Nationwide has never denied Appellant her UIM benefits under the policy, but rather is seeking a fair determination of a procedural issue. Nationwide has simply requested that Appellant elect a remedy: (1) proceed in the trial court against the defendant tortfeasor and Nationwide; or (2) proceed against Nationwide in binding arbitration. Appellant cannot, as she falsely maintains, litigate against Nationwide in both venues and then force Nationwide to pay the most lucrative judgment.

Moreover, Appellant’s reliance on *Colorado Structures, Inc. v. Insurance Company of the West*, 161 Wn.2d 577, 167 P.3d 1125 (2007) to support her claim for *Olympic Steamship* fees is misplaced. In *Colorado Structures*, the Washington Supreme Court was asked to determine whether *Olympic Steamship* fees are awardable when a surety refuses to pay the terms of a performance bond. *Colorado Structures*, 161 Wn.2d at 597. As set forth in Appellant’s brief, the *Colorado Structures* court held a surety is liable for *Olympic Steamship* attorney fees when it:

Refused to pay any claim based upon its legal interpretation of the bond. Since the question is a legal one, which requires Structures to litigate to obtain a declaratory judgment ruling regarding the meaning of the contract, it is a coverage dispute. Generally, when an insured must bring

a suit against its own insurer to obtain a legal determination interpreting the meaning or application of an insurance policy, it is a coverage dispute.

Colorado Structures, 161 Wn.2d at 617.

In contrast to *Colorado Structures*, Nationwide asked the trial court to make a venue determination and never denied coverage to its insured. Nationwide simply asked that Appellant elect her remedy under the doctrine of res judicata. Nationwide has not denied UIM benefits to Ms. Riebe, nor has Nationwide refused to pay Ms. Riebe's UIM claim.

As such, this is not a case involving a coverage dispute, but rather a question of procedural interpretation of UIM law. Clearly, an award of *Olympic Steamship* fees is not warranted in this matter.

V. CONCLUSION

Based on the foregoing legal authority, Intervenor Nationwide respectfully requests that the Court of Appeals affirm the trial court's ruling denying Appellant's motion to compel arbitration. Under well established Washington law regarding election of remedies and res judicata, Appellant may not force her insurer to defend and be bound in multiple forums allowing her to select the most profitable outcome. Moreover, this is not a matter involving a coverage dispute, but rather is a case involving a procedural interpretation, pursuant to UIM law. As such, an award of *Olympic Steamship* fees is clearly unwarranted.

DATED this 11th day of February 2010.

LAW OFFICE OF
ANDREA HOLBURN BERNARDING

A handwritten signature in black ink, appearing to read "Kelly M. Madigan", is written over a horizontal line.

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Certificate of Service

I hereby certify under penalty of perjury that a true and correct copy of Reply Brief of Intervenor Nationwide Insurance Company was served via Legal Messenger on the following parties:

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DATED this 11th day of February 2010.



Laura K. Criss

APPENDIX A

Plaintiff's Response to Nationwide Insurance Company's
Motion to Dismiss Plaintiff's Demand for Arbitration and
Motion for Attorney Fees

10 pages

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II. STATEMENT OF FACTS

On March 25, 2008, Plaintiff Rebecca Riebe was involved in a motor vehicle crash. On June 17, 2009, Ms. Riebe filed suit against Jennifer West, the driver involved in the accident, and Christopher Thomas, the owner of the vehicle. Defendants West and Thomas have \$250,000 in underlying insurance limits. Ms. Riebe asserts her claim will exceed the \$250,000 underlying limits and has given notice of such to Nationwide Insurance Company, her own automobile and UIM insurance carrier.

The order of events relating to the UIM arbitration demand are as follows:

- 10 1) At some point on, or prior to, May 29, 2009, Ms. Riebe was given notice by
11 Nationwide that it intended to intervene in 'any lawsuit filed'¹;
- 12 2) On May 29, 2009, Ms. Riebe formally demanded UIM arbitration of her claim
13 and requested Nationwide submit its choice of arbitrator within 30 days of
14 receiving the request²;
- 15 3) On July 23, 2009, this Court granted Nationwide's uncontested motion to
16 intervene³;
- 17 4) On August 25, 2009, Ms. Riebe notified Nationwide of the arbitrator she had
18 chosen⁴; and
- 19 5) On that day, Nationwide wrote Ms. Riebe's attorney: "I do not believe that we
20 should have the arbitration until the underlying matter is completed."⁵
21
22
23

24 ¹ See attached May 29, 2009 facsimile from Amanda Jacober to Ms. Celeste Dykes hereto as Exhibit 1.

² Id.

25 ³ See attached July 21, 2009 Order granting Nationwide's Motion to Intervene hereto as Exhibit 2.

⁴ See attached August 25, 2009 e-mail from Amanda Jacober to Ms. Holburn Bernarding hereto as Exhibit 3.

26 ⁵ See attached August 25, 2009 e-mail from Andrea Holburn Bernarding to Amanda Jacober, hereto as Exhibit 4.

1 Nationwide was placed on notice of Ms. Riebe's demand for arbitration before the
2 existing third-party suit began or Nationwide intervened in it.

3 The insurance policy contains the following arbitration clause that permits either party to
4 make a written demand for arbitration if there is a dispute regarding whether Ms. Riebe is legally
5 entitled to recover damages under the UIM policy or a dispute regarding the amount of damages.
6

7 **Arbitration.**

8 A. If we and an "insured" do not agree:

9 1. Whether that person is legally entitled to recover damages
10 under this Part: or

11 2. As to the amount of damages;

12 **Either party may make a written demand for arbitration.**

13 (emphasis added). In this event, each party will select an arbitrator. The
14 two arbitrators will select a third. If they cannot agree within 30 days,
15 either may request that selection be made by a judge of a court having
16 jurisdiction.
17

18 B. Each party will:

19 1. Pay the expenses it incurs; and

20 2. Bear the expenses of the third arbitrator equally.

21 C. Unless both parties agree otherwise, arbitration will take place in
22 the county in which the "insured" lives. Local rules of law as to procedure
23 and evidence will apply. A decision agreed to by two of the three
24 arbitrators will be binding as to:
25

1 agree as to redressability under the policy or amount of damages, then, "Either party may make a
2 written demand for arbitration." If insurance policy language is clear and unambiguous, courts
3 must enforce it as written, and may not modify it or create ambiguity where none exists.
4 *Quadrant Corp. v. American States Ins.*, 154 Wn.2d 165, 171 110 P.3d 733 (2005). Here, the
5 plain language of the arbitration provision is unambiguous and should be enforced as written.
6 On May 29, 2009, Ms. Riebe made a written demand for arbitration and a dispute existed as to
7 the amount of damages Ms. Riebe is entitled to. Therefore, since the conditions precedent
8 (dispute over damages and written demand for arbitration) occurred, Ms. Riebe is entitled to
9 enforce the arbitration provision of the UIM contract with Nationwide.
10

11 **2. Insurance contracts are construed in favor of the insured and Nationwide's**
12 **attempt to insert a condition precedent—that arbitration should take place**
13 **after the third party claim is resolved—should be rejected.**

14 Nationwide attempts to construe the arbitration clause to contain a condition precedent—
15 *that the arbitration should take place after the third party claim is resolved*—which is a
16 condition precedent that does not exist in the policy and is not supported by existing law. On
17 August 25, 2009, Nationwide's counsel wrote to Ms. Riebe's counsel, "I do not believe that we
18 should have the arbitration until the underlying matter is completed." If insurance policy
19 language is clear and unambiguous, courts must enforce it as written, and may not modify it or
20 create ambiguity where none exists. *Quadrant Corp. v. American States Ins.*, 154 Wn.2d 165,
21 171 110 P.3d 733 (2005). Language in an insurance policy that is susceptible of two different
22 but reasonable interpretations is ambiguous and must be liberally construed in favor of the
23 insured. *McAllister v. Agora Syndicate, Inc.*, 103 Wn. App. 106, 109, 111 P.3d 859 (2000).
24 Here, there is no ambiguity as to the timing of when arbitration can take place; however, if an
25 ambiguity does exist, then the arbitration clause must be construed in favor of Ms. Riebe.
26

1 Nationwide's attempt to insert the condition that arbitration take place after the third party claim
2 is resolved should accordingly be denied.

3 3. **Ms. Riebe did not waive her right to arbitration because her conduct**
4 **consistently evinced an intent to exercise her right.**

5 A party may waive arbitration as a matter of law by failing to invoke an
6 arbitration clause when legal action is commenced and arbitration ignored. *Lake Wash.*
7 *School Dist. 414 v. Mobile Modules N.W.*, 28 Wn App. 59, 61, 621 P.2d 791 (1980). A
8 waiver will not be found, however, absent conduct inconsistent with any other intention
9 but to forego that right. *Lake Wash., supra* at 62, 621 P.2d 791. Therefore, merely filing
10 a lawsuit does not forego a party's right to arbitration unless its conduct is clearly
11 inconsistent with any other intention but to forego that right.
12

13 Here, Ms. Riebe's desire to arbitrate with Nationwide has been consistent from the
14 beginning. On May 29, 2009, Ms. Riebe formally demanded UIM arbitration with Nationwide.
15 This came after Ms. Riebe received notice that Nationwide would intervene in 'any lawsuit
16 filed.' Accordingly, Ms. Riebe consistently intended to arbitrate its UIM claim despite its filing
17 of a lawsuit and knowledge that Nationwide would intervene. Additionally, on August 25, 2009
18 less than a month after Nationwide's motion to intervene was granted, Ms. Riebe notified
19 Nationwide that she had chosen an arbitrator. Ms. Riebe's actions of formally demanding UIM
20 arbitration and notifying Nationwide that she had chosen an arbitrator are consistent with an
21 intention to arbitrate. **Ms. Riebe's conduct at no time demonstrated an intention to forego**
22 **her right to arbitration.** (emphasis added) Therefore, as a matter of law, arbitration has not
23 been waived and Ms. Riebe is entitled to arbitrate her UIM claim pursuant to her contract with
24 Nationwide.
25

1 **B. Ms. Riebe, as UIM Insured, has Right to Determine the Order in which Tort and**
2 **UIM Claims are Pursued.**

3 Washington courts have established that a UIM insured (not the UIM insurer) may
4 determine the order in which Tort and UIM claims are pursued. Thomas V. Harris, WASH. INS.
5 LAW, § 35.2, at 35-3 (2d ed. 2006).⁷ Accordingly, Ms. Riebe (not Nationwide) has the right to
6 determine when the arbitration provision in her UIM claim may be enforced.

7 In *Hamilton v. Farmers Ins. Co. of Wash.*, the court established a very general formula
8 for determining whether an insured is entitled to recover from her UIM insurer:

9 Under these provisions there are two conditions to underinsurer motorist coverage: (1)
10 the “covered person” must be legally entitled to recover damages; and (2) damages must
11 exceed the limits of liability under all applicable insurance policies.
12

13 *Hamilton v. Farmers Ins. Co. of Wash.*, 107 Wn.2d 721, 726-27, 733 P.2d 213 (1987).

14 The legislature has not imposed any other requirements upon UIM claimants. Moreover,
15 the courts will not allow an underinsurer to establish any non-statutorily-validated requirements
16 or limitations in its UIM policies. In *Elovich v. Nationwide Ins. Co.*, the court determined that an
17 underinsurer cannot require an insured to secure its consent before he settles with either a
18 tortfeasor or the tortfeasor’s liability insurer. *Elovich v. Nationwide Ins. Co.*, 104 Wn.2d 543,
19 533 707 P.2d 1319 (1985). The court categorically declared in *Elovich* that any “consent to
20 settle” clause was void. *Id.* The court cited the same rationale in *Hamilton v. Farmers Ins. Co.*
21 *of Wash.* and held that an underinsurer cannot assert a contractual or equitable right of
22

23
24
25 ⁷ Thomas V. Harris is a leading expert on insurance law in the state of Washington. He has spent over 33
26 years as a Washington trial lawyer, representing both plaintiffs and defendants in many types of cases.
He currently is employed as an arbitrator, mediator, and private judge. Penny Gans, *Mediator Focus: Tom
Harris, Arbitration and Mediation News*, June 1, 2007, Volume 3, Issue 2.

1 subrogation prior to the time which it has paid underinsurance benefits to its insured. *Hamilton*,
2 107 Wn.2d 732-33.

3 In reaffirming that aspect of its *Elovich* holding, the court stated in *Hamilton*, that “an
4 underinsurer’s attempts to limit contractually the insured’s right to recover [against the
5 tortfeasor’s liability insurance] are void against public policy.” *Id.*, at 728. The court
6 specifically noted that it would not allow the imposition of such restrictions because they have
7 not been authorized by the legislature. *Id.*, at 729. *See also Britton v. Safeco Ins. Co. of Am.*,
8 104 Wn.2d 518, 531, 707 P.2d 125 (1985). The court’s rationale in *Hamilton* was as follows:
9

10 ...Why should the insurer, mandated by statute to afford UM coverage and receiving a
11 premium for exposure over liability limits of the underinsured motorist, have the right to
12 interfere with the insured’s settlement with a liability carrier within policy limits, and that
13 carrier’s insured?

14 *Id.*, at 729 (quoting *Niemann v. Travelers Ins. Co.*, 368 So.2d 1003, 1007 (La. 1979).

15 The Supreme Court has further determined that an underinsurer cannot force its insured
16 to exhaust her remedies against the tortfeasor and the tortfeasor’s liability insurer. In *Hamilton*,
17 the court held that such an exhaustion of potential remedies is not a prerequisite to seeking UIM
18 coverage:
19

20 ...The injured insured is entitled to compensation from his underinsurer
21 without regard to any recovery obtained from other sources and without
22 regard to whether such recovery exhausts any coverage provided by the
23 liability insurers of the tortfeasor...Whether the injured insured obtains
24 full recovery of the tortfeasor’s liability insurance limits is irrelevant to the
25 determination of underinsurance payments.
26

1 *Id.*, at 727.

2 **As a result, an insured can choose the sequence in which she will seek to recover**
3 **damages. She may invoke the UIM process without having initiated, much less concluded,**
4 **a lawsuit against the tortfeasor.** (Emphasis Added). Moreover, as the court emphasized in
5 *Elovich and Hamilton*, an insured may choose, at any time, to settle her claim with the tortfeasor
6 or his liability insurer. Harris, Washington Insurance Law § 35.2, at 35-4.

7
8 An insured can proceed with her UIM claim even if she has settled for less than the
9 tortfeasor's available liability insurance. *Hamilton*, 107 Wn.2d 727; *Elovich*, 104 Wn.2d 552;
10 *Allstate Ins. Co. v. Dejvod*, 63 Wn. App. 278, 280, 285, 818 P.2d 608 (1991). If she chooses to
11 proceed directly with the arbitration of her UIM claim, the UIM arbitrators will resolve all of the
12 requisite issues necessary to determine whether the underinsurer has a duty to pay its insured. In
13 that regard, the arbitrators will make binding determinations on liability and damage issues.
14 Those issues may be resolved in an inconsistent fashion during any subsequent trial against the
15 tortfeasor. Any final arbitration determinations become the law of the arbitration dispute, and an
16 underinsurer will not benefit from more favorable determinations which might be made in
17 subsequent tort litigation. Harris, Washington Insurance Law § 35.2, at 35-4.

18
19 **C. Ms. Riebe is entitled to an award of attorney fees under the Olympic**
20 **Steamship Rule.**

21 When the conduct of the insurer imposes upon the insured the cost of compelling the
22 insurer to honor its commitments under an insurance contract, the insured can recover those
23 costs. *Olympic S.S Co. v. Centennial Ins. Co.*, 117 Wash.2d 37, 53, 811 P.2d 673 (1991). Here,
24 Ms. Riebe incurred costs (i.e. researching for and writing this response) in order to compel
25 Nationwide to honor its commitment of submitting to arbitration upon the occurrence of the
26

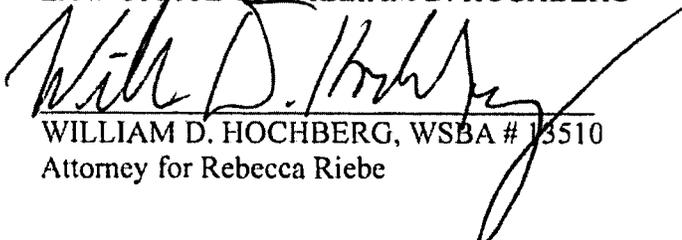
1 above-mentioned conditions precedent (damages and written demand by insured). Accordingly,
2 Ms. Riebe is entitled to recover attorney fees for the costs related to this response. If
3 Nationwide's Motion is denied, Ms. Riebe will submit a Motion for Fees and Costs if the parties
4 are unable to agree upon an amount.

5
6 **VI. CONCLUSION**

7 Ms. Riebe is entitled to arbitration under her UIM policy. Additionally, as a UIM
8 insured, she is entitled to choose when arbitration should take place, so long as the conditions
9 precedent for bringing an arbitration claim have been met. Furthermore, Nationwide is not
10 permitted to add an additional condition precedent that arbitration should take place after the
11 resolution of the third party claim. Such a stance is inconsistent with Ms. Riebe's insurance
12 policy and existing law. Finally, Ms. Riebe is entitled to attorney fees incurred relating to this
13 response.

14 DATED this 16 day of September, 2009.

15
16 LAW OFFICE OF WILLIAM D. HOCHBERG

17 
18 WILLIAM D. HOCHBERG, WSBA # 13510
19 Attorney for Rebecca Riebe