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No. 86535-3

SUPREME COURT
OF THE STATE OF WASHINGTON

No. 64712-1-I

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

NATIONAL SURETY CORPORATION,

Petitioner/Cross-Respondent,

v.

IMMUNEX CORPORATION,
Respondent/Cross-Petitioner.

**ANSWER TO PETITION FOR REVIEW
AND CROSS-PETITION FOR REVIEW**

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TABLE OF CONTENTS

I. Identity of Respondent/Cross-Petitioner 1

II. Issue Presented for Review in Cross-Petition..... 1

III. Statement of the Case 1

IV. This Court Should Deny National Surety’s Petition for Review 3

 A. National Surety’s “recoupment” argument does not raise a question of “substantial public interest” 3

 i. This Court reserves review under RAP 13.4(b)(4) largely for moot cases that present a question of “substantial public interest” 4

 ii. National Surety’s recoupment argument does not present an issue of “substantial public interest” 5

 iii. This Court’s precedent required the Court of Appeals to refuse to write a recoupment provision into National Surety’s insurance policy, and this view is followed by a number of courts beyond Washington 5

 iv. The public interest is overwhelmingly on the side of Immunex..... 7

 B. National Surety’s pre-tender issue does not present a matter of “substantial public interest” 9

V. This Court Should Accept Immunex’s Cross-Petition for Review 10

 A. The Court of Appeals’ published opinion conflicts with *Kitsap County v. Allstate Insurance Co.*, 136 Wn.2d 567 (1998). 10

 B. This Court may also grant review because the Court of Appeals’ opinion presents an issue of “substantial public interest” 14

VI. Conclusion 15

TABLE OF AUTHORITIES

CASES

<i>Am. & Foreign Ins. Co. v. Jerry’s Sport Ctr., Inc.</i> , 606 Pa. 584 (2010)	7
<i>Am. Best Food, Inc. v. Alea London, Ltd.</i> , 168 Wn.2d 398 (2010)	2, 8, 12, 14
<i>Austl. Unlimited, Inc. v. Hartford Cas. Ins. Co.</i> , 147 Wn. App. 758 (2008).....	11
<i>Avemco Ins. Co. v. Mock</i> , 44 Wn. App. 327 (1986).....	11
<i>Bellevue Sch. Dist. v. E.S.</i> , 171 Wn.2d 695 (2011)	4
<i>Farmers Ins. Co. of Wash. v. Miller</i> , 87 Wn.2d 70 (1976)	6
<i>Gen. Agents Ins. Co. of Am., Inc. v. Midwest Sporting Goods Co.</i> , 215 Ill. 2d 146 (2005).....	6
<i>Gen. Star Indem. Co. v. V.I. Port Auth.</i> , 564 F. Supp. 2d 473 (D. V.I. 2008).....	7
<i>GESA Fed. Credit Union v. Mut. Life Ins. Co. of N.Y.</i> , 105 Wn.2d 248 (1986)	7
<i>Kirk v. Mount Airy Insurance Co.</i> , 134 Wn.2d 558 (1998)	5
<i>Kitsap County v. Allstate Insurance Co.</i> , 136 Wn.2d 567 (1998)	passim
<i>Minnesota Mutual Life Insurance Co. v. Fraser</i> , 128 Wash. 171 (1924).....	6
<i>Mut. of Enumclaw Ins. Co. v. USF Ins. Co.</i> , 164 Wn.2d 411 (2008)	9, 10
<i>Nat’l Sur. Corp. v. Immunex Corp.</i> , 162 Wn. App. 762 (2011).....	4, 12

<i>Nationwide Mut. Ins. Co. v. Mortensen</i> , No. 00-1180, 2009 U.S. Dist. LEXIS 74870 (D. Conn. Aug. 24, 2009)	7
<i>Pension Trust Fund v. Fed. Ins. Co.</i> , 307 F.3d 944 (9th Cir. 2002).....	12
<i>Phil Schroeder, Inc. v. Royal Globe Ins. Co.</i> , 99 Wn.2d 65 (1983), <i>modified on other grounds</i> , 101 Wn.2d 830 (1984)	10
<i>Safeco Ins. Co. of Am. v. Butler</i> , 118 Wn.2d 383 (1992)	14
<i>Satomi Owners Ass'n v. Satomi, LLC</i> , 167 Wn.2d 781 (2009)	4,5
<i>St. Paul Fire & Marine Ins. Co. v. Holland Realty, Inc.</i> , No. 07-390, 2008 U.S. Dist. LEXIS 59431 (D. Idaho Aug. 6, 2008).....	7
<i>State v. Watson</i> , 155 Wn.2d 574 (2005)	15
<i>Terra Nova Ins. Co., Ltd. v. 900 Bar, Inc.</i> , 887 F.2d 1213 (3d Cir. 1989).....	7
<i>Toll Bridge Auth. v. Aetna Ins. Co.</i> , 54 Wn. App. 400 (1989).....	11
<i>Tran v. State Farm Fire & Cas. Co.</i> , 136 Wn.2d 214 (1998)	10
<i>Transamerica Ins. Grp. v. United Pac. Ins. Co.</i> , 92 Wn.2d 21 (1979)	13
<i>Truck Ins. Exch. v. VanPort Homes, Inc.</i> , 147 Wn.2d 751 (2002)	8, 14
<i>Westchester Fire Ins. Co. v. Wallerich</i> , 563 F.3d 707 (8th Cir. 2009).....	7
<i>Weyerhaeuser Co. v. Commercial Union Ins. Co.</i> , 142 Wn.2d 654 (2000)	8
<i>Woo v. Fireman's Fund Insurance Co.</i> , 161 Wn.2d 43 (2007)	2, 5, 6

OTHER AUTHORITIES

RAP 13.4(b)(1).....	10, 14, 15
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RAP 13.4(b)(4)..... passim
Thomas V. Harris, *Washington Insurance Law* § 17.01 (3d ed. 2010) 7

I. Identity of Respondent/Cross-Petitioner.

Immunex Corporation, the respondent before the Court of Appeals and the defendant in the Superior Court, asks the Court to deny National Surety Corporation's petition for review because National Surety does not satisfy the criteria to obtain review. Immunex further asks the Court to grant Immunex's cross-petition for review.

II. Issue Presented for Review in Cross-Petition.

1. Whether the Court of Appeals erroneously ruled against National Surety's duty to defend Immunex based on the court's conclusion that the "average wholesale price" litigation does not "arise out of" discrimination.

III. Statement of the Case.

National Surety makes a number of inaccurate statements in its recitation of the procedural background of this matter. Here, Immunex focuses on certain key inaccuracies, without waiving its ability to challenge with the Court National Surety's other incorrect statements.

First, National Surety is correct that none of the "average wholesale price" ("AWP") complaints used the word "discrimination." However, that fact is not relevant for purposes of evaluating coverage. In fact, all that is necessary to trigger coverage are allegations loosely connected to discrimination — the term "discrimination" (which nowhere is defined in National Surety's policy) need not explicitly be used in the underlying complaints. The AWP complaints include those allegations. National Surety wrongly asserts that "none of the AWP suits alleged that Immunex had caused damage by selling drugs at different prices to differently-placed persons or entities." Pet. at 3. To the contrary, the plaintiffs alleged that they were required to pay more for drugs than providers. CP 926–28, ¶¶ 49, 52, 73–74; CP 933, ¶¶ 9–10; CP 945, ¶ 5;

CP 948, ¶ 126. Similarly, the plaintiffs alleged that “for the same drug, pharmacies are given one price, hospitals another, and doctors yet another.” CP 927, ¶ 62. Moreover, the basis for the damages claims of “elderly and disabled citizens” was that they “had to pay higher co-pays for their prescriptions” than others because of Immunex’s alleged pricing scheme. CP 943, ¶ 80.

Second, National Surety is wrong that Immunex did not timely tender defense to National Surety. Pet. at 3. This issue is largely irrelevant at this stage of the proceedings because neither of the issues that National Surety presents for review turn on whether Immunex timely tendered the AWP litigation. Specifically, National Surety’s first issue for review concerns “[w]hether an insurer’s good faith duty to defend under *Woo* and *Alea* can extend to require the insurer to reimburse an insured for its independently-incurred costs of defending a claim that the insurer has no contractual obligation to defend under the terms of its policy.” Pet. at 1. This issue is wholly concerned with an insurer’s reimbursement obligations under a duty-to-defend policy, and not at all with the “timeliness” of a policyholder’s tender. National Surety’s second issue deals with “[w]hether an insurer that does not have a contractual duty to defend can be liable for costs incurred by its insured in defending itself prior to the insured’s tender of the uncovered claim.” Pet. at 2. This is a legal issue that is not germane to the timeliness of Immunex’s tender: the inquiry here is whether a policyholder is liable for pre-tender defense costs, regardless of the claimed timeliness of tender.

Finally, as a general matter, National Surety’s statement of the case is laden with suggestions that Immunex incompletely or improperly tendered the AWP litigation. Pet. at 3–4. Along these lines, National Surety implies that Immunex breached its duties under National Surety’s policy. Pet. at 3–5. In the first instance, National Surety is wrong. Regardless, these matters are wholly irrelevant at this juncture because they have no effect on the two legal

questions presented by National Surety. In other words, even if Immunex improperly tendered the AWP litigation, which it did not, these subjects have no bearing on the legal questions presented by the reimbursement issue and the pre-tender issue.¹

IV. This Court Should Deny National Surety's Petition for Review.

A. National Surety's "recoupment" argument does not raise a question of "substantial public interest."

In its petition for review, National Surety claims that the "recoupment of defense fees" issue presents a matter of "substantial public interest" under RAP 13.4(b)(4). However, simply proclaiming something does not make it so. National Surety argues: "[t]his Court should accept review under RAP 13.4(b)(4) to determine whether an insurer's good faith duty to defend under a reservation of rights can extend to an obligation to reimburse an insured for its independently-incurred costs of defending a claim that is not covered by the insurer's policy." Pet. at 8. Stated another way, National Surety's argument, which relates to insurers that have agreed to defend their policyholders under a reservation of rights, asks this Court to hold that insurers do not have a duty to reimburse their policyholders for out-of-pocket defense costs if a court determines that no duty to defend exists.

The question for this Court, of course, is why this "recoupment" issue merits discretionary review. National Surety does not explain *how* this issue is important to the public. Instead, in conclusory fashion, National Surety claims in a single sentence that "[t]he Court of Appeals' published decision presents an issue of substantial public concern to insurers and their insureds state-wide." Pet. at 8. National Surety's petition on this issue boils down to one insurance company's backwards-looking wish that it gave itself recoupment rights that it in fact

¹ Should the Court conclude that any of the above issues are relevant at this stage in the proceedings, National Surety can submit additional briefing.

did not.² This is far from a “public interest,” much less a “substantial” public interest. Tellingly, National Surety seeks review under only RAP 13.4(b)(4). This is because the Court of Appeals’ decision on this issue is consistent with Washington Supreme Court and Court of Appeals precedent. As both the Court of Appeals and the Superior Court concluded in this case, Washington law prohibits insurers from seeking to recoup defense fees unless they included explicit policy language that provided this right. *Nat’l Sur. Corp. v. Immunex Corp.*, 162 Wn. App. 762, 773–79 (2011); CB 1361–62.

i. This Court reserves review under RAP 13.4(b)(4) largely for moot cases that present a question of “substantial public interest.”

National Surety’s half-hearted assertion that it meets the RAP 13.4(b)(4) threshold is insufficient to merit this Court’s review. As an initial matter, in many instances where this Court has granted review under RAP 13.4(b)(4), the case was moot, yet the Court concluded that a question presented by the case should nevertheless be decided because it had substantial ramifications on the public interest. In other words, RAP 13.4(b)(4) in many instances functions as an exception to the mootness doctrine. *See, e.g., Bellevue Sch. Dist. v. E.S.*, 171 Wn.2d 695, 699 n.1 (2011) (“[T]he question of whether or not a child has the right to counsel at an initial truancy hearing is an issue of significant public interest affecting many parties and will likely be raised in the future. Because we decide cases of substantial public interest likely to recur even though the issues may be moot, we reach the issues presented.”); *Satomi Owners Ass’n v. Satomi, LLC*, 167 Wn.2d 781, 796 (2009) (“Notwithstanding the fact that the case is moot, we

² Because National Surety has not yet paid any defense fees, as a practical matter Immunex is actually seeking reimbursement of defense costs paid by Immunex. However, given that insurers are required to make timely defense payments and cannot await a court determination regarding whether they have a duty to defend, this argument typically comes up as one for recoupment. Whether the Court calls this a “reimbursement” issue or a “recoupment” issue is immaterial. National Surety’s essential argument is that, one way or another, Immunex is not entitled to any defense fees.

choose to review the preemption question. We do so because it is one of ‘continuing and substantial public interest.’”) (citation omitted).

As an initial matter, because the present appeal is not moot, National Surety’s petition for review should be denied. Indeed, National Surety has not cited a single case that supports that review under RAP 13.4(b)(4) is appropriate in these circumstances.

ii. National Surety’s recoupment argument does not present an issue of “substantial public interest.”

Even assuming RAP 13.4(b)(4) applies outside the mootness realm, “substantial public interest” entails some degree of importance to the citizenry beyond the insular desire of a single insurer like that asserted by National Surety here. Simply put, from multinational corporations to mom-and-pop shops to individuals, the public interest on this issue is one way: all policyholders have an interest in receiving the benefit of their duty-to-defend bargain. Given that the Court of Appeals correctly decided in favor of coverage, insurers have no “public” interest in defeating coverage, and National Surety has thus not met its burden here.

iii. This Court’s precedent required the Court of Appeals to refuse to write a recoupment provision into National Surety’s insurance policy, and this view is followed by a number of courts beyond Washington.

Significantly, this Court has previously recognized that insurers cannot seek recoupment of defense fees in the absence of an insurance policy-based right to do so. As the Court of Appeals properly observed, its inability to rewrite a recoupment provision into National Surety’s insurance policy is mandated by this Court’s decisions in *Woo v. Fireman’s Fund Insurance Co.*, 161 Wn.2d 43 (2007), and *Kirk v. Mount Airy Insurance Co.*, 134 Wn.2d 558 (1998). Given that National Surety’s position is contrary to this Court’s precedent, there should be no serious dispute that National Surety’s petition for review does not advance a substantial public interest.

In an effort to de-emphasize *Woo* and other decisions of this Court, National Surety casts the Court of Appeals' decision as being out of the mainstream. National Surety argues: "[t]here is no authority, anywhere, for the proposition that an insurer that does not have a contractual duty to defend can nevertheless be obligated to reimburse defense costs if it has not refused a tender of defense." Pet. at 11. That simply is not so.

Indeed, Washington law directly undermines National Surety's position. National Surety asks the Court to disregard the ruling in *Minnesota Mutual Life Insurance Co. v. Fraser*, 128 Wash. 171 (1924), because it was not a duty-to-defend case. Pet. at 12. Contrary to National Surety's argument, *Fraser* is not distinguishable based on the fact that it did not concern the duty to defend. *Fraser* stands for the general principle that one party to a contract cannot "rewrite" that contract without the consent of the other party. In *Fraser*, the insurer sued its agent and sought reimbursement of monthly advances the insurer had given to the agent. *Id.* at 171. The court held that the insurer had no right to reimbursement because the parties' contract did not include any language giving the insurer such a right. *Id.* at 175; *see also Farmers Ins. Co. of Wash. v. Miller*, 87 Wn.2d 70, 73 (1976) ("[T]he court cannot . . . create a contract for the parties which they did not make themselves, nor can the court impose obligations which never before existed.").

National Surety's position also is contra to multiple decisions around the country. For example, the Illinois Supreme Court has held that an insurer is not entitled to reimbursement of defense fees that were incurred before the court ruled that there was no duty to defend. *Gen. Agents Ins. Co. of Am., Inc. v. Midwest Sporting Goods Co.*, 215 Ill. 2d 146, 147 (2005). The U.S. Court of Appeals for the Eighth Circuit has reached the same result: "Westchester could have included in the policy an express provision for such reimbursement. Westchester cannot

now unilaterally amend the policy by including the right to reimbursement in its reservation-of-rights letter.” *Westchester Fire Ins. Co. v. Wallerich*, 563 F.3d 707, 719 (8th Cir. 2009).

Numerous other courts agree. *E.g.*, *Terra Nova Ins. Co., Ltd. v. 900 Bar, Inc.*, 887 F.2d 1213, 1220 (3d Cir. 1989); *Nationwide Mut. Ins. Co. v. Mortensen*, No. 00-1180, 2009 U.S. Dist. LEXIS 74870, at *18 (D. Conn. Aug. 24, 2009); *Gen. Star Indem. Co. v. V.I. Port Auth.*, 564 F. Supp. 2d 473, 480 (D. V.I. 2008); *St. Paul Fire & Marine Ins. Co. v. Holland Realty, Inc.*, No. 07-390, 2008 U.S. Dist. LEXIS 59431, at *23 (D. Idaho Aug. 6, 2008); *Am. & Foreign Ins. Co. v. Jerry’s Sport Ctr., Inc.*, 606 Pa. 584, 615 (2010).³

iv. The public interest is overwhelmingly on the side of Immunex.

The two public interests at stake in this case strongly favor Immunex, not National Surety. First, Washington citizens have a clear and important interest in being able to freely enter into contracts and rely upon the explicit terms contained in those contracts. It is black-letter law in Washington that insurers may not, post-policy issuance, unilaterally, via a reservation-of-rights letter, change the bargained-for exchange between them and their policyholders. By its petition, however, National Surety asks the Court to do just that, to rely upon its claimed reservation to seek reimbursement of defense fees, to add a recoupment provision to National Surety’s insurance policy never agreed to by Immunex. *See* Thomas V. Harris, *Washington Insurance Law* § 17.01, at 17-2 (3d ed. 2010) (“A reservation of rights will never allow an insurer to seek retroactive reimbursement for attorney fees and defense costs already incurred by

³ The only factual distinction between the cited reimbursement cases and the present case is that, in the reimbursement cases, the insurers actually performed as promised, they paid defense fees until the court held that they did not owe their policyholders a duty to defend, and then the insurers sought recoupment. Here, National Surety agreed to pay defense fees, but has paid none, leaving Immunex to wait for years to obtain any benefit from its insurance policies. There is no legal distinction between reimbursement and recoupment in the duty-to-defend context, as Washington law does not allow “the exaltation of form over substance.” *GESA Fed. Credit Union v. Mut. Life Ins. Co. of N.Y.*, 105 Wn.2d 248, 256 (1986).

the insurer.”). The public is best served by enforcing National Surety’s insurance policy as written. The Court thereby should not allow National Surety to — years after its policy inception and Immunex made a claim for coverage under that policy for the AWP litigation — give itself additional policy benefits never agreed to by Immunex.

The second public interest weighing heavily in Immunex’s favor is the recognition that insurance policies must be liberally construed to protect policyholders and society at large. This Court long has concluded that insurance policies must be strictly construed to provide maximum coverage for policyholders whenever possible. *See Am. Best Food, Inc. v. Alea London, Ltd.*, 168 Wn.2d 398, 404 (2010); *Truck Ins. Exch. v. VanPort Homes, Inc.*, 147 Wn.2d 751, 760 (2002). This fundamental tenant of insurance law is grounded in the pragmatic fact that a contrary rule would put the citizenry at the mercy of sophisticated insurance companies along with insurers’ “take it or leave it” offers. To effectuate this public policy, this Court requires insurance contracts to be given a “fair, reasonable, and sensible construction as would be given to the contract by the average person purchasing insurance.” *Weyerhaeuser Co. v. Commercial Union Ins. Co.*, 142 Wn.2d 654, 666 (2000) (citation omitted). To give National Surety’s policy the most liberal construction in favor of coverage, and because it contains no recoupment provision, it naturally follows that the Court of Appeals’ decision rejecting National Surety’s recoupment claim was proper.

* * *

In short, the Court should refuse National Surety’s invitation to review the “recoupment” issue because it does not raise a question of “substantial public interest” under RAP 13.4(b)(4). The public interests at stake in this case, as well as this Court’s precedent, show that the Court of Appeals decided this issue correctly.

B. National Surety's pre-tender issue does not present a matter of "substantial public interest."

As with the recoupment issue, National Surety erroneously asserts that its pre-tender argument raises an issue of substantial public interest under RAP 13.4(b)(4). National Surety's contention is again flawed.

National Surety argues: "[t]his Court should accept review under RAP 13.4(b)(4) and hold that an insurer cannot be obligated to pay pre-tender defense costs of an uncovered claim and that prejudice to the insurer is established as a matter of law when, as here, an insured in violation of its obligations under the policy delays tender of an uncovered claim for years in order to control the defense and settlement of the claims without the consent of its insurer." Pet. at 19. Again, National Surety does not tell the Court *how* this issue implicates the public interest — its claimed basis for review.

For the same reasons that review of the recoupment issue is improper, National Surety has not demonstrated how its pre-tender argument merits discretionary review under RAP 13.4(b)(4). There is not even a hint of public concern over the inability of Washington insurers to recoup defense-cost payments after a court determines that no duty to defend exists. Simply put, National Surety has not presented a substantial public interest necessitating this Court's review. While this may be an issue important to National Surety and similarly situated insurers, it is not an issue of "public" interest, let alone one of substantial public concern.

In fact, the public interest at stake here overwhelmingly favors Immunex. This Court's precedent plainly requires insurers to establish "*actual and substantial* prejudice" in order to escape paying pre-tender defense costs. *E.g., Mut. of Enumclaw Ins. Co. v. USF Ins. Co.*, 164 Wn.2d 411, 430–31 (2008) (emphasis added). It is firmly established that insurers must pay pre-tender defense costs *unless* they can meet certain criteria specified by this Court. *See id.* at 427–

30.⁴ And, critically, pre-tender issues present a question of fact — this Court has stated repeatedly that the “pre-tender” question can seldom be decided as a matter of law, which National Surety demands here. *E.g., id.* at 427; *Tran v. State Farm Fire & Cas. Co.*, 136 Wn.2d 214, 228 (1998). National Surety’s attempt to abrogate this Court’s time-honored precedent is a draconian shift away from the public interest. Because the prejudice analysis often involves conflicting evidence, courts are simply in no position to decide this issue as a matter of law, especially given that all “doubts, ambiguities and uncertainties” must be resolved in the policyholder’s favor. *See Phil Schroeder, Inc. v. Royal Globe Ins. Co.*, 99 Wn.2d 65, 69 (1983), *modified on other grounds*, 101 Wn.2d 830 (1984) (citation omitted).

In sum, given that National Surety’s pre-tender argument presents no issue, stated or otherwise, of “substantial public interest” under RAP 13.4(b)(4), the Court should deny review. Both this Court’s precedent and the public’s interest with this issue demonstrate that the Court of Appeals’ decision represents sound law and policy.

V. This Court Should Accept Immunex’s Cross-Petition for Review.

A. The Court of Appeals’ published opinion conflicts with *Kitsap County v. Allstate Insurance Co.*, 136 Wn.2d 567 (1998).

This Court should review the Court of Appeals’ holding that National Surety did not have a duty to defend Immunex. Review is proper under RAP 13.4(b)(1) because the Court of Appeals’ decision conflicts with this Court’s decision in *Kitsap County v. Allstate Insurance Co.*, 136 Wn.2d 567 (1998).

In *Kitsap*, this Court held that the factual allegations contained in the underlying complaint — not the labels placed on the enumerated causes of action — determine whether the

⁴ The Court of Appeals correctly concluded that National Surety could not identify any evidence that it had been prejudiced at all, let alone enough evidence to establish prejudice *as a matter of law*. *Mut. of Enumclaw*, 164 Wn.2d at 427.

insurer has a duty to defend. *See id.* at 580–81. Stated another way, to determine the existence of the duty to defend, courts should focus on the policyholder’s conduct giving rise to the claimant’s theory of liability, not the labels used in the underlying complaint. *Id.*

National Surety’s policy provides coverage for “Personal Injury or Advertising injury” that is caused by an offense arising out of Immunex’s business.” CP 630. The policy defines “Personal and Advertising injury” as “injury, including consequential Bodily Injury, *arising out of* one or more of the following offenses, [including] Discrimination.” CP 654 (emphasis added). The policy does not define “discrimination.” *See* CP 644–49.⁵

The Court of Appeals concluded that regardless of the meaning of “discrimination,” National Surety did not have a duty to defend because the AWP complaints did not “arise out of” discrimination. Washington courts have interpreted “arising out of” to mean “‘originating from,’ ‘having its origin in,’ ‘growing out of,’ or ‘flowing from.’” *See Austl. Unlimited, Inc. v. Hartford Cas. Ins. Co.*, 147 Wn. App. 758, 774 (2008) (citation omitted); *Toll Bridge Auth. v. Aetna Ins. Co.*, 54 Wn. App. 400, 404 (1989) (citation omitted); *Avemco Ins. Co. v. Mock*, 44 Wn. App. 327, 329 (1986) (citation omitted). All of these iterations of “arising out of” suggest that a loose causal connection is sufficient to trigger the duty to defend. That loose causal connection exists here. Nevertheless, the Court of Appeals concluded:

While it is true that some AWP complaints alleged the consumers of certain groups paid a higher price as a result of Immunex’s actions, the offenses originate not from discriminatory actions but from fraudulently inflating the AWP. Although the effect of that action might have impacted some consumers and providers more than others, that does not mean the

⁵ In the lower courts, Immunex argued that the AWP litigation arose out of “discrimination,” which dictionaries generally define as “to make a clear distinction; distinguish.” The Superior Court rejected the dictionary and concluded that “[d]iscrimination means more than a distinction or a difference.” CP 1023. The Court of Appeals did not reach this issue, so if the Court grants review and Immunex prevails in this case, it may be an issue for the Court of Appeals to consider on remand.

offenses originated from discrimination. The theories underlying the offenses are not that the consumers and providers paid higher prices as compared to others, but that the price itself was fraudulently inflated.

Immunex, 162 Wn. App. at 773.

In so holding, the Court of Appeals did not follow *Kitsap*. In particular, the court did not consider all of the factual allegations and theories pursued by the AWP plaintiffs. The Court of Appeals instead impermissibly focused on the AWP plaintiffs' *primary* theory of liability — fraudulent inflation of the AWP. This was a misapplication of *Kitsap*. A single allegation of discriminatory conduct connected to the claimant's theory of liability is all that is required to trigger coverage; no further causal connection is necessary. Certainly, the defense duty is not determined based upon whether the allegations that trigger coverage are the "primary" basis for recovery asserted by the plaintiff. *See Pension Trust Fund v. Fed. Ins. Co.*, 307 F.3d 944, 951 (9th Cir. 2002) (concluding that "remote facts buried within causes of action that may potentially give rise to coverage are sufficient to invoke the defense duty"); *Am. Best Food*, 168 Wn.2d at 404 ("The duty to defend 'arises when a complaint against the insured, construed liberally, alleges facts which could, if proven, impose liability upon the insured within the policy's coverage.'") (citation omitted).

The AWP complaints include numerous such allegations. For example, the plaintiffs alleged that *Immunex's* pricing policies discriminated between the AWP plaintiffs and providers — most notably, the complaints contain allegations that the providers received discounts and rebates not given to the AWP plaintiffs. CP 926–28, ¶¶ 49, 52, 73–74; CP 933, ¶¶ 9–10; CP 945, ¶ 5; CP 948, ¶ 126. Other allegations dealt with discrimination among providers that were allegedly charged different prices. *E.g.*, CP 927, ¶ 62 ("[D]efendants further obscure their true prices for their drugs with their policy of treating different classes of trade differently. Thus, for

the same drug, pharmacies are given one price, hospitals another, and doctors yet another.”). Still other allegations concerned disparate-impact discrimination against the elderly and disabled. *E.g.*, CP 943, ¶ 80 (“Illinois Medicare, Part B, participants, who are primarily elderly and disabled citizens, have had to pay higher co-pays for their prescriptions than if defendants had truthfully reported the wholesale prices of their drugs.”).

The Court of Appeals had no authority — and indeed none was cited — for its view that only the *primary* theory of liability alleged in the AWP complaints is relevant for purposes of determining the duty to defend. *Kitsap* does not allow this distinction. Thus, the Court of Appeals should have recognized a duty to defend because the AWP complaints are at least casually and loosely based on Immunex’s allegedly discriminatory pricing scheme. *Cf. Transamerica Ins. Grp. v. United Pac. Ins. Co.*, 92 Wn.2d 21, 27 (1979) (concluding that the duty to defend exists so long as the alleged discrimination had “some causal relationship” to the injury). In light of the broad “arising out of” language of the policies, and given applicable Washington law, the AWP plaintiffs did not need to allege that their injury was directly caused by “discrimination.”

The AWP plaintiffs’ allegations that Immunex’s pricing scheme allegedly distinguished between the AWP plaintiffs and providers is a central and critical component of the plaintiffs’ theory of the case. An essential reason these complaints were filed was because one group paid more for drugs than other groups. Without this discrimination, no damages could exist. In short, what is crucial is that Immunex’s allegedly preferential pricing policies resulted in “discrimination.”

Given that the Court of Appeals' decision is in direct conflict with the duty-to-defend principles articulated by this Court in at least *Kitsap*, the Court should accept review under RAP 13.4(b)(1).

B. This Court may also grant review because the Court of Appeals' opinion presents an issue of "substantial public interest."

As an additional reason for this Court to grant review, whether National Surety had a duty to defend may be a matter of substantial public concern under RAP 13.4(b)(4).⁶ The Court of Appeals' published decision places in jeopardy a significant right of Washington policyholders that are confronted with allegations casually or loosely connected to a potentially covered claim.

The public policy of Washington has long favored imposing a liberal duty to defend on insurers. For this reason, Washington policyholders have come to count on coverage as long as a complaint contains an allegation with some casual or loose nexus to a covered claim. *See Am. Best Food*, 168 Wn.2d at 404, 410–11. This Court has recognized that having the "peace of mind" that comes from holding a duty-to-defend policy is one of the policy's chief benefits. *See Safeco Ins. Co. of Am. v. Butler*, 118 Wn.2d 383, 392 (1992). Indeed, courts examine insurance policies with an eye towards providing the policyholder with maximum coverage whenever possible. *See Am. Best Food*, 168 Wn.2d at 404; *VanPort Homes*, 147 Wn.2d at 760. Simply put, Washington has always heavily favored policyholders when it comes to the duty to defend.

The Court of Appeals' decision, however, might be argued to severely restrict the insurance industry's duty-to-defend obligations. By holding that the AWP litigation did not "arise out of" discrimination, the Court of Appeals has created uncertainty over whether lawsuits

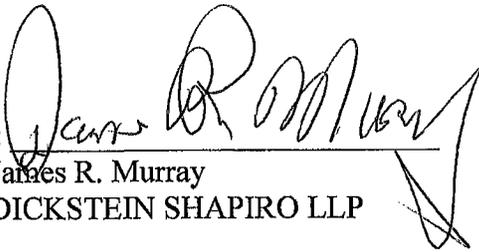
⁶ To the extent review under RAP 13.4(b)(4) is not limited to cases that are moot, then RAP 13.4(b)(4) is an alternative basis on which to grant review of Immunex's cross-petition.

that do not directly allege a potentially covered claim are covered by standard comprehensive general liability policies. Needless to say, uncertainty over coverage — whether business or personal — is not good for economic growth or peace of mind, and is not in the public interest. Review under RAP 13.4(b)(4) is proper because the reasoning employed by the Court of Appeals “invites unnecessary litigation on [a] point and creates confusion generally.” *State v. Watson*, 155 Wn.2d 574, 577 (2005).

VI. Conclusion.

This Court should deny National Surety’s petition for review because it does present any issues of “substantial public interest” under RAP 13.4(b)(4), indeed National Surety’s arguments are manifestly contrary to the public interest, and National Surety has cited no other basis for review (and there is none). This Court should grant Immunex’s cross-petition for review based on RAP 13.4(b)(1) and potentially RAP 13.4(b)(4) as well, as the Court of Appeals’ published decision conflicts with this Court’s decision in *Kitsap County v. Allstate Insurance Co.*, 136 Wn.2d 567 (1998) and is also against the public interest.

Dated: October 26, 2011

By: 
James R. Murray
DICKSTEIN SHAPIRO LLP

Linda D. Kornfeld
Damon Thayer
JENNER & BLOCK LLP

Attorneys for Respondent/Cross-Petitioner

DECLARATION OF SERVICE

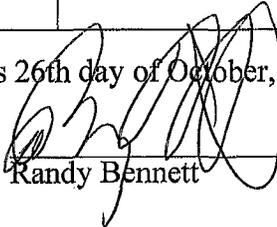
The undersigned declares under penalty of perjury, under the laws of the State of Washington, that the following is true and correct:

That on October 26, 2011, I arranged for service of the foregoing Answer to Petition for Review and Cross-Petition for Review, to the court and to the parties to this action as follows:

Supreme Court Temple of Justice P.O. Box 40929 Olympia, WA 98504	<input type="checkbox"/> Facsimile <input checked="" type="checkbox"/> Messenger <input type="checkbox"/> U.S. Mail <input type="checkbox"/> Overnight Mail
Jerret E. Sale Deborah L. Carstens Bullivant Houser Bailey PC 1601 Fifth Avenue, Suite 2300 Seattle, WA 98101-1618	<input type="checkbox"/> Facsimile <input checked="" type="checkbox"/> Messenger <input checked="" type="checkbox"/> U.S. Mail <input type="checkbox"/> Overnight Mail
Catherine W. Smith Howard M. Goodfriend Smith Goodfriend, P.S. 1109 First Avenue, Suite 500 Seattle, WA 98101	<input type="checkbox"/> Facsimile <input checked="" type="checkbox"/> Messenger <input checked="" type="checkbox"/> U.S. Mail <input type="checkbox"/> Email Mail

DATED at ~~Los Angeles, California~~ this 26th day of October, 2011.

Seattle WA



Randy Bennett