

SUPREME COURT OF THE
STATE OF WASHINGTON
Case No. 94677-9

CERTIFICATION FROM
UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
AT TACOMA

IN

OHIO SECURITY INSURANCE COMPANY,

Plaintiff,

v.

AXIS INSURANCE COMPANY,

Defendant

RESPONSE BRIEF OF
PLAINTIFF OHIO SECURITY
INSURANCE COMPANY

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TABLE OF CONTENTS

I. INTRODUCTION.....1

II ISSUE CERTIFIED TO THE WASHINGTON SUPREME COURT.....2

III. STATEMENT OF THE CASE.....2

IV. ARGUMENT.....5

 A. Axis was served under the provisions of RCW 4.28.080(10).....5

 B. The *Kiblen* and *Powell* cases.....7

 C. The statutory principal this Court should follow, is to give effect to each part of the statute, and, therefore, to allow service under RCW 4.28.080(7) or 4.28.080(10).....11

 D. The 2011 Amendments to RCW 48.05.200.....15

 E. *Nitardy v. Snohomish County* is inapposite.....16

V. CONCLUSION.....18

TABLE OF AUTHORITIES

Cases

Blakenship v. Kaldor, 114 Wn. App 312, 57 P.3d 295 (2002).....21

Butler v. Joy, 116 Wn. App. 291, 65 P.3d 671 (2003)21

City of Tacoma v. Taxpayers of City of Tacoma, 108 Wn.2d 679, 690,
743 P.2d 793 (1987).....15, 16, 17

Int'l Shoe Co. v. Washington, 326 U.S. 310 (1945)14

Kiblen v. Mut. of Omaha Ins. Co., 42 Wn. App.65, 708 P.2d 1215
(1985).....8, 11, 12, 13

Lybert v. Grant County, 141 Wn.2d 29, 1 P.3d 1124 (2000)20

Martin v. Triol, 121 Wn.2d 135, 847 P.2d 471 (1993).....16, 17

Nitardy v. Snohomish County, 105 Wn.2d 133, 712 P.2d 296 (1986).....20

Powell v. Sphere Drake Ins., P.L.C., 97 Wn. App. 890, 988
P2d 12 (1999).....11, 13, 15, 19

Reiner v. Pittsburgh Des Moines Corp., 101 Wn.2d 475, 479, 680
P2d 55 (1984).....11

Topliff v. Chicago Ins. Co., 130 Wn. App. 301, 122 P.3d 922 (2005).....11

Statutes

RCW 4.16.17016, 17

RCW 4.28.0809, 10, 13

RCW 4.28.080(7).....	8, 10, 12, 13, 15, 22
RCW 4.28.080(7)(a)	10
RCW 4.28.080(9).....	10
RCW 4.28.080(10).....	8, 10, 11, 13, 14, 15, 22
RCW 4.28.090(7)(a)	5
RCW 4.28.180	12, 13, 14
RCW 4.28.185	11, 12, 13
RCW 4.28.185(1)(d).....	11
RCW 48.02.200	5
RCW 48.05.200.....	6, 11, 13
RCW 48.05.200(1).....	8

Other Authorities

K. Tegland, 14 Wash. Prac., Civil Procedure § 8.1 (2d ed.)	10
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I. INTRODUCTION

This is a case where defendant Axis Insurance Company (“Axis”) was initially served with a copy of the summons and complaint at its corporate office some three months before a statute of limitation was to run, after which Axis soon hired counsel to defend it. Axis waited seven months to file its Answer, at which time it asserted that service was improper because, Axis claims, the Washington State Insurance Commissioner should have been served.

Axis makes no claim that it did not receive notice of the lawsuit, or that it was in any way prejudiced, but, unabashedly, makes a purely procedural argument, which if accepted by the Court, will deprive the plaintiff in this case, and potentially scores of future policyholders, from having their insurance claims heard on the merits.

From a policy standpoint, the rule of law advocated by Axis makes little or no sense, and as will be explained, it is not at all what the Washington Legislature was trying to accomplish in enacting the various service statutes.

II. ISSUE CERTIFIED TO THE WASHINGTON SUPREME COURT

Ohio Security Insurance Company (“Ohio Security”) agrees with Axis that the issue certified to the Washington Supreme Court is, “Do RCW 4.28.090(7)(a), RCW 48.02.200, and RCW 48.05.200 establish service through the Washington State Insurance Commissioner as a uniform and exclusive means of service for authorized foreign or alien insurers in Washington State?”

III. STATEMENT OF THE CASE

This is a case concerning an insurance company defendant who was served with a summons and complaint a few months before a statute of limitation was to run, who in turn hired counsel who “laid in wait” until after this statute of limitation had run, and then filed an Answer asserting, on purely technical grounds, that there was “improper service” on the insurance company.

The facts are that suit was filed by plaintiff Ohio Security in Pierce County Superior Court on January 16, 2015, ahead of a statute of limitation that was to run on May 22, 2015. (Dkt No. 1-3 at pp. 1-7, original Complaint). Axis was served with a copy of the summons and complaint on January 28, 2015 at its “registered” office in Chicago, Il. (Dkt No. 1-3 at pp. 13-14, Return of Service; Dkt No. 27 at ¶ 2; Summary

Judgment Supporting Declaration). Axis quickly retained the Bullivant Houser law firm, who filed a Notice of Appearance on March 19, 2015. (Dkt No. 1-3 at pp. 15-16, Notice of Appearance; Dkt No. 27 at ¶ 3, Summary Judgment Supporting Declaration). This Notice did *not* indicate that there was any alleged improper service of process, or even that Axis was reserving the right to raise that issue or defense. (Dkt No. 1-3 at pp. 15-16, Notice of Appearance).

On August 7, 2015, some six weeks after the statute of limitation had ran, Axis finally filed its Answer, at which time it raised a defense of improper service. (Dkt No. 1-3 at pp. 44-49, Original Answer; Dkt No. 19 at p. 11, Axis Motion for Summary Judgment). At that point, Ohio Security arranged to re-serve Axis, this time through the Washington State Insurance Commissioner, which service was accomplished on August 28, 2015. (Dkt No. 1-3 at p. 173, Return of Service). Then in September 2015, Axis (as a foreign corporation with its principal place of business in a state other than Washington), removed the case from Pierce County Superior Court to the United States District Court of the Western District of Washington (at Tacoma). (Dkt No. 1; Notice of Removal).

The federal case is now pending before Judge Benjamin Settle, on cross-motions for summary judgment, and Axis has again raised the issue of improper service. (Dkt No. 42, Judge Settle's Summary Judgment

Opinion). Judge Settle ruled that the January 28, 2015 service on Axis was, indeed, adequate, at least under the provisions of RCW 4.28.080(10), which sets out how service is to be made on “a foreign corporation...doing business in this state.” (Dkt No. 42 at pp. 24-26, Judge Settle’s Summary Judgment Opinion). Axis argued, however, that even if that January 28, 2015 service was adequate under RCW 4.28.080(10), it did not count, as there cannot be any legally adequate service on Axis unless and until the Insurance Commissioner is served with a summons and complaint under RCW 4.28.080(7) and RCW 48.05.200(1). (Dkt No. 19 at pp. 10-11, Axis’ Motion for Summary Judgment). Axis argues that this is so, regardless of any actual prior service and receipt of the summons and complaint by Axis, and regardless of the fact that Axis cannot show any prejudice by the lack of an earlier service on the Insurance Commissioner. (Dkt No. 19 at pp. 10-11, Axis’ Motion for Summary Judgment).

Judge Settle acknowledged that Axis’ argument was contrary to the holding in *Kiblen v. Mut. of Omaha Ins. Co.*, 42 Wn. App.65, 708 P.2d 1215 (1985), but wondered if that case was correctly decided, and in light of the absence of any controlling precedent from this Court, he decided to certify this issue. (Dkt No. 42 at pp. 23- 24, Judge Settle’s Summary Judgment Opinion).

IV. ARGUMENT

A. Axis was served under the provisions of RCW 4.28.080(10).

RCW 4.28.080 is Washington's general service statute. It is divided into 17 sub-parts, with ways to serve various types of defendants. The most common provision is probably sub-section 16, which indicates how one serves a natural person ("by leaving a copy of the summons at the house or his or her usual abode with some person of suitable age and discretion then resident therein").

Many of the sub-sections of RCW 4.28.080 concern service on corporations, including a provision concerning foreign corporations:

Service made in the modes provided in this section is personal service. The summons **shall** be served by delivering a copy thereof, as follows:

* * *

(10) If against a foreign corporation or nonresident joint stock company, partnership or association doing business within this state, to any agent, cashier or secretary thereof.
RCW 4.28.080(10) (bolding added)

Because defendant Axis was a foreign corporation, Ohio Security employed this prong of the general service statute to serve Axis, and as indicated, Judge Settle found this service was adequate under RCW 4.28.080(10).

Axis now argues that one cannot use this prong of the service statute, but, instead, argues it is compulsory to use the more specific prong

of that statute that is directed, specifically, at any “authorized foreign or alien insurance company.” RCW 4.28.080(7)(a).

The first thing to note is that nowhere in RCW 4.28.080 does it state, or even suggest, that that RCW 4.28.080(7) is preferred to RCW 4.28.080(10), let alone that RCW 4.28.080(7) is exclusive. Thus, on the face of RCW 4.28.080 alone, there is no way, one would conclude that RCW 4.28.080(7)(a) in any way “trumps” RCW 4.28.080(10).¹ In that regard, the common wisdom in this state, is that RCW 4.28.080 intends to give multiple service options as to corporations. Tegland puts it this way:

Multiple methods of service. When the defendant is a business entity, the statutes may authorize more than one method of service. For example, if the defendant is a corporation that is a bank, the statutes may offer a method of serving a corporation and another method for serving a bank.

K. Tegland, 14 Wash. Prac., Civil Procedure § 8.1 (2d ed.)(footnotes omitted)

¹ By way of comparison, if Axis were a *domestic* insurer, than it would have to be served under RCW 4.28.080(6), which provides that service is *not* through the Insurance Commissioner, but, rather, through “any agent authorized by such company to solicit insurance within this state.” And, furthermore, if Axis were a domestic insurer, RCW 4.28.080(10), relating to *foreign* corporations would *not* apply. One might look at RCW 4.28.080(9), concerning service on corporations in general, but that subsection *does* makes clear that it has no application to corporations “designated in subsections (1) though (8) of this section.”

Indeed, intuitively, one would think that a plaintiff has a choice of service. From a policy standpoint, if a method of service is valid as to a non-insurance foreign corporation, it should be equally valid on a foreign corporation that happens to write insurance policies. When it comes to method of service, there is no good policy reason to make a distinction between insurance corporations and non-insurance corporations. Of course, the Legislature may want to provide *an alternate and easier* method of serving a foreign insurer, but why would it want to make the more general service mechanism invalid, altogether?² There is no good policy reason why the Legislature, or this Court, would want to make service on the Insurance Commissioner the exclusive method for serving a foreign insurer.

B. The *Kiblen* and *Powell* cases.

Washington Court of Appeals case law is in accord with this common sense approach that the various Washington service methods give a plaintiff a choice as to how to serve a foreign insurer. More than

² If anything, service on an insurer's agent provides better and more direct notice to the insurer, and is not subject to mistakes by the Insurance Commissioner. See *Topliff v. Chicago Ins. Co.*, 130 Wn. App. 301, 122 P.3d 922 (2005) (Insurance Commissioner failed to forward suit papers to insurer). In that regard, RCW 48.05.200 is considered a substitute service statute, *Topliff* at 306, whereas service on a foreign corporation under RCW 4.28.080(10) is considered personal service, requiring only "substantial compliance" and notice to the defendant. *Reiner v. Pittsburgh Des Moines Corp.*, 101 Wn.2d 475, 479, 680 P2d 55 (1984).

thirty years ago, the Washington Court of Appeals decided *Kiblen v. Mut. of Omaha Ins. Co.*, 42 Wn. App.65, 708 P.2d 1215 (1985). That case involved a suit against Mutual of Omaha, who had its home office in Omaha, Nebraska. Mutual of Omaha was served at its home office (in Omaha), and not through the Washington Insurance Commissioner as set out in RCW 4.28.080(7). The court held that such home office service was adequate under Washington law, and rejected the argument of Mutual of Omaha that RCW4.28.080(7) mandated that service on the Insurance Commissioner was the exclusive manner of service on a foreign or alien insurer.

The *Kiblen* court looked at yet another statute that gives instructions as to how to serve out-of-state actors, who are subject to the court's jurisdiction under Washington's Long Arm Statute, including those who are "Contracting to insure any person, property, or risk located within this state at the time of contracting." RCW 4.28.185(1)(d).

The service statute at issue was *not* the Long Arm Statute itself, but a companion service statute:

Personal service of summons or other process may be made upon any party outside the state. If upon a citizen or resident of this state *or upon a person who has submitted to the jurisdiction of the courts of this state*, it shall have the force and effect of personal service within this state; otherwise it shall have the force and effect of service by publication. ...

RCW 4.28.180 (italics added)

The *Kiblen* court noted that this statute was enacted after the general service statute, and therefore a foreign insurer could be served *either* through the Insurance Commissioner, or through an agent at its home office.

We believe the Legislature's failure to amend the word "shall" in RCW 4.28.080 and similar language in RCW 48.05.200 and .210 indicates at best a preference for service upon the Insurance Commissioner in order that he be apprised of an action against a foreign insurance company doing business in this state.

42 Wn. App. at 67-68 (footnote omitted)

Kiblen was further explained in *Powell v. Sphere Drake Ins., P.L.C.*, 97 Wn. App. 890, 988 P2d 12 (1999). There a foreign insurer was served through one of its agent, and not through the Insurance Commissioner. The court held the service was adequate, and in addition to relying on *Kiblen* and RCW 4.28.180 and RCW 4.28.185, it also relied on RCW 4.28.080(10).

Powell contends that RCW 4.28.080(7) cannot be read as the exclusive method for effecting service upon an alien insurer. We agree.

Under RCW 4.28.180 and .RCW 4.28.185, for instance, alien insurers can always be served directly by means of extraterritorial service. Similarly, if the alien insurer designates a domestic agent for receipt of service of process, a plaintiff abides by the statutory requirements of RCW 4.28.080(10) by serving that designated agent.

Service on a foreign corporation under RCW 4.28.080(10) is reviewed for substantial compliance. In determining substantial compliance, the inquiry focuses on whether the method of attempted service was reasonably calculated to provide notice to the defendant.

97 Wn. App. at 900 (footnotes omitted)

Axis spends much of its Opening Brief (at 16-25) arguing that the *Kiblen* court was confused, and got its history wrong. That is not so. First of all, Axis' Opening Brief does not even mention even once, let alone address, RCW 4.28.080(10). Rather, Axis spends many pages discussing the Long Arm Statute (RCW 4.28.185), itself, with barely any analysis of the companion service statute of RCW 4.28.180.

Axis agrees that the Long Arm Statute of RCW 4.28.185 is primarily a *jurisdictional* statute, passed in response to *Int'l Shoe Co. v. Washington*, 326 U.S. 310 (1945) and its progeny (Opening Brief at 22-23). It is true that the Long Arm Statute has some service provisions, the most important of which, *for purposes of this case*, states, "Nothing herein contained limits or affects the right to serve any process in any other manner now or hereafter provided by law." RCW 4.28.185(6).

Axis then spends much time explaining why it could not be served under the provisions of RCW 4.28.185, ignoring the fact that it could be served under the provisions of either RCW 4.28.080(10) or RCW 4.28.180.

RCW 4.28.180 makes it clear that “personal service may be made upon any party outside the state...upon a person who has submitted to the jurisdiction of the courts of this state...” The *Kiblen* court was simply pointing out that one could *not* reconcile its passage, with the concept that the exclusive manner of serving a foreign insurer was through the Insurance Commissioner. The *Powell* court then added to this mix, that, indeed, one could also *not* reconcile RCW 4.28.080(10) with the concept that, under RCW 4.28.080(7), the exclusive manner of serving a foreign insurer was through the Insurance Commissioner.

In short, *Kiblen* and *Powell* make it clear that the statutory scheme is set up, so that one has a choice as to how one can serve a foreign insurer. That has been the law in Washington for over thirty years. Many plaintiffs have relied on these two cases in serving foreign insurers. It would serve no purpose for this Court to announce a different rule so that insurance companies (*including* Ohio Security) could escape liability on otherwise valid claims.

C. The statutory principal this Court should follow, is to give effect to each part of the statute, and, therefore, to allow service under RCW 4.28.080(7) or 4.28.080(10).

Axis acknowledges in its Opening Brief that “apparently inconsistent statutes be harmonized, if at all possible, so that each statute may be given effect”, at 26, citing *City of Tacoma v. Taxpayers of City of*

Tacoma, 108 Wn.2d 679, 690, 743 P.2d 793 (1987). Ohio Security agrees with this proposition. Here, within the very same statute- RCW 4.28.080- there are two subsections setting forth how a summons “*shall* be served” on a foreign insurance corporation- subsection 7(a), and subsection 10. One sub-section requires service on the Insurance Commissioner, and one sub-section requires service on the insurance company’s agent.

This makes for a very easy case of applying this maxim of giving effect to each statutory provision. Simply, one can give effect to each provision, by allowing either method of service, particularly since that has been the law of this state for over thirty years, with no apparent difficulties.

A case worth examining is *Martin v. Triol*, 121 Wn.2d 135, 847 P.2d 471 (1993) (cited by Axis in its Opening Brief at 19). The question there was whether or not the “90-days-to-serve” statute of limitation tolling provision of RCW 4.16.170 applied to the motor vehicle substitute service statute. The latter statute provided that the secretary of state is appointed for three years (and no more) from the date of the accident for service of a summons in a lawsuit relating to a motor vehicle accident. Nonetheless, this Court found the 90-day tolling period applied to the motor vehicle substitute service statute. In doing so, the Court applied the principal that each statute should be given effect.

Legislative enactments which relate to the same subject and are not actually in conflict should be interpreted to give meaning and effect to both. Considering the legislative objective of reducing procedural difficulties and the blanket application of the tolling statute to various statutory time limits, we read together the two statutes, RCW 4.16.170 and RCW 46.64.040, and interpret them to give effect to their legislative purpose. We thus conclude that when a plaintiff commences suit by filing a complaint, it is logical to construe RCW 4.16.170 as extending by 90 days the time period for satisfying the provisions of RCW 46.64.040.

121 Wn.2d at 148 (italics added; footnotes omitted)

What is important to note about *Martin* is that in a service/statute of limitation case, this Court gave effect to *both* statutes which were arguably in conflict, in an effort to reduce procedural difficulties and to decide the case on the merits. The Court should apply the same principal here, and find that service was adequate and let this case be decided on the merits.

Furthermore, this Court has made it clear that this principal of giving effect to each statute, overrides the principals that the court should give effect to the more specific statute over the more general statute, or that in construing a statute, a provision should not be made superfluous.

As stated in *City of Tacoma*:

We also reject WNG's invocation of a basic rule of statutory construction, requiring a specific statute to control a statute of general application. *See, e.g., Sim v. State Parks*

& Recreation Comm'n, 90 Wash.2d 378, 382, 583 P.2d 1193 (1978). ...However, this court gives preference to a more specific statute *only* if the two statutes deal with the same subject matter and they have an apparent conflict. *In re Estate of Little*, 106 Wash.2d 269, 284, 721 P.2d 950 (1986). Moreover, we have often recognized our responsibility to harmonize statutes if at all possible, so that each may be given effect. *See, e.g., In re Mayner*, 107 Wash.2d 512, 522, 730 P.2d 1321 (1986).
108 Wn.2d at 690

Similarly, in *Gold Bar Citizens for Good Government v. Whalen*, 99 Wash 2d 724, 728, 665 P.2 393 (1983), this court said:

This holding presumes that whenever two statutes govern the same area, the more specific statute preempts the general. This is not the law. Only when the two statutes conflict must the court choose between the two. As we observed in *Pearce v. G.R. Kirk Co.*, 92 Wash.2d 869, 872, 602 P.2d 357 (1979),

The rule is that legislative enactments which relate to the same subject *and are not actually in conflict* should be interpreted so as to give meaning and effect to both, even though one statute is general in application and the other is special. Such an interpretation gives significance to both acts of the legislature.

(Citation omitted; italics ours.) In the present case, no conflict exists between the two statutes; they are simply different, alternative remedies.

That is the case here, as well. The Legislature has given plaintiffs two alternative methods for serving a foreign insurer. This makes perfect

sense. Why not allow both methods of service? In short, neither Ohio Security nor Axis can seriously state, that this interpretation of the law (which has been in effect for the past thirty years) has created any conflict or any problem, for itself, or any other insurers.

D. The 2011 Amendments to RCW 48.05.200.

Axis makes much of the fact that in 2011, the Legislature amended RCW 48.05.200 by substituting the word “must” for “shall”. Opening Brief at 10-14 and 29-30. But it is clear that the purpose of this change was merely to “clean up” and modernize the language of the statute, and not to change existing law or precedent. According to the official explanation of the law:

The Revised Code of Washington is periodically updated and clarified by the various state agencies responsible for its implementation. This *clean-up process eliminates obsolete language*, makes minor substantive or technical changes, and repeals outdated sections.

Final Bill Report- SB 5123, 62nd Leg. Reg. Sess. (Wash, 2011)(italics added)

Clearly, when the Legislature changed “must” for “shall” in the service statutes, it was in no way trying to change the substance of the service statutes, and in no way was it trying to legislatively overrule *Kiblen and Powell*.

E. *Nitardy v. Snohomish County* is inapposite.

Axis' reliance on *Nitardy v. Snohomish County*, 105 Wn.2d 133, 712 P.2d 296 (1986) is misplaced. In *Nitardy*, plaintiff sued Snohomish County. The very first subsection of RCW 4.28.080, addresses service on a county, and requires service on the county auditor. RCW 4.28.080(1). In *Nitardy*, plaintiff, instead, served a secretary to the county executive. The plaintiff did not assert, as Ohio Security does here, that another prong of RCW 4.28.080 applies. The case was pretty cut and dried, as the plaintiff simply did not comply with RCW 4.28.080(1). Indeed, even the *Nitardy* court recognized that a different analysis might apply to cases where service was accomplished under RCW 4.28.080(10), 105 Wn.2d at 135.

Beyond that, the rule of *Nitardy* is far from absolute. The biggest exception is probably found in "waiver" cases. For instance, *Lybert v. Grant County*, 141 Wn.2d 29, 1 P.3d 1124 (2000) also concerned a suit against a county, where service was not made on the county auditor as required by RCW 4.28.080(1). In *Lybert*, suit was filed on August 30, 1995. The County finally filed its Answer nine months later in June of 1996, during which time the statute of limitation had run. In the Answer, *for the first time*, the County raised a defense of insufficient service.³

³ Unlike the case at bar, when the County filed its Notice of Appearance in *Lybert*, it did specifically state that it was *not* waiving objections to improper service.

This Court held that this behavior and nine-month wait amounted to a waiver of the insufficient service defense, and specifically distinguished *Nitardy*. 141 Wn.2d at 45, n. 9.

By contrast, here, the County failed to preserve the defense by pleading it in its answer or other responsive pleading before proceeding with discovery. Instead, it engaged in discovery over the course of several months and then, after the statute of limitations had apparently extinguished the claim against it, it asserted the defense. *French [v. Gabriel]*, 116 Wn.2d 584] does not remotely stand for the proposition that it is acceptable for a defendant to lie in wait, engage in discovery unrelated to the defense, and thereafter assert the defense after the clock has run on the plaintiff's cause of action.

141 Wn.2d at 45-46 (footnote omitted)

See also *Butler v. Joy*, 116 Wn. App. 291, 65 P.3d 671 (2003) and *Blakenship v. Kaldor*, 114 Wn. App 312, 57 P.3d 295 (2002). Although, the issue of waiver is not specifically before the Court, given that Axis also “laid in wait” for eight months and let the statute of limitation expire before asserting the insufficient service defense, these waiver cases should help inform this Court as to how it should rule in this case.

V. CONCLUSION

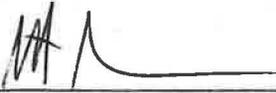
Axis is trying to advance a “gotcha” theory of defense. It does not argue that it did not have notice, nor does it argue any good policy reason why a foreign insurance company doing business in Washington should not be allowed to be served through an agent at its home office.

Plaintiff Ohio Security is also a foreign insurance company, and it has no qualms, at all, in a law that allows service on its agent at its home office. That is how Ohio Security is often served, and this creates no problems for Ohio Security.

This Court should give effect to both RCW 4.28.080(7) and 4.28.080(10), and allow service on a foreign insurer by either method of service. The Court, therefore, should answer “no” to the District Court’s certified question, and allow this dispute to be decided on the merits.

DATED: October 12, 2017

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DECLARATION OF SERVICE

I hereby declare that on October 12, 2017, I electronically filed the foregoing with the Clerk of the Court using the Web Portal System which will send notification of such filing to the persons below:

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I declare under penalty of perjury under the laws of the state of Washington on October 12, 2017, at Portland, Oregon.



Tanya Young, Legal Assistant

HITT HILLER MONFILS WILLIAMS LLP

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