

No. 80753-1

**SUPREME COURT  
OF THE STATE OF WASHINGTON**

RECEIVED  
SUPREME COURT  
STATE OF WASHINGTON

2008 OCT 13 P 4: 21

BY RONALD R. CARPENTER

CLERK

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

Respondents,

v.

ALEA LONDON, LTD., a foreign corporation,

Petitioner.

**ALEA LONDON, LTD.'S ANSWER  
TO AMICI CURIAE BRIEFS OF STATE FARM, PROFESSOR  
WEAVER, AND INTERESTED LONDON MARKET INSURERS**

Philip A. Talmadge  
WSBA No. 6973

J. C. Ditzler, WSBA No. 19209  
Melissa O. White, WSBA No. 27668  
Molly K. S. Eckman, WSBA No. 35474

TALMADGE/FITZPATRICK  
18010 Southcenter Parkway  
Tukwila, Washington 98188  
Telephone: (206) 574-6661  
Facsimile: (206) 575-1397

COZEN O'CONNOR  
1201 Third Avenue, Suite 5200  
Seattle, Washington 98101  
Telephone: (206) 340-1000  
Facsimile: (206) 621-8783

Email: phil@tal-fitzlaw.com

Email: jditzler@cozen.com  
mwhite@cozen.com  
meckman@cozen.com

**Attorneys for Petitioner  
Alea London, Ltd.**

TABLE OF CONTENTS

	<u>Page</u>
I. INTRODUCTION .....	1
II. STATEMENT OF THE CASE.....	1
III. ARGUMENT .....	1
A. The Meaning of “Arising Out Of” Has Been Established. ....	1
B. The Reasonableness of a Legal Determination is an Issue of Law to be Decided by a Court. ....	2
IV. CONCLUSION.....	4

**TABLE OF AUTHORITIES**

	<u>Page</u>
<b>Cases</b>	
<i>Krempf v. Unigard Sec. Ins. Co.</i> , 69 Wn. App. 703, 850 P.2d 533 (1993) .....	2
<i>Mut. of Enumclaw v. Jerome</i> , 122 Wn.2d 157, 856 P.2d 1095 (1993) .....	3
 <b>Other Authorities</b>	
Thomas V. Harris, WASH. INS. LAW, § 5.2 at 5-4 (2d ed. 2006).....	3
 <b>Rules</b>	
RAP 10.3(e) .....	1

## I. INTRODUCTION

Petitioner Alea London, Ltd. (“Alea”) files this combined answer to the amicus brief filed by State Farm Fire & Casualty Company (“State Farm”), and the amicus brief filed by Professor Weaver and the Interested London Market Insurers.

After fully considering the analysis of the amici and their collective knowledge, qualifications, and expertise in insurance matters, Alea respectfully requests that this Court hold that 1) there is no coverage for any claim causally connected to an assault and/or battery under a policy that “does not apply to any claim arising out of” assault and/or battery, and 2) as a matter of law no bad faith claim can be sustained where, as here, an insurer’s claim handling and coverage determination followed Washington law.

## II. STATEMENT OF THE CASE

For the purposes of this answer, Alea relies upon the statement of the case set forth in its supplemental brief.

## III. ARGUMENT<sup>1</sup>

### A. The Meaning of “Arising Out Of” Has Been Established.

In its amicus brief, State Farm clarifies that the “[u]se of the efficient proximate cause rule to analyze ‘arising out of’ cases is

---

<sup>1</sup> In accordance with RAP 10.3(e), the scope of Alea’s answer is limited to the new matters raised in the amicus curiae briefs.

improper.” St. Farm Br. at 13.<sup>2</sup> Alea agrees. As discussed at length in Alea’s supplemental brief, the phrase “arising out of” is unambiguous and has an established meaning under Washington law. *See* Alea’s supp. br. at 6-10. Alea mentioned efficient proximate cause solely for the purpose of illustrating a point. While it remains true that the identification of what constitutes a superseding cause ensures that the “causal connection” analysis is not applied in an absurd fashion, Alea agrees that this Court should only look to established Washington law addressing the phrase “arising out of.”

After doing so, this Court should hold that the exclusion for any claim “arising out of” assault and/or battery bars coverage for any claim causally connected to an assault and/or battery.

**B. The Reasonableness of a Legal Determination is an Issue of Law to be Decided by a Court.**

Drawing from their expertise and experience in the global insurance industry, Professor Weaver and the Interested London Market Insurers also remind this Court of the important academic and practical distinctions between an issue of fact to be decided by a jury and an issue of law to be decided by a court. This Court has previously held that the

---

<sup>2</sup> State Farm goes on to discuss the efficient proximate cause rule as it has been applied in first-party property cases. Alea notes that the rule has also been applied in third-party contexts. *See, e.g., Kreml v. Unigard Sec. Ins. Co.*, 69 Wn. App. 703, 850 P.2d 533 (1993).

“interpretation of an insurance policy is a matter of law.” *Mut. of Enumclaw v. Jerome*, 122 Wn.2d 157, 160, 856 P.2d 1095 (1993). As Professor Weaver and the Interested London Market Insurers point out, whether a coverage determination made based upon an interpretation of Washington law is reasonable is also an issue of law to be decided by a court. The Harris treatise on Washington Insurance Law confirms this, explaining as follows:

The resolution of “reasonableness” issues is dramatically different in tort cases than in the interpretation and construction of insurance policies. In tort cases, the trier of fact determines whether a party was reasonable as a mixed issue of law and fact. When a court resolves an interpretive issue as a question of law, the court itself ascertains the meaning of the policy by giving it a practical and “reasonable” interpretation.

Thomas V. Harris, WASH. INS. LAW, § 5.2 at 5-4 (2d ed. 2006).

Significantly, the Washington State Trial Lawyers Association (which describes itself as having an interest in “the rights of insureds”) agrees that the reasonableness of an insurer’s legal determination of coverage is an issue of law. See WSTLA Br. at 17 (“[T]he issue here appears to be one of law for resolution by the court.”). Alea agrees.

This Court should therefore conclude that when the issue is the reasonableness of an insurer’s interpretation of an insurance policy, that is a question of law for the court and not a question of fact for the jury.

#### IV. CONCLUSION

This Court should hold that 1) there is no coverage for any claim causally connected to an assault and/or battery under a policy that “does not apply to any claim arising out of” assault and/or battery, and 2) as a matter of law no bad faith claim can be sustained where, as here, an insurer’s claim handling and coverage determination followed Washington law.

RESPECTFULLY SUBMITTED this 13th day of October, 2008.



---

J. C. Ditzler, WSBA # 19209  
Melissa O. White, WSBA # 27668  
Molly K. S. Eckman, WSBA # 35474  
Cozen O'Connor

Philip A. Talmadge, WSBA #6973  
Talmadge/Fitzpatrick

Attorneys for Petitioner Alea London, Ltd.

**FILED AS  
ATTACHMENT TO EMAIL**

### DECLARATION OF SERVICE

Dava Bowzer states as follows:

I am a citizen of the United States of America and a resident of the State of Washington, I am over the age of 21 years, I am not a party to this action, and I am competent to be a witness herein.

On this 13th day of October, 2008, I caused to be filed via electronic filing with the Supreme Court of the State of Washington, the foregoing ALEA LONDON, LTD.'S ANSWER TO AMICI CURIAE BRIEFS OF STATE FARM, PROFESSOR WEAVER, AND INTERESTED LONDON MARKET INSURERS. I also served copies of said document on the following parties as indicated below:

<b><i>Counsel for Plaintiffs/Appellants:</i></b> Scott B. Easter Paul J. Miller Sandy K. Lee Montgomery Purdue Blankinship & Austin PLLC 701 Fifth Avenue, Suite 5500 Seattle, WA 98104	<input type="checkbox"/> Via Legal Messenger <input type="checkbox"/> Via Facsimile <input checked="" type="checkbox"/> Via Email <input checked="" type="checkbox"/> Via U.S. Mail
<b><i>Counsel for Plaintiffs/Appellants:</i></b> Shane Moloney Short Cressman & Burgess PLLC 999 Third Avenue, Suite 3000 Seattle, WA 98104	<input type="checkbox"/> Via Legal Messenger <input type="checkbox"/> Via Facsimile <input checked="" type="checkbox"/> Via Email <input checked="" type="checkbox"/> Via U.S. Mail

<p><b><i>Counsel for Amici WSTLA:</i></b>  Bryan P. Harnetiaux  517 E. 17<sup>th</sup> Avenue  Spokane, WA 99203</p> <p>and</p> <p>David M. Beninger  705 – 5<sup>th</sup> Avenue, Suite 6700  Seattle, WA 98104</p>	<p>( ) Via Legal Messenger  ( ) Via Facsimile  (X) Via Email  (X) Via U.S. Mail</p> <p>( ) Via Legal Messenger  ( ) Via Facsimile  (X) Via Email  (X) Via U.S. Mail</p>
<p><b><i>Counsel for Amici State Farm:</i></b>  Pamela A. Okano  Michael S. Rogers  Reed McClure  601 Union Street, Suite 1500  Seattle, WA 98101</p>	<p>( ) Via Legal Messenger  ( ) Via Facsimile  (X) Via Email  (X) Via U.S. Mail</p>
<p><b><i>Counsel for Amici Weaver/ILMI:</i></b>  Karen Southworth Weaver  Soha &amp; Lang, PS  701 – 5<sup>th</sup> Avenue, Suite 2400  Seattle, WA 98104</p>	<p>( ) Via Legal Messenger  ( ) Via Facsimile  (X) Via Email  (X) Via U.S. Mail</p>

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Executed at Seattle, Washington, this 13th day of October, 2008.

  
\_\_\_\_\_  
Dava Bowzer

**FILED AS  
ATTACHMENT TO EMAIL**

SEATTLEV766472A 142445.000