

NO. 81160-1

SUPREME COURT  
OF THE STATE OF WASHINGTON

CORNHUSKER CASUALTY INSURANCE COMPANY,

*Plaintiff - Respondent,*

v.

CHRIS KACHMAN and DEBBIE KACHMAN; ROCKERIES, INC.; and  
BROOKS SAMPLES, individually and as personal representative of the  
estate of Leanne Samples,

*Defendants - Appellants.*

AMICUS BRIEF OF PROPERTY CASUALTY INSURERS  
ASSOCIATION OF AMERICA

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of America

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## TABLE OF AUTHORITIES

WASHINGTON CASES	<u>Page</u>
<i>American Continental Insurance Co. v. Steen</i> , 151 Wn. 2d 512, 91 P.3d 864 (2004).....	4
<i>Collins v. Lomas &amp; Nettleton Co.</i> , 29 Wn. App. 415, 628 P.2d 855 (1981).....	4-5, 7
<i>In re Estate of Jones</i> , 152 Wn. 2d 1, 93 P.3d 147 (2004).....	3-4
<i>State, Department of Ecology v. Campbell &amp; Gwinn, LLC</i> , 146 Wn. 2d 1, 43 P.3d 4 (2002).....	4
<i>Tremmel v. Safeco Insurance Co. of America</i> , 42 Wn. App. 684, 713 P.2d 155 (1986).....	11
<i>Trinity University Insurance Co. v. Willrich</i> , 13 Wn. 2d 263, 124 P.2d 950 (1942).....	11
<i>W. Telepage, Inc. v. City of Tacoma</i> , 140 Wn. 2d 599, 998 P.2d 884 (2000).....	4
<i>Wisniewski v. State Farm General Insurance Co.</i> , 25 Wn. App. 766, 609 P.2d 456 (1980).....	11

## OTHER STATE CASES

<i>Raptis v. Safeguard Insurance Co.</i> , 13 Mich. App. 193, 163 N.W.2d 835 (1968).....	7
---	---

## STATE STATUTES

RCW 48.03.040(5).....	9
RCW 48.05.210(1), (2).....	9

	<u>Page</u>
RCW 48.05.485 .....	9
RCW 48.15.150(2).....	9
RCW 48.18.290 .....	1-8, 12
RCW 48.18.290(1)(a) .....	1, 4, 7
RCW 48.18.290(2) .....	6-12
RCW 48.30.010(5).....	9
RCW 48.43.355 .....	9
WAC 48.18.290(2).....	5

#### COURT RULES

CR 5(b).....	4, 7
CR 5(b)(1).....	4-5
CR 5(b)(2)(A) .....	5-6
RAP 13.4(h).....	3

#### MISCELLANEOUS

UNITED STATES POSTAL SERVICE DOMESTIC MAIL MANUAL (2008).....	1, 8
WEBSTER'S THIRD NEW INT'L DICTIONARY 367 (1981).....	1

**TABLE OF CONTENTS**

	<u>Page</u>
TABLE OF AUTHORITIES .....	ii
I. INTRODUCTION .....	1
II. IDENTITY AND INTEREST OF AMICUS CURIAE .....	2
III. STATEMENT OF THE CASE .....	3
IV. ARGUMENT.....	3
A. Sending a Notice of Cancellation Via Certified Mail Satisfies the Definition of “Mailing” .....	3
1. RCW 48.18.290 Is Not Ambiguous.....	3
2. The Additional Steps Required to Send Certified Mail Do Not Remove Certified Mail from the Statutory Definition of “Mailing” .....	8
3. Differences in How Certified Mail Is Received Are Not Material under RCW 48.18.290 .....	8
B. Sending a Notice of Cancellation Via Certified Mail Satisfies the Insurer’s Obligation to Provide Notice of Cancellation.....	10
V. CONCLUSION .....	12

## I. INTRODUCTION

On September 29, 2004, a Cornhusker Casualty employee printed a notice of cancellation, placed it in a sealed envelope, addressed the envelope to a Cornhusker insured (Rockeries, Inc.), and affixed sufficient postage. The employee attached a copy of a Postal Service form requesting the option of certified mail with delivery tracking before depositing the envelope in the United States Mail.<sup>1</sup>

The insurance code provides that a notice of cancellation is effective if “actually delivered or mailed to the named insured.” RCW 48.18.290(1)(a) (1997) (Appendix A).<sup>2</sup> This Court is asked to decide whether “sending notice of cancellation by certified mail satisf[ies] the ‘mailed’ requirement of RCW § 48.18.290.” 514 F.3d 983, 988 (9th Cir. 2008).

Subsection 2 of RCW 48.18.290 instructs insurers how to accomplish “mailing” a notice of cancellation: “by depositing it in a sealed envelope, directed to the addressee . . . , with proper prepaid postage affixed, in a letter depository of the United States post office.”

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<sup>1</sup> “Certified mail” is first class mail that “provides the sender with a mailing receipt and, upon request, electronic verification that an article was delivered or that a delivery attempt was made.” UNITED STATES POSTAL SERVICE DOMESTIC MAIL MANUAL § 503.3.2.1 (2008) (Appendix B); *see also* WEBSTER’S THIRD NEW INT’L DICTIONARY 367 (1981) (defining “certified mail” as “first class mail for which proof of delivery is secured but no indemnity value is claimed.”).

<sup>2</sup> All references to RCW 48.18.290 herein are to the version effective in 2004.

The issue is, if an insurer mails a notice of cancellation according to these instructions, is it material whether the insurer chooses the option of certified mail? Under the “plain meaning rule” of statutory interpretation, a notice of cancellation mailed according to the instructions in the statute is effective regardless of the type of mail.

This Court is also asked to decide whether a notice of cancellation sent via certified mail “give[s] 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.” 514 F.3d at 988-89. A notice of cancellation “mailed” pursuant to RCW 48.18.290 is effective regardless of receipt.

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

The Property Casualty Insurers Association of America (PCIAA) is a trade group representing more than 1,000 property and casualty insurance companies that transact business in all 50 states. Its member companies account for \$173 billion in direct written premiums; 50.2% of all personal auto premiums in the United States, and 37.8% of all homeowners’ premiums. PCIAA advocates its members’ interests in state and federal courts and has filed amicus briefs in courts throughout the United States.

PCIAA requested permission to file this brief under RAP 13.4(h) because the certified questions implicate the rights and obligations of its members. PCIAA members are interested in strict adherence to the rule that proof of mailing according to the procedures set forth by the legislature is all that is required to cancel an insurance policy for nonpayment of premium. Insurers must be able to cancel an insurance policy with certainty when the policyholder has failed to pay the premium when due. Certified mail provides proof of the postmark date and, if it is received, confirmation of receipt. Insurers satisfy the statute by using certified mail and increase the recipient's awareness of the notice by requiring acknowledgment of receipt.

### **III. STATEMENT OF THE CASE**

The facts have been ably stated by the parties to this case. The certified question poses an issue of statutory interpretation. The agreed facts are determinative.

### **IV. ARGUMENT**

#### **A. Sending a Notice of Cancellation Via Certified Mail Satisfies the Definition of "Mailing"**

##### **1. RCW 48.18.290 Is Not Ambiguous**

Statutory interpretation in this Court begins with the principle that the legislature "means what it says." *In re Estate of Jones*, 152 Wn.2d 1,

11, 93 P.3d 147 (2004). Under the “plain meaning rule” of statutory interpretation, the meaning of an unambiguous statute is derived from its language alone. *State, Dept. of Ecology v. Campbell & Gwinn, LLC*, 146 Wn.2d 1, 11, 43 P.3d 4 (2002). A statute is ambiguous if it can be *reasonably* interpreted in more than one way, but not merely because different interpretations are conceivable. *Am. Continental Ins. Co. v. Steen*, 151 Wn.2d 512, 518, 91 P.3d 864 (2004). The court will not “search for ‘an ambiguity by imagining a variety of alternative interpretations.’” *Id.* at 518, quoting *W. Telepage, Inc. v. City of Tacoma*, 140 Wn.2d 599, 608, 998 P.2d 884 (2000).

RW 48.18.290 requires an insurer either to mail or actually deliver a notice of cancellation. Subsection 2 of RCW 48.18.290 sets forth the procedure for “mailing” a notice of cancellation: “depositing it in a sealed envelope, directed to the addressee . . . , with proper prepaid postage affixed, in a letter depository of the United States post office.” These elements are satisfied regardless of whether mail is sent via regular or certified mail.

The court of appeals decided this issue in *Collins v. Lomas & Nettleton Co.*, 29 Wn. App. 415, 628 P.2d 855 (1981), in the context of CR 5(b), which governs service of pleadings. Similar to RCW 48.18.290(1)(a), CR 5(b)(1) permits service either by actual delivery or

mailing: “Service upon the attorney or upon a party shall be made by delivering a copy to him or by mailing it to him at his last know address[.]” Similar to WAC 48.18.290(2), CR 5(b)(2)(A) defines “mailing,” stating, “If service is made by mail, the papers shall be deposited in the post office addressed to the person on whom they are being served, with the postage prepaid.” Subject to exceptions regarding holidays, service is “deemed complete” on the third day after mailing. CR 5(b)(2)(A).

In *Collins*, a defendant sent notice of a motion to dismiss to the plaintiffs using certified mail. 29 Wn. App. at 417. The plaintiffs failed to appear for the hearing, and the motion was granted. *Id.* The plaintiffs then moved to set aside the order of dismissal, arguing that they did not receive notice of the hearing. *Id.* The evidence showed that the plaintiffs failed to respond to the postal service notices that certified mail was being held for them, and the mail was returned to the defendant after the order of dismissal was entered. *Id.* The trial court declined to set aside the dismissal. *Id.* On appeal, the plaintiffs contended that service of pleadings by certified mail did not constitute “mailing” under CR 5(b)(2)(A) and provided insufficient notice. *Id.* The court of appeals disagreed, holding:

CR 5(b)(2)(A) provides: “If service is made by mail, the papers shall be deposited in the post office addressed to the person on whom they are being served, with the postage prepaid.” The law firm complied with this rule. We find no justification for precluding the use of certified mail absent express language to that effect. The use of certified mail may be superior, in fact, to service by first-class mail since certification assures that the postmark, which determines the time of mailing, is accurate.

*Id.* at 417-18. The same reasoning applies to RCW 48.18.290(2), which defines the procedure for mailing and which Cornhusker followed.

Appellant concedes that certified mail comes within the terms of RCW 48.18.290. (Reply Brief of Appellant at 5.) Appellant attempts to create ambiguity by restating the certified question and asking the Court to decide “whether certified mail . . . falls under the ‘mailing’ prong or the ‘actual delivery’ prong of RCW 48.18.290.” (Brief of Appellant at 1-2.) Appellant contends that the use of certified mail is not “mailing” but an attempt to achieve “actual delivery,” stating, “Unlike regular mail, certified mail is only effective to provide notice of cancellation to an insured if it is actually delivered to the insured.” (*Id.* at 12.) But neither regular mail nor certified mail results in actual notice unless it is actually delivered. Moreover, Appellant’s focus on whether mail is actually delivered ignores the statutory definition of “mailing,” which says nothing about delivery or receipt. RCW 48.18.290(2). If the insurer affixes proper postage and deposits the notice with the postal service, it has satisfied the

mailing requirement and delivery is not relevant. The court of appeals held in *Collins* that certified mail was “mailing” under CR 5(b) which, like RCW 48.18.290(1)(a), includes the option of actual delivery or mailing. Appellant’s restating of the certified question does not make the statute ambiguous.

Appellant concedes that courts in other jurisdictions interpreting statutes that provide for “mailing” notice of cancellation to the insured have held that certified or registered mail is effective regardless of receipt. (Reply Brief of Appellant at 6.) *See, e.g., Raptis v. Safeguard Ins. Co.*, 13 Mich. App. 193, 163 N.W. 2d 835 (1968). Appellant contends that such cases are “not helpful” because “RCW 48.18.290, unlike the statutes in those other states, provides the options of ‘mail’ or ‘delivery,’ and is ambiguous as to where certified mail falls between those options.” (Reply Brief of Appellant at 6.) Whether certified mail is within the definition of “mailing” does not depend on whether alternative means of providing notice exist. Certified mail is within the definition of mailing in RCW 48.18.290(2). The legislature could have specified only certain types of mailing; its choice of broader terms must be respected.

2. The Additional Steps Required to Send Certified Mail Do Not Remove Certified Mail from the Statutory Definition of "Mailing"

Appellant contends that the definition of "mailing" is ambiguous as to certified mail because additional steps are required to send certified mail. Appellant asserts that certified mail is unlike regular mail in that it "must be taken into a post office so that additional paperwork can be filled out and an additional fee paid." (Brief of Appellant at 16.) Even if this were true, a sender following this procedure nonetheless satisfies the elements of "mailing" set forth in RCW 48.18.290(2). But Appellant's assertion is incorrect. According to the Postal Service, "A mailer may mail Certified Mail at a post office, branch, or station or give it to a rural carrier. Certified Mail may also be deposited in a post office maildrop, a street letterbox, a nonpersonnel unit, or any other receptacle for First-Class Mail." UNITED STATES POSTAL SERVICE DOMESTIC MAIL MANUAL § 503.3.3.1 (2008) (Appendix B).

3. Differences in How Certified Mail Is Received Are Not Material under RCW 48.18.290

Appellant contends that certified mail is inferior to regular mail in that it is less likely to be received by the addressee and may result in the insured being required to pick up the letter. Whether sending notice of cancellation by certified mail should be prohibited is a choice for the

legislature to make. The definition of "mailing" in RCW 48.18.290(2) is consistent with certified mail and does not exclude it.

Furthermore, the legislature does not consider certified mail to be inferior to regular mail as a means of giving notice. Unlike RCW 48.18.290, numerous Washington statutes *require* the use of certified or registered mail.<sup>3</sup> Appellant cites many of these and contends, "In circumstances where the Legislature intends for certified mail or regular mail to be used, the Legislature says so." (Brief of Appellant at 15.) To the contrary, these statutes evidence the Washington Legislature's awareness of different means of mailing and its ability to limit permissible types of mailing when it so intends. It further evidences the legislature's conclusion that certified mail is as good as -- or superior to -- regular mail as a means of providing notice. For instance, the Insurance Code provides that notice sent by the insurance commissioner to an insurer that may result in regulatory action is effective "upon receipt" if sent by regular mail or other means but is effective "upon dispatch" if sent by certified or registered mail. RCW 48.05.485; RCW 48.43.355.

In addition, the numerous statutes authorizing or requiring certified mail are evidence that the legislature does not view certified mail as

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<sup>3</sup> See, e.g., RCW 48.03.040(5); RCW 48.05.210(1), (2); RCW 48.05.485; RCW 48.15.150(2); RCW 48.30.010(5); RCW 48.43.355; and other statutes cited in Brief of Appellant at 15-16.

imposing an unfair burden on the addressee. Significantly, the post office delivers, *with the insured's regular mail*, at least two notices that a certified letter has been sent to the insured, each identifying the sender. The legislature's choice to require certified mail in certain circumstances reflects the fact that certified mail not only creates a "paper trail" but commands a person's attention unlike regular mail. Whereas an ordinary letter sent by an insurance company might be readily ignored or discarded, a person appreciates that a certified letter is intended to communicate something of importance.

The first part of the certified question must be answered in the affirmative: mailing a notice of cancellation via certified mail constitutes "mailing" under RCW 48.18.290(2).

**B. Sending a Notice of Cancellation Via Certified Mail Satisfies the Insurer's Obligation to Provide Notice of Cancellation**

The second part of the certified question asks whether sending a notice of cancellation via certified mail "give[s] 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." 514 F.3d at 988-89. This question must be answered in the affirmative because the statute does not require proof of receipt and because certified mail satisfies the definition of "mailing."

Appellant contends that the effectiveness of a notice of cancellation sent by regular mail is based on a presumption of delivery that should not apply to certified mail. Appellant's premise is false. The legislature defined the steps any insurer must take. If those steps are taken, the insurer is deemed to have given notice even if the mail is returned. RCW 48.18.290(2) requires an insurer to retain any notice of cancellation returned by the Postal Service:

The insurer shall retain in its records any [notice of cancellation] so mailed, together with its envelope, which was returned by the post office upon failure to find, or deliver the mailing to, the addressee.

The statute does not provide that the notice is ineffective if returned by the Postal Service. *Cf. Trinity Univ. Ins. Co. v. Willrich*, 13 Wn.2d 263, 273-74, 124 P.2d 950 (1942) (holding, where insurance policy provided for mailing notice of cancellation, and where notice of cancellation was not received by the insured, mailing is sufficient "whether or not such notice is actually received by the insured."). *See also Tremmel v. Safeco Ins. Co. of Am.*, 42 Wn. App. 684, 687, 713 P.2d 155 (1986) ("[T]he long established rule in Washington is that proof of mailing is all that is necessary in order to effect cancellation of an insurance policy."), citing *Wisniewski v. State Farm Gen. Ins. Co.*, 25 Wn. App. 766, 767, 609 P.2d 456 (1980).

The second part of the certified question must therefore be answered in the affirmative because RCW 48.18.290 does not require proof of actual delivery by the insured but requires only that the notice of cancellation be “mailed” to the insured.

#### V. CONCLUSION

RCW 48.18.290 is not ambiguous. An insurer can follow the instructions in subsection 2 of RCW 48.18.290 whether it uses regular or certified mail, and delivery is not material if the notice of cancellation is “mailed” according to those instructions. RCW 48.18.290 places the burden on the insurer to follow the instructions for “mailing” a notice of cancellation (e.g., using a sealed envelope, affixing sufficient postage, etc.), and places the burden on the insured to see that mail is received (e.g., providing a current address to the insurer, providing a secure delivery location, and retrieving and reading mail). The numerous statutes that require the use of certified mail are evidence that the legislature does not believe certified mail imposes an unfair burden on the addressee. If certified mail is to be excluded from the definition of “mailing,” that is a decision for the legislature to make.

DATED this 16<sup>th</sup> day of July, 2008.

CARNEY BADLEY SPELLMAN, P.S.

By  30512

Timothy J. Parker, WSBA No. 8797

Jason W. Anderson, WSBA No. 30512

Attorneys for Amicus Curiae Property Casualty  
Insurers Association of America

# **APPENDIX A**

### 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.]

#### Historical and Statutory Notes

Effective date—1988 c 249: See note following RCW 48.18.289.

Application—1985 c 264 §§ 17-22: "Sections 17 through 22 of this act apply

to all new or renewal policies issued or renewed after May 10, 1985. Sections 17 through 22 of this act shall not apply to or affect the validity of any notice of

# **APPENDIX B**

**Additional Services: Certified Mail**

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503.2.6.3

**3.0 Certified Mail**

**3.1 Certified Mail Fees**

**3.1.1 Certified Fees**

Fee, in addition to postage and other fees, per piece: \$2.70.

**3.1.2 Fee and Postage**

The Certified Mail fee must be paid in addition to the correct postage. The fee and postage may be paid with ordinary postage stamps, meter stamps, or permit imprints. The fee and postage on official mail of federal government agencies and departments are collected under the applicable reimbursement procedures.

**3.2 Basic Information****3.2.1 Description**

Certified Mail service provides the sender with a mailing receipt and, upon request, electronic verification that an article was delivered or that a delivery attempt was made. Customers can retrieve the delivery status in three ways: (1) over the Internet at [www.usps.com](http://www.usps.com) by entering the article number shown on the mailing receipt; (2) by telephone at 1-800-222-1811; or (3) by bulk electronic file transfer for mailers who provide an electronic manifest to the USPS. Certified Mail is dispatched and handled in transit as ordinary mail. Delivery of Certified Mail is subject to 508.1.0 and 508.2.0. No insurance coverage is provided. USPS maintains a record of delivery (which includes the recipient's signature) for a specified period of time. Customers may obtain a delivery record by purchasing return receipt service. See 6.0 for details.

**3.2.2 Eligible Matter**

Only mailable matter on which postage is paid at a First-Class Mail price (including Priority Mail) may be accepted as Certified Mail.

**3.2.3 Additional Services**

Purchasing Certified Mail service allows customers to then purchase restricted delivery service or a return receipt.

**3.2.4 Delivery Record**

Mailers may request a delivery record after mailing under 6.0, *Return Receipt*.

**3.3 Mailing****3.3.1 Where to Mail**

A mailer may mail Certified Mail at a Post Office, branch, or station or give it to a rural carrier. Certified Mail may also be deposited in a Post Office maildrop, a street letterbox, a nonpersonnel unit, or any other receptacle for First-Class Mail, subject to 3.3.5.

**3.3.2 Available Destinations**

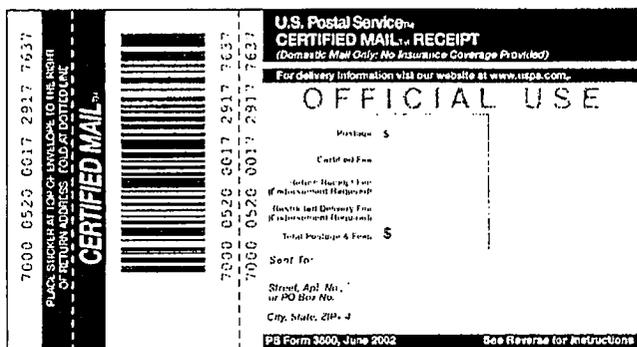
Certified Mail may be addressed for delivery only in the United States and its territories and possessions, through APOs and FPOs, or through the United Nations Post Office, New York.

**3.3.3 Form 3800**

Certified Mail must bear a barcoded green Form 3800 (see Exhibit 3.3.3). The label part of the form must be placed above the delivery address and to the right of the return address, or to the left of the delivery address on parcels.



**Exhibit 3.3.3 Form 3800**



**3.3.4 Privately Printed Form 3800**

If authorized, a mailer may use a privately printed Form 3800. The privately printed form must be nearly identical in design and color to the USPS form with a barcode and human readable numbers that meet the USPS specifications in Publication 109. A minimum of three preproduction samples must be submitted to the business mail entry manager serving the mailer's location for review by the mailpiece design analyst. Once approved, the mailer must print sample labels with barcodes to be certified under the technical requirements in Publication 109.

**3.3.5 Procedure**

A mailer of Certified Mail must:

- a. Enter on Form 3800 the name and complete address of the person or firm to whom the mail is addressed.
- b. If a return receipt is requested, check the block on the mailing receipt to show the fee. Near the Certified Mail endorsement on the address side, add the endorsement "Return Receipt Requested." Enter the Certified Mail number on the return receipt card, address it to himself or herself, and attach it to the back of a small envelope or on the front of a package or large envelope, if the card does not cover the address. Enter the name and delivery address on the reverse of the return receipt to show where the receipt is to be sent. When a return receipt is requested, a complete return address (sender's name and delivery address) is required on the mailpiece. The name and delivery address entered on the reverse of the return receipt do not have to match the sender's name and return address on the mailpiece.
- c. Affix to the envelope enough postage to pay for the Certified Mail fee and First-Class Mail price and, if requested, the return receipt fee.
- d. If a postmarked sender's receipt is requested, attach the Certified Mail sticker to the address side of the article and present the article and the completed receipt to the USPS employee, who then round-dates the receipt to show when the article was accepted. If asked to do so, the USPS employee also

shows on the receipt the time the article was accepted. Otherwise, attach the "Certified Mail" sticker to the address side of the article, detach the receipt, and mail the article. Mark the receipt to show the date.

- e. If restricted delivery of Certified Mail to the addressee or someone named by the addressee in writing is requested, endorse the mail "Restricted Delivery." This service is available only for articles addressed to individuals by name.

### **3.3.6 Firm Sheet—Three or More Pieces**

If three or more certified articles are presented for mailing at one time, the mailer may use Form 3877 (firm sheet) or privately printed firm sheets, in lieu of the receipt portion of Form 3800. Privately printed or computer-generated sheets that contain the same information as Form 3877 may be approved by the local postmaster. The mailer may omit columns from Form 3877 that are not applicable to Certified Mail. If the mailer wants the firm sheets receipted by the USPS, the mailer must present the books with the articles to be mailed at a Post Office. The sheets of the books become the mailer's receipts. All entries made in firm sheets must be made by typewriter, ink, or ballpoint pen. Alterations must be initialed by the mailer and accepting employee. All unused portions of the addressee column must be obliterated with a diagonal line.