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SUPREME COURT OF THE STATE OF WASHINGTON

CERTIFICATION FROM
THE UNITED STATES COURT OF APPEALS FOR THE
NINTH CIRCUIT

IN

CORNHUSKER CASUALTY INSURANCE COMPANY,

Plaintiff – Appellee,

v.

CHRIS KACHMAN AND DEBBIE KACHMAN, husband and wife;
ROCKERIES, INC., a Washington corporation; and BROOKS
SAMPLES, individually and as Personal Representative of the Estate of
Leanne Samples,

Defendants – Appellants.

APPELLEE CORNHUSKER CASUALTY INSURANCE COMPANY'S
RESPONSIVE BRIEF

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I. INTRODUCTION

This case involves interpretation of the Washington statute that tells insurers how to cancel a commercial auto insurance policy when the insured fails to pay the premium. After Rockeries, Inc. (Rockeries) failed to pay the premium for its commercial auto policy when it was due, Cornhusker Casualty Company (Cornhusker) mailed a certified notice of cancellation advising Rockeries the policy would cancel unless payment was received by a date certain. Rockeries failed to make the payment and the policy cancelled. Three days after cancellation a fatal accident occurred involving one of Rockeries' trucks.

Samples filed a wrongful death suit against Rockeries, its owners the Kachmans, and a Rockeries employee. Cornhusker defended under a reservation of rights and filed a declaratory judgment action in federal court, seeking a determination that the policy had been cancelled due to non-payment of the premium prior to the accident, and therefore, that the losses resulting from the accident were not covered.

Resolution of cross-motions for summary judgment in the declaratory judgment action focused on RCW 48.18.290 (1997). RCW 48.18.290 requires an insurer to cancel an insurance policy for non-payment of premium by "actually delivering" a cancellation notice to the insured or "mailing" the notice to the insured's last known address.

Samples argued certified mail was not “mailing” because Rockeries did not receive the letter. Actually, the postal service left two notices of the certified cancellation letter in Rockeries’ mailbox, but Rockeries did not pick up the letter from the Post Office. The Honorable Ronald B. Leighton held (1) RCW 48.18.290 unambiguously permits cancellation by certified mail; (2) Cornhusker complied with the statute; and (3) under Washington law, actual receipt of a mailed notice of cancellation is not required to effect cancellation.

Samples appealed to the Ninth Circuit Court of Appeals, which certified the following question concerning statutory interpretation of RCW 48.18.290 (as it was in effect in 2004) to this Court:

Does sending notice of cancellation by certified mail satisfy the “mailed” requirement of RCW § 48.18.290 (1997) and give sufficient notice of cancellation to comply with RCW § 48.18.290, even if there is no proof that the cancellation letter was received by the insured?

This certified question has two parts: (1) does sending a cancellation notice by certified mail satisfy the “mailed” requirements of RCW 48.18.290; and (2) does mailing the notice by certified mail give the notice required by RCW 48.18.290, even if the cancellation letter was not received. The answer to both questions is “Yes.”

First, mailing a notice of cancellation by certified mail satisfies the “mailed” requirements of RCW 48.18.290, because it complies with the procedure the Legislature has prescribed. RCW 48.18.290 tells the insurer how to mail the notice: (1) deposit it in a sealed envelope; (2) directed to the insured at his last known address; (3) with proper prepaid postage affixed; (4) in a letter depository of the United States Post Office. RCW 48.18.290(2). Cornhusker complied with all of the statutory elements of mailing in the present matter because it mailed the notice in *exactly* this manner. The term “mailed” in RCW 48.18.290 is broad enough to conclude the Legislature intended for certified mail to satisfy the mailing requirement.

Looking at the plain meaning of the terms “mailed” and “actually delivered” and applying the rules of statutory interpretation, which presume that when two different terms are used in the same statute the Legislature intended the terms to have different meanings, the only reasonable conclusion is that a notice of cancellation by United States Postal Service certified mail comes within the “mailed” prong of the statute, not the “actually delivered” prong of the statute.

Second, sending a notice by certified mail provides sufficient notice under RCW 48.18.290 even if the notice is not received. *Actual receipt of a notice of cancellation is not required to cancel a policy by*

mailing. Instead, proof of mailing itself is all the Legislature requires under RCW 48.18.290. With certified mail, the insured twice receives notice of the cancellation letter which is held at the Post Office. The insured should not be rewarded for refusing to pick it up its certified mail or arrange for its delivery.

While the Legislature has amended RCW 48.18.290 numerous times, both before and after the time period relevant in this case, it has never amended the statute to require actual receipt of a notice of cancellation—proof of mailing is all that has ever been required. Under Washington law the fact that actual receipt is not required for a notice of cancellation to be effective is not based upon a presumption of receipt, nor does RCW 48.18.290 impose on the insurer the risk of non-delivery of the mail. Rather, the statute reflects a legislative decision that an insurer should be allowed to stop providing insurance for which it has not been paid a premium once it mails a letter informing the insured of the cancellation.

Finally, mailing the notice to Rockeries by certified mail did nothing to prevent Rockeries from receiving the notice. The evidence establishes that two postal services notices were left in Rockeries' mailbox concerning the certified mail cancellation notice, that Rockeries received numerous certified notices of cancellation at its business address before

the accident, and that another certified letter was delivered to Rockeries at the same address after the accident.

Mailing a notice of cancellation by certified mail satisfies both the mailing and notice requirements of RCW 48.18.290. The Court should answer the certified question in the affirmative.

II. STATEMENT OF THE CASE

A. CANCELLATION OF THE POLICY FOR NONPAYMENT OF THE PREMIUM.

Rockeries was insured through Cornhusker under The Homestate Companies' Commercial Auto policy, number WAA000539, from June 28, 2000 until October 19, 2004. The policy renewed annually, with the last renewal beginning on June 28, 2004. ER 27:10-13. Rockeries was required to pay the premium in four equal installments each year. ER 27:13-16.

Rockeries did not pay the \$1,948.75 premium due September 2, 2004. On September 29, 2004, Cornhusker mailed, by certified mail, a notice of cancellation to Rockeries at the address listed on the policy, 9924 352nd St. E., Eatonville, Washington, which was also the Kachmans' personal residence. The notice of cancellation told Rockeries the policy would be cancelled October 19, 2004 for non-payment of premium if

\$1,948.75 was not received by October 19, 2004. ER 29:20-25; ER 30:1-2; ER 51-52.¹

Because a gate prevented the postal carrier from reaching the Kachmans' front door, on October 5, 2004, the postal carrier left a notice in Rockeries/Kachmans' mailbox, in accordance with postal regulations, advising Rockeries that it was holding a certified letter at the Post Office. ER 54, ER 63; ER 66. Rockeries did not pick up the letter at the Post Office. On October 15, 2004, the postal carrier left a second notice in Rockeries/Kachmans' mailbox, advising again that it was holding a certified letter at the Post Office for Rockeries. ER 54; ER 63:17-20. Rockeries again failed to pick up the letter from the Post Office. ER 63:19-20. Because Rockeries failed to pay the minimum premium due on the policy, the Cornhusker policy cancelled on Tuesday, October 19, 2004. ER 30:14-15. The letter was returned to Cornhusker on or about November 1, 2004. ER 54; ER 63:19-20; ER 30:10-13.

Meanwhile on Friday, October 22, 2004, three days after the policy cancelled, Lester Madden, a Rockeries employee, was involved in the accident that resulted in the death of Leanne Samples. On October 25, 2004, six days after the policy cancelled, Rockeries notified its insurance

¹ The invoice and cancellation notice was also mailed to Rockeries' broker, Bell Anderson, and Consesco Bank, Inc., Ford Motor Credit, and Manifest Funding Services, designated loss payees on the policy. ER 30:3-9; ER 53.

broker, Bell-Anderson, of the fatal accident. ER 31:1-3; ER 55-56. On October 28, 2004, nine days after the policy was cancelled, Cornhusker received a check from Rockeries in the amount of \$2,555.25. ER 31:4-10; ER 57-58. On October 29, 2004, Cornhusker sent another letter to Rockeries stating that the policy had cancelled as of October 19, 2004, because Cornhusker did not receive the premium payment of \$1,948.75 by October 19, 2004. ER 31:14-18; ER 60.²

B. ROCKERIES WAS NO STRANGER TO RECEIVING NOTICES OF CANCELLATION BY CERTIFIED MAIL FOR FAILURE TO PAY POLICY PREMIUMS WHEN DUE.

During the four year period Rockeries was insured through Cornhusker, Rockeries failed to pay its premium on *eleven* separate occasions, causing Cornhusker to mail *eleven* separate notices of cancellation, by certified mail, to Rockeries. ER 36-45; 51-52; SUPP. ER 8-9; 11-12; 14-15; 17-18; 20-21; 23-24; 26-27; 29-30; 32-33. Rockeries received all but three of them. ER 30:20-22; 49; 54. No doubt Rockeries had a pretty good idea as to what the notice of certified mail related to on October 5 and then again on October 15, 2004.

C. THE FEDERAL DISTRICT COURT RULED IN THE DECLARATORY JUDGMENT ACTION THAT CERTIFIED MAIL SATISFIED THE MAILING REQUIREMENTS OF

² Cornhusker returned unearned premiums of \$2,542.00 to Rockeries on or about December 3, 2004. ER 31:19-22; ER 61

RCW 48.18.290 AND THAT ACTUAL RECEIPT OF THE NOTICE OF CANCELLATION WAS NOT REQUIRED.

A wrongful death suit was filed by Brooks Samples against Rockeries, its owners the Kachmans, and Lester Madden, the Rockeries driver involved in the accident. ER 4-5. Rockeries tendered the defense to Cornhusker, which agreed to defend Rockeries and Madden under a reservation of all rights. ER 4; ER 6. Cornhusker filed a declaratory judgment action in the federal District Court of the Western District of Washington seeking a judicial determination that the policy had been cancelled before the accident due to non-payment of the premium and, therefore, that Cornhusker had no obligation to provide a defense or indemnity with respect to the wrongful death action. ER 1-9.

Both parties moved for summary judgment. The Honorable Ronald B. Leighton granted Cornhusker's motion and denied Samples' cross-motion. ER 119. The Court, applying the rules of statutory interpretation, held that RCW 48.18.290 was not ambiguous, and "clearly permitted general mail as well as certified mail to accomplish its intended purpose." ER 116-117. Because Cornhusker complied with the mailing requirements and receipt of a mailed notice is not required under Washington law, the policy was effectively cancelled. *Id.*

Samples appealed to the Ninth Circuit Court of Appeals, which certified the question of whether mailing a notice of cancellation by United States postal service certified mail complies with the “mailed” requirements of RCW 48.18.290 and gives sufficient notice under the statute even if the notice of cancellation was not actually received.

III. ARGUMENT

A. MAILING A NOTICE OF CANCELLATION BY CERTIFIED MAIL SATISFIES THE STATUTORY MAILING REQUIREMENTS OF RCW 48.18.290.

1. Cornhusker Complied with the “Mailing” Process Set Forth in RCW 48.18.290(2) When It Mailed the Notice of Cancellation by Certified Mail.

An insurer has the legal right to cancel an insurance policy when the insured fails to pay the premium due and owing. RCW 48.18.290 governs the cancellation process.³ It provides that to cancel for non-payment of premium, written notice of such cancellation must be “actually delivered *or* mailed” to the insured, stating why the policy will cancel, at least ten (10) days before the effective date of the cancellation. RCW 48.18.290(1)(a) (emphasis supplied).⁴

³ A complete copy of the statute is attached as Appendix A to this brief.

⁴ In 2006, after Rockeries’ policy canceled, the Legislature amended RCW 48.18.290 and omitted the term “actually” from the phrase “actually delivered.” The statute now reads “must deliver or mail.” RCW 48.18.290(1)(a)(i) and RCW 48.18.290(1)(c) (2006).

The statute also prescribes what constitutes “mailing” of a cancellation notice. RCW 48.18.290(2) provides that the “mailing” of a notice of cancellation under the statute “shall be effected” by the insurer (1) depositing the notice in a sealed envelope; (2) directed to the insured at his last known address; (3) with proper prepaid postage affixed; (4) in a letter depository of the United States Post Office. *Id.*

This is exactly how a certified letter is mailed, and it is exactly what Cornhusker did. Cornhusker put the cancellation notice in a sealed envelope, directed it to Rockeries at its last known address, with proper prepaid postage affixed, and deposited the letter in a letter depository of the United States Post Office. ER 27:4-9. The language used by the Legislature in specifying what constitutes “mailing” a notice of cancellation clearly encompasses a notice sent by United States Postal Service certified mail. The statute does not specify a particular type of United States Postal Service mail or have any restrictions or limitations on the type of United States Postal Service mail that can be used. Rather, it broadly includes any form of mail that utilizes a letter depository of the United States Post Office. Thus, under the express provisions of RCW 48.18.290(2), mailing a notice of cancellation using United States Postal Service certified mail satisfies the “mailed” requirement of RCW 48.18.290.

2. Under the Rules of Statutory Interpretation, Certified Mail is “Mail,” as that Term is Used in RCW 48.18.290.

The rules of statutory interpretation support the District Court’s conclusion that sending a notice of cancellation by certified mail complies with the “mailed” requirement of RCW 48.18.290. The Court’s objective in construing a statute is to determine the legislative intent: “If the statute’s meaning is plain on its face, then the court must give effect to that plain meaning as an expression of legislative intent.” *Christensen v. Ellsworth*, 162 Wn.2d 365, 372-73, 173 P.3d 228 (2007), quoting *Dep’t of Ecology v. Campbell & Gwinn, LLC*, 146 Wn.2d 1, 9-10, 43 P.3d 4 (2002). “Plain meaning is discerned from the ordinary meaning of the language at issue, the context of the statute in which that provision is found, related provisions, and the statutory scheme as a whole.” *Christensen*, 162 Wn.2d at 373, citing *Dep’t of Ecology*, 146 Wn.2d at 9-12. “Statutory provisions and rules should be harmonized wherever possible.” *Christensen*, 162 Wn.2d at 373, citing *Emwright v. King County*, 96 Wn.2d 538, 543, 637 P.2d 656 (1981). Clearly, certified mail is “mail”.

In this case, the key phrase is “actually delivered or mailed.” “Actually” and “delivered” are not defined. Under rules of construction, undefined terms are to be given their “ordinary and popular” meaning and

the Court may look to the dictionary to determine “ordinary and popular” meaning. *Wash. State Coalition for the Homeless v. DSHS*, 133 Wn.2d 894, 906, 949 P.2d 1291(1997). Webster’s dictionary defines “actually” to mean, “in fact; really.” Webster’s New Twentieth Century Dictionary, 20 (2nd ed. 1964). It defines “deliver” to mean “a giving or handing over; to give or transfer.” *Id.* at 481. Thus, the “ordinary and popular” meaning of “actually delivered” is in fact to hand over or transfer the notice of cancellation.

The term “mailed” is defined by RCW 48.18 290(2)’s express directives as to how “mailing” of a notice of cancellation is to be accomplished: by depositing the notice with prepaid postage affixed in a letter depository of the United States postal service. This is unambiguous and consistent with the dictionary definition of “mail.” Webster’s defines “mail” to mean “to send by mail; to post; to turn over to the postal department for transmission.” Webster’s, *supra.* at p. 1086. Likewise, this Court has recognized that when a statute requires notice to be sent “by mail,” that term means “postal matter carried by the United States Postal Service.” *Cont’l Sports Corp. v. Dep’t of Labor & Indus.*, 128 Wn.2d 594, 602, 910 P.2d 1284 (1996).

Since the statute is plain on its face, “the court must give effect to that plain meaning as an expression of legislative intent” and conclude that

the phrase “mailed” includes a notice of cancellation sent by United States Postal Service certified mail. Under any definition or common understanding of the term mail, certified mail is “mail”.

This construction is further supported by the Legislature’s use of two different terms, “actually delivered” and “mailed.” When different terms are used in the same statute, the court must presume the Legislature intends different meanings. *Koenig v. City of Des Moines*, 158 Wn.2d 173, 182, 142 P.3d 162 (2006). Different language in the same statute should not be read to mean the same thing. *Densley v. Dept. of Ret. Sys.*, 162 Wn.2d 210, 219, 173 P.3d 885 (2007)). Certified mail falls squarely within the plain meaning of “mailed:” the letter is turned over to the postal service for transmission as postal matter carried by the United States Postal Service.

Samples’ assertion that certified mail, *if* delivered, is “actually delivered,” and therefore no longer qualifies as “mailed” is not a reasonable interpretation of the statute. The flaw in this argument is clearly evident by the fact that once regular mail is delivered, it too, has been “actually delivered.” But the Legislature certainly did not intend that sending a notice by regular mail, if delivered, meant it no longer qualifies as “mailed.” The only reasonable interpretation is that a cancellation

notice sent through the United States Postal Service, whether by regular mail or certified mail, satisfies the “mailing” requirement.

Samples also asserts that if certified mail satisfies the mailing requirements, RCW 48.18.290(3), which provides that “[t]he affidavit of the individual making or supervising such a mailing, shall constitute prima facie evidence of the facts of the mailing as are therein affirmed,” would be superfluous because an affidavit is unnecessary for certified mail, which creates its own paper trail. Contrary to Samples’ claim, this does not make the statutory provision superfluous, because the broad term “mailed” in RCW 48.18.290 clearly encompasses multiple forms of United States Postal Service mail, some of which do not create their own paper trail. In addition, review of a dozen or so statutes in which the Washington Legislature *requires* notice to be sent certified, reveals that the Legislature *also* provides for an affidavit of mailing with respect to those notices. *See* RCW 48.53.040 (requiring an insurer to mail a notice of cancellation of a fire insurance policy by certified mail and comply with the affidavit of mailing requirements of RCW 48.18.290(3) with respect to the cancellation). *See also* RCW 6.21.020; 6.23.030; 6.27.080; 6.27.130; 11.11.050; 17.04.200, 17.10.170, 35.50.030, 46.55.120, 48.18.290(3) and 60.08.085, all of which require both certified mail and an affidavit of mailing.

3. Washington Case Law Supports the District Court's Conclusion that Mailing By Certified Mail Satisfies the Mailing Requirement.

Washington case law recognizes that certified mail is just as much “mail” as ordinary mail in an analogous situation. In *Collins v. Lomas & Nettleton, Co.*, 29 Wn. App. 415, 417, 628 P.2d 855 (1981), the issue was whether a court rule that called for service of pleadings by “mail” authorized the use of “certified mail,” even if not actually received. *Id.* at 417; CR 5(b)(2)(A). As in RCW 48.18.290, the court rule prescribes how “mailing” was to be accomplished: “...the papers shall be deposited in the Post Office addressed to the person on whom they are being served, with the postage prepaid.” *Collins*, 29 Wn. App. at 417. The plaintiffs argued pleadings that were served by certified mail but not received were not served by “mail.” *Id.* The court disagreed. Finding “no justification for precluding the use of certified mail absent express language [in the rule] to that effect,” the court held the defendant complied with the rule when it served the pleadings by certified mail, despite the fact the pleadings were not actually delivered to plaintiffs and were returned to the defendant by the Post Office.⁵ *Id.* at 418. The court explained that the test for legal sufficiency of notice is whether the notice is “reasonably calculated to

⁵ As in the present case, in *Collins* the postal carrier left notices of the certified mailing in the defendants’ mail box but they failed to pick up the mailing at the Post Office. *Collins*, 29 Wn. App. at 418.

reach the intended parties,” holding that notice by certified mail satisfies this test. *Collins*, 29 Wn. App. at 418, quoting *In Re Saltis*, 25 Wn. App. 214, 607 P.2d 316 (1980).

4. Case Law From Other Jurisdictions Supports the Conclusion that Certified Mail Satisfies the “Mailing” Requirement of RCW 48.18.290

Citing cases from Alabama, Indiana, Maryland, New York, and New Jersey, Samples claims “most cases” hold certified mail insufficient to cancel a policy. *See* Appellant’s Opening Brief at 28-33.

Not so. Samples’ cases are distinguishable for two independent reasons. Moreover, the only courts which have addressed the validity of notice by certified mail under statutes similar to RCW 48.18.290 hold that it is as good as or better than regular mail for mailing a valid cancellation notice.

a. Appellant’s Cases Construe Policy Language and Not Statutory Prescriptions.

As the District Court pointed out, *see Cornhusker Cas. Ins. Co. v. Kachman*, 2006 WL 151932 at *4 (W.D. Wash., Jan. 18, 2006), Samples’ out-of-state cases construe policy provisions, not statutes. *See American Automobile Ass’n v. Watts*, 12 Ala. App. 518, 67 So. 758 (1914); *Conrad v. Universal Fire & Cas. Ins. Co.*, 686 N.E. 840, 841 (Ind. 1997); *Fidelity & Cas. Co. of New York v. Riley*, 168 Md. 430, 178 A. 250, 252 (1935); *Werner v. Commonwealth Cas. Co.*, 109 N.J.L. 119, 120, 160 A. 547, 548

(1932); *Fichtner v. State Farm Fire & Cas. Co.*, 148 Misc. 2d 194, 196, 560 N.Y.S. 94, 95 (Sup. Ct. Cattaraugus Cty. 1990); *Kamille v. Home Fire & Marine Ins. Co.*, 129 Misc. 536, 537, 221 N.Y.S. 38 (Sup. Ct. N.Y. Cty. 1925). Samples' cases implicate the rule of policy construction requiring courts to construe ambiguity against the insurer. See *Riley*, 178 A. at 252 (ambiguous cancellation provision "strictly construed"); *Watts*, 67 So. at 759, 760 (ambiguous cancellation language "construed most strongly" against insurer because it was of carrier's "own choosing"); *Werner*, 160 A. at 548 (by using registered mail insurer "overreached itself and defeated the object" of the policy's notice provision).

The rule for ambiguous policy language is irrelevant to the present case, in which the question is what the Washington Legislature meant when it instructed insurers to "mail" cancellation notices. See, e.g., *Raptis v. Safeguard Ins. Co.*, 13 Mich. App. 193, 200, 163 N.W. 2d 835, 837 (1968) (distinguishing cancellation statute from cancellation provision in policy).

Samples cites no out-of-state case holding a statutory "mailing" requirement cannot be satisfied by certified mail, and none has been located. To the contrary, cases construing statutory mailing provisions hold certified mail is "mailing" whether or not the letter reaches the addressee. See, e.g., *Raptis*, 163 N.W. 2d at 837 (under statute allowing

cancellation by “mailing” notice, registered mail cancels policy even if insured did not receive notice); *cf.*, *Durkin v. Siegel*, 340 Mass. 445, 447, 165 N.E.2d 81, 83 (1960) (statute requiring bank to “mail” notice of dishonored check does not merely make mailing evidence of delivery but is a legislative declaration that mailing notice by first-class, certified or registered mail constitutes “delivery” even if the addressee does not receive the letter).

b. Appellant’s Out-Of State Cases Construe Ambiguous Policy Language in which Insurers Promised to “Give” Notice “To” the Insured, Not an Unambiguous Legislative Instruction to Cancel By “Mailing” Notice to the Insured’s Last Known Address.

Samples’ cases construed policy language requiring Insurers to “give” or “deliver” a “notice” to the insured.” *E.g.*, *Riley*, 178 A. at 251 (“written notice delivered to the insured or mailed to his last address”); *Watts*, 67 So. at 758 (“written notice to” the insured); *Conrad*, 686 N.E. 2d at 841 (cancellation effected by carrier “notifying you in writing”); *Werner*, 160 A. at 548 (cancellation by either party “upon written notice to the other party”); *Kamille*, 221 N.Y.S. at 39 (cancellation by “giving to the assured five...days’ written notice”); *Fichtner*, 560 N.Y.S. 2d at 195 (same). Those courts read these provisions to imply insurer acceptance of responsibility for ensuring the letter reaches its destination (beyond

dropping it in the mail and retaining proof of mailing). *See Riley*, 178 A. at 252 (policy bound insurer to send letter via a method that creates a presumption it was “duly delivered”); *Watts*, 67 So. at 759 (language promising notice “to” the insured, “construed most strongly” against the insurer, bound insurer to protect insured’s “opportunity of getting the letter”); *Conrad*, 686 N.E. 2d at 841 (promise to cancel by “notifying you in writing” is only satisfied by mailing “reasonably calculated to ensure receipt”); *Werner*, 160 A. at 548 (cancellation “upon written notice” requires delivery method “reasonably expected to reach the place designated by the policy”); *Kamille*, 221 N.Y.S. at 536 (cancellation by “giving to the assured five . . . days’ written notice” requires “actual receipt”); *Fichtner*, 560 N.Y.S. 2d at 95 (provision requiring “five days’ notice” not satisfied if insured proves use of certified mail prevented actual delivery). In each case it was reasonable for the court to analyze likelihood of delivery because the insurer assumed responsibility for delivery in the policy. *See Riley*, 178 A. at 252; *Watts*, 67 So. at 759-60; *Conrad*, 686 N.E. 2d at 842; *Werner*, 160 A. at 548; *Kamille*, 221 N.Y.S. at 40; *Fichtner*, 560 N.Y.S. 2d at 95.

RCW 48.18.290, on the other hand, does not require insurers to “give” notice “to” the insured. Instead, it unambiguously instructs insurers canceling policies for non-payment of premium to mail a notice to

the insured's last known address ten days before the cancellation date. No particular kind of mail is specified. Under Washington law the only requirement is mailing, which is "reasonably calculated to reach the intended parties." Certified mail satisfies this test regardless of whether it raises a presumption of delivery and even if the notice does not actually reach the intended party. *Collins*, 29 Wn. App. at 418.

This Court need not probe beneath the surface of the plain language of the Legislature's decision, but public policies behind "mailing" statutes like RCW 48.18.290 support the conclusion that the Washington Legislature balanced competing public interests when it decided to allow cancellation via ten days' notice by any kind of "mail" even if delivery fails. On the one hand, the notice requirement protects insureds (and injured third parties) by requiring reasonable steps to give the insured a chance to replace cancelled coverage. At the same time, allowing the cancellation to take effect upon mailing even if delivery does not occur protects policyholders because it frees insurers (and the other policyholders in their risk pool) from providing free insurance to people who refuse to pay premiums and then make themselves hard to locate, e.g., by moving without leaving a forwarding address or making it hard for the Postal Service to deliver mail. *See Nowell v. Titan Ins. Co.*, 446 Mich. 478, 488 n. 11, 648 N.W.2d 157, 162 n. 11 (2002)). The Washington

Legislature's decision that cancellation would be effective if "mailed" by certified mail (instead of requiring the insurer to track such people down) evidences a careful balancing of interests which the Court should refrain from disturbing.

Out-of-state cases agree statutory "mailing" requirements do not place responsibility for delivery on the insurer and certified mail qualifies as "mailing" even if delivery fails. *Compare Raptis*, 163 N.W. 2d at 837 (under Michigan statute prescribing cancellation by "mailing," registered mail cancels policy even if insured does not receive notice) *and Durkin*, 165 N.E.2d at 83 (statute requiring bank to "mail" notice of dishonored check is "legislative declaration" that certified mail is sufficient) *with Rasberry v. R.O. Knost & Sons.*, 146 Okla. 186, 293 P 778, 779 (1930) (under statute requiring "service" of notice and naming registered mail as one form of "service" cancellation by mail was not effective unless actual delivery occurred); *cf.*, *Powell v. Lititz Mut. Ins. Co.*, 419 F.2d 62, 64, 66 (5th Cir. 1969) (under Georgia statute requiring notice by "at least first class mail" mailing alone is sufficient to cancel policy, but because policy had a term providing for "giving of notice to the insured" insurer was responsible under policy for ensuring delivery); *accord*, *DiProspero v. Nationwide Mut. Fire Ins. Co.*, 30 Conn.Supp. 291, 294-95, 311 A.2d 561,

562-63 (Conn. Com.Pl. 1973) (distinguishing “mailing” notice, which does not require delivery, from “giving” of notice, which does).

Out-of-state cases construing policy language similar to RCW 48.18.290 also accept certified mail as “mailing.” *See, e.g., Westmoreland v. General Accident Fire & Life Assurance Corp.*, 144 Conn. 265, 270-73, 129 A.2d 623, 625-26 (1957) (under policy requiring “mailing” insurer “is not required to use reasonable diligence to get actual notice of cancellation to the insured” and “all kinds of mailing,” including certified mail, are acceptable); *Gerard v. Massachusetts Bonding & Ins. Co.*, 106 N.H. 1, 11, 203 A.2d 279, 285-86 (1964) (certified mail satisfies policy’s “mailing” requirement); *Hill v. Gulf Oil Corp.*, 200 Va. 287, 291, 105 S.E. 2d 625, 627-28 (1958)(contract language requiring notice “be mailed” includes registered mail); *Stratton v. Abington Mut. Fire Ins. Co.*, 9 Conn.App. 557, 520 A.2d 617 (1987) (cancellation effective despite the fact the notice was returned to the insurer undelivered because policy term “mailing” was not ambiguous and certified mail, although not mentioned in policy, constituted “mailing”).

c. Out-of-State Law Holds Certified Mail Is as Good as or Better Than Regular Mail as a Means of Delivery.

Samples cites six cases for the proposition that certified mail is an inferior method of ensuring delivery. The proposition is incorrect.

Three of Samples' six cases are irrelevant because contrary to Samples' characterization, they do not reject certified mail even under policy language placing responsibility for delivery on the insurer. The *Watts* court said it was *not* determining what method of mailing would constitute compliance with policy terms regarding notice. Instead, the court took issue with the insurer's instructions to the Post Office to return the notice if not delivered within five days, which gave the insured a shorter time to retrieve the letter than postal regulations would otherwise allow. 67 So. at 760. This issue is absent from the present case.

New York case law, rather than rejecting certified mail out of hand, holds certified mail ineffective under policy language promising the insurer will "give notice" of cancellation by "mail" only where the insured proves that use of certified mail actually prevented him from receiving the notice. *See, e.g., Fichtner*, 560 N.Y.S. 15 196; *Fields v. Western Millers Mut. Fire Ins. Co.*, 182 Misc. 895, 898, 50 N.Y.S. 2d 70, 71 (N.Y. Sup. Ct., Broome Cty., 1944). No such proof is present in the record of the present case.

Moreover, other out-of-state authority holds certified mail is as good as or better than regular mail. *E.g., Echavarria v. National Grange Mut. Ins. Co.*, 275 Conn. 408, 417 n. 7, 880 A. 2d 882, 888 n. 7 (Conn. 2005) (certified or registered mail provides better evidence of mailing than

first class mailing); *Hill*, 105 S.E. 2d at 628 (registered mail is safer than regular mail and qualifies as “mailing”); *Sorenson v. Stowers*, 251 Wis. 398, 403, 29 N.W. 2d 512, 514 (Wis. 1947) (same).

Finally, no statute or case has been found that treats certified mail as inferior to regular mail as a means of satisfying a statutory requirement for cancellation by mailing.

On the other hand, of states which permit mailing to effect cancellation even in the absence of actual delivery, Louisiana and Minnesota statutes treat certified mail as a superior form of “mailing.” *See, e.g.*, Louisiana Stats. Ann.-Rev. Stats 22:636.1 D (1) (requiring notice by certified mail except where cancellation is for non-payment of premium, in which case regular mail is adequate); Minn.Stats.Ann. § 67A.18 (2008) (cancellation of certain mutual insurance effective only if mailed by certified mail). Both Louisiana and Minnesota treat cancellation as effective even if delivery of the certified mail did not take place. *See, e.g.*, *Beasley v. Puglise*, 454 So.2d 1125, 1127 (La.App. 1984) (cancellation effective where insured failed to pick up certified mail at Post Office); *Schneider v. Plainview Farmers Mut. Fire Ins. Co.*, 407 N.W.2d 673, 674 (Minn. 1987) (same).

In addition, Georgia, Connecticut, Florida, Kansas, and Vermont explicitly permit cancellation to take effect absent delivery under statutes

that equate certified and regular mail. For example, a Georgia statute makes cancellation effective if the notice is sent by “at least first-class mail,” *see* Ga. Code Ann. § 33-24-44 (b) (2008); while Georgia case law, like Washington case law, recognizes cancellation even in the absence of actual delivery, *see Powell*, 419 F.2d at 66. A Connecticut statute makes cancellation effective if sent by registered or certified mail or by mail evidenced by certificate of mailing, *see* Conn. Gen. Stats. Ann. §§ 38a-343, 38a-344, while Connecticut case law holds the certified mail cancellation is effective even if delivery fails, *see Schneider v. Brown*, 2003 WL 21040162 at *7 (Conn.Super. Apr 23, 2003),⁶ *cited with approval in Demchak v. State*, 48 Conn.Supp. 460, 466, 849 A.2d 1, 5 (2003); *accord, Figueroa v. Allstate Indem. Co.*, 105 Conn.App. 538, 543 n. 5, 938 A. 2d 1264, 1267 n. 5 (2008). A Florida statute makes cancellation effective if sent by U.S. Mail, certified mail, or registered mail, *see* Fla. Stats. Ann. § 626.728.5 (2008), while Florida case law holds mailed cancellation effective without delivery, *see Aries Ins. Co. v. Cayre*, 785 So. 2d 656, 658 (Fla. App. 2001). A Kansas statute makes cancellation effective if mailed by certified or registered mail or Post Office certificate of mailing, *see* Kan. Stats. Ann. § 40-3118 (2008), while

⁶ A copy of *Schneider v. Brown*, 2003 WL 21040162 (Conn.Super. Apr 23, 2003) is attached as Appendix B to this brief.

Kansas case law recognizes cancellation in the absence of actual delivery, *see Feldt v. Union Ins. Co.*, 240 Kan. 108, 111-12, 726 P.2d 1341, 1343-44 (1986). And a Vermont statute makes cancellation effective if sent by certified mail or regular mail with certificate of mailing, *see* Vt. Stats. Ann. § 4226 (2008), while Vermont also makes such cancellation effective even without delivery, *see Loiselle v. Barsalow*, 180 Vt. 531, 534, 904 A.2d 1168, 1173 (2006). All of these jurisdictions recognize undelivered certified mail as equivalent to or better than regular mail, while none holds certified mail is inferior.

5. That RCW 48.18.290 Does Not Include the Term “Certified Mail” In Its Definition Of “Mailed” Or Specifically Require Certified Mail Does Not Demonstrate A Deliberate Choice by the Legislature To Prohibit Certified Mail as a Proper Form of Mailing.

The silence of RCW 48.18.290 with respect to certified mail does not indicate a deliberate choice by the legislature to reject certified mail as a way to satisfy the mailing requirements. Samples argues the legislature defined the term “mail” in other statutes to include “regular mail” without including the term “certified mail,” suggesting that the absence of the term “certified mail” shows an intent to exclude it, relying on RCW 15.44.010, 15.65.020(27), 15.66.010(17), 16.67.030(13), 34.05.010(10). A review of these statutes makes clear that they do not support Samples’ argument.

The statutes Samples cites address how notices regarding rule making, referenda or elections are to be distributed to the public by governmental groups: the Washington State Dairy Products Commission, (RCW 15.44.010); the Washington State Department of Agriculture (RCW 15.65.020(27), 15.66.010(17)); the Washington State Beef Commission (RCW 16.67.030(13)) and under the Administrative Procedure Act (RCW 34.05.010(10)). The statutes define mail as follows:

“Mail” or “send” for purposes of any notice relating to rule making, referenda, or elections means regular mail or electronic distribution, as provided in RCW 34.05.060 for rule making. “Electronic distribution” or “electronically” means distribution by electronic mail or facsimile mail.”

RCW 15.44.010, 15.65.020(27), 15.66.010(17).

“Mail” or “send” for purposes of any notice relating to rule making means regular mail or electronic distribution, as provided in RCW 34.05.060 for rule making. “Electronic distribution” or “electronically” means distribution by electronic mail or facsimile mail.”

RCW 16.67.030(13), 34.05.010(10).

The stated purpose of these statutes is to ensure wide public distribution of information regarding agency policy, referenda and elections. RCW 34.05.060.⁷ Neither the Legislature nor the Commissions

⁷ RCW 34.05.060 provides in pertinent part: “(1) In order to provide the greatest possible access to agency documents to the most people, agencies are encouraged to make their

would have contemplated sending information regarding policy and elections to the public by certified mail. Therefore, the absence of the term “certified mail” in the definition of “mail” in these statutes support Samples’ argument that certified mail does not satisfy the mailing requirements of RCW 48.18.290.

Nor does the fact that various statutes cited by Samples *require* the use of certified mail suggest that the absence of such a requirement in RCW 48.18.290 shows legislative intent to exclude certified mail as a form of mailing when the broad term “mailed” is used. The statutes Samples cites do not authorize certified mail, they *require* it.⁸ Thus, these

rule, interpretive, and policy information available through electronic distribution as well as through the regular mail. Agencies that have the capacity to transmit electronically may ask persons who are on mailing lists or rosters for copies of interpretive statements, policy statements, pre-proposal statements of inquiry, and other similar notices whether they would like to receive the notices electronically.”

⁸ See, e.g., RCW 4.28.330 (requires that notice be sent registered mail); RCW 7.04A.090 (requires a party to initiate arbitration by certified mail or by service as authorized for the initiation of a civil action); RCW 11.11.050 (requires written notice be served by certified mail or by personal service); RCW 11.88.040 requires notice of hearing by registered or certified mail or by personal service in the manner provided for service of summons); RCW 12.20.040 (requires that notice be served either personally as provided for the service of summons and complaint or by registered or certified mail); RCW 14.08.122 (requires airport operator to notify airplane owner’s by registered mail that the airport has seized the aircraft); RCW 18.35.100 (requires that the notice be sent by certified or registered mail or by means authorized for service of process); RCW 19.28.381 (requires notice be sent by registered mail, return receipt requested); RCW 22.09.120 (requires certified mail) RCW 48.03.040(5); 48.05.210(1) and (2)(requiring service of legal process to be personally served on the insurance commissioner or sent by registered mail); RCW 48.15.150(2)(same); RCW 48.30.010(5)(insurance commissioner required to deliver notices directly to the violator or send by registered mail, receipt requested) RCW 48.43.355; 48.05.485 (notices by insurance commissioner are effective upon dispatch if transmitted by certified mail; when transmitted in any other transmission, notice is effective upon receipt).

statutes are not in any way relevant to or instructive of what is meant by “mailed” in RCW 48.18.290.

The term “mailed” as used in RCW 48.18.290 is not ambiguous. Certified mail is just as much mail as regular mail. Certified mail satisfies the statutory mailing requirements in RCW 48.18.290 that the notice of cancellation be accomplished by prepaying postage and placing the letter in a letter depository of the United States Post Office. The language is clearly broad enough to support the District Court’s conclusion that the Legislature intended for certified mail to satisfy the mailing requirement. It is contrary to the plain meaning of the statute and the rules of statutory interpretation to conclude that mailing a letter by certified mail is not mailing. The first part of the certified question should be answered in the affirmative: mailing a notice of cancellation by certified mail does, in fact, satisfy the mailing requirements of RCW 48.18.290.

B. SENDING NOTICE OF CANCELLATION BY CERTIFIED MAIL PROVIDES SUFFICIENT NOTICE TO COMPLY WITH RCW 48.18.290 EVEN IF THERE IS NO PROOF THE LETTER WAS ACTUALLY RECEIVED BECAUSE PROOF OF MAILING IS ALL THAT IS REQUIRED TO SATISFY THE STATUTORY NOTICE REQUIREMENT; ACTUAL RECEIPT IS NOT REQUIRED.

The second part of the certified question asks whether notice of cancellation by certified mail gives sufficient proof of notice to comply with RCW 48.18.290 even if the letter is not received. This question, too,

should be answered in the affirmative. Proof of mailing of a notice of cancellation satisfies the Notice Requirement of RCW 48.18.290; actual receipt is not required.

Under RCW 48.18.290, mailing is deemed effective when the cancellation notice is deposited in a United States Post Office letter depository in a sealed envelope, with prepaid postage affixed, directed to the insured's last known address. RCW 48.18.290(2). Actual receipt is *not* required to effect cancellation via a "mailed" notice. Instead, mailing itself effectuates the cancellation. RCW 48.18.293(2) specifically provides: "*Proof of mailing of notice of cancellation . . . to the named insured . . . shall be sufficient proof of notice.*" (emphasis added).⁹ Therefore, proof of mailing of a notice of cancellation *is all that is required* to satisfy the notice requirement of RCW 48.18.290. Samples has provided this Court with no reasoned analysis to conclude that this rule applies only to a notice mailed by regular mail and not to a notice mailed by certified mail.

The court in *Fields v. Western Millers Mutual Life Insurance Co.*, 182 Misc. 895, 50 N.Y.S. 2d 70 (Sup. Ct. 1944), addressed whether a notice of cancellation sent by registered mail satisfied the mailing requirements of a policy which included a substantially identical

⁹ A copy of RCW 48.18.293(2) is attached as Appendix C to this brief.

provision: “[n]otice of cancellation mailed to the address of the Assured stated in this policy shall be sufficient notice.” *Id.* at 71. The court held that sending the notice by registered mail satisfied the mailing and notice requirement of the policy, despite the fact the notice was not received. *Id.* at 73.

Washington Courts have long agreed with the Legislature and consistently held that notice of cancellation is effective if properly mailed, even when it is undisputed that the insured did not receive the notice. *Tremmel v. Safeco Ins. Co.*, 42 Wn. App. 684, 689-691, 713 P.2d 155 (1986)(holding coverage is effectively cancelled by the fact of mailing); *Wisniewski v. State Farm Gen. Ins. Co.*, 25 Wn. App. 766, 767-768, 609 P.2d 456 (1980)(holding that proof of receipt of a notice of cancellation is not required; proof of mailing is all that is required); *Trinity Universal Ins. Co. v. Willrich*, 13 Wn.2d 263, 272-74, 124 P.2d 950 (1942)(enforcing policy provision containing language similar to RCW 48.18.290 and holding that actual receipt of a notice of cancellation is not required).

In *Trinity*, it was undisputed that the insured did not receive the notice of cancellation; however, this Court held that the insurance policy was effectively cancelled because the insurer had proved that it had mailed the notice. *Trinity Universal*, 13 Wn.2d at 274-75.

In *Wisniewski*, the Court, interpreting the very statute at issue, RCW 48.18.290, reiterated “the long-established rule in this State is that proof of mailing is all that is necessary [to cancel an insurance policy].” *Wisniewski*, 25 Wn. App. at 767-68. The Court rejected the insured’s claim that the notice of cancellation was not effective because it had not actually been received, holding instead that because the insurer mailed the cancellation notice to the insured, the cancellation was effective as a *matter of law*. *Id.* The court held that RCW 48.18.290 was unambiguous and did not impose a requirement that the insured actually receive the notice of cancellation before it is deemed effective. *Id.* at 768.

The court in *Tremmel* addressed essentially the same argument with respect to a companion statute, RCW 48.18.291(1)¹⁰ and refused to read a requirement for actual receipt into the statute. *Tremmel*, 42 Wn. App. at 688-689. The court recognized that RCW 48.18.290(1) and 48.18.291(1) permit cancellation for nonpayment of premium upon proof of mailing of the notice. The court reviewed the legislative history behind the two statutes and found the intent clear: the amendments to the statutes related only to the time in which notices were to be sent to the insured; “nowhere is it evident that the Legislature intended that notice of

¹⁰ RCW 48.18.291 permits an insurer to cancel a private automobile policy for failure to pay the premium by mailing a notice of cancellation twenty days prior to the effective date of cancellation.

cancellation would not be effective until received.” *Id.* at 689-690. Under Washington law, an insurer may cancel the insurance policy “by simply mailing notice to the insured at least [10] days before the effective date thereof, so long as the reason therefore is stated in the notice.” *Id.* at 689-90.

Despite the fact that actual receipt of a notice of cancellation is not required to effect cancellation, Samples, relying on the Financial Responsibility Act, Chapter 46.29 RCW and *dicta* in *Olivin Corp. v. United Capitol Insurance*, 147 Wn.2d 148, 52 P.3d 494 (2002) and *Taxler v. Safeco Insurance*, 44 Wn. App. 121, 721 P.2d 972 (1986), argues that this Court should interpret RCW 48.18.290 “in a manner that carries out the legislative intent [of providing notice and opportunity to find other insurance]” by requiring that ‘certified mail’ be placed under the ‘actually delivered’ prong” to require actual receipt because “certified mail is only effective to provide notice of cancellation to an insured if it is actually delivered.” Appellant’s Opening Brief at p. 10. Samples fails to acknowledge that with certified mail, the insured receives at least two notices of the certified letter in his mailbox, which actually *increases* the likelihood of notice of the certified cancellation letter over regular mail. Samples also fails to acknowledge that when regular mail is not received, the insured is likewise left without actual notice of the impending

cancellation. While the Legislature no doubt desired to provide insureds with notice of a cancellation and the opportunity to find insurance elsewhere, it also did not want to force insurers (and their policyholders) to provide free insurance to people who fail to pay premiums and then make it difficult to track them down to deliver a premium notice. The Legislature struck the balance by providing that proof of mailing the notice satisfies the statutory requirement. This, together with the holdings in *Trinity Universal*, *Wisniewski*, and *Tremmel*, that actual receipt is not required, establishes that such a result is *not* required to effectuate cancellation.

The Court must presume that the Legislature is familiar with its own prior legislation. *Graffell v. Honeysuckle*, 30 Wn.2d 390, 399, 191 P.2d 858 (1948). The Legislature has taken no action to amend RCW 48.18.290 to require actual receipt of a notice of cancellation since its enactment in 1947, despite having passed the Financial Responsibility Act in 1963. In fact, in 1969, the Legislature enacted RCW 48.19.293(2) which expressly provides that proof of mailing of notice of cancellation *shall be* sufficient proof of notice. While the Legislature amended RCW 48.18.290 nine times since its enactment, it has chosen not to include a provision requiring actual receipt of a mailed notice of cancellation to

effect cancellation.¹¹ The Legislature's decision not to require actual receipt of a notice of cancellation or to remove the mandate that proof of mailing satisfies the notice requirement, demonstrates the Legislature's intent that a desire for an insured to receive notice and an opportunity to obtain other insurance in the face of pending cancellation for failure to pay the policy premium does not override an insurer's right to cancel a policy for nonpayment of premium.

Finally, Samples' suggestion that Cornhusker acted in bad faith when sending the notice by certified mail in an effort to convince this Court to conclude that mailing by certified mail does not fall within the mailing prong of the statute, but rather within the "actual delivery" prong, is an unsupported misuse of the law of bad faith and misconstrues the obligations of good faith and fair dealing imposed on both insurers and insureds. If any inference is to be drawn in this case, the inference must be that Rokeries was fully aware that its insurance was being cancelled from its prior receipt of notices of cancellation by certified mail. The

¹¹ S.B. 47, 30th Leg., Laws of 1947, ch. 79, § 19.29; Substitute H.B. 1544, 44th Leg., Laws of 1975-76, 2d Ex. Sess., ch. 119 § 2; Substitute H.B. 1121, 46th Leg., Laws of 1979, Ex. Sess., ch. 199 § 5; S.B. 3318, 46th Leg., Laws of 1980, ch. 102 § 7; Engrossed S.B. 3297, 47th Leg., Laws of 1982, ch. 110 § 7; Substitute H.B. 39, 49th Leg., Laws of 1985, ch. 264 § 17; Reengrossed Substitute S.B. 4541, 49th Leg., Laws of 1986, ch. 287 § 1; Substitute H.B. 1320, 50th Leg., Laws of 1988, ch. 249 § 2; S.B. 5732, 55th Leg., Laws of 1997, ch. 85 § 1; Second Substitute H.B. 2292, 59th Leg., Laws of 2006, ch. 8 § 212.

Rockeries should not be rewarded for its failure to pick up its certified mail.

1. That Certified Mail Satisfies the Notice Requirements In RCW 48.18.290 Even If Not Received Is Further Supported By the Fact That Even In Those Situations Where A Statute Requires Certified Mail, Actual Receipt Is Not Required.

Even where a statute *requires* a mailing be sent certified, Washington Courts hold actual receipt is *not* required unless the statute expressly requires receipt. *In re Marriage of McLean*, 132 Wn.2d 301, 312, 937 P.2d 602 (1997); *Baker v. Altmayer*, 70 Wn. App. 188, 851 P.2d 1257 (1993).

In *McLean*, the issue was whether a statute calling for service of a petition to modify a child support award by “personal service or by any form of mail requiring a return receipt” requires actual receipt of the petition when sent by certified mail. *McLean*, 132 Wn.2d at 303; *see*, RCW 26.09.175(2). This Court held actual receipt was *not* required under the plain language of the statute. *McLean*, 132 Wn.2d at 308. “If the Legislature had intended to require evidence of actual delivery, it could have said so expressly.” *Id.* at 307. This Court noted that the statute did not require that the return receipt be signed by the addressee or otherwise indicate that actual delivery was required. *Id.* at 306.

Similarly, in *Baker*, 70 Wn. App. 188, the court held a mechanics' lien statute that required a notice of intent to claim a lien be given by personal service or certified mail did not require actual receipt of certified mail. *Id.* at 190-91. While the statute required proof of receipt when notice was given by personal service, no such expression was included in the provision for notice by certified mail. *Id.* The court in *Baker* thus concluded that the plain language of the statute did not support an inference that actual notice was required when the mailing was sent certified or registered. *Id.* at 191.

Likewise, no language in RCW 48.18.290 suggests that a notice of cancellation sent by certified mail is a form of "actual delivery" that requires receipt. Samples' claim that it is, is virtually identical to that urged by the dissent in *McLean*, a proposition soundly rejected by this Court in *McLean*, 132 Wn.2d at 307-08.

2. Under Washington Law, The Rule That Actual Receipt Is Not Required To Effect Cancellation Is Not Premised On A Presumption of Delivery; Therefore, Samples' Reliance On Cases From Other Jurisdictions That Rely On A Presumption of Delivery for Regular Mail To Hold That Notices Sent Certified Must Be Received Have No Application Here.

Samples does not dispute that under Washington law, proof of mailing is all that is required to effect the cancellation of an insurance policy for failure to pay the policy premium when due and that actual

receipt is not required. However, he mistakenly argues that these rules apply *only* if the notice is sent by regular mail because there is a presumption of receipt with regular mail, and hence, actual receipt is required if the notice is sent by certified mail. To the contrary, these rules are *not* based on a presumption of delivery; they apply regardless if the mail is sent by regular or certified mail.

There are *no* Washington cases, and Samples cites to none, that rely on, or make any mention, either expressly or implicitly, of a presumption of delivery in holding that actual receipt is not required to effect cancellation. In fact, Washington case law supports the conclusion that the rule that actual receipt is not required and proof of mailing is all that is required to effectuate a cancellation is not based on a presumption of delivery. If the courts relied on a presumption of delivery, it is axiomatic that the presumption would be rebuttable. However, in *Trinity Universal Insurance v. Willrich*, 13 Wn.2d 263, 124 P.2d 950 (1942), it was *undisputed* that the insured had not received the notice. If a presumption of delivery applied, then the insured would have successfully rebutted the presumption and the policy would not have been effectively cancelled, or at best, it would have raised a question for the jury to decide. But the Court did not apply the presumption of delivery; instead, the Court held that the policy cancelled as a matter of law despite the fact the notice

had not been received. Similarly, in *Tremmel v. Safeco Ins. Co.*, 42 Wn. App. 684, 713 P.2d 155 (1986), the insured did not receive the notice of cancellation until two days before the effective cancellation date. The insured argued the notice was not effective until received and that he, therefore, had ten days from receipt to make his payment. The court disagreed, holding that coverage had been effectively cancelled by the fact of mailing, noting that there was no evidence that the Legislature intended the notice of cancellation “would not be effective until received.” *Id.* at 689-90. The court is clearly not relying on a presumption of delivery, but stating the rule of law that in Washington an insurer can cancel a policy for non-payment of the premium “by simply mailing notice to the insured at least [10] days before the effective date thereof, so long as the reason therefore is stated in the notice.” *Id.* at 689-90.

As explained above, Samples’ out-of-state cases are distinguishable and do not accurately represent the multistate law. Moreover, to the extent Samples is asking this Court to analyze the issues by reference to a presumption of delivery, they are inconsistent with Washington law, because the rule in Washington is that actual delivery of a mailed notice of cancellation is not required as a matter of law, with no connection to a presumption of delivery.

Finally, Samples' reliance on *Moya v. United States*, 35 F.3d 501, 504 (10th Cir. 1994) is also misplaced. *Moya*, a Tenth Circuit case, involved the filing and receipt of a claim under the Federal Tort Claim Act. Under the Act, prior to filing suit, the plaintiff was required to present her claim to an appropriate federal agency and to file a request for reconsideration if the claim was denied, but a request for reconsideration was not effective until it was *actually received* by the agency. *Id.* at 503-504. Having failed to produce a certified mailing showing proof of receipt, the court rejected plaintiff's argument that her counsel's affidavit stating that the request for reconsideration was mailed established a presumption of receipt. *Id.*

Even assuming for the sake of argument that a presumption of delivery applies to regular mail, that presumption of delivery is equally applicable to the two notices of the certified cancellation letter that were delivered to the Rockeries' mailbox. In this case, the mail carrier placed two notices, one on October 5, 2004, and a second one on October 15, 2005, in the Rockeries mail box along with its other mail, notifying them of the certified cancellation letter at the Post Office. These notices were delivered to the Rockeries mail box just like regular mail and must be presumed to have reached the Rockeries. In fact, because at least two notices are delivered, there is actually a greater likelihood Rockeries will

receive notice of a certified cancellation letter. As such, there is no public policy reason for treating certified mail as anything other than mail under RCW 48.18.290.

3. Because Actual Receipt of A Notice of Cancellation Is Not Required for Effective Cancellation, The Risk of Non-Delivery Should Not be Imposed on the Insurer.

Samples' argument that the "risk" of non-delivery for using certified mail should fall on Cornhusker is inconsistent with Washington law providing that actual receipt of a notice of cancellation is not a prerequisite to effective cancellation. Moreover, even if the Court were to impose such a requirement, Rockeries has failed to present any evidence to support a conclusion that Cornhusker prevented Rockeries from receiving the notice of cancellation.

Samples' reliance on *State v. Bazan*, 79 Wn. App 723, 904 P.2d 1167 (1995), *review denied*, 129 Wn.2d 1023 (1996), for the proposition that the risk of non-delivery should fall on Cornhusker is misplaced and should be rejected for the same reasons the court in *McLean* rejected the petitioner's reliance on *Bazan*. *Bazan* is not applicable because it was a criminal case in which the defendant sought to dismiss a conviction because the State had violated his right to a speedy trial.

In *Bazan*, the State had sent a summons requiring Bazan to appear for arraignment by certified mail on four different occasions, all of which

were returned “unclaimed.” *Id.* at 725-26. Under the *Striker* rule, the State is required to set a constructive criminal arraignment date “where there has been a long and unnecessary delay in bringing a defendant who is amendable to process to court.” *McLean*, 132 Wn.2d at 313, citing *State v. Striker*, 87 Wn.2d 870, 557 P.2d 847 (1976); *see, Bazan*, 79 Wn. App. at 727. However, “[a]ny period of delay resulting from the fault or connivance of the defendant is excluded from the time for trial period.” *Bazan*, 79 Wn. App. at 727. The State argued that under the *Striker* rule, the defendant's failure to claim the certified mail excused the State from its obligation to act with due diligence in bringing the defendant to trial and excused the State from taking further steps to bring him to trial in a timely fashion. *Id.* at 726.

The Court of Appeals disagreed, holding that while nothing prevented the State from using certified mail to notify the defendant of the pending charge, the State could not assume that the defendant's failure to pick up the certified mail indicated “fault or connivance” on defendant's part, which would have excused the State from taking further steps to notify the defendant of the pending charges. *Bazan*, 79 Wn. App at 729. *See also, McLean*, 132 Wn.2d at 313. The State was still obligated to use due diligence and take additional steps, such as attempt personal service of

the summons or contact the investigating officer, to notify the defendant of the pending charges. *Bazan*, 79 Wn. App. at 729.

As a criminal case involving the speedy trial rule, which required the State to use due diligence in notifying the defendant of criminal charges, *Bazan* clearly has no application to the issue before this Court, whether certified mail meets the “mailed” requirements of RCW 48.18.290. Further, Samples’ reliance on *Bazan* assumes that actual receipt of the notice of cancellation is required, a proposition that has been rejected by Washington courts. *See also, McLean*, 132 Wn.2d at 314 (court notes reliance on *Bazan* is misplaced because it assumes actual receipt of a certified letter was required under the statute at issue, which was not the case).

Likewise, Samples’ reliance on *Larocque v. Rhode Island Joint Reinsurance Ass’n*, 536 A.2d 529 (R.I. 1988), for the proposition that Cornhusker bears the risk of non-delivery so actual receipt should be required when a notice is sent by certified mail is misplaced. In *Larocque*, the court was asked to construe a statutory provision that required the insurer to “give notice” to the insured of the pending cancellation. The Rhode Island court recognized that the statute did not set forth how notice was to be given. *Id.* at 531. The court did not state that sending the notice by certified mail was improper. However, it *specifically* noted a

distinction between “giving notice” and “mailing notice” and held that when policy language requires that the insurer “give notice” of cancellation, actual receipt of the notice required. *Id.* at 531-32. Washington law does not require actual notice and therefore, the risk of non-delivery analysis in *Larocque* simply does not apply here.

Nor does *Long v. Home Indemnity Co.*, 169 So. 154 (La. Ct. App. 1936) support Samples’ argument that the risk of non-delivery falls on Cornhusker because it sent the notice by certified mail, such that actual receipt should be required. In *Long*, the insurance policy provision allowed for cancellation of the insurance policy upon written notice to insured’s last known address. The insurer sent the notice by registered mail “out of an abundance of caution.” *Id.* at 157. The court in *Long* noted that the policy provided that cancellation was effective upon proof of mailing, and thus would not normally require receipt to effect cancellation. *Id.* However, because the letter advising the insured of the cancellation stated that the cancellation would be effective “at the expiration of five (5) days from receipt of this notice,” the insurance company itself imposed a requirement of receipt before the notice could become effective. *Id.* (emphasis added). Thus, the court held that because the notice had not been received, a requirement the insurer imposed for cancellation, the notice of cancellation was not effective. *Id.* at 158.

Moreover, mailing the notice of cancellation by certified mail did *not* deprive Rockeries of the opportunity to receive it as Samples claims. While a certified letter requires a signature, if as alleged in this case, the gate at Rockeries prevented the postal carrier from bringing the letter to the front door, the postal carrier *twice* delivered a Form 3849 to Rockeries' *mail box* telling Rockeries that the Post Office was holding a certified letter. See, ER 54; 63; 66.

Delivering notice of the certified letter in Rockeries' mailbox is accomplished in exactly the same manner as delivering a regularly mailed letter – both are left in the insured's *mailbox*. “Certified mail is not returned ‘unclaimed’ until the postal carrier *twice delivers notice of the mail with the addressee's ordinary mail*. If the mail is not picked up within 15 days it is returned as ‘unclaimed.’” *In re Marriage of McLean*, 132 Wn.2d 301, 308, n.3, 937 P.2d 602 (1997) (emphasis supplied); *See also*, ER 63:9-13. Rockeries was advised *through regular mail* that the Post Office was holding a certified letter for it. While Rockeries claims it did not receive the two notices, under Washington law, the court must presume that the postal carrier performed his or her duties as required. *Potter v. Whatcom County*, 138 Wash. 571, 578, 245 P. 11 (1926)(“the law presumes, until the contrary appears, that such public officers perform their duties”); *State v. Hodge*, 11 Wn. App 323, 523 P.2d 953

(1974)(holding that a court is required to presume that public officers perform their duties properly and in compliance with statutory provisions). Moreover, the evidence here conclusively establishes that the postal carrier *twice* delivered a Form 3849 to Rockeries' *mail box* telling Rockeries that the Post Office was holding a certified letter. See, ER 54; 63; 66.

Further, Samples' argument that the Post Office "will not deliver certified mail" to Rockeries business address because the Kachmans have a gate at their driveway, suggesting that Cornhusker is responsible for preventing delivery of the notice of cancellation because it sent the notice by certified mail, ignores the fact that Rockeries did, in fact, receive numerous certified letters mailed at that same address. Rockeries used the Kachmans' residence as its business mailing address since at least May 2003. Cornhusker mailed five separate certified notices of cancellation to Rockeries at this address, on August 8, 2003, September 15, 2003, March 9, 2004, August 9, 2004 and September 29, 2004. ER 27; SUPP ER 26-27; 29-30; 32-33; 35-36. The notices mailed on August 8, 2003, September 15, 2003 and March 9, 2004 were *not* returned to Cornhusker as unclaimed or undelivered. ER 30. And, after the accident, Rockeries received a certified letter from its broker, Bell Anderson, on November 1, 2004. ER 111.

Samples' argument that Cornhusker "had knowledge...that certified mail was not an effective means of providing notice to Rockeries"¹² is not supported by the law or the facts. Samples' assertion is based upon the single fact that a notice of cancellation sent to Rockeries in August 2004 was returned unclaimed. Rockeries' failure to pick up the certified letter at the Post Office does not establish that certified mail is not effective or that Cornhusker had "knowledge" that certified mail was allegedly not effective. Indeed, despite having failed to pick up the certified letter in August, Rockeries nonetheless paid the past due premium shortly after receiving the first notice from the Post Office advising Rockeries that it was holding a certified letter, suggesting, instead, that Rockeries was well aware of the fact that Cornhusker had sent a certified notice of cancellation to it. ER 29:3-11.

There is no support or suggestion in any Washington law that Cornhusker bears the risk of non-delivery when sending the notice of cancellation by certified mail, such that this Court should read an additional requirement of actual notice into RCW 48.18.290. Moreover, even if the Court were to impose such a requirement, Rockeries has failed to present any evidence to support a finding that sending the notice of cancellation by certified mail prevented Rockeries from receiving the

¹² Appellant's Opening Brief at page 21.

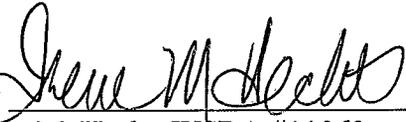
notice of cancellation. Accordingly, the Court should answer the second part of the certified question in the affirmative: mailing the notice by certified mail satisfied the notice requirement of RCW 48.18.290 even though the notice was not received because actual receipt of the notice of cancellation is not required, proof of mailing is sufficient to effectuate cancellation of a policy for failure to pay the premium.

IV. CONCLUSION

Certified mail is mail and actual receipt of a notice of cancellation is not required under RCW 48.18.290, if the notice of cancellation is mailed. Cornhusker respectfully requests that the Court answers the certified question, "Yes, mailing a notice of cancellation by certified mail satisfies the mailing requirement of RCW 48.18.290 and gives sufficient notice of cancellation to comply with RCW 48.18.290 even if there is no proof that the cancellation letter was actually received by the insured."

RESPECTFULLY SUBMITTED this 31 day of March, 2008.

KELLER ROHRBACK L.L.P.

By 
Irene M. Hecht, WSBA #11063
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Attorneys for Plaintiff-Appellee

48.18.290. Cancellation by insurer

(1) Cancellation by the insurer of any policy which by its terms is cancellable at the option of the insurer, or of any binder based on such policy which does not contain a clearly stated expiration date, may be effected as to any interest only upon compliance with the following:

(a) Written notice of such cancellation, accompanied by the actual reason therefor, must be actually delivered or mailed to the named

insured not less than forty-five days prior to the effective date of the cancellation except for cancellation of insurance policies for nonpayment of premiums, which notice shall be not less than ten days prior to such date and except for cancellation of fire insurance policies under chapter 48.53 RCW, which notice shall not be less than five days prior to such date;

(b) Like notice must also be so delivered or mailed to each mortgagee, pledgee, or other person shown by the policy to have an interest in any loss which may occur thereunder. For purposes of this subsection (1)(b), "delivered" includes electronic transmittal, facsimile, or personal delivery.

(2) The mailing of any such notice shall be effected by depositing it in a sealed envelope, directed to the addressee at his or her last address as known to the insurer or as shown by the insurer's records, with proper prepaid postage affixed, in a letter depository of the United States post office. The insurer shall retain in its records any such item so mailed, together with its envelope, which was returned by the post office upon failure to find, or deliver the mailing to, the addressee.

(3) The affidavit of the individual making or supervising such a mailing, shall constitute prima facie evidence of such facts of the mailing as are therein affirmed.

(4) The portion of any premium paid to the insurer on account of the policy, unearned because of the cancellation and in amount as computed on the pro rata basis, must be actually paid to the insured or other person entitled thereto as shown by the policy or by any endorsement thereon, or be mailed to the insured or such person as soon as possible, and no later than forty-five days after the date of notice of cancellation to the insured for homeowners', dwelling fire, and private passenger auto. Any such payment may be made by cash, or by check, bank draft, or money order.

(5) This section shall not apply to contracts of life or disability insurance without provision for cancellation prior to the date to which premiums have been paid, or to contracts of insurance procured under the provisions of chapter 48.15 RCW.

[1997 c 85 § 1; 1988 c 249 § 2; 1986 c 287 § 1; 1985 c 264 § 17; 1982 c 110 § 7; 1980 c 102 § 7; 1979 ex.s. c 199 § 5; 1975-'76 2nd ex.s. c 119 § 2; 1947 c 79 § .18.29; Rem. Supp. 1947 § 45.18.29.]

HSchneider v. Brown
 Conn.Super.,2003.

UNPUBLISHED OPINION. CHECK COURT
 RULES BEFORE CITING.

Superior Court of Connecticut, Judicial District of
 Fairfield.
 Edward SCHNEIDER et al.,
 v.
 Andrew BROWN et al.
 No. 340692.

April 23, 2003.

Palmesi Kaufman Goldstein & Petruce, Trumbull,
 CT, for Edward and Lorrie Schneider.
 Coyne Von Kuhn Brady & Fries LLC, Stratford, CT,
 for Hartford Insurance Company of the Midwest.
 Pullman & Comley LLC, Bridgeport, CT, for
 Andrew G. Brown and Gerald Brown.
 Jontos & Lotty, Fairfield, CT, for CNA Insurance
 Company.
BRUCE L. LEVIN, Judge.

*1 The principal issue raised by the motion before the court is whether, pursuant to General Statutes (Rev.1995) § 38a-343(a), a notice of cancellation of insurance sent by certified mail, must actually be received by the insured to be effective. Based on General Statutes § 38a-344, this court holds that it does not.

This is an action seeking damages for personal injuries sustained by the plaintiffs Edward Schneider and Lorrie Schneider in a motor vehicle accident on January 24, 1996, which was allegedly caused by the negligence of the defendant Andrew Brown in the operation of a motor vehicle owned by the defendant Gerald Brown.^{FN1}Earlier in these proceedings, the court granted the defendants' motion to cite in and assert a third-party complaint against CNA Insurance Company (CNA). The defendants' third-party complaint alleges that at the time of the accident, the defendants were insured by a policy of insurance issued by CNA, that they provided CNA with timely notice of the accident involving the plaintiffs and demanded that CNA provide them with a defense and

indemnification. The defendants allege that CNA breached its contract with them by refusing their demand for a defense and indemnification. CNA answered the third-party complaint, denying that it had breached its insurance contract with the defendants.

FN1. Hereafter, Gerald Brown is referred to as the defendant.

On June 23, 1997, the plaintiffs commenced an action against the Hartford Insurance Company of the Midwest (Hartford) seeking uninsured motorist benefits for injuries arising out of the January 24, 1996 accident with the defendants' vehicle. *Edward Schneider et al. v. Hartford Insurance Company of the Midwest*, Superior Court, judicial district of Fairfield at Bridgeport, Docket No. CV 97 0344450. On May 15, 2001, the court rendered judgment in that action for the plaintiffs and against Hartford in the amount of \$50,000, in accordance with a stipulation between the plaintiffs and Hartford.

On May 17, 2001, Hartford moved for permission to join as a third-party plaintiff in this action for the purposes of asserting a complaint against CNA. On October 30, 2001, the court granted Hartford's motion. In its complaint against CNA, Hartford alleges that CNA was required to pay the plaintiff's uninsured motorists benefits because it wrongfully denied coverage to the defendants under a policy of insurance that was in full force and effect at the time of the accident.

Hartford now moves for summary judgment on its complaint against CNA. Hartford claims that it is entitled to judgment "because there exists no genuine issue of material fact that CNA failed to comply with the notice provisions of General Statutes § 38a-343(a) in canceling Gerald Brown's insurance policy." In connection with its motion, Hartford has filed the affidavit of the defendant Gerald Brown. In his affidavit, the defendant avers that he maintained insurance through CNA on the vehicle that was involved in the accident with the plaintiffs, and that he provided CNA with timely notice of the accident and made a demand that CNA defend and indemnify him. When CNA declined, his insurance

representative, Litchfield Insurance Group, notified him that it had failed to receive the insurance premium that was due in November 1995. A representative from Litchfield Insurance Group also informed the defendant that CNA had sent him a notice by registered mail that the policy was being canceled for nonpayment of premium. The defendant states, however, that he never received such a notice of cancellation and "at no time did the mailman assigned to my residence either leave notice in my mailbox of the certified letter or come to my door to deliver this document." (Affidavit of Gerald Brown.)

*2 In response, CNA has filed the affidavit of the letter carrier employed by the U.S. Postal Service whose postal route in January 1996 included the defendant's home. The letter carrier states in his affidavit that on January 9, 1996, he attempted to deliver a certified letter, # P 169 184 465, from CNA but was unable to do so because of snow accumulation on the walkway from the street to the entrance of the house and that he left a notice in the mailbox stating that the certified letter could be picked up at the main post office in town. (Affidavit of Vincent Mancini.) Attached to that affidavit is a copy of the CNA envelope which the letter carrier attempted to deliver, and which contains notations that delivery was twice attempted, that the walk was not clean and that a dog was loose.^{FN2} The certified letter was never picked up.

^{FN2}. The defendant confirms this notation in his affidavit, stating that he recalls a significant snowstorm in his town in January 1996 and that at that time, he owned a fifteen year old dog.

Practice Book § 17-49 provides that summary judgment "shall be rendered forthwith if the pleadings, affidavits and any other proof submitted show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law."³ "In deciding a motion for summary judgment, the trial court must view the evidence in the light most favorable to the nonmoving party ... The party moving for summary judgment has the burden of showing the absence of any genuine issue of material fact and that the party is, therefore, entitled to judgment as a matter of law." (Citation omitted; internal quotation marks omitted.) LaFlamme v. Dallesio, 261 Conn. 247,

250, 802 A.2d 63 (2002). "[Summary judgment] is appropriate only if a fair and reasonable person could conclude only one way." Miller v. United Technologies Corp., 233 Conn. 732, 751, 660 A.2d 810 (1995). "In ruling on a motion for summary judgment, the court's function is not to decide issues of material fact, but rather to determine whether any such issues exist." Nolan v. Borkowski, 206 Conn. 495, 500, 538 A.2d 1031 (1988).

Hartford argues that pursuant to General Statutes § 38a-343(a), CNA was required to give the defendant actual notice of its cancellation of the policy since cancellation was based on nonpayment of an insurance premium. CNA counters that it complied with the statute by sending notice by certified mail and that actual notice was not required. Resolution of this issue requires an interpretation of our statutes governing cancellation of an automobile insurance policy for nonpayment of premium.

In State v. Courchesne, 262 Conn. 537, 562, 816 A.2d 562 (2003), our Supreme Court abandoned the "plain meaning rule" of statutory interpretation and adopted the "Bender formulation." The Bender formulation provides that statutory interpretation must consist of a "reasoned search for the intention of the legislature," even if the text of the statute appears plain and unambiguous. *Id.* In other words, the court will always engage in "a reasoned search for 'the meaning of the statutory language as applied to the facts of [the] case, including the question of whether the language actually does apply.'" *Id.*, at 562-63. Courchesne did not, however, deviate from the well established principles of statutory construction that "[a] court interpreting a statute must consider all relevant sources of meaning of the language at issue—namely, the words of the statute, its legislative history and the circumstances surrounding its enactment, the legislative policy it was designed to implement, and its relationship to existing legislation and to common-law principles governing the same general subject matter." *Id.*

*3 "General Statutes §§ 38a-341 through 38a-344 govern the procedures for the cancellation of an automobile insurance policy by an insurer." Majernicek v. Hartford Casualty Ins. Co., 240 Conn. 86, 92, 688 A.2d 1330 (1997). The first and most important factor used to interpret these statutes, and the starting point of any statutory

analysis, is the words of the statutes themselves.^{FN3} Rivera v. Double A Transportation, Inc., 248 Conn. 21, 25, 727 A.2d 204 (1999). In January 1996, when CNA claims to have given the defendant notice of cancellation of the insurance policy, General Statutes § 38a-343(a) provided: "No notice of cancellation of policy to which Section 38a-342 applies may be effective unless sent, by registered or certified mail or by mail evidenced by a certificate of mailing, or delivered by the insurer to the named insured at least forty-five days before the effective date of cancellation, provided where cancellation is for nonpayment of premium at least ten days' notice of cancellation accompanied by the reason therefor shall be given. No notice of cancellation of a policy which has been in effect for less than sixty days may be effective unless mailed or delivered by the insurer at least forty-five days before the effective date of cancellation, provided that at least ten days' notice shall be given where cancellation is for nonpayment of premium or material misrepresentation. The notice of cancellation shall state or be accompanied by a statement specifying the reason for such cancellation."^{FN4}

FN3. "[T]he language of the statute is the most important factor to be considered, for three very fundamental reasons. First, the language of the statute is what the legislature enacted and the governor signed. It is, therefore, the law. Second, the process of interpretation is, in essence, the search for the meaning of that language as applied to the facts of the case, including the question of whether it does apply to those facts. Third, all language has limits, in the sense that we are not free to attribute to legislative language a meaning that it simply will not bear in the usage of the English language." (Emphasis in original.) State v. Couzchesne, supra, 262 Conn. at 563-64.

FN4. In 1998 and 2002 General Statutes § 38a-343 was amended. There is no claim that those amendments apply to this case.

No issue has been raised over the timeliness or the contents of the notice, only its mode. With respect to the mode by which notice is given, the rule is that "[s]trict compliance by an insurer with the statutory mandates and policy provisions as to notice is

essential to effect a cancellation through such notice." Travelers Ins. Co. v. Hendrickson, 1 Conn.App. 409, 412, 472 A.2d 356 (1984).

Hartford focuses on the statutory language that provides that where a policy is cancelled for nonpayment of premium, notice must be "given." "Given" is the past participle of the verb to give, and it is also a verb. The dictionary contains well over a dozen definitions of the word "give," including proffer, deliver, provide and to cause to have or receive. Merriam Webster's Collegiate Dictionary (10th Ed., 1996).

In Rapid Motor Lines v. Cox, 134 Conn. 235, 237, 256 A.2d 519 (1947), the plaintiff brought an action under General Statutes (Rev.1930) § 1481, now General Statutes § 13a-144, the state highway defect statute. A statutory condition precedent to bringing such an action was that notice of the injury and other particulars "shall have been given within sixty days thereafter to the highway commissioner." The issue in Cox was whether a notice mailed within the sixty-day period, but not received by the commissioner until after sixty days, satisfied the requirement of the statute. The court held that it did not.

*4 The court in Cox stated: "One meaning of the verb 'give' is 'to make over or bestow.' Another is 'to deliver or transfer; to ... hand over.' The idea of delivery is predominant in other meanings of the word. Webster's New International Dictionary (2d Ed.). It is obvious from the context of the statute that 'give' was not used in the former sense. To accord it the latter meaning is the reasonable and natural interpretation, in view of the purpose of the provision, which, it must be held, is to fix a definite limit upon the time within which notice shall be received by the highway commissioner. Any other construction would give rise to needless and undesirable uncertainty." Rapid Motor Lines, Inc. v. Cox, supra, 134 Conn. at 237-38.

As Hartford observes, the statute here employs the word "sent" in connection with the general means of cancellation in one part of the statute, and "given" with respect to cancellation for nonpayment of premium later in the statute. "Sent" is the past tense of "send," which in this context means "to cause to go to dispatch by means of communication ..." Merriam Webster's Collegiate dictionary (10th Ed.,

1996). To “send” does not generally connote receipt. In re Ionosphere Clubs, Inc., 111 B.R. 436, 442-43 (S.D.N.Y.1990) (notice was “sent” when posted with the U.S. Post Office); Sovereign Camp of Woodmen of the World v. Grandon, 64 Neb. 39, 89 N.W. 448, 449-50 (1902). Thus, Hartford observes, “[t]he use of different terms within the same sentence of a statute plainly implies that differing meanings were intended.” Hinchliffe v. American Motors Corporation, 184 Conn. 607, 613, 440 A.2d 810 (1981).

Hartford’s argument is supported by Hernandez v. Hartford Accident & Indemnity Co., Superior Court, judicial district of New Haven, Docket No. CV 88277868 (February 27, 1990) (1 Conn. L. Rptr. 317, 319), in which Judge Hodgson analyzed General Statutes § 38-175h, the predecessor to § 38a-343 and noted that “the shift in wording of the statute to ‘given’ in the clause relating to notice of cancellation for nonpayment of premiums must be afforded some meaning.” The court concluded that the legislature’s decision to use the word “given” signifies “an intention that a cancellation notice for nonpayment of premium must actually be received by the insured before the policy is canceled.” *Id.*

Invocation of this rule of interpretation, however, does not measurably advance the analysis here. General Statutes § 38a-343 provides that to be effective a notice of cancellation must generally be sent by specially evidenced mail “or delivered by the insurer to the named insured at least 45 days before cancellation,” but provides that notice of at least ten days “shall be given” if cancellation is for nonpayment of premium. “The word ‘deliver’ includes a handing over for the purpose of taking even though both acts do not occur simultaneously...” (Citation omitted.) Tucker v. Connecticut Ins. Placement Facility, 192 Conn. 653, 660, 473 A.2d 1210 (1984). Depositing a letter with the post office in the specified manner can constitute delivery when the applicable statute authorizes mail delivery. *Id.* Here, the statute provides for either sending or delivering notice “to the named insured,” and specifies that notice must be “given” when cancellation is for nonpayment of premium. Had the legislature intended to require actual notice to the named insured where cancellation was for nonpayment of premium it could have again used the word “deliver” rather than the far more equivocal

word “given.”

*5 Moreover, a statute is to be construed as a whole in an effort to reconcile all of its parts. Vibert v. Board of Education, 260 Conn. 167, 171, 793 A.2d 1076 (2002). A reasonable construction of the statute is not that the phrase “shall be given” connotes a different mode of notice but, rather, refers back to the methods of giving notice previously stated in the statute. Cf. Stenson v. Northland Insurance Co., 42 Conn.App. 177, 181, 678 A.2d 1000 (1996) (“Cancellation of a policy during the policy period due to nonpayment of the premium requires specific notice sent by registered or certified mail or by mail evidenced by a certificate of mailing at least ten days before the effective date of cancellation”). On balance, this court finds the text of the statute inconclusive in determining whether actual notice is required.

Legislative history is another significant component of statutory construction. Courchesne, supra, 262 Conn. at 561; Burke v. Fleet National Bank, 252 Conn. 1, 16, 742 A.2d 293 (1999). That history reflects that a principal purpose behind the legislature’s enactment of what is now § 38a-343 was to standardize the procedure by which insurers canceled automobile insurance. See 13 H.R. Proc., Pt. 10, 1969 Sess., p. 4436 (remarks of Representative Vicino, floor sponsor) (“this will set a uniformity to the way companies may cancel automobile insurance. This measure gives the public positive assurance that all insurance companies will comply with reasonable standards for cancellation. For the most part this merely puts into statute which many of you companies are now doing voluntarily”). Also, as the Supreme Court has observed, “in enacting § 38a 343(a), the legislature appears to have intended to eliminate the potentially harsh consequences to an insured of driving without knowing that his or her policy was inoperative. See 13 H.R. Proc., Pt. 10, 1969 Sess., p. 4437, remarks of Representative Gerald Stevens (“[i]f ... someone has his insurance policy canceled and is driving under the mistaken impression that he has insurance and subsequently is involved in an accident, the consequences can be rather severe”); see also Johnston v. American Employers Ins. Co., 25 Conn.App. 95, 97-98, 592 A.2d. 975 (1991) (‘purpose of General Statutes § 38a-343... is to assure that before an automobile insurance policy is canceled the insured has a clear

and unambiguous notice of the cancellation'). Thus, the requirement that an insurer provide an insured with notice of its decision to cancel an automobile insurance policy was a legislative effort that focused on affording an insured an adequate opportunity to procure other insurance." Majernicek v. Hartford Casualty Ins. Co., *supra*, 240 Conn. at 93.

The original bill giving rise to what is now General Statutes § 38a-343 "provided where cancellation is for nonpayment of premium at least ten days notice of cancellation accompanied by the reason therefor shall be given." Public Act No. 809 § 3. Thus, the word "given" appeared in the original legislation and in the same context. The legislative history, however, fails to reflect that the legislature ascribed a meaning to "given" distinct from mailing.

*6 The legislative history, however, does reflect that the bill was amended on the floor of the House of Representatives to provide for mailing of a notice of cancellation by certified mail, return receipt requested, instead of ordinary mail. That provision is now General Statutes § 38a-344. The proponent of the amendment, Representative Gerald Stevens stated: "It is our feeling that such an important step as cancellation of an insurance policy or intention not to renew should require more than simple proof of mailing which can be a stamped receipt from the post office. By requiring a return receipt there is proof not only of mailing but of receipt, and if you remember the proof of mailing required is that the person have knowledge that his insurance is being canceled. If there is no provision for return receipt and someone has his insurance policy canceled and is driving under the mistaken impression that he has insurance and subsequently is involved in an accident, the consequences can be rather severe. I think this simple amendment will provide more adequate protection for the policyholder and I urge its adoption." 13 H.R. Proc., Pt. 10, 1969 Sess., p. 4437. Concededly, these remarks may be read to support Hartford's claim that actual notice to the insured is required in order to effectuate notice of cancellation.

In interpreting § 38a-343, however, this court is duty-bound to examine the statute's relationship to other existing legislation. State v. Courchesne, *supra*, 262 Conn. at 561. Here, General Statutes § 38a-344 proves dispositive of the issue before the court. General Statutes § 38a-344 provides: "Proof of

mailing by certified mail, return receipt requested, notice of cancellation, or of intention not to renew or of reasons for cancellation, to the named insured at the address shown in the policy, shall be sufficient proof of notice."

"It is settled that statutes must be construed consistently with other relevant statutes because the legislature is presumed to have created a coherent body of law. In re Valerie D., 223 Conn. 492, 524, 613 A.2d 748 (1992). In construing a statute, the court may look to other statutes relating to the same subject matter for guidance. Vecca v. State, 29 Conn.App. 559, 564, 616 A.2d 823 (1992)." Petco Insulation Co. v. Crystal, 231 Conn. 315, 323-24, 649 A.2d 790 (1994). "A statute 'relates to' the same subject matter of another statute where they have a connection with or reference to the same subject matter ... The subject matter of a statute is the matter with which it deals; Martineau v. Crabbe, 46 Utah 327, 150 P. 301, 304 (1915); broadly construed. Crews v. Cook, 220 Ga. 479, 139 S.E.2d 490, 492 (1964)." In re Terrence S., Superior Court, Child Protection Session at Middletown (April 11, 2002) (32 Conn. L. Rptr. 52, 54).

General Statutes § 38a-343 and General Statutes § 38a-344 are in the same chapter of the general statutes, chapter 700; both statutes are the progeny of the same statutory ancestor, 1969 Public Act No. 809, "An Act Concerning The Regulation of Automobile Insurance Policy Cancellation,"^{FNS} and both statutes relate to the notice of cancellation of insurance. Manifestly, both statutes relate to the same subject matter.

^{FNS} "A statute is passed as a whole and not in parts or sections and is animated by one general purpose and intent. Consequently, each part or section should be construed in connection with every other part or section so as to produce a harmonious whole. Thus, it is not proper to confine interpretation to the one section to be construed ..." (Citations omitted; internal quotation marks omitted.) In re Bruce R., 234 Conn. 194, 207-08, 662 A.2d 107 (1995).

*7 General Statutes § 38a-344 provides that proof of mailing a notice of cancellation by certified mail return receipt requested "shall be sufficient proof of

notice." Although the phrase "shall be sufficient proof" has not previously been subject to interpretation within the context of § 38a-344 or any other General Statute, it has been interpreted in the context of an insurance policy provision pertaining to the cancellation of insurance. In *Westmoreland v. General Accident F. & L. Assurance Corporation*, 144 Conn. 265, 270, 129 A.2d 623 (1957), the policy provided: "This policy may be canceled by the company by mailing to the named insured at the address shown in this policy written notice stating when not less than five days thereafter such cancellation shall be effective. The mailing of notice as aforesaid shall be sufficient proof of notice ..." Construing this provision, the court held that "[i]t is always competent for parties to contract as to how notice shall be given, unless their contract is in conflict with law or public policy. When they do so contract, the giving of a notice by the method contracted for is sufficient *whether it results in actual notice or not.*" (Emphasis added.) *Id.*, at 270. This court can divine no reason why the command of § 38a-344 should be given less effect than a similar provision in an insurance policy which, after all, if ambiguous must be construed against the insurer. *Hansen v. Ohio Casualty Insurance Co.*, 239 Conn. 537, 548, 687 A.2d 1262 (1996). Notably, *Westmoreland* was decided in 1957 and, thus, was the law when the predecessor to § 38a-344 was enacted in 1969.

Despite the ambiguity in the language of General Statutes § 38a-343, Section 38a-344 is clear and unambiguous, and there is no relevant extratextual evidence that would suggest to read the statute other than as its plain language indicates. *State v. Courchesne, supra*, 262 Conn. at 574.

The *Hartford* admits in its brief that "CNA sent notification of cancellation, dated December 26, 1995 to Gerald Brown [the insured] via certified mail." This is all that the law required in order to accomplish the cancellation. Pursuant to General Statutes § 38a-344, proof of mailing a certified letter is sufficient proof of notice. Actual notice to the named insured is not required. "It is proof of mailing, not proof of receipt by the insured, that is sufficient. Nowhere does the statute require an insurer to produce a signed return receipt to establish sufficient proof of notice, nor have the plaintiffs cited case law which supports this proposition." *Iuteri v. Allstate*

Insurance Co., Superior Court, judicial district of New Haven, Docket No. CV 94 0357659 (July 8, 1999, Downey, J.) (25 Conn. L. Rptr. 67, 69). CNA had no duty to make further efforts to serve notice of cancellation beyond those expressed in the statute. Cf. *Stratton v. Abington Mutual Fire Ins. Co.*, 9 Conn.App. 557, 562, 520 A.2d 617, cert. denied, 203 Conn. 807, 525 A.2d 522 (1987).

*8 The remarks of Representative Stevens quoted *supra* do not militate a different result. Even if those remarks may be construed as stating that the requirement of certified mail, return receipt requested contemplated actual receipt by the insured, General Statutes § 38a-344 is absolutely clear that it is proof of mailing by certified mail, return receipt requested, not actual receipt, that is sufficient proof of notice. There is no other plausible reading of § 38a-344. Although our Supreme Court recently held that statutory analysis does not stop with the plain meaning of a statute, it noted that in most cases, the plain meaning will "prove to be the legislatively intended meaning of the language." *State v. Courchesne, supra*, 262 Conn. at 574.

Certain earlier trial court cases are either distinguishable or not persuasive. In *Clary v. Empire Mutual Ins. Co.*, 30 Conn.Sup. 113, 303 A.2d 26 (1972), the defendant insurer refused to defend the plaintiff and denied her coverage on the ground that it canceled her policy prior to the date of the accident. The court held that the plaintiff's evidence of mailing notice of cancellation was not sufficient under the terms of the plaintiff's policy as it was conflicting, uncertain and of questionable credibility. Moreover, the plaintiff's own agent did not notify her that her policy had been canceled because he did not know himself. *Clary* is not instructive here because its facts are distinguishable, and it did not involve or discuss § 38a-343 or § 38a-344.

The court's holding in *DiProspero v. Nationwide Mutual Fire Ins. Co.*, 30 Conn.Sup. 291, 311 A.2d 561 (1973), that "giving" notice without stipulating the form or way in which notice must be given means that the insured must have actual receipt, is also distinguishable. Although *DiProspero* interprets the word "giving," it does so in the context of the standard form fire insurance policy, a statute to which § 38a-344 clearly does not apply.

Finally, Hartford cites to *Hernandez et al v. Hartford Accident & Indemnity Co. et al., supra*, Superior Court, judicial district of New Haven, Docket No. CV 88 277868, 1 Conn. L. Rptr. 317, 319 (holding that notice of cancellation pursuant to § 38a-343 must be actually received), and *Atwood v. Progressive Insurance Co.*, Superior Court, judicial district of Ansonia/Milford at Milford, Docket No. CV 95 0051089 (September 3, 1997, Corradino, J.) (20 Conn. L. Rptr. 473) (reasoning that notice of cancellation pursuant to § 38a-343 requires that notice be received by the insured). While these Superior Court cases do hold that notice of cancellation under § 38a-343 must actually be received by the insured, neither case discusses § 38a-344, which this court finds dispositive.^{FN6}

FN6. Additionally, as to whether the letter carrier left a notice of certified mail in the insured's mailbox, the letter carrier states by affidavit that he left a notice in the defendant's mailbox that a certified letter could be picked up at the post office, and that the letter was never claimed. The defendant denies that the letter carrier ever left such notice.

Certainly "[o]ne cannot refuse the acceptance of notice and then claim that it was not given to him." *Stratton v. Abington Mutual Fire Ins. Co., supra*, 9 Conn.App. at 563. Moreover, "[f]ull and adequate means of knowledge ordinarily are, in law, equivalent to knowledge." *Attardo v. Ambriscoe*, 147 Conn. 708, 711, 166 A.2d 458 (1960).

Questions of credibility as to each party's allegations raise an issue of fact which this court cannot resolve on a motion for summary judgment. *Suarez v. Dickmont Plastics Corp.*, 229 Conn. 99, 107, 639 A.2d 507 (1994). In light of this court's holding that actual notice to the defendant was not required, however, the court does not deem these outstanding question of fact to be material.

Pursuant to General Statutes § 38a-343 notice of cancellation of an automobile insurance policy may be made by certified mail, return receipt requested; actual notice to the named insured is not necessary. Pursuant to § 38a-344 proof of such mailing is sufficient proof of notice. Here, the letter carrier's affidavit and the copy of the envelope evidencing the letter carrier's two attempts to make delivery of the letter are proof of such mailing and, hence, proof of

notice to the named insured. *Hartford's* motion for summary judgment is denied.^{FN7}

FN7. Subsequent to oral argument on *Hartford's* motion, the court received a letter from counsel to the defendants Gerald Brown and Andrew Brown advising the court that earlier in these proceedings both CNA and the Browns had respectively moved for summary judgment and that both motions had been denied by the court (Brennan, J.). Judge Brennan is presently disabled. *Hartford's* counsel posited that the denial of those motions is the law of the case in this matter. Clearly, the denial of the Browns' motion, which sought summary judgment against CNA, can hardly be deemed law of the case against CNA. For this reason, the court will address the doctrine only with respect to the denial of CNA's motion for summary judgment.

Preliminarily, however, the court notes that the Supreme Court has repeatedly expressed its "disapproval of submission by parties of informal letter requests ..." *Gauvin v. New Haven*, 187 Conn. 180, 186 n. 2, 445 A.2d 1 (1982).

The law of the case was extensively discussed by the Supreme Court in *Breen v. Phelps*, 186 Conn. 86, 99, 439 A.2d 1066 (1982). "The law of the case is not written in stone but is a flexible principle of many facets adaptable to the exigencies of the different situations in which it may be invoked ... In essence it expresses the practice of judges generally to refuse to reopen what has been decided and is not a limitation on their power ... New pleadings intended to raise again a question of law which has been already presented on the record and determined adversely to the pleader are not to be favored ... But a determination so made is not necessarily to be treated as an infallible guide to the court in dealing with all matters subsequently arising in the cause ... Where a matter has previously been ruled upon interlocutorily, the court in a subsequent proceeding in the case may treat that decision as the law of the case, if it is of the opinion that the issue was correctly decided, in the absence of some new or overriding circumstance ... A judge should hesitate to change his own rulings in a case and should be even more reluctant to overrule those of another judge ... Judge shopping is not to be encouraged and a decent respect for the views of his brethren on the bench is commendable in a judge. Nevertheless, if the case comes before him regularly

and he becomes convinced that the view of the law previously applied by his coordinate predecessor was clearly erroneous and would work a manifest injustice if followed, he may apply his own judgment ...*The adoption of a different view of the law by a judge in acting upon a motion for summary judgment than that of his predecessor in considering such a motion or some other pretrial motion is a common illustration of this principle.*" (Citations omitted; emphasis added; internal quotation marks omitted.) Breen v. Phelps, supra, 186 Conn. at 99-100.

The doctrine of the case is not applicable here for several reasons. First, since Judge Brennan simply denied the motion to strike the complaint "without giving his reasons, it is not possible to divine the basis of his ruling. See *Gould v. M & B Motorsport*, Superior Court, judicial district of Waterbury, Docket No. 112515 (November 30, 1994, Sylvester, J.); *Birdsall v. Insulation Material Products*, Superior Court, judicial district of New Haven, Docket No. 324316 (May 4, 1992, Hodgson, J.) (6 Conn. L. Rptr. 388)." *Galligan v. Edward D. Jones & Co.*, Superior Court, judicial district of New Haven, Docket No. 389623 (November 13, 2000, Levin, J.). That is, this court is unable to determine from Judge Brennan's denial of CNA's motion what "law" is the law of the case. Second, assuming, as the Brown's counsel states in his letter, that the basis of Judge Brennan's ruling was that there were genuine issues of material fact extant, such a basis would certainly not control the disposition of *Hartford's* motion. Otherwise stated, that there existed genuine issues of material fact that precluded the granting of summary judgment in favor of CNA does require this court, on *Hartford's* motion, to grant summary judgment against CNA. Third, on summary judgment, a court is required to view the evidence in the light most favorable to the nonmoving party. *Pelletier v. Sordoni/Skanska Construction Co.*, 262 Conn. 372, 376, 815 A.2d 82 (2003). Thus, on CNA's motion for summary judgment, Judge Brennan presumably viewed the evidence in the light most favorable to the Browns. On *Hartford's* motion for summary judgment against CNA, however, this court is required to view the evidence in the light most favorable to CNA. "If the standards are different, then the law of the case does not apply." *Southington v. Commercial Union Ins. Co.*, 71 Conn.App. 715, 735, 805 A.2d 7 (2002); see *Firgeleski v. Hubbell, Inc.*, Superior Court, judicial district of Fairfield at Bridgeport, Docket No. CV 98 035287 (December 19, 2001, Sevens, J.); *Galligan v. Edward D. Jones & Co., supra*, Superior Court,

Docket No. 389623. Fourth, it is particularly appropriate for a Judge of the Superior Court trial judge to reconsider a motion for summary judgment that has been denied where new evidence has been presented which was not before the court at the time of the original motion. *Mac's Car City, Inc. v. American National Bank*, 205 Conn. 255, 260-61, 532 A.2d 1302 (1987). Here, CNA has submitted the affidavit of the letter carrier who sought to deliver the certified notice of cancellation to Gerald Brown. This affidavit was not before Judge Brennan. Moreover, in its earlier motion for summary judgment, CNA failed to cite General Statutes § 38a-344, which this court has found dispositive of *Hartford's* motion. Finally, our courts have flatly held that "[a] judge is not bound to follow the earlier decisions of another judge in the same proceedings." *Young v. Marx*, 24 Conn.App. 81, 83, 585 A.2d 1253, 2003 (1991); see also *McCutcheon & Burr, Inc. v. Berman*, 218 Conn. 512, 526, 590 A.2d 438 (1991); *Mac's Car City, Inc. v. American National Bank, supra*, 205 Conn. at 262; *Barnes v. Schlein*, 192 Conn. 732, 734, 473 A.2d 1221 (1984); *Fiaschetti v. Nash Engineering Co.*, 47 Conn.App. 443, 445-46, 706 A.2d 476 (1998).

Conn.Super.,2003.

Schneider v. Brown

Not Reported in A.2d, 2003 WL 21040162 (Conn.Super.), 34 Conn. L. Rptr. 403

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48.18.293. Nonliability of commissioner, agents, insurer for information giving reasons for cancellation or refusal to renew—Proof of mailing of notice

(1) There shall be no liability on the part of, and no cause of action of any nature shall arise against, the insurance commissioner, his agents, or members of his staff, or against any insurer, its authorized representative, its agents, its employees, or any firm, person or corporation furnishing to the insurer information as to reasons for cancellation or refusal to renew, for any statement made by any of them in any written notice of cancellation or refusal to renew, or in any other communications, oral or written, specifying the reasons for cancellation or refusal to renew or the providing of information pertaining thereto, or for statements made or evidence submitted in any hearing conducted in connection therewith.

(2) Proof of mailing of notice of cancellation or refusal to renew or of reasons for cancellation, to the named insured, at the latest address filed with the insurer by or on behalf of the named insured shall be sufficient proof of notice.

[1969 ex.s. c 241 § 21.]

Historical and Statutory Notes

Construction—1969 ex.s. c 241: See note following RCW 48.18.291.

Appendix C