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(Washington Court of Appeals No. 76479-9-I)

SUPREME COURT OF THE STATE OF WASHINGTON

ZURICH AMERICAN INSURANCE COMPANY,
a foreign insurer doing business in Washington State,

Appellant.

v.

JOGINGER SINGH DBA AP TRANSPORT,

Respondent.

APPELLANT'S ANSWER TO MEMORANDUM OF AMICUS CURIAE AMERICAN PROPERTY CASUALTY INSURANCE ASSOCIATION OF AMERICA

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I. ANSWER

A. AMICUS CURIAE ("APCI") CORRECTLY OBSERVES THE COURT OF APPEALS' DECISION CONFLICTS WITH PRECEDENT, AND LEAVES INSURERS IN AN IMPOSSIBLE POSITION WHEN CONFRONTED WITH MULTIPLE CLAIMS AND INSUFFICIENT LIMITS.

The decision of the Court of Appeals puts insurers in an impossible place. On the one hand, there is the uniform body of Washington case law APCI discusses holding that insurers must meet policy limit demands expeditiously in excess exposure cases, or risk bad faith. Then we have the decision in this case essentially saying that an insurer should gamble with a policy limits demand by offering less than the limits in an effort to preserve the insurer's defense obligation, should the insured be sued in the future. Of course, if the gamble is taken and lost, then under every Washington case that has ever addressed what happens to an insurer when it rejects a policy limits demand, it will be the insurer, and the insurer alone, that pays the price. *See, e.g., Miller v. Kenny,* 180 Wn. App. 772, 325 P.3d 278 (2014), where the insurer rejected a policy limits demand then, three months before trial, offered the limits of $1.5 million. "This offer came too late," said the *Miller* court. 180 Wn. App. at 784. The insurer was found to have acted in bad faith and the total judgment entered against it was $21,837,286.73. *Id.* at 789.

When the Beckwith plaintiffs issued their policy limits demand to Mr. Singh approximately three months before trial, there can be—and there was—no dispute that their claim against Mr. Singh had at minimum a $3 million-dollar value. That was defense counsel's minimum assessment.

CP 1154-1156; RP 61-62 (12/14/16 afternoon session) & 134-135 (12/15/16 morning session). Max Meyers, one of Beckwith's lawyers testified he believed the case value was $15 million. RP 386 (12/13/16).

Yes, Mr. Singh faced multiple judgments that his minimum limits of insurance would not cover if all possible claims against him were filed and ran their course. Mr. Singh had no defense to his own liability. But the combined value of the non-Beckwith claims: 1) those that became suits, which were two if the Brian Sykes suit is included and its $250,000 settlement considered, and the Farmers suit for $25,150.32, Ex. 243 & CP 560-565; and 2) those potential claims for which defense counsel received damages documentation, but which did not become suits (all withdrawn on notice that Mr. Singh's limits were exhausted)—was far lower, indeed millions of dollars lower, than the value of the Beckwith case. As of January 2013, when ZAIC received the Beckwith's policy limits demand, the damages documentation for the non-Beckwith claims (including those of Farmers, which did not sue until February) totaled $101,661.21.[1]

Given the relative exposures presented by all non-Beckwith actual and potential claims arising from the July 20, 2011 accident; the Beckwith case presented an exposure to Mr. Singh that, by many multiples, far

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[1] *See* Exs. 215, 217, 219, 220, 221, 222, 223, 225, 228 & CP 183-185, CP 479-527 – collectively summarized in table form at p. 15 of Appellant's Opening Brief. Though defense counsel asked Mr. Sykes for documentation of his damages in October 2011, neither Mr. Sykes nor his attorney responded with this information. Exs. 211, 212, & 214, p. 2.

exceeded not just any one other claim, but all other claims and potential claims combined. APCI gets this exactly right when it posits the goal must be "extinguish as much potential liability as reasonably possible," *APCI brief at p. 5,* not as many claims as possible. The latter makes no sense and has the very real potential to leave an insured in the worst position of all.

ZAIC did not rush to settlement to avoid paying Beckwith defense expenses—a claim that was nothing more than Mr. Singh's expert's opinion based solely on the fact that ZAIC—just like all other insurance companies—asked defense counsel to update his budget before trial.[2] Depositions of Rachel Beckwith's parents were being scheduled. And as every litigator knows, when a defendant's liability is certain, the more time the plaintiffs' attorneys invest in completing discovery, preparing their damages witnesses, and gearing up for trial in the waning weeks before it is set to begin, the more likely those attorneys are to insist on more money, not less, to settle a case—especially when a prior policy limits demand has been rejected. That is precisely what happened in *Miller v. Kenny, supra,* which involved the same plaintiff law firm.

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[2] Rather, the testimony from defense counsel was that when ZAIC was asked to approve a defense expense or budget increase, it always did so. RP 53-55 (testimony of Ken Roessler 12/14/16 afternoon session). Moreover, ZAIC continued to pay defense counsel for at least six months after policy exhaustion for his work in negotiating a $2,512.73 deal with Washington State Dept. of Transportation, and in convincing Farmers, which had sued Mr. Singh to recover $25,150.32, and other potential claimants that there was no money left in Mr. Singh's policy. Ex. 288, p. 4-7; RP 130-136 (testimony of defense counsel 12/15/16 morning session).

B. AN INSURER'S DUTY TO DEFEND IS A VALUABLE POLICY BENEFIT—BUT IT IS NOT AN UNLIMITED OBLIGATION

Given the number of drivers, passengers, and vehicles involved in the July 2011 accident, there was never going to be enough money available under the ZAIC policy to pay all claims against Mr. Singh arising from this single occurrence, a contingency that Mr. Singh could have reasonably planned for by purchasing adequate insurance for his commercial trucking company. As discussed below, the appellate court's decision instead requires ZAIC, post-accident, to give up its bargained-for cap on its defense obligation.re was no "pay and walk" clause in Mr. Singh's policy. *Answer to Petition* at p. 1, 13. The defense benefit is valuable. *APIC brief* at 7. And neither the policy, nor Washington case law, nor the duty of good faith, permit an insurer to overpay one set of plaintiffs, or pay its limits into the court registry without negotiating a release for its insureds (*Viking v. Hill,* 57 Wn. App. 341, 787 P.2d 1385 (1990), and thereby prematurely terminate its defense obligation to avoid defending other suits. ZAIC does not contend otherwise. But the ZAIC policy, like many, does expressly and unambiguously limit the insurer's duty to defend. Under the contract's clear and unequivocal terms, the limit of the defense obligation is actual payment of judgment or settlement, at which point the duty to defend terminates. Ex. 201, p. 76. And when the duty of good faith is superimposed on these terms, the limit of the defense obligation is the actual payment of a covered judgment or a good faith reasonable settlement in

exchange for a complete release of the insured, which the Beckwith settlement clearly was when it was negotiated and paid.

However, neither the policy nor any other standard requires an insurer to defend all claims arising from a covered occurrence until the statute of limitations expires, which basically is what Mr. Singh has urged and is the practical effect of the Court of Appeals' decision. And, such a standard unforgivably contradicts the parties' express bargain. As APCI observes by citing *Weyerhaeuser Co. v. Comm'l Union Ins. Co.,* 142 Wn.2d 654, 15 P.3d 115 (2000), actual payment of policy limits for a covered claim has always been the point at which a primary insurer has the contractual right to stop paying for its insured's defense. "We hold … the underlying insurer's duty to defend ceases once its policy has been exhausted by payments made for this purpose." *Weyerhaeuser,* 142 Wn.2d at 692. *See also Hamilton v. State Farm Ins. Co*., 83 Wn.2d 787, 523 P.2d 193 (1994) (refusal to compromise a claim within policy limits when a reasonable analysis of the facts indicates a finding of liability against the insured in excess of the policy limits is a negligent or bad faith performance of an insurer's duty). Mr. Singh could have protected himself further by purchasing higher primary limits or, if higher primary limits were unavailable, procured excess or umbrella coverage which would have picked up the defense obligation after ZAIC's primary limits became exhausted. *See Weyerhaeuser*, *supra,* at 670, discussing *MacKenzie v. Empire Ins. Cos.*, 113 Wn.2d 754, 759, 782 P.2d 1063 (1989) (catastrophe policies provide coverage excess to that provided by the primary policy);

and *Millers Cas. Ins. Co. v. Briggs*, 100 Wn.2d 9, 13, 665 P.2d 887 (1983) (liability of excess insurer does not arise until after the limits of the coverage under the primary policy have been exceeded). But Mr. Singh chose not to purchase more than $1 million in primary insurance limits, and as with any other insured, the resulting shortfall was Mr. Singh's to bear, not ZAIC's through a post-occurrence rewrite of the insurance contract. *See Ross v. Frank B. Hall,* 73 Wn. App. 630, 638, 870 P.2d 1007 (1994): "Thus it logically follows that if the policy limits were exhausted, the assured would be accountable for any loss, damages, costs, fees, expenses and/or claims exceeding the policy limit."

C. APCI CORRECTLY OBSERVES "HOLDBACK AGREEMENTS" ARE NOT THE ANSWER

APCI observes that holdback agreements benefit the insured, not the insurer, by extending an insurer's defense obligation, post-occurrence and without additional compensation. They certainly are not required by Washington's claim handling regulations; nor are they even hinted at by Washington cases such as *Miller v. Kenny* and *Hamilton v. State Farm,* discussed above, holding that when an insurer that rejects a policy limits demand, it puts its insured and itself in jeopardy. Nor are holdback agreements inferred in those cases suggesting an insurer should solicit its insured's participation when settlement demands exceed policy limits. *See, e.g., Truck Ins. Exch. v. Century Indem.*, 76 Wn. App. 527, 534, 887 P.2d 455 (1995) ("When a settlement offer exceeds the primary insurer's policy limits, the insurer must communicate the offer to its insured, ascertain

whether the insured is willing to make the necessary contribution to the settlement amount, and must exercise good faith in deciding whether to pay its own limits."), and WPI 320.05(5) which contemplate an insured's participation in settlement only when a demand exceeds policy limits. *See also Miller v. Kenny,* 180 Wn. App. at 788. The obvious purpose in this situation is to give the insured a choice to put up its own funds to settle a case before a trial results in a much greater personal exposure. Compare those decisions with *Tyler v. Grange Ins. Assoc.,* 3 Wn. App. 167, 174, 473 P.2d 193 (1970) (noting that pressure by the insurer on the insured to contribute towards a compromise settlement within the policy limits as an inducement to settlement by the insurer is bad faith).

No case has ever held that to avoid bad faith an insurer must allow an insured to avoid exhausting a policy by paying part of a limits demand. Such a holding would violate, as the Court of Appeals did here, the principle that the "duty of good faith does not extend to obligate a party to accept a material change in the terms of its contract … [n]or does it inject substantive terms into the parties' contract. Rather, it requires only that the parties perform in good faith the obligations imposed by their agreement. Thus, the duty arises only in connection with terms agreed to by the parties." *Badgett v. Sec. State Bank*, 116 Wn.2d 563, 807 P.2d 356 (1991). *See also Fedway Marketplace W. LLC v. State,* 183 Wn. App. 860, 873, 336 P.3d 615 (2014) ("the duty of good faith and fair dealing does not inject substantive terms into the parties' contract …"); and *Johnson v. Yousoofian,* 84 Wn. App. 755, 765, 930 P.2d 921 (1996) ("The implied duty of good

faith is derivative, in that it applies to the performance of specific contract obligations. If there is no contractual duty, there is nothing that must be performed in good faith.")

The fact that Alaska National negotiated a holdback for its insured is not dispositive either, nor is it even relevant. Attorneys for Beckwith demanded policy limits from Singh. Gilliardi Trucking was unlikely to be sued by anyone else—as unfolding events proved true. It had twice as much insurance as Mr. Singh, but none of the liability according to the Washington State Patrol. Ex. 230 & Ex. 231, p. 2; RP 115-116 & 123-126 (12/15/16 morning session). Although the Beckwith attorneys, and Singh's defense counsel (paid for by ZAIC), developed expert testimony that implicated Gilliardi's driver, and thus were able to persuade Alaska National to put up its limits under principles of joint and several liability theory, the Beckwiths and Mr. Singh (through ZAIC) had the resources to pay for those experts and exert that pressure. No other claimant did, including Brian Sykes, evidenced by his failure to sue Gilliardi before the statute of limitations ran.

II. CONCLUSION

Equal interests, not the insured's best interests, as APCI observes in its brief at p. 10*,* has always been and necessarily must be the standard that guides an insurer's conduct vis a vis its insureds. Otherwise, the business of insurance becomes one of providing benefits to insureds that extend beyond the contract issued by the insurer and paid for by the insured. This

is contrary to Washington law, and to the notion of a sustainable insurance marketplace.

Respectfully submitted this 13th day of February 2019.

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By: _/s/ Jacquelyn A. Beatty_
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CERTIFICATE OF SERVICE

The undersigned certifies that on February 13th, 2019, I caused to be served the foregoing document to:

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I declare under penalty of perjury under the laws of the state of Washington on February 13, 2019, at Seattle, Washington.

/s/ Kay M. Sagawinia
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