

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

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

IN

OHIO SECURITY COMPANY,

Plaintiff,

v.

AXIS INSURANCE COMPANY

Defendant.

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REPLY BRIEF OF  
DEFENDANT AXIS  
INSURANCE COMPANY

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## **I. INTRODUCTION**

The United States District Court for the Western District of Washington (the “District Court”) certified this question to the Court:

Do RCW 4.28.080(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?<sup>1</sup>

The Legislature has already provided a direct answer.

Washington’s general service statute, RCW 4.28.080, explains how to serve a summons on several different types of defendants. Subsection (7)(a) of this statute addresses authorized foreign insurers, requiring that they be served as provided in RCW 48.05.200. RCW 48.05.200 identifies who can accept service on an authorized foreign insurer’s behalf:

***Each authorized foreign or alien insurer must appoint the commissioner as its attorney to receive service of, and upon whom must be served, all legal process issued against it in this state upon causes of action arising within this state. Service upon the commissioner as attorney constitutes service upon the insurer. Service of legal process against the insurer can be had only by service upon the commissioner, except actions upon***

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<sup>1</sup> Dkt No. 47 (Order Certifying Question to the Washington State Supreme Court).

*contractor bonds* pursuant to RCW 48.27.040. . . .<sup>2</sup>

Thus, unless an action involves a statutory contractor bond, the Commissioner is the exclusive agent to accept service on behalf of an authorized foreign insurer. RCW 48.05.200 goes on to require that service on the Commissioner must be accomplished in compliance with RCW 48.02.200.<sup>3</sup>

Together, these three statutes—RCW 4.28.080(7)(a), RCW 48.02.200, and RCW 48.05.200—set forth the sole method to serve an authorized foreign insurer in Washington. The answer to the District Court’s question is “yes.”

## II. ARGUMENT

### A. RCW 48.05.200 governs service upon authorized foreign insurers.

Ohio Security argues that RCW 4.28.080(10) provides an alternative method for serving an authorized foreign insurer. According to Ohio Security, each of RCW 4.28.080’s seventeen subsections make up an inclusive list of independent service methods. It concludes, therefore, that if a particular defendant falls under more

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<sup>2</sup> RCW 48.05.200(1) (emphasis added).

<sup>3</sup> RCW 48.05.200(5).

than one subsection (e.g., an authorized foreign insurer which is also a foreign corporation), service can be accomplished under multiple subsections of RCW 4.28.080.

Irrespective of whether RCW 4.28.080's subsections identify different methods to serve an authorized foreign insurer, RCW 48.05.200 does not. Under RCW 48.05.200, to serve an authorized foreign insurer, all legal process "*must be served*" upon the Commissioner, and service of legal process "*can be had only by service upon the [C]ommissioner. . . .*"<sup>4</sup> Ohio Security ignores this clear statutory language and does not even attempt to offer an alternative interpretation of what it means.

Ohio Security contends that a legal treatise by Karl Tegland supports its position. This is, at best, only half true. Relying solely on dicta in *Powell v. Sphere Drake Ins.*<sup>5</sup> (discussed in more detail below), Tegland suggests that RCW 48.05.200 does not mandate service on the

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<sup>4</sup> RCW 48.05.200(1) (emphasis added).

<sup>5</sup> 97 Wn. App. 890, 988 P.2d 12 (1999).

Commissioner.<sup>6</sup> But recognizing that this assertion cannot be reconciled with RCW 48.05.200, Tegland states:

The court in *Powell* . . . did not discuss RCWA 48.05.200, which *does* purport to make the statutory procedure (service on the Insurance Commissioner) the exclusive procedure for serving what the statute calls a “foreign or alien insurer.” In light of RCWA 48.05.200, the cautious practice is to comply with the statute when the statute is applicable.<sup>7</sup>

Thus, Tegland *acknowledges* that RCW 48.05.200 requires service upon the Commissioner and *advises* plaintiffs to serve the Commissioner if the statute applies.

Next, Ohio Security abandons its textual argument and instead argues that, notwithstanding the statutory language, public policy favors its position. According to Ohio Security, the Legislature has no good reason to make the Commissioner the sole agent to accept service on behalf of authorized foreign insurers and, therefore, it must not have intended to do so.

But Ohio Security’s inability to imagine a good reason for the Legislature’s decision does not mean that no such reason exists. For

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<sup>6</sup> KARL B. TEGLAND, 14 WASHINGTON PRACTICE: CIVIL PROCEDURE, § 8:15, p. 258 (2d ed. 2009).

<sup>7</sup> *Id.* at p. 259 n. 11 (emphasis in original).

example, by making the Commissioner the only agent able to accept service for authorized foreign insurers,<sup>8</sup> the Legislature privileges these insurers, which, in turn, creates an incentive for foreign insurers to seek authorization to sell insurance in Washington. Increasing the number of authorized insurers is desirable because it provides Washington policyholders with additional protection.

Authorized or “admitted” foreign insurers must obtain a certificate to sell insurance in Washington.<sup>9</sup> These insurers are subject to numerous statutory requirements, such as statutes governing the amount of capital funds they must maintain.<sup>10</sup> And, upon admission, they automatically become members of the Washington Insurance Guaranty Association (the “WIGA”).<sup>11</sup> The WIGA guarantees payment of covered claims if a member insurer becomes insolvent.<sup>12</sup>

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<sup>8</sup> Washington law distinguishes between “authorized” and “unauthorized” insurers. *See, e.g.*, RCW 4.28.080(7)(a) and (b).

<sup>9</sup> RCW 48.05.030(1).

<sup>10</sup> *See, e.g.*, RCW 48.05.040.

<sup>11</sup> RCW 48.32.030(7).

<sup>12</sup> RCW 48.32.010; *see also* THOMAS V. HARRIS, WASHINGTON INSURANCE LAW, § 60.01 (3d ed. 2010) (discussing the general nature and purpose of the WIGA).

Except for actions involving statutory contractor bonds, an authorized foreign insurer can be served only through the Commissioner.<sup>13</sup>

In contrast, “unauthorized” insurers underwrite certain lines of insurance, called “surplus lines,” which cannot be procured from admitted insurers.<sup>14</sup> And coverage under these surplus lines is not backed by the WIGA.<sup>15</sup> Unlike authorized foreign insurers, which can be served only through the Commissioner, unauthorized insurers may be served in one of two ways: (1) through the Commissioner;<sup>16</sup> or (2) through personal service on any officer at the insurer’s last known principal place of business.<sup>17</sup>

Thus, RCW 48.05.200 promotes the Legislature’s objective of maximizing the amount of available insurance on the admitted market. Admitted insurers, like AXIS, are subject to more stringent regulation,

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<sup>13</sup> RCW 48.05.200(1).

<sup>14</sup> RCW 48.15.040. Surplus line coverage is not available if a diligent search reveals that the same insurance is available on the admitted market. RCW 48.15.040(2); *see also Sternoff Metals Corp. v. Vertecs Corp.*, 39 Wn. App. 333, 340, 693 P.2d 175 (1984) (discussing surplus line insurance).

<sup>15</sup> *See* WAC 284-15.050(1)(c)(iii).

<sup>16</sup> RCW 48.05.215(2).

<sup>17</sup> RCW 48.05.215(3).

and policyholders who purchase insurance from authorized insurers benefit from WIGA protection. As an incentive to participate in the admitted market, authorized foreign insurers know with certainty that the Commissioner is the sole agent who can accept service of legal process on their behalf. Unauthorized insurers—and other foreign corporations generally—lack this advantage. The Legislature, thus, has good reasons to privilege authorized foreign insurers over other foreign corporations, which explains the different statutory service methods applicable to them.

**B. *Kiblen and Powell do not provide a sound basis to disregard the express language of RCW 48.05.200.***

Ohio Security predictably contends that this Court should adopt the reasoning of the Washington Court of Appeals in *Kiblen v. Mut. of Omaha Ins. Co.*<sup>18</sup> and *Powell v. Sphere Drake Ins.*<sup>19</sup> As discussed at length in AXIS's opening brief, neither case provides a sound basis to disregard the express language of RCW 48.05.200.

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<sup>18</sup> 42 Wn. App. 65, 708 P.2d 1215 (1985).

<sup>19</sup> 97 Wn. App. 890.

In *Kiblen*, the court did not require the policyholder to serve the insurer through the Commissioner.<sup>20</sup> The court reasoned that because the Legislature adopted RCW 4.28.185 (the long-arm statute) and RCW 4.28.180 (the extra-territorial service statute) after it adopted RCW 48.05.200, the provisions of RCW 48.05.200 requiring service on the Commissioner should be interpreted as mere “preferences.”<sup>21</sup> The reason the court in *Kiblen* construed provisions mandating service on the Commissioner as “preferences” is because the court perceived a conflict between the long-arm statute and RCW 48.05.200.<sup>22</sup>

But no such conflict exists. The long-arm statute permits service only where a defendant cannot be served within the state,<sup>23</sup> and an authorized foreign insurer can always be served within Washington via the Commissioner.<sup>24</sup> Thus, contrary to *Kiblen*, there is no conflict.

Ohio Security contends that the service statute at issue in *Kiblen* was the extra-territorial service statute—not the long-arm statute. But

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<sup>20</sup> 42 Wn. App. at 68.

<sup>21</sup> *Id.* at 67-68.

<sup>22</sup> *Id.* at 67.

<sup>23</sup> RCW 4.28.185(4).

<sup>24</sup> RCW 48.05.200(1).

although *Kiblen* cited both statutes, the only conflict the court identified concerned RCW 48.05.200 and a provision of the long-arm statute.<sup>25</sup> Ohio Security's preferred interpretation of *Kiblen* is incorrect.

Moreover, the extra-territorial service statute, RCW 4.28.180, does not create an alternative method of service distinct from the methods outlined in the general service statute, RCW 4.28.080. RCW 4.28.180 just explains that personal service *outside* of Washington can be accomplished in the same manner as service *inside* of Washington. A party must still consult RCW 4.28.080 to determine what constitutes personal service. The extra-territorial service statute does not establish an entirely separate service scheme.

Ohio Security's reliance on the *Powell* decision is likewise misplaced. In *Powell*, the court held that a question of fact remained as to whether the defendant, which was an unauthorized foreign insurer, had designated a third-party administrator as its agent to accept service.<sup>26</sup> But because the defendant in *Powell* was *not* an authorized foreign insurer, the statute requiring service on the Commissioner,

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<sup>25</sup> *Kiblen*, 42 Wn. App. at 67-68.

<sup>26</sup> 97 Wn. App. at 900.

RCW 48.05.200, did not apply. *Powell* did not analyze or discuss the statutory language at issue in this case—that is, language requiring that legal process “must be served,” and effective service “can be had only” by service on the Commissioner.<sup>27</sup> *Powell* does not abrogate statutory language that the *Powell* court never considered.

C. **Ohio Security fails to properly construe Washington’s service statutes.**

Ohio Security concedes at least two of the principles of statutory interpretation identified in AXIS’s opening brief: (1) apparently inconsistent statutes should be harmonized, if at all possible, so that each statute may be given effect;<sup>28</sup> and (2) if two statutes actually conflict, a court should give effect to the more specific over the more general statute.<sup>29</sup> But Ohio Security then contends that this Court should “harmonize” subsections (7)(a) and (10) of RCW 4.28.080 by treating them as two alternative methods for serving authorized foreign

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<sup>27</sup> RCW 48.05.200(1).

<sup>28</sup> *City of Tacoma v. Taxpayers of City of Tacoma*, 108 Wn.2d 679, 690, 743 P.2d 793 (1987); *In re Mayner*, 107 Wn.2d 512, 522, 730 P.2d 1321 (1986).

<sup>29</sup> *Sim v. Wash. State Parks & Recreation Comm’n*, 90 Wn.2d 378, 382, 583 P.2d 1193 (1978); *Meade v. French*, 4 Wash. 11, 14, 29 P. 833 (1892).

insurers. According to Ohio Security, there is no need to apply the more specific over the more general statutory provisions because there is no actual conflict between these two subsections.

This argument is a red herring. No apparent “conflict” exists between the various subsections of RCW 4.28.080. The only conflict is between RCW 48.05.200 (which mandates service on the Commissioner) and Ohio Security’s position that the Commissioner is not the exclusive agent to accept service on an authorized foreign insurer’s behalf.

Again, there is no conflict between subsections (7)(a) and (10) of RCW 4.28.080. Subsection (7)(a) addresses authorized foreign insurers and subsection (10) addresses foreign corporations not otherwise enumerated in the statute. This is the most straightforward and reasonable way to interpret the various subsections of RCW 4.28.080. And all of the statute’s provisions can easily be “harmonized” by interpreting the statute accordingly.

But even if subsections (7)(a) and (10) provide alternative methods of serving an authorized foreign insurer that is also a foreign corporation, RCW 48.05.200 still requires authorized foreign insurers to be served through the Commissioner. If, as Ohio Security contends,

RCW 4.28.080(10) permits service on an authorized foreign insurer through someone other than the Commissioner, then RCW 4.28.080(10) conflicts with RCW 48.05.200, which does not. To the extent these two statutes conflict, the provisions of the more specific statute, RCW 48.05.200 (which applies only to authorized foreign insurers), should be given effect over the more general provisions of RCW 4.28.080(10) (which applies generally to all foreign corporations).

In addition, Ohio Security completely disregards a third pertinent principle of statutory construction. Namely, a court may not adopt an interpretation of a statute (such as, RCW 48.05.200) that eliminates the meaning of the statutory language or renders it superfluous.<sup>30</sup> Ohio Security's contention that any agent can accept service on behalf of an authorized foreign insurer hollows the exclusive service language of RCW 48.05.200 and empties it of any meaningful content. Likewise, Ohio Security's proposal renders meaningless the exception in RCW 48.05.200(1) for statutory contractor bonds. Ohio

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<sup>30</sup> See *Whatcom County v. City of Bellingham*, 128 Wn.2d 537, 546, 909 P.2d 1303 (1996); see also *City of Seattle v. State Dep't of Labor & Indus.*, 136 Wn.2d 693, 698, 965 P.2d 619 (1998).

Security's attempt to abrogate RCW 48.05.200 by reading its exclusive language out of the statute should be rejected.

**D. The 2011 Amendments to RCW 48.05.200 further clarified the intent of the Legislature.**

Ohio Security contends that the 2011 Amendments to RCW 48.05.200, in which the Legislature changed the word "shall" to "must," did not substantively alter the statute. AXIS agrees. RCW 48.05.200 has always mandated service on the Commissioner. To the extent *Kiblen* (or any other lower court decision) disregarded the clear language of the statute, it was wrongly decided.

The 2011 Amendments, however, do undermine Ohio Security's reliance on *Kiblen*. In *Kiblen*, the court recognized that RCW 48.05.200 mandated service through the Commissioner, but it reasoned that the Legislature was presumably aware of this when it later adopted the purportedly more permissive requirements in the state's long-arm (RCW 4.28.185) and extra-territorial service (RCW 4.28.180) statutes.<sup>31</sup> According to the court, the appropriate way to resolve this

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<sup>31</sup> *Kiblen*, 42 Wn. App. at 67.

alleged tension was to treat the earlier mandates of RCW 48.05.200 as mere “preferences.”<sup>32</sup>

But if later Legislative enactments are always given priority over earlier ones, as *Kiblen*’s reasoning suggests, then the 2011 Amendments should abrogate the *Kiblen* decision. *Kiblen* held that an earlier version of RCW 48.05.200 expressed a mere “preference” for service on the Commissioner. But then the Legislature subsequently changed the statutory language and clarified that legal process “must” be served upon him.<sup>33</sup> Saying the Commissioner “must” be served does not express a mere preference, and Ohio Security fails to provide any convincing argument as to why RCW 48.05.200 should not be applied as it is now written.

**E. This Court has consistently affirmed the Legislature’s authority to designate a public official as the exclusive agent to accept service of process.**

Ohio Security argues that *Nitardy v. Snohomish County*<sup>34</sup> does not support AXIS’s position. In *Nitardy*, the plaintiff sued Snohomish

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<sup>32</sup> *Id.* at 67-68.

<sup>33</sup> LAWS OF 2011, ch. 47, § 5.

<sup>34</sup> 105 Wn.2d 133, 712 P.2d 296 (1986).

County and served a copy of the summons and complaint on the secretary for the County Executive, but the relevant service statute, RCW 4.28.080(1), designated the County Auditor as the exclusive agent to accept service on the County's behalf.<sup>35</sup> This Court held that the plaintiff's failure to serve the official designated by the Legislature barred her lawsuit.<sup>36</sup> AXIS accurately cited this case for the proposition that the Legislature may designate one local official to accept service of process on behalf of certain classes of defendants.

Ohio Security argues that the Court should distinguish *Nitardy* because it involved only subsection (1) of RCW 4.28.080, not subsection (10). This argument misses the point. In *Nitardy*, this Court affirmed the Legislature's authority to identify a single local official to accept service of process. Under RCW 48.05.200, the Legislature designated the Commissioner as the sole agent to accept service on behalf of an authorized foreign insurer. *Nitardy* affirms the validity of the Legislature's designation and, thus, the distinction urged by Ohio Security is inapposite.

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<sup>35</sup> *Id.* at 134.

<sup>36</sup> *Id.* at 134-35.

Ohio Security next argues that *Nitardy* “recognized” that its principles might not apply to service accomplished under RCW 4.28.080(10). Again, this is not true. In *Nitardy*, the plaintiff relied on an earlier decision, *Reiner v. Pittsburg Des Moines Corp.*,<sup>37</sup> to argue that strict compliance with RCW 4.28.080(1) was unnecessary.<sup>38</sup> *Reiner* involved an injured worker who sued a foreign corporation and served its agent by handing a copy of the summons and complaint to the agent’s wife, at the agent’s residence, while the agent was sitting inside watching television.<sup>39</sup> At issue was whether RCW 4.28.080(10) required strict or substantial compliance.<sup>40</sup> In *Reiner*, the Court held that the statute required only substantial compliance.<sup>41</sup> And, therefore, it affirmed the validity of the plaintiff’s service on the agent’s wife.<sup>42</sup>

In *Nitardy*, however, this Court rejected the plaintiff’s contention that RCW 4.28.080(1) required only substantial

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<sup>37</sup> 101 Wn.2d 475, 680 P.2d 55 (1984).

<sup>38</sup> *See id.* at 135.

<sup>39</sup> *Id.* at 476.

<sup>40</sup> *Id.* at 478.

<sup>41</sup> *Id.* at 479.

<sup>42</sup> *Id.* at 480.

compliance.<sup>43</sup> In doing so, the Court recognized that its analysis called into question the continued vitality of the *Reiner* decision.<sup>44</sup> But, instead of expressly overruling *Reiner*, the Court simply acknowledged that “the specific issue of whether service on the wife of an agent of a defendant foreign corporation is sufficient under RCW 4.28.080(10) is not presented.”<sup>45</sup> Ohio Security is mistaken when it contends that *Nitardy* “recognized” that a defendant does not have to be served in accordance with the Legislature’s statutory mandates.

Ohio Security devotes the remainder of its response brief to arguing that AXIS “waived” any defenses based on insufficient service. Ohio Security’s “waiver” argument, of course, has nothing to do with the pure legal question certified to this Court—i.e., whether the Commissioner is the exclusive agent to accept service on behalf of authorized foreign insurers.

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<sup>43</sup> See *Nitardy*, 105 Wn.2d at 135.

<sup>44</sup> *Id.* See also *Fox v. Sunmaster Prods., Inc.*, 63 Wn. App. 561, 566 n. 5, 821 P.2d 502 (1991) (noting that *Nitardy* criticized *Reiner* and called its continuing vitality into question); *Spokane County v. Utils. & Transp. Comm’n*, 47 Wn. App. 827, 832, 737 P.2d 1022 (1987) (same).

<sup>45</sup> *Nitardy*, 105 Wn.2d at 135.

And besides, there was no waiver. A litigant waives a defense based upon insufficient service of process if it fails to assert it in a responsive pleading or in a motion under CR 12(b)(5).<sup>46</sup> Here, AXIS asserted an affirmative defense based on Ohio Security's insufficient service of process in both its responsive pleading,<sup>47</sup> and in a motion under CR 12(b)(5).<sup>48</sup> Accordingly, AXIS did not waive its insufficient service defense.

Relying on *Lybbert v. Grant County*,<sup>49</sup> Ohio Security argues that AXIS "laid in weight" for "eight months" before filing its Answer and, thus, like the defendant in *Lybbert*, AXIS's purportedly inconsistent conduct waived any defenses based on insufficient service. But the facts at issue in *Lybbert* are not at all similar to this case. In *Lybbert*, the defendant, over a course of nine months, propounded written discovery unrelated to its service of process defense and stalled on

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<sup>46</sup> *O'Neill v. Farmers Ins. Co. of Wash.*, 124 Wn. App. 516, 527, 125 P.3d 134 (2004).

<sup>47</sup> Dkt No. 1-3, at pp. 44-49 (Answer of Defendant AXIS Insurance Company).

<sup>48</sup> *Id.* at pp. 51-59 (Defendant AXIS Insurance Company's Motion to Dismiss).

<sup>49</sup> 141 Wn.2d 29, 1 P.3d 1124 (2000).

responding to plaintiff's discovery requests concerning insufficient service.<sup>50</sup> After engaging in this conduct, the defendant then sought dismissal of the plaintiff's lawsuit due to improper service.<sup>51</sup>

In this case, however, AXIS did not engage in any written discovery and, within roughly two months after its counsel filed a notice of appearance, AXIS notified both Ohio Security and the trial court that it had not been properly served.<sup>52</sup> Even if the District Court had certified the waiver issue to this Court, AXIS did not waive its insufficient service defense.

### **III. CONCLUSION**

This is not a difficult case. The District Court requests an answer to the following question: do RCW 4.28.080(7)(a), RCW 48.05.200, and RCW 48.02.200, establish service through the Commissioner as the uniform and exclusive means of service for authorized foreign insurers? The answer is "yes."

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<sup>50</sup> *Id.* at 32-33.

<sup>51</sup> *Id.*

<sup>52</sup> *See* Dkt No. 1-3, p. 40 (Confirmation of Joinder of Parties Claims and Defenses).

RCW 4.28.080(7)(a) requires that authorized foreign insurers be served in accordance with RCW 48.05.200, which says: “*Service of legal process against the insurer can be had only by service upon the [C]ommissioner. . .*”<sup>53</sup> Based on this unambiguous statutory language, AXIS respectfully requests that this Court issue a decision providing an affirmative answer to the District Court’s question.

DATED: October 23, 2017.

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4848-6621-2946.1

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<sup>53</sup> RCW 48.05.200(1) (emphasis added).

CERTIFICATE OF SERVICE

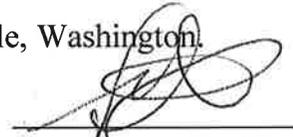
I hereby certify that on October 23, 2017, I electronically filed the foregoing with the Clerk of the Court using the Web Portal system which will send notification of such filing to the person(s) listed below,

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Tacoma LLC and Ohio Security Insurance  
Company*

I declare under penalty of perjury under the laws of the state of Washington on October 23, 2017, at Seattle, Washington.

  
Genevieve Schmidt,  
Legal Assistant

**BULLIVANT HOUSER BAILEY**

**October 23, 2017 - 4:20 PM**

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