

69109-1

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NO. 69109-1-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION I

MWW, PLLC, a Washington corporation, Plaintiff and Respondent,

vs.

KIRIBATI SEAFOOD COMPANY, LLC, and OLYMPIC PACKER, et al.,  
Defendants;

KIRIBATI SEAFOOD COMPANY, LLC, and OLYMPIC PACKER, et al.,  
Counterclaim-Plaintiffs,

v.

MWW, PLLC and DENNIS MORAN; et al.,  
Counterclaim-Defendants and Respondents;

MONITOR LIABILITY MANAGERS, LLC and CAROLINA  
CASUALTY INSURANCE COMPANY,  
Intervenors and Appellants.

**BRIEF OF INTERVENORS AND APPELLANTS  
MONITOR LIABILITY MANAGERS, LLC AND  
CAROLINA CASUALTY INSURANCE COMPANY**

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## I. ASSIGNMENTS OF ERROR

### A. Assignments of Error

1. The trial court erred in granting MWW's motion to approve the settlement as reasonable. CP 3585.

2. The trial court erred in entering finding number 2 that MWW's fee claim settled "for a compromised amount of . . . \$550,000" and that the fee settlement was "reasonable and prudent based on the *Glover* factors." CP 3583.

3. The trial court erred in entering finding number 3 that the "parties have agreed to settle the Kiribati legal malpractice claim and fiduciary breach counterclaims for a compromised amount of \$550,000" which was "reasonable and prudent based on the *Glover* factors." CP 3583.

4. The trial court erred in entering finding number 4, which approved the escrow clause of the settlement agreement. CP 3584.

5. The trial court erred in entering finding number 7, that "Kiribati's settlement offer of May 18 was timely + almost immediately communicated to Monitor; Monitor did not timely respond." CP 3585.

### B. Issues Pertaining to Assignments of Error

1. Under RCW 4.22.060, did the trial court err in approving the \$550,000 insurer payment term of the settlement agreement when

neither party to the settlement promised to pay any money or stipulated to liability, and when the actual consideration for the settlement was the exchange of mutual releases?

Interpretation of a statute is reviewed *de novo*. *Coulter v. Asten Grp., Inc.*, 155 Wn. App. 1, 14, 230 P.3d 169 (2010). The scope of the trial court's power to determine issues in a reasonableness hearing is an issue of law reviewed *de novo*. *Id.* at 7, n.2.

2. Did the trial court err in entering findings of fact regarding the timeliness of Carolina's response to a settlement proposal when those findings were not necessary to the outcome of the hearing and were based on a reply declaration filed the day before the reasonableness hearing?

The scope of a trial court's power to determine issues in a reasonableness hearing is an issue of law reviewed *de novo*. *Id.* A trial court's reasonableness determination is reviewed for abuse of discretion. *Id.*

## II. STATEMENT OF THE CASE

Appellant Carolina Casualty Company ("Carolina") was the legal malpractice liability insurer for plaintiff MWW, PLLC and Dennis Moran (collectively "MWW"). CP 3487. Appellant Monitor Liability Managers, LLC was the managing general underwriter for Carolina with respect to the claim against MWW.

In May 2010, MWW initiated suit to recover attorney fees from its former clients Kiribati Seafood Company, LLC and Olympic Packer, LLC (collectively, “Kiribati”) with respect to its representation of Kiribati in various maritime proceedings. CP 1. As described by MWW, Kiribati was started as a fishing venture between 2000 and 2001. CP 13. Kiribati’s vessel, the MADEE, was damaged in 2001 due to negligent installation of a rudder in Hawaii and later destroyed in a 2002 collapse of a dry dock in Tahiti. CP 13. Since that time, Kiribati’s sole business has been asserting claims arising out of the rudder and dry dock incidents and responding to claims from its creditors. *Id.* MWW sought fees allegedly earned in representing Kiribati in these matters. Kiribati’s primary asset to satisfy the MWW fee claim and the claims of its creditors was the proceeds of prior and ongoing litigation in Tahiti over the damage to the MADEE. CP 63-64.

Kiribati filed counterclaims against Moran and MWW for legal malpractice and breach of fiduciary duty. CP 359. Carolina provided a defense under reservation of rights to Moran and MWW against the counterclaims. CP 3487.

The lawsuit was highly contentious, especially with respect to the preservation of Kiribati’s assets for creditors. At MWW’s request, the trial court created a receivership to preserve Kiribati’s assets in the interest

of MWW. CP 66; CP 95-98. Kiribati principals were accused of hiding assets and engaging in fraudulent transfers, and were even found in contempt of court. CP 96. Many of Kiribati's other creditors intervened in the lawsuit, resulting in competing claims for the receivership funds, as illustrated by the receiver's report submitted three months before the settlement, which concluded that "the sum of all creditor claims exceeds the Tahiti court proceeds by hundreds of thousands of dollars." CP 2085-2097. Over two years, the lawsuit generated more than 900 docket entries.

Kiribati and MWW mediated their dispute in April 2012, but failed to reach an agreement. CP 3395. Settlement negotiations resumed after a May 18, 2012 summary judgment ruling that allowed some of Kiribati's counterclaims to proceed to trial. CP 3397. MWW and Kiribati reached an agreement on May 22, 2012 at approximately 7 p.m. PDT. CP 3491-3492; CP 3409. The agreement was made without Carolina's consent.

On May 31, 2012, MWW noted a hearing on the reasonableness of the settlement for June 8, 2012. CP 3359. Attached to the hearing notice was a copy of the written settlement agreement. CP 3364-3369.

The written settlement agreement contained an unusual and suspicious payment provision, which required that Kiribati pay \$550,000

to MWW in settlement of the fee claims, and MWW's insurer (presumably Carolina) also pay \$550,000 to Kiribati in exchange for the settlement of the malpractice and fiduciary duty counterclaims. The settlement agreement specifically stated as follows:

A. Kiribati shall pay \$550,000 in full and final settlement of MWW, PLLC's fee claims and lien and MWW PLLC's insurer shall pay Kiribati \$550,000.00 in full and final settlement of its legal malpractice and breach of fiduciary duty counterclaims. Payment shall be accomplished as follows:

CP 3365.

Upon reading the set of clauses that followed, it is clear that both \$550,000 payments would be made with the same money supplied by MWW's insurer. In other words, the money would be passed through, with only MWW being "paid." Essentially, the party getting paid last, MWW, would be the only one that actually gets paid in any meaningful sense. The clauses specifically stated as follows:

1. Within 10 (ten) calendar days of approval by the Court of this settlement agreement at a reasonableness hearing, MWW's insurer shall pay the full \$550,000.00 into an escrow agreed by MWW and Kiribati. Upon payment by MWW's insurer of the full \$550,000 into the agreed escrow, the following shall promptly and simultaneously occur:

2. The escrow shall pay Kiribati \$550,000.00 by check and Kiribati shall immediately endorse this check back to the escrow.

3. The escrow shall immediately pay MWW, PLLC \$550,000.00 by check.

CP 3365.

Carolina objected to the above set of provisions as an impermissible “pass through” arrangement that, in effect, treated MWW’s malpractice insurance as an asset to pay MWW’s own attorney fee claim. RP 23; CP 3481. It is undisputed that Carolina has no duty to pay MWW’s attorney fee claim under the subject malpractice insurance policy.

The settlement agreement further specified that the parties would release all pending claims, liens, or judgments against one another. CP 3365-3366. In support of the settlement, MWW and Kiribati filed a motion, including a host of declarations, and argued that the settlement of claim and counterclaim were reasonable under the nine *Chaussee v. Maryland Cas. Co.*, 60 Wn. App. 504, 510, 803 P.2d 1339 (1991), factors. CP 3372-3378; CP 3391-3399; CP 3412-3415.

The parties presented the following evidence.

**1. Releasing Person’s Damages.** MWW claimed as much as \$1,103,518 plus interest for its fee claim. For the counterclaim, Kiribati was seeking more than \$2 million in combined malpractice claims and

refunds of amounts already received by MWW pursuant to a breach of fiduciary duty theory. CP 3372-73; CP 3413.

**2. Merits of Releasing Person's Liability Theory.** For MWW's claim, it asserted that its fees were supported by fee agreements and the risks it undertook in representing Kiribati, as well as expert testimony. Kiribati's claims, by contrast, were riddled with duty, breach and causation problems. CP 3374; CP 2433-2477. Kiribati had designated an expert in support of its claims. RP 30-31, 38.

**3. Merits of Released Person's Defense Theory.** For MWW's fee claim, Kiribati would apparently contend at trial through expert testimony that the fee agreements were invalid and also that MWW could not recover in *quantum meruit* in the absence of time records. CP 3375. On the malpractice counterclaims, MWW would argue that the alleged malpractice incidents were tactical judgment calls for which MWW would be immune. CP 3376. MWW would also argue that the claims suffered from causation defects. *Id.* For example, the most significant claim against MWW, for \$1.7 million, was based on the following theory: but for Moran's negligence, a factfinder would have concluded that it was a foreseeable consequence of the negligent installation of a rudder **in Hawaii** that the ship would later be destroyed in a dry dock collapse **in Tahiti** while undergoing repairs. CP 2446.

Another significant malpractice claim would have depended on showing that MWW, which became attorney of record after the expert disclosure deadline had passed, would have been able to successfully persuade a federal judge to allow a **late** expert report, and that the late-disclosed expert would have been believed instead of the other party's expert, thereby changing the outcome of the litigation. CP 2445.

**4. Released Person's Relative Fault.** This factor is irrelevant to MWW's fee claim because it is a contract claim. With respect to the malpractice counterclaim, both parties alleged that other attorneys were at fault. CP 3376; CP 3394. MWW also claimed Kiribati was at fault. CP 3376; CP 3414. Kiribati's counsel explained that with respect to its most significant claim for \$1.7 million, they settled because "we have another defendant that we think is an easier mark on the subrogation claim." RP 36.

**5. Risks and Expense of Continued Litigation.** Trying the case would have been expensive because of its complexity. Moreover, MWW faced the risk that a jury would not like Mr. Moran because he was an attorney claiming a significant fee. Kiribati faced serious credibility problems because of its conduct during the case. CP 3376; RP 43.

**6. Released Person's Ability to Pay.** Payment from Kiribati on the fee claim would need to come out of the amounts collected by the

receiver. RP 43-44. Payment for any judgment on the malpractice claim would come either from the remaining limits of the insurance or from some other source. Under the settlement agreement, the same \$550,000 from a third-party insurance carrier serves as “payment” of both parties’ \$550,000 claims.

**7. Evidence of Bad Faith Collusion or Fraud.** The parties attested that the agreement was reached through arms-length negotiations with the involvement of a mediator. CP 3395-3396. They asserted that they could not have colluded because they disliked one another so much. *Id.* Carolina highlighted for the trial court that the pass through provisions of the settlement were themselves evidence of collusion because the parties are purporting to exchange **identical** sums with the net result of MWW having its fees paid by Carolina. RP 23-24; CP 3477.

**8. The Extent of the Releasing Person’s Investigation and Preparation of the Case.** The parties agree that there was substantial pretrial litigation.

**9. The Interests of the Parties Not Being Released.**  
Carolina was not released by the settlement.

The other intervening creditors most likely benefitted from the settlement because MWW would not need to collect its fee from the limited funds collected by the receiver. CP 3378.

Carolina moved to intervene in the reasonableness hearing on shortened time and filed an opposition to a motion, a request for discovery, and a continuance. CP 3473. Carolina's objections in its briefing and at the hearing itself focused on the pass through provision obligating Carolina to pay \$550,000 to satisfy MWW's fee claim against Kiribati. CP 3473; RP 23-24. Carolina requested discovery because it was unclear why any payment to MWW would not come out of the funds being held by the receiver for that purpose. CP 3477; RP 24-25.

A hearing was held on June 8, 2012. RP 1. The trial court allowed Carolina to intervene, but refused to allow a continuance or discovery. The trial court then reached a conclusion based on submitted declarations and the oral argument at the hearing. CP 3586; RP 3-4; RP 47.

The court entered a written order granting the motion for determination of reasonableness on June 18, 2012. CP 3585. The order included findings that MWW's fee claim settled "for a compromised amount of . . . \$550,000" and that the fee settlement was "reasonable and prudent based on the *Glover* factors." CP 3583. The court also found that the "parties have agreed to settle the Kiribati legal malpractice claim and fiduciary breach counterclaims for a compromised amount of \$550,000" in addition to satisfaction of the prior contempt sanction. CP 3583-3584. The court specifically approved the escrow clause of the settlement

agreement purporting to obligate MWW's insurer to pay MWW through escrow, noting factors such as "money tracing problems" and "competing security interests" with respect to the assets of Kiribati held by the receiver. CP 3584.

Finally, the court entered a handwritten finding that "Kiribati's settlement offer of May 18 was timely + almost immediately communicated to Monitor; Monitor did not timely respond." CP 3585. This statement appeared to be taken from the ninth paragraph of a reply declaration dated the day before the reasonableness hearing. CP 3516.

Carolina timely filed a notice of appeal. CP 3594.

### **III. SUMMARY OF ARGUMENT**

The settlement agreement is a nullity. Rather than settle MWW's liability to Kiribati in exchange for a payment of money, and settle Kiribati's liability to MWW in exchange for a payment of money, MWW and Kiribati agreed to release all claims they have against one another because per their agreement, MWW's insurer would be required to pay MWW \$550,000 for its uncovered attorney fee claim.

MWW and Kiribati's attempted to persuade the trial court that this agreement should be treated like a typical covenant judgment settlement. They framed the issues as whether MWW committed malpractice while representing Kiribati, inflicting damages of \$550,000 upon Kiribati, and at

the same time whether MWW was due a fee from Kiribati in the amount of \$550,000. MWW and Kiribati's obvious and nefarious goal was to give Kiribati a source of funds to pay MWW's fee. This injection of insurance money would thus satisfy the parties—MWW would get paid, Kiribati would not do the paying, and both sides could walk away after years of litigation.

Washington courts have never approved, and RCW 4.22.060 does not authorize, the use of a reasonableness hearing as a means to conduct an appraisal of competing claims settled by mutual release. And unlike in all prior uses of the covenant judgment reasonableness hearing, MWW's **liability** was not the primary driver of the settlement because it **was the plaintiff**. As a result, the settlement does not reliably assess the monetary value of the legal malpractice counterclaim claim.

Additionally, Carolina was deprived of the ability to meaningfully participate in the reasonableness hearing. In particular, Carolina was given minimal notice of the hearing. Compounding this was the court's inexplicable denial of Carolina's request to conduct any discovery. Carolina had not been a party to the case prior to the reasonableness hearing, and upon being forced into intervening to protect its interests, Carolina was not afforded any opportunity to learn of the negotiation for and formation of the settlement agreement. In other words, without

discovery, how could Carolina determine whether the settlement agreement was, in fact, the product of collusion?

Finally, the trial court's finding that Carolina did not timely respond to a settlement proposal was inappropriate. That issue was not before the court and was not properly supported by the record.

The Court of Appeals should therefore vacate the trial court's reasonableness determination.

#### IV. ARGUMENT

##### A. **Covenant Judgment Reasonableness Determinations Are Reserved for Particular Types of Settlements**

Twenty years ago, this Court announced the factors that should be used to determine whether a settlement in one lawsuit determines the liability of the insured in a later lawsuit against a liability insurer. It adopted the following list:

[T]he releasing person's damages; the merits of the releasing person's liability theory; the merits of the released person's defense theory; the released person's relative faults; the risks and expenses of continued litigation; the released person's ability to pay; any evidence of bad faith, collusion, or fraud; the extent of the releasing person's investigation and preparation of the case; and the interests of the parties not being released.

*Chaussee v. Maryland Cas. Co.*, 60 Wn. App. 504, 510, 803 P.2d 1339 (1991). The *Chaussee* test is based on the factors needed to assess the reasonableness of a settlement under RCW 4.22.060. *Id.* The factors

eventually became part of a “reasonableness hearing” procedure in which a defendant insured and a plaintiff tort claimant could seek approval from a trial court of a settlement entered into when the insurer either refused to defend the insured or settle a claim against it.<sup>1</sup> This Court recently described the specific “pattern” involved in such cases:

A defendant is sued and seeks coverage. The defendant’s insurer refuses to defend. The defendant enters into a settlement agreement with the plaintiff. The defendant stipulates to entry of a judgment and assigns to the plaintiff any claims against the insurer in exchange for the plaintiff’s promise not to execute the judgment against the defendant. This is called a covenant judgment. *See Besel v. Viking Ins. Co. of Wis.*, 146 Wash.2d 730, 734, 49 P.3d 887 (2002). The plaintiff, now standing in the defendant’s shoes, sues the insurer for bad faith and related claims, seeking to recover the agreed settlement amount. If the insurer is liable for bad faith and the covenant judgment is reasonable, the presumptive measure of damages is the amount in the covenant judgment. *Besel*, 146 Wash.2d at 738, 49 P.3d 887. The plaintiff has the burden of proving the covenant judgment is reasonable. *Chaussee v. Md. Cas. Co.*, 60 Wash.App. 504, 510, 803 P.2d 1339, *review denied*, 117 Wash.2d 1018, 818 P.2d 1099 (1991).

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<sup>1</sup> *Besel v. Viking Ins. Co. of Wisconsin*, 146 Wn.2d 730, 739, 49 P.3d 887, 891-892 (2002) (“We hold the amount of a covenant judgment is the presumptive measure of an insured’s harm caused by an insurer’s tortious bad faith if the covenant judgment is reasonable under the *Chaussee* criteria.”); *Red Oaks Condo. Owners Ass’n v. Sundquist Holdings, Inc.*, 128 Wn. App. 317, 321, 116 P.3d 404, 406 (2005); *Water’s Edge Homeowners Ass’n v. Water’s Edge Assocs.*, 152 Wn. App. 572, 583, 216 P.3d 1110, 1117 (Wn. App. Div. 2, 2009) (“stipulated judgment amount of \$8.75 million unreasonable”); *Howard v. Royal Specialty Underwriting, Inc.*, 121 Wn. App. 372, 375, 89 P.3d 265, 267 (2004).

*Unigard Ins. Co. v. Mut. of Enumclaw Ins. Co.* 160 Wn. App. 912, 919, 250 P.3d 121, 125-26 (2011).

In *Unigard*, this Court went on to note that the absence of key portions of this pattern make it inappropriate to apply *Chaussee* and its progeny:

This case follows the pattern except there was no covenant judgment. Engelmann did not admit liability or stipulate to a judgment amount. He merely assigned to Newmarket his rights against Mutual of Enumclaw. Because there was no presumptive measure of damages arising from the settlement agreement, the task of determining Engelmann's damages remained an issue for trial.

*Id.* at 919.

In *Bird v. Best Plumbing Group*, 287 P.2d 551 (2012), the Supreme Court also described the types of settlements to which the procedure applies:

These settlements typically involve a stipulated judgment against the insured, a covenant not to execute on that judgment against the insured, and an assignment to the plaintiff of the insured's bad faith claim against the insurer. This is referred to collectively as a covenant judgment. If the settlement amount is deemed reasonable by a trial court, it becomes the presumptive measure of damages in the later bad faith action.

*Id.* at 554.

Approval of a covenant judgment settlement has potentially important consequences for an insurer even when it is not alleged to have acted in bad faith. The hearing is dispositive of the insured's legal liability

and the amount of damages in subsequent coverage litigation. *Mut. of Enumclaw Ins. Co. v. T&G Constr., Inc.*, 165 Wn.2d 255, 267, 199 P.3d 376, 382-383 (2008) (Reasonable covenant judgment establishes “fact of liability and the presumptive amount of damages in the absence of an insurer’s bad faith.”).

**B. A Reasonableness Hearing Could Not Set the Value of the Insured’s Liability in this Case**

Like the settlement in *Unigard*, this case falls far outside the accepted and time-honored category of settlements subject to the covenant judgment reasonableness hearing. The following is a comparison of the characteristics of this case with those of a case reasonably susceptible to fair settlement by this procedure:

COVENANT JUDGMENT SCENARIO	SETTLEMENT IN THIS CASE
A defendant is sued and seeks coverage.	A plaintiff receives a counterclaim and seeks coverage.
The defendant enters into a settlement agreement with the plaintiff.	The plaintiff and counterclaim plaintiff settle their claims against one another.
The defendant stipulates to entry of a judgment.	Mutual release with no entry of judgment.
[The insured] assigns to the plaintiff any claims against the insurer in exchange for the plaintiff’s promise not to execute the judgment against the defendant.	No assignment of rights.

COVENANT JUDGMENT SCENARIO	SETTLEMENT IN THIS CASE
The plaintiff, now standing in the defendant's shoes, sues the insurer for bad faith and related claims, seeking to recover the agreed settlement amount.	The plaintiff, still standing in its original shoes, sues its liability insurer.

As set forth above, the following well settled elements of a settlement subject to a reasonableness hearing were missing here: (1) a covenant judgment, (2) an admission of liability, and (3) an assignment of MWW's insurance claim to Kiribati. Instead, the parties agreed to dismiss their competing claims and agreed that MWW's insurer, which was a non-party to the case at the time the settlement was negotiated and reduced to writing, should pay MWW. Moreover, there is no promise by any party to the settlement agreement that the initial \$550,000 insurer payment will be made. Rather, the settlement agreement simply states that MWW shall make the payment into an escrow starting a chain of transactions culminating in a payment to MWW. Kiribati was not to receive any consideration under the agreement apart from dismissal of MWW's fee and sanctions claim against it.

The trial court inappropriately found that the settlement was one in which the parties were settling the claims against each other for \$550,000. The trial court apparently harbored a fundamental misapprehension of the agreement's terms.

Moreover, there are sound practical reasons for not applying the reasonableness procedure to this type of settlement.

First, covenant judgment reasonableness hearings are designed to protect against an insured's indifference. That is, the insured lacks the incentive to drive a hard bargain to reduce the judgment amount because it will not be personally liable. The Supreme Court has explained:

We are aware that an insured's incentive to minimize the amount of a judgment will vary depending on whether the insured is personally liable for the amount. Because a covenant not to execute raises the specter of collusive or fraudulent settlements, the limitation on an insurer's liability for settlement amounts is all the more important.

*Besel v. Viking Ins. Co. of Wisconsin*, 146 Wn.2d 730, 738, 49 P.3d 887 (2002). Here, the danger goes well beyond mere indifference. Because the amount of the settlement here is the exact amount that MWW intends to **be paid**, MWW's interest was best served to **inflate** the amount of the settlement as much as possible. But Carolina, as a liability insurer, does not cover its own insured's unpaid receivables. Thus, the recited "settlement amount" affects only how much MWW intends to receive from its own liability insurer for its own uncovered fee claim against Kiribati.

Second, the premise of using a reasonableness hearing to determine an insured's liability for a subsequent insurance dispute

disintegrates under these facts. That premise is “[w]hat the insured is legally obligated to pay is the exact issue to be determined in the liability suit”<sup>2</sup> and as a result, “the merits of [the insured’s] defense theories [are] . . . central . . . because whether to settle, and under what terms, turned in large part on the risk of an adverse judgment.”<sup>3</sup>

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<sup>2</sup> *T&G Constr.*, 165 Wn.2d at 264-65.

<sup>3</sup> *Id.*

Because in this case the insured brought a claim for fees and was defending a legal malpractice counterclaim, the risk is of an adverse judgment *against* the insured is not necessarily “central” to any global settlement reached by the parties. Instead, the settlement is equally shaped by MWW’s fee claim, making it is equally driven by the risks associated with MWW’s fee claim. Unlike in the covenant judgment context, it would be unfair on these facts to treat the “settlement amount” as the measure of MWW’s liability to Kiribati for liability insurance purposes.

Because there was no basis for using the settlement agreement as a measure of MWW’s liability to Kiribati, the trial court erred in treating the settlement as if it were an ordinary covenant judgment settlement for \$550,000.

**C. The Plain Language of RCW 4.22.060 Precludes Its Application to this Settlement**

In *Bird*, the Supreme Court held that reasonableness hearings are governed by RCW 4.22.060: “We take this opportunity to explicitly approve the application of RCW 4.22.060 to reasonableness hearings involving covenant judgments.” 287 P.3d at 557.<sup>4</sup>

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<sup>4</sup> This was done because the statute was actually adopted for use in the context of one of multiple defendants settling with a plaintiff. *Bird* and other cases concerned covenant judgments, which are different.

Pursuant to RCW 4.22.060, hearings are restricted to the “issue of the reasonableness of the amount to be paid” in exchange for a release or covenant not execute a judgment:

(1) A party prior to entering into a release, covenant not to sue, covenant not to enforce judgment, or similar agreement with a claimant shall give five days’ written notice of such intent to all other parties and the court. The court may for good cause authorize a shorter notice period. The notice shall contain a copy of the proposed agreement. A hearing shall be held **on the issue of the reasonableness of the amount to be paid** with all parties afforded an opportunity to present evidence. A determination by the court that the amount to be paid is reasonable must be secured. . . .

(2) . . . the claim of the releasing person against other persons is reduced by **the amount paid** pursuant to the agreement unless the amount paid was unreasonable at the time of the agreement in which case the claim shall be reduced by an amount determined by the court to be reasonable.

(3) A determination that the **amount paid for a release, covenant not to sue, covenant not to enforce judgment,** or similar agreement was unreasonable. . . .

RCW 4.22.060 (emphasis added).

The “pass through” provision here is not an agreement on an “amount to be paid” in exchange for the release of Kiribati’s claims against MWW. A covenant judgment necessarily involves the insured defendant being released in exchange for a money judgment in favor of the plaintiff, the amount of the judgment representing the amount that may be paid by the insurer.

Yet, the malpractice claims against MWW were not released in exchange for payment to Kiribati or a money judgment against MWW. Instead, Kiribati released its counterclaims in exchange for MWW's reciprocal agreement to release its claims.

Instead of seeking a determination of the reasonableness of the amount to be paid (because there wasn't one), MWW's motion manufactured the notion that there were equal amounts to be paid. MWW and Kiribati then asked the trial court to rule: (1) that MWW's barter exchange of its fee claim for Kiribati's malpractice claim in a mutual release was reasonable, and (2) the exchange was reasonable because both claims were reasonably worth \$550,000.

RCW 4.22.060 does not apply to determinations of whether it was "reasonable" for the parties to enter into mutual releases. Even if it applied to such a situation, a determination that each claim had a certain monetary value would be entirely superfluous. If the competing claims had equal value, then nobody gets paid, and a reasonableness hearing is, in turn, unnecessary.

Because the \$550,000 pass through provision was not the "amount to be paid" in exchange for Kiribati's release of MWW, the trial court erred in finding that it was reasonable for either party to pay \$550,000 to the other.

**D. The Trial Court Erred in Entering Findings on the Timeliness of Carolina's Settlement Communications**

The trial court found that “Kiribati’s settlement offer of May 18 was timely + almost immediately communicated to Monitor; Monitor did not timely respond.” CP 3585. This finding and conclusion appears to be a paraphrase of paragraph nine of a reply declaration dated the day before the reasonableness hearing. CP 3516.

The trial’s court’s must be vacated because: (1) Carolina’s conduct is an issue germane to coverage litigation, not a reasonableness hearing; (2) the trial court’s conclusion was not supported by either admissible or sufficient evidence; and (3) Carolina never had a meaningful opportunity to respond before the hearing.

Pursuant to RCW 4.22.060, the scope of the hearing should have been limited to the reasonableness of amount of the settlement. Thus, the trial court exceeded its authority by entering findings about the timeliness of Carolina’s settlement communications. *Cf., Roundup Tavern, Inc. v. Pardini*, 68 Wn.2d 513, 516, 413 P.2d 820, 822 (1966) (reversing trial court’s unnecessary determination of an issue that may arise between the parties in a future proceeding).

The trial court’s finding here relates to issues that are better decided in the separate pending coverage litigation. There, Carolina (and

MWW) will have a complete opportunity to present evidence and respond to allegations.

Insurers, such as Carolina, should be free to participate in reasonableness hearings without fear that derogatory findings about claim handling will be entered against them based solely on naked assertions in a reply declaration. This is particularly true because first, an insurer is ordinarily given only a few days' notice of these hearings, and second, the claims handling conduct is wholly irrelevant to the reasonableness determination.

Separate from whether the trial court should make side comments about an insurer's claim handling in the context of the underlying tort action, the trial court's conclusion is factually erroneous. The declaration does not support the conclusion that Carolina was "untimely" in its response. In fact, Mr. Walsh attested that an e-mail about an offer was sent to Carolina sometime on Friday, May 18, 2012. CP 3516. He also testified that the parties went on to reach an actual agreement by the following Tuesday, May 22, 2012. *Id.* Carolina is said to have first responded to the agreement on Friday, May 25, 2012. CP 3516. Mr. Walsh's declaration, which Carolina vehemently disputes, does not show that Carolina violated any recognized standard for timely analysis of a settlement proposal (especially one that transformed from offer to

agreement in just two business days) and lacks any information about the circumstances that would justify the court's conclusion. Therefore, this Court should vacate the trial court's handwritten finding regarding Carolina's claim handling with respect to the settlement.

## V. CONCLUSION

The trial court erred in approving as reasonable the agreement MWW and Kiribati portrayed as a reciprocal \$550,000 settlement. It was no settlement of the parties' liability—it was simply a pass through of Carolina's payment to MWW in order to satisfy an otherwise uncovered claim. Nor was a mutual release of competing claims the type of settlement to which RCW 4.22.060 applies.

Finally, the trial court erred in making findings regarding the timeliness of Carolina's communications with MWW. That issue was clearly not before the trial court and was immaterial to the purported reasonableness of the settlement between Kiribati and MWW.

Carolina therefore respectfully requests that the Court of Appeals vacate the trial court's order approving the settlement as reasonable.

RESPECTFULLY SUBMITTED this 8th day of January, 2013.

BETTS, PATTERSON & MINES, P.S.

By: \_\_\_\_\_

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Attorneys for Intervenors/Appellants  
Monitor Liability Managers, LLC and  
Carolina Casualty Insurance Company

**CERTIFICATE OF SERVICE**

I, Valerie D. Marsh, declare as follows:

1) I am a citizen of the United States and a resident of the State of Washington. I am over the age of 18 years and not a party to the within entitled cause. I am employed by the law firm of Betts Patterson & Mines, One Convention Place, Suite 1400, 701 Pike Street, Seattle, Washington 98101-3927.

2) By the end of the business day on January 8, 2013, I caused to be served upon counsel of record at the addresses and in the manner described below, the following documents:

- **Brief of Intervenors and Appellants Monitor Liability Managers, LLC and Carolina Casualty Insurance Company; and**
- **Certificate of Service.**

Dennis M. Moran	<input type="checkbox"/>	U.S. Mail
Moran and Keller	<input checked="" type="checkbox"/>	Hand Delivery
5608 - 17th Avenue NW	<input type="checkbox"/>	Telefax
Seattle, WA 98107-5232	<input type="checkbox"/>	UPS
	<input type="checkbox"/>	E-mail

William H. Walsh	<input type="checkbox"/>	U.S. Mail
Margaret Pak	<input checked="" type="checkbox"/>	Hand Delivery
Corr Cronin	<input type="checkbox"/>	Telefax
1001 Fourth Avenue, Suite 3900	<input type="checkbox"/>	UPS
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I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 8th day of January, 2013.

  
Valerie D. Marsh