

NO. 80753-I

IN THE SUPREME COURT  
OF THE STATE OF WASHINGTON

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AMERICAN BEST FOOD, INC., a Washington corporation dba CAFE  
ARIZONA; MYUNG-CHOL SEO and HYUN HEUI SE-JEONG

Respondents,

vs.

ALEA LONDON, LTD, a foreign corporation,

Petitioner.

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APPEAL FROM KING COUNTY SUPERIOR COURT  
Honorable Brian D. Gain, Judge

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BRIEF OF AMICUS CURIAE

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## **I. IDENTITY AND INTEREST OF AMICUS CURIAE**

Amicus curiae State Farm Fire & Casualty Company (“State Farm”) is one of the largest casualty insurers doing business in the State of Washington. It issues thousands of insurance policies in this state. Its policies frequently contain the phrase “arising out of” or “arising from”, in both insuring agreements and exclusions. Thus, both State Farm and its policyholders have a substantial interest in how that phrase is construed and whether non-Washington decisions can control the duty of good faith owed by all insurers doing business in this state.

## **II. ISSUES PRESENTED**

A. Should the “arising out of” assault exclusion be analyzed under well-established Washington case law on the meaning of “arising out of”?

B. Should a claim for bad faith refusal to defend be based on an insurer’s knowledge of a non-Washington adverse decision, particularly where, as here, there is a well-developed body of Washington law construing the critical policy language and there is no consensus amongst other jurisdictions, many of which do not use Washington’s definition of “arising out of”?

### III. STATEMENT OF THE CASE

Amicus adopts the Statement of the Case set forth in the Brief of Respondent.

### IV. ARGUMENT

#### A. **THE WELL-ESTABLISHED WASHINGTON LAW ON THE MEANING OF “ARISING OUT OF” SHOULD NOT BE ABANDONED.**

The phrase “arising out of” has widespread use in insurance policies, not only in exclusions, but also in coverage grants. Consequently, the phrase has a well-established meaning in this state, both for insureds and insurers.

Nevertheless, the panel ignored that meaning in favor of a different construction given that phrase by courts in some other states. This court should not abandon the substantial body of case law on “arising out of” that Washington courts have developed over the years.

#### 1. **Adherence to Well-Established Washington Law Is Essential to Both Insurers and Their Insureds.**

Insurance policies of various types frequently use the phrase “arising out of” or variations thereof. The phrase can be used in an insuring agreement to define the risk insured. For example, motor vehicle policies typically cover third-party or underinsured motorist liability for bodily injury or property damage “arising out of the ownership, maintenance or use” of covered vehicles. Thus, Washington courts have

many times construed the phrase ‘arising out of’ in such an insuring agreement. *See, e.g., Transamerica Insurance Group v. United Pacific Insurance Co.*, 92 Wn.2d 21, 593 P.2d 156 (1979); *Handley v. Oakley*, 10 Wn.2d 396, 116 P.2d 833 (1941); *Culp v. Allstate Insurance Co.*, 81 Wn. App. 664, 915 P.2d 1166, *rev. denied*, 130 Wn.2d 1009 (1996); *Heringlake v. State Farm Fire & Casualty Co.*, 74 Wn. App. 179, 872 P.2d 539, *rev. denied*, 125 Wn.2d 1003 (1994).

The phrase “arising out of” may also be used to define who is an insured entitled to coverage. In *Equilon Enterprises, LLC v. Great American Alliance Insurance Co.*, 132 Wn. App. 430, 132 P.3d 758 (2006), the commercial general liability policy defined “additional insured” to include an oil company but “only with respect to liability arising out of [the named insured’s] operations or premises owned by or rented to [the named insured].”

“Arising out of” can also be used in an exclusion to identify what the insurance does not cover. *See, e.g., Stouffer & Knight v. Continental Casualty Co.*, 96 Wn. App. 741, 982 P.2d 105 (1999) (dishonesty exclusion to errors and omissions policy), *rev. denied*, 139 Wn.2d 1018 (2000); *Beckman v. Connolly*, 79 Wn. App. 265, 898 P.2d 357 (1995) (auto exclusion to homeowners and commercial general liability policies); *Munn v. Mutual of Enumclaw Insurance Co.*, 73 Wn. App. 321, 869 P.2d

99, *rev. denied*, 124 Wn.2d 1030 (1994) (aircraft exclusion); *City of Everett v. American Empire Surplus Lines Insurance Co.*, 64 Wn. App. 83, 823 P.2d 1112 (1991) (death exclusion to errors and omissions policy).

Hence, while this case involves a coverage exclusion, this court's interpretation of the phrase "arising out of" will also affect cases where the phrase is contained in coverage grants. Consequently, both policyholders trying to prove a claim falls within the policy coverage and insurance companies trying to prove an exclusion takes a claim outside the policy coverage need clear direction from the courts on the interpretation of common insurance policy terminology. Deviating from the longstanding Washington interpretation of the phrase is not only unnecessary, but it creates unwarranted confusion.

But that is what the panel here did. Without discussing *any* of the numerous Washington cases that explain what "arising out of" means in this state, the Court of Appeals instead relied almost entirely on case law from other jurisdictions to rule that the exclusion did not apply to post-assault negligence.<sup>1</sup> And, as will be discussed, most of that case law did not define "arising out of" the same as Washington case law.

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<sup>1</sup> The panel did discuss one Washington case, *McAllister v. Agora Syndicate, Inc.*, 103 Wn. App. 106, 11 P.3d 859 (2000), which dealt with an assault exclusion using the phrase "based on."

Accordingly, in deciding this case, this court should go back to basics: analyze the case using the well-established Washington definition of “arising out of.” If review of out-of-state cases is then deemed desirable, this court should look to those cases that utilize the same definition of “arising out of.” Only then can sound jurisprudence be maintained.

**2. Washington Courts Have a Well-Established Meaning for “Arising Out Of”.**

Whether the phrase is in an insuring agreement or an exclusion, Washington courts have frequently broadly construed “arising out of”. In this state, the law is crystal clear that “arising out of” does not mean “caused by” or require proximate cause. *Transamerica*, 92 Wn.2d at 26; *Munn*, 73 Wn. App. at 325; *State Farm Mut. Auto. Ins. Co. v. Centennial Ins. Co.*, 14 Wn. App. 541, 543, 543 P.2d 645 (1975), *rev. denied*, 87 Wn.2d 1003 (1976). *See generally Yakima Cement Products Co. v. Great American Insurance Co.*, 93 Wn.2d 210, 608 P.2d 254 (1980) (“caused by” requires some direct and substantial relation between occurrence and ensuing damage).

Rather, the term “arising out of” has the broader meaning of “originating from,” “having its origin in,” or “flowing from.” *Beckman v. Connolly*, 79 Wn. App. 265, 273, 898 P.2d 357 (1995); *Toll Bridge Auth.*

v. *Aetna Ins. Co.*, 54 Wn. App. 400, 404, 773 P.2d 906 (1989). All that is required is *some* causal connection; the causal connection need not be as strong as proximate cause. See *Transamerica*, 92 Wn.2d at 26; *Detweiler v. J.C. Penney Cas. Ins. Co.*, 110 Wn.2d 99, 109, 751 P.2d 282 (1988).

Several cases appear to equate 'arising out of' with a "but for"-type analysis. For example, in *Beckman*, 79 Wn. App. 265, the insured lit a cigarette while he was driving his truck. He had earlier placed a filled gas can in the truck's cab.

An explosion occurred. When flames engulfed the cab, the insured lost control. The truck went over an embankment. A passenger was severely burned.

The issue was whether the accident fell within an exclusion for bodily injury "arising out of the use of any auto". The Court of Appeals ruled that it did, explaining:

"The phrase 'arising out of' is . . . ordinarily understood to mean 'originating from', having its origin in', 'growing out of', or 'flowing from.'" Here, then, the phrase means that the claimed injury must have originated from, had its origin in, grown out of, or flowed from, the use of the vehicle. . . . This is the only causal connection required, and the "use" need not be a "proximate" cause of the occurrence or injury.

. . . [T]he gas fumes that exploded, the ensuing flames, and [the passenger] were all confined by the cab of the truck. It follows that the accident would not have happened as it did *but for* the use of the vehicle . . . ."

*Id.* at 273-74 (quoting *Toll Bridge Authority v. Aetna Insurance Co.*, 54 Wn. App. 400, 404, 773 P.2d 906 (1989) (citations and footnote omitted) (emphasis added).

*McDonald Industries, Inc. v. Rollins Leasing Corp.*, 95 Wn.2d 909, 631 P.2d 947 (1981), is also illustrative. That case involved insurance coverage for liability “arising from the ownership, maintenance or use” of a tractor. While the tractor was pulling a trailer loaded with a counterweight around an “S” curve, the counterweight slid off the trailer. Two vehicles collided with it.

This court ruled that the accident fell within the phrase “arising from the ownership, maintenance or use” of a tractor because “[w]ithout *the motive power of the insured tractor* the trailer would not have been able to negotiate the “S” curve on the highway at 40 m.p.h.” *Id.* at 912 (emphasis added).

*Allstate Insurance Co. v. Bowen*, 121 Wn. App. 879, 91 P.3d 879 (2004), also presents a helpful comparison. There, the insured seller was sued for misrepresenting that there were no known defects in the house’s plumbing system. The policy at issue covered property damage “arising from” an occurrence. Giving “arising from” the same meaning as ‘arising out of’, the court ruled there was no coverage because the property damage arose independently of any misrepresentation. In other words, the

property damage would have occurred with or without the misrepresentation.

The analysis used in these cases is consistent with the Washington courts' analysis of the phrase "arising out of the use" of a motor vehicle. In such cases, "the question is whether the vehicle itself or permanent attachments to the vehicle causally contributed in some way to produce the injury." *Transamerica Insurance Group v. United Pacific Insurance Co.*, 92 Wn.2d 21, 26, 593 P.2d 156 (1979). The vehicle must not be "the mere 'situs'" of the accident. *Id.*; accord *Mutual of Enumclaw Insurance Co. v. Jerome*, 122 Wn.2d 157, 856 P.2d 1095 (1993); *Handley v. Oakley*, 10 Wn.2d 396, 116 P.2d 833 (1941) (ice cream truck was but a place, not an instrument); *McCauley v. Metropolitan Property & Casualty Insurance Co.*, 109 Wn. App. 628, 36 P.3d 1110 (2001); *Culp v. Allstate Insurance Co.*, 81 Wn. App. 664, 915 P.2d 1166, *rev. denied*, 130 Wn.2d 1009 (1996); *Heringlake v. State Farm Fire & Casualty Co.*, 74 Wn. App. 179, 872 P.2d 539, *rev. denied*, 125 Wn.2d 1003 (1994). In other words, the question is whether an accident or injury would have occurred but for the use of the motor vehicle. If the use of the motor vehicle simply provides a location, that without more is insufficient.

In the instant case the Court of Appeals correctly observed that "the critical question is whether Café Arizona's potential liability to

Dorsey for its employees' alleged postassault negligence clearly 'arise[s] out of' an assault or battery." 138 Wn. App. at 685. But instead of analyzing the issue in light of any of the myriad Washington cases construing "arising out of", the panel relied on out-of-state case law to hold that the post-assault injuries did not arise out of the assault because dumping plaintiff on the sidewalk was a "discrete intervening act[s] of alleged negligence."<sup>2</sup> 138 Wn. App. at 688 (quoting *United National Insurance Co. v. Penuche's, Inc.*, 128 F.3d 28, 32 (1<sup>st</sup> Cir. 1997)).<sup>3</sup> This discussion of intervening acts smacks of proximate cause analysis and unnecessarily muddies the waters of what has heretofore been a consistent and clear test for when an injury or accident "arises out of" a given act. See, e.g., *Crowe v. Gaston*, 134 Wn.2d 509, 951 P.2d 1118 (1998)

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<sup>2</sup> Amicus does not suggest that review of out-of-state cases can never be appropriate or that it was even completely inappropriate in this case. Where, as here, however, there is an abundance of Washington law construing the policy language in issue, courts should begin with an analysis of that language under Washington law before moving on, if at all, to look to cases from other jurisdictions.

<sup>3</sup> Although *Penuche's* purported to use the same definition of "arising out of" as do Washington courts, the case it cited for its ultimate holding, *Winnacunnet Cooperative School Dist. v. National Union Fire Ins. Co.*, 84 F.3d 32 (1<sup>st</sup> Cir. 1996), held that an exclusion for claims "arising out of" assault and battery applied only if the assault and battery were the "immediate" cause of the injury. To the best of the undersigned's knowledge, no Washington case has held that "arising out of" refers to immediate causation. Cf. *Toll Bridge Auth. v. Aetna Ins. Co.*, 54 Wn. App. 400, 406, 773 P.2d 906 (1989) (noting that in first-party property cases, Washington courts had adopted proximate causation rather than immediate physical causation rule).

(reasonably foreseeable intervening act does not preclude proximate causation).

**3. Only Non-Washington Cases Applying the Same Definition of “Arising Out of” Are Relevant.**

By bypassing an analysis of “arising out of” under Washington law, the panel failed to realize that most of the out-of-state decisions on which it relied do not construe “arising out of” the same way as Washington courts.<sup>4</sup> For example, *Planet Rock, Inc. v. Regis Insurance Co.*, 6 S.W.3d 484 (Tenn. App. 1999), used the concurrent causation doctrine to construe “arising out of.” Washington does not use that doctrine to construe “arising out of.”<sup>5</sup> *Krempl v. Unigard Security Insurance Co.*, 69 Wn. App. 703, 706-07, 850 P.2d 533 (1993).

*Bucci v. Essex Insurance Co.*, 393 F.3d 285 (1<sup>st</sup> Cir. 2005), and *Western Heritage Insurance Co. v. Estate of Dean*, 55 F. Supp. 2d 646 (E.D. Tex. 1998), not only rejected a “but for” analysis, but never really gave “arising out of” any definition at all. Neither did *West v. City of Ville Platte*, 237 So.2d 730 (La. App. 1970).

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<sup>4</sup> Only one of the cases cited by the panel purported to use the same definition of “arising out of” as Washington courts. See *United National Insurance Co. v. Penuche’s, Inc.*, 128 F.3d 28 (1<sup>st</sup> Cir. 1997).

<sup>5</sup> Indeed, the case that *Planet Rock* relied upon, *Allstate Ins. Co. v. Watts*, 811 S.W.2d 883 (Tenn. 1991), was very similar in facts to *Krempl*, but reached the opposite conclusion.

Thus, those decisions did not use the same definition of “arising out of” as Washington courts. By basing its decision on these non-Washington decisions, the panel was comparing apples and oranges.

In contrast, *Canutillo Independent School District v. National Union Fire Insurance Co.*, 99 F.3d 695 (5<sup>th</sup> Cir. 1996), and *Continental Casualty Co. v. City of Richmond*, 763 F.2d 1076 (9<sup>th</sup> Cir. 1985), both utilized the same definition of “arising out of” as Washington courts and both came to a conclusion opposite to that of the *Alea* panel. In *Canutillo*, plaintiff parents sued the insured school district after a teacher had sexually abused their children. Their claims included allegations that the district had failed to implement policies and procedures that would have detected the abuse and that other teachers had created a “hostile and threatening” environment that discouraged the children from reporting the abuse. 99 F.3d at 705.

The district’s insurance policy excluded any claims “arising out of” assault and battery. Noting that “arising out of” means “originating from,” “having its origin in,” “growing out of,” or “flowing from,” the court ruled the exclusion applied:

While the teachers’ failure to adequately respond to the children’s complaints of abuse may have exacerbated the emotional injuries of the children, there clearly would have been no injury at all absent that abuse. Therefore, under Texas law, Perales’s abuse and the claims asserted in the

first amended complaint are not independent and mutually exclusive but rather related and interdependent.

99 F.3d at 705.

In *City of Richmond*, the claimants sued the insured City after its police officers assaulted their father, who later died while in jail. One of their claims was that their father had been denied prompt and appropriate medical attention. Another claim was that a biased investigation had been designed to protect the persons responsible for the misconduct.

The City's insurance policy excluded coverage for claims arising directly or consequentially from assault or battery. Treating 'arising from' as "arising out of" and defining "arising out of" to mean "originating from," "having its origin in," "growing out of", or "flowing from," the court ruled that the exclusion applied:

[T]here exists a close connection between the heirs' second claim (failure of the Richmond police to administer proper medical care to the decedent) and the decedent's injuries. No medical treatment would have been needed if Drumgoole had not suffered any bodily harm at the hands of the police. The heirs' third claim (for alleged biased investigation of the case designed to protect the persons responsible for the misconduct) also clearly finds its genesis in the attack on Drumgoole. Had the attack never occurred, no investigation of Drumgoole's death would have been necessary.

763 F.2d at 1080-81.

Had the panel here analyzed the coverage issue in this case under Washington law, it would have realized that only out-of-state cases using the same definition of ‘arising out of’ were pertinent.

#### **4. The Efficient Proximate Cause Rule Is Irrelevant.**

While amicus agrees with Alea that the Court of Appeals used the wrong analysis, the causal connection required by the phrase “arising out of” should not be analogized to the efficient proximate cause rule.<sup>6</sup> (Supplemental Brief of Petitioner Alea London, Ltd. 10) Not only does that rule apply only to first-party property cases, it does not apply to exclusions phrased in terms of “arising out of.” Use of the efficient proximate cause rule to analyze “arising out of” cases is improper.

First, and foremost, the seminal efficient proximate cause case, *Garvey v. State Farm Fire & Cas. Co.*, 48 Cal. 3d 395, 770 P.2d 704, 257 Cal. Rptr. 292 (1989), held that because of the significant differences between first- and third-party coverages, efficient proximate cause analysis applies only to first-party property damage cases, not to third-

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<sup>6</sup> The efficient proximate cause rule “addresses the issue of whether an all-risk insurance policy covers a loss caused by two or more perils when one of the perils is excluded and the other peril is covered.” *Findlay v. United Pac. Ins. Co.*, 129 Wn.2d 368, 372, 917 P.2d 116 (1996). Under the efficient proximate cause rule, if the efficient proximate cause—*i.e.*, the predominant cause—of a first-party property loss is covered, the loss is covered. *See id*; *McDonald v. State Farm Fire & Cas. Co.*, 119 Wn.2d 724, 732, 837 P.2d 1000 (1992).

party liability cases.<sup>7</sup> 770 P.2d at 710 (quoting Bragg, *Concurrent Causation & the Art of Policy Drafting: New Perils for Property Insurers*, 20 FORUM 385, 386-87 (1985)) (emphasis by the court), *Accord United States Liability Ins. Co. v. Bourbeau*, 49 F.3d 786, 790 (1st Cir. 1995); *Utica Mut. Ins. Co. v. Hall Equipment, Inc.*, 73 F. Supp. 2d 83, 91-93 (D. Mass. 1999), *aff'd on other grounds*, 292 F.3d 77 (1st Cir. 2002); *Bohrer v. Church Mut. Ins. Co.*, 965 P.2d 1258, 1265-66 (Colo. 1998).

Thus, this court has explained the efficient proximate cause rule as “address[ing] the issue of whether *an all-risk insurance policy* covers a loss . . . .” *Findlay v. United Pac. Ins. Co.*, 129 Wn.2d 368, 372, 917 P.2d 116 (1996) (emphasis added). *See generally Safeco Ins. Co. of Am. v. Hirschmann*, 112 Wn.2d 621, 773 P.2d 413 (1989); *Villella v. Public Employees Mut. Ins. Co.*, 106 Wn.2d 806, 725 P.2d 957 (1986); *Garvey v. State Farm Fire & Cas. Co.*, 48 Cal. 3d 395, 770 P.2d 704, 257 Cal. Rptr. 292 (1989). All-risk policies are a type of *first-party* property policy that purports to insure against all risks not specifically excluded.<sup>8</sup> *Findlay*, 129 Wn.2d at 381 n.2.

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<sup>7</sup> Washington courts have also distinguished between first- and third-party coverages. *See, e.g., Coventry Assocs. v. American States Ins. Co.*, 136 Wn.2d 269, 961 P.2d 933 (1998).

<sup>8</sup> In contrast to “all risk” policies, first-party property insurance can also be written in “specified risk” policies, which purport to insure against only those risks specifically included. *See Findlay*, 129 Wn.2d at 381 n.2.

Even if the efficient proximate cause rule could apply in third-party liability insurance cases, it does not apply where, as here, an exclusion written in terms of “arising out of” is at issue. This court has ruled that “whenever the term ‘cause’ appears in an exclusionary clause it must be read as ‘efficient proximate cause.’” *Safeco Ins. Co. of Am. v. Hirschmann*, 112 Wn.2d 621, 629, 773 P.2d 413 (1989) (construing exclusion for loss “caused by” earth movement). Here, the exclusion does not use the term “cause”. Instead, it uses “arising out of.” Washington law is clear that “arising out of” does not mean “caused by.”

*Everett v. American Empire Surplus Lines Ins. Co.*, 64 Wn. App. 83, 823 P.2d 1112 (1991), is illustrative. There the widow of a firefighter who had died in the line of duty sued the City for negligent supervision and training. The City’s insurance policy excluded damages arising from or caused by death. When the insurer moved for summary judgment in a coverage action, the City argued there were factual questions as to what the efficient proximate cause of the loss was.

Division I disagreed because the death exclusion was phrased in terms of injury “arising out of”, as well as “caused by”, death. Since “arising out of” was broader than causation and since the widow’s claims depended upon her husband’s death, the court ruled her claim “arose out of” her husband’s death, so there was no coverage as a matter of law. *See*

also *Krempl v. Unigard Security Ins. Co.*, 69 Wn. App. 703, 706-07, 850 P.2d 533 (1993), *Toll Bridge Authority v. Aetna Insurance Co.*, 54 Wn. App. 400, 773 P.2d 906 (1989).

**B. INSURANCE POLICY CONSTRUCTION BY NON-WASHINGTON COURTS SHOULD NOT BE THE MEASURE OF BAD FAITH.**

The panel here also ruled that the policyholder was entitled to a trial on whether Alea denied a defense in bad faith. The court explained:

The evidence on this issue includes the letters from Café Arizona to Alea asserting that *McAllister* did not apply to postassault negligence and *citing authorities from other jurisdictions in support of its position*, and Alea's responses thereto. These communications raise a factual issue as to whether Alea unreasonably denied its defense obligation.

138 Wn. App. at 690 (emphasis added). In other words, the panel decided that because the insured had told Alea that another court in another jurisdiction had adopted the insured's position on how the policy should be construed, a fact finder could find Alea in bad faith.

This court has recognized that an insurer that makes a mistake is not necessarily in bad faith:

Of course, insurance companies, like every other organization, are going to make some mistakes. As long as the insurance company acts with honesty, bases its decision on adequate information, and does not overemphasize its own interests, an insured is not entitled to base a bad faith or CPA claim against its insurer on the basis of a good faith mistake.

*Coventry Associates, L.P. v. American States Insurance Co.*, 136 Wn.2d 269, 280, 961 P.2d 933 (1998) (emphasis omitted). Rather, an insurance company acts in bad faith only if its breach of the insurance contract is “unreasonable, frivolous, or unfounded.” *Smith v. Safeco Insurance Co.*, 150 Wn.2d 478, 485, 78 P.3d 1274 (2003). “The insurer is entitled to summary judgment if reasonable minds could not differ that its denial of coverage was based on upon reasonable grounds.” *Id.* at 486.

Here, there was a substantial body of Washington law construing “arising out of.” As discussed *supra*, most of the out-of-state cases on which the court relied did not even utilize the Washington definition of “arising out of.” Is a Washington insurer that reached what could only be deemed as a reasonable conclusion under well-established Washington law to be held in bad faith because it declined to adopt out-of-state cases that did not even utilize Washington’s approach to “arising out of”?

Furthermore, as also discussed *supra*, there are out-of-state cases that *do* use the Washington definition that actually support Alea’s position. Even if a Washington court were to ultimately find that the insurer was mistaken in adopting the approach of such cases, how can the insurer’s doing so have been unreasonable, frivolous, and unfounded? Being mistaken is not the same as being in bad faith.

Thus, this case well illustrates the perils of basing a bad faith refusal to defend claim on the notion that the carrier had knowledge of out-of-state case law that allegedly supports the insured's position. Not only is out-of-state case law not binding on a Washington court and, indeed, may conflict with Washington case law, there is often no consensus amongst other jurisdictions on how the same policy language should be construed.<sup>9</sup> See *In re Estate of Burns*, 131 Wn.2d 104, 119, 928 P.2d 1094 (1997). Is an insurer to be held in bad faith if 48 other jurisdictions agree with it but the insured advises the insurer of the only one that does not? What if the split is 25-24? Or only a handful of states have considered the issue? As *Johnson v. National Union Fire Insurance Co.*, 177 Ga. App. 204, 338 S.E.2d 687 (1985), *cert. denied*, No. 70406 (1986), declared:

Johnson argues that as a matter of law National Union's good faith defense was refuted by its knowledge that foreign jurisdictions, in litigating similar factual situations, had reached conclusions adverse to National Union's position as to its liability as the insurer of the moving vehicle. ***However, those opinions were not binding interpretations of Georgia law and we are not persuaded***

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<sup>9</sup> Basing an insurer's bad faith on its failure to follow out-of-state case law in construing its policy may also chill the ability of the insurer's attorney to properly advise his or her client. Insurers frequently ask coverage counsel for opinions on how to construe their policies. Since this often occurs when there is no Washington case law directly on point, counsel may wish to discuss case law in other jurisdictions before making a recommendation.

*by Johnson's arguments that National Union's knowledge of these nonbinding foreign decisions is a ground for the bad faith damages* sought by Johnson. Although we now adopt the reasoning of these other courts as to the construction of "struck by," this case is one of first impression in Georgia in its interpretation of the specific language . . . and presented a close question as to the construction to be given this language. Thus, we find the trial court erred by denying National Union's motion for directed verdict on the issue of bad faith penalties as there was no legal basis for the jury to award such damages.

*Id.* at 206-07 (citations omitted) (emphasis added).

As this brief demonstrates, there is no consensus amongst courts in other jurisdictions whether the exclusion would apply in a situation such as was presented here. This is hardly surprising since some courts do not even construe "arising out of" the same way as Washington courts. Under these circumstances, an insurer should not be deemed in bad faith simply because it declined to defend after its insured advised it of non-Washington case law favorable to the insured.

## V. CONCLUSION

Washington law controls this case. Although there is no Washington case with a similar fact pattern, there are numerous Washington cases construing the phrase "arising out of." By not addressing any of these cases and instead relying on case law from other jurisdictions, the panel effectively abandoned well-established Washington law construing "arising out of". Any analysis of an exclusion

or a coverage grant using the phrase “arising out of” should begin with a review of Washington case law defining that phrase.

Further, an insurer’s duty of good faith in Washington should not be controlled by out-of-state case law construing similar policy language, particularly where, as here, other jurisdictions disagree and many do not use the same definition of “arising out of” as in Washington.

**DATED this 18<sup>th</sup> day of September, 2008.**

**REED McCLURE**

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