Recent Court Decisions

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Administrator Hired to Run City's Health Insurance Program Owes Duty of Good Faith and Fair Dealing Just as Insurer Would Owe Duty

Cary v. United of Omaha Life Insurance Co., 68 P.3d 462 (Supreme Court of Colorado—April 21, 2003)

The city of Arvada, Colorado, provided a self-funded health insurance program to its employees through the Arvada Medical and Disability Program Trust Fund. The Trust was administered by United of Omaha and Mutual of Omaha of Colorado. Under the arrangement, the Trust was governed by a Board of Trustees but had no employee staff of its own. Rather, the Trust relied on United and Mutual for claims administration. The Trust's arrangement with United was akin to stop-loss insurance for the Trust in that the Trust was responsible for the first $75,000 of covered payments for employee illness, with United responsible for amounts between $75,000 and $1 million.

The daughter of Plan member Cary shot herself in an unsuccessful suicide attempt, leading to extensive injuries and extensive, expensive medical treatment. United, acting as administrator for the Trust, refused coverage, citing the Plan's exclusion of self-inflicted injuries. Cary sued for benefits and alleged bad faith in the denial. The trial court granted partial summary judgment for Cary, finding that the exclusion for self-inflicted injury was ambiguous. Applying the rule of construing ambiguities against the drafter, the trial court ruled for Cary and against the Plan on the coverage issue. However, the trial court also dismissed the bad faith claim on the ground that United as Plan administrator was not in contractual "privity" with Cary and hence could not be sued for bad faith. According to the trial court, the insurance contract was only between the Plan and Cary. Therefore, according to the trial court, Cary had no standing to sue United for contract-based claims since Cary had not directly contracted with United. The intermediate state court of appeals affirmed the trial court's decisions.

The Colorado Supreme Court reversed the lower courts and held that United, although a third-party insurance plan administrator technically outside the contractual relationship between Cary and the Trust, was nonetheless a proper defendant for claims arising out of United's administration of the Trust. The Supreme Court reasoned that United as administrator effectively took the role of the Trust in determining claims

payment and treatment of the insured. Consequently, United as administrator should be responsible for any bad faith or other misconduct that adversely affects the insured. Note that the *Cary v. United of Omaha* decision does not state that United acted in bad faith by invoking the self-inflicted wound exclusion and denying the Cary claim. The actual merits of the Cary bad faith claim against United will be determined by the trial court, which now has the matter again after the Supreme Court's remand of the case. The *Cary v. United* decision merely states that Cary has the legal right to sue United for bad faith. Proving it may be quite another thing because characterizing attempted suicide as a self-inflicted injury may well be seen as reasonable conduct by United even if the trial court disagreed as to the clarity of the exclusion and its ultimate impact on coverage. The test for determining bad faith in Colorado and most states devolves largely to a question of whether an insurer's conduct was reasonable, not whether it was completely correct. United would, of course, prefer not to be sued at all. However, United will not be found liable merely because it was wrong at the end of the day.

This notion that one had contract rights only against the entity with which it directly contracts is contractual "privity" or primary contractual relationship. Historically, under the common law, only parties in direct contractual relationships could sue one another over disputes related to the contract. Although others might well be affected by the contract, they did not have the required legal "standing" to sue for rights under the contract. Only those parties in "privity" could make these types of breach of contract or breach of warranty claims. These parties were not necessarily precluded from bringing tort law claims against one of the contracting parties because the contract might create duties to the third party beyond the ordinary duties citizens in society owe one another. As a practical matter, however, such tort-based-on-contract suits by parties not in privity were rare until the 20th century because tort law was not nearly as comprehensive as it is today and did not create many rights for plaintiffs beyond protection from negligence that more or less directly caused physical injury or protection from intentional torts such as trespass or assault and battery.

All of this began to change in the late 19th and early 20th centuries as courts began to find exceptions to the privity requirement in order to prevent injustice. Famous tort law scholar William Prosser (author of the classic *Prosser on Torts* read by almost every lawyer in America from time to time) referred to this trend as the "Fall of the Citadel" of privity that had historically protected manufacturers from direct liability to consumers. The classic example found in the Torts casebooks of practically every first-year law school course involves whether a consumer can sue the manufacturer of a defective product even though the consumer's only direct contractual relationship is with retailer that sold the allegedly tainted product. For example, a consumer buys a loaf of bread at the supermarket. The bread has a pin in it, causing significant injury when the consumer attempts to enjoy a sandwich. Under a pure privity of contract doctrine, the consumer can only sue the supermarket where the bread was purchased and not the manufacturer that allowed the pin to be in the bread loaf. Under the modern view of privity, the baker may be sued because it was reasonably foreseeable that its bread would be sold through supermarkets to consumers who would be injured if the bread was tainted.

A similar fact situation was responsible for the famous New York Court of Appeals decision in *MacPherson v. Buick Motor Co.*, NY (1918) in which the famous jurist Benjamin Cardozo, then a Judge on New York's highest state court (before he became a U.S. Supreme Court Justice), held that an automobile buyer could sue the manufacturer of an allegedly defective vehicle (the wheel in particular was alleged to be defective) even though the buyer's only direct contractual relationship was with the local auto dealer that sold him the allegedly defective car. Since *MacPherson v. Buick*, direct suits against manufacturers for defective products have been the rule more than the exception.

Insurance benefits, of course, differ from finished goods and contract rights are different than the warranty of merchantability that generally accompanies products. However, the analogy—or more properly a reverse analogy—may help explain the *Cary v. United* result. In the *Cary* case, the Trust provided benefits to Cary. Cary and the Trust were in contractual privity. But the Trust did not service the contract itself. Instead, the Trust "outsourced" claims adjustment to United. Cary had no say in the matter and probably no knowledge or conscious appreciation of the arrangement until the claim arose. Cary had no contractual relationship with United but would not have had to deal with United were it not for United's key role in administering what for Cary (and most workers covered by health insurance) undoubtedly viewed as a most important contract. In cases like the bread loaf with the pin or the Buick with the broken wheel, the manufacturer is the key entity regarding the happening of an event even though it was not the entity with which the consumer plaintiff had a contract. In cases like Cary, the claims adjuster/Plan administrator is the key entity that determines coverage but it is not the entity with which the consumer insured has a contract. In the latter set of cases, American law for nearly a century has found that lack of strict contractual privity is not a bar to suit where the consumer alleges injury. *Cary v. United* can be seen as simply an extension of the concept to the area of self-funded insurance with Plan administration outsourcing.

On the question of United's amenability to suit by Cary, the Colorado Supreme Court was reminiscent of product liability cases such as *MacPherson v. Buick* in that Cary took a functional approach (looking to the actual operation of the party's relationships) rather than a formal approach (looking only at the strictly formal legal relationships of the parties) in determining that, as a practical matter, United made and enforced the coverage decisions affecting Cary.

> United, whom the Trust hired to administer the Plan, exercised near-complete control over the administration of the Plan. United's contract with the Trust obligated it to: providing claim handling facilities; furnish claim handling personnel; establish claim handling procedure, including claim files and systems; verify claimant eligibility for the Plan; receive all claim forms and related materials from Plan members; process submitted claims; send "explanation of benefit" letters to claimants when it acts on a claim; prepare claim payments; provide actuarial services to the Trust to project estimated Plan benefit costs; provide underwriting services whereby it analyzes Plan benefits and makes recommendations to the Trust about modifying the benefits; print and pay the cost of all Plan claim forms and benefit checks; develop and print Plan benefit booklets

> and identification cards; evaluate the health histories of "late" applicants and determine whether they should have Plan coverage; provide a toll-free number for Plan claimants; and periodically audit the claims processing system to determine the quality of claim administration. United even established an appellate procedure for denials of coverage (though the Trust was the entity of last resort for appeals).

See 68 P.3d at 464 (footnote omitted).

> We disagree with the court of appeals' strict application of a privity of contract analysis to this case. Here, the insurance administrators had primary control over benefit determinations, assumed some of the insurance risk of loss, undertook many of the obligations and risks of an insurer, and had the power, motive, and opportunity to act unscrupulously in the investigation and servicing of the insurance claims. Under such circumstances, we hold that a special relationship existed between the administrators and the insured sufficient to establish in the administrators a duty to act in good faith. In order for Cary to recover for a breach of that duty in tort on remand of this case, he must show that the Administrators' conduct was unreasonable and the Administrators knew their conduct was unreasonable or acted in reckless disregard of whether their conduct was unreasonable.

See 68 P.3d at 465.

Not surprisingly, in holding that United may be sued in connection with the claim denial, the *Cary v. United* court was influenced not only by the practical control United had over the claim but also by the nature of insurance and the insurer–policyholder relationship. [*See* 68 P.3d at 466 ("insurance contracts are not ordinary contracts" and carry with them more stringent duty of good faith that is "nondelegable"; courts heightened responsibility to police insurance agreements on grounds of fairness and conformity to overall public policy)]. In order to prevent a situation where the insured received less protection merely because of the form of the arrangement for claims administration, the *Cary* Court (by a 5 to 2 majority) found it logical and fair to permit suit against United.

> In the typical insurance case, only the insurer owes the duty of good faith to its insured; agents of the insurance company—even agents involved in claims processing—do not owe a duty, since they do not have the requisite special relationship with the insured.
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> In the typical case, the insured is adequately protected by the nondelegable duty the law imposes on the insurer. However, the existence of this nondelegable duty does not mean that a third-party claims administrator never has an independent duty to investigate and process the insured's claim in good faith. When the actions of a defendant are similar enough to those typically performed by an insurance company in claim administration and disposition, we have found the existence of a special relationship

> sufficient for imposition of a duty of good faith and tort liability for its breach—even when there is no contractual privity between the defendant and the plaintiff.

See 68 P.3d at 467 (footnote omitted).

The *Cary v. United* decision also noted that Colorado precedent had given similar treatment to the issue of contractual privity in cases involving administration of a worker's compensation plan (*see Travelers Ins. Co. v. Savio*, 706 P.2d 1258 (Colo. 1985) and claims-adjusting by an independent contractor working on behalf of a self-insured employer (see *Scott Wetzel Servs. Inc. v. Johnson*, 821 P.2d 804 (Colo. 1991)). In this sense, the *Cary v. United* opinion is not a dramatically new direction for Colorado law but represents continuing fall of the "citadel of privity" for insurance matters. It also represents a strong 21st century statement on the issue from a well-regarded state supreme court.

However, despite the logic of the Cary holding as applied to undisputed facts showing that the administrator essentially was the insurer for purposes of claims, two Justices dissented, viewing the majority opinion as an overly dramatic departure from the traditional presumption that privity is required to sue under a contract. (*See* 68 P.3d at 469 (Coats, J., joined by Kourlis, J.).) As the dissent noted, there are also 21st century decisions taking a more restrictive view of an insured's ability to sue insurance plan administrators. (*See, e.g.*, *Kuykendall v. Gulfstream Aerospace Technologies*, P.3d (Okla. 2002).) In essence, the *Cary v. United* dissenters argued that there was insufficient basis for characterizing United's relationship with Cary as a "special relationship" like that of insurer and policyholder. Justice Coats went so far as to accuse the Cary majority of announcing a "new civil duty (giving rise to a tort claim for damages) that is neither implied in contract, mandated by statute, nor recognized at common law." (*See* 68 P.3d at 469.)

So, who is correct in *Cary*? My own view is that the majority's holding subjecting United to suit is unobjectionable and not at odds with the overall legal framework governing commercial and insurance relationships. It may be that calling the United position bad faith is incorrect, even far-fetched. However, it is hardly a major expansion of tort liability to say that companies that act as insurance gatekeepers can be subject to suit over claims denials. Putting it another way: why should third-party administrators like United, that actually run the show, be immunized from bad faith claims when passive insurers such as the City of Arvida health plan Trust are subject to suit. Alternatively, a court could find that both the Plan and the Administrator are immunized from liability, but this would create the perverse situation where no one is responsible for treatment of the policyholder, no matter how unreasonable. As a matter of common sense, independent claims administrators should be subject to the same ground rules governing insurers that themselves actively administer policies. Where they act in bad faith, they should be subject to liability. Similarly, where a policyholder's suit is frivolous or prosecuted in bad faith, the claims administrator should be able to hold the policyholder accountable.

In addition, when considering the 100-year history of the fall of the citadel of privity, the *Cary v. United* majority opinion seems completely correct and reasonable. Product manufacturers have no particularly special relationship with users of the product but

the law has long held that they may be sued for product defects causing injury despite the presence of any "middlemen" and a lack of a direct contract between manufacturer and consumer. By comparison, the insurance relationship, even as filtered through outsourced claims adjustment, is filled with considerably more sense of obligation. If privity of contract is not a bar to product liability and warrant claims against bakers and auto manufacturers, it seems incongruous to think that privity of contract can immunize insurance claims administrators for misconduct that may have dramatic financial consequences for insureds.

LIFE INSURER SUCCEEDS IN DEFEATING CLAIM ARISING FROM DEATH BY AUTOEROTIC ASPHYXIATION ON BASIS OF EXCLUSION FOR "SELF-INFLICTED" INJURY

Critchlow v. First UNUM Life Insurance Co., 340 F.3d 130 (United States Court of Appeals for the Second Circuit—August 7, 2003)

Although the "self-inflicted" injury exclusion did not work for the City of Arvada insurance plan in connection with the Cary suit arising out of attempted suicide, the exclusion suffered more charitable judicial treatment from two judges of a federal appeals court panel in a case arising out of self-stimulation through intentional oxygen deprivation, a situation seemingly further removed from self-injury. Perhaps not surprisingly, the decision included a strong dissent. Autoerotic asphyxiation in self-stimulation may account for as many as 2000 deaths per year, suggesting that the practice is both fairly widespread and fairly dangerous. Of course, thousands of people get injured or die doing things regarded as near-suicidal by the meeker among us: motocross racing; hand-gliding; bungee-jumping; surfing (even where there are not sharks). Cases like *Critchlow* and others in this genre force courts to consider the point at which risk ceases to be risk and becomes an uninsurable certainty.

In *Critchlow*, the facts were undisputed if perhaps something other than a "Leave it to Beaver" picture of modern recreation. David Critchlow was alone in his parent's home, where he apparently lived. He "retired to his locked bedroom . . . disrobed completely and attached an intricate, home-made harness consisting of ropes, weights, and counterweights leading to a noose around his neck. While engaging in stimulation, the noose apparently closed on his neck without release, depriving him of oxygen and killing him. The *Diagnostic and Statistical Manual of Mental Disorders* (3rd edition) classifies autoerotic asphyxiation as a sexual mannerism in which arousal is induced by depriving the brain of oxygen by a variety of means such as hanging, strangulation, chest compression, or blockage of the airways. (*See* 340 F.3d at 132.) David was insured under a group accidental death insurance policy through his employer. The policy, issued by First UNUM Life, provided coverage for "accidental" death that resulted "directly and independently of all other causes" and specifically excluded loss "caused by . . . intentionally self-inflicted injuries." (*See* 340 F.3d at 132.) David's mother as his beneficiary under the policy filed a claim for benefits, which was denied by First UNUM, citing the self-inflicted injury exclusion. Shirley Critchlow then sued for benefits. The trial court found as a matter of law (without need for jury consideration) that David's death was self-inflicted.

On appeal, a 2-1 majority of a federal appeals court panel affirmed the decision for First Unum. The majority reasoned that David's act was clearly intentional and that as designed it provided injury to his body, albeit more injury (death) than the injury he had specifically intended (short-term reduction in oxygen). According to the majority "the deliberate constriction of one's windpipe with the purpose of depriving the brain of oxygen is an intentionally self-inflicted injury within the meaning of the policy's exclusionary clause." (*See* 340 F.3d at 133.)

In dissent, Judge Kearse found the majority opinion insufficiently deferential to the normal rule that exclusions should be (1) strictly and narrowly construed against the insurer that drafted the contract, and (2) construed in accordance with an average person's view of what constitutes intent to injure oneself rather than intent to engage in risky behavior. (*See* 340 F.3d at 134 (Kearse, J., dissenting)). In addition, the dissent noted that the Critchlow-First UNUM policy was part of an ERISA employee benefit plan subject to the common law of construing insurance policies subject to ERISA. In the dissent's view, the body of ERISA precedent was more favorable to the claimant than the state-law based precedents relied on by the majority. Specifically cited was *Todd v. AIG Life Ins. Co*., 47 F.3d 1448 (5th Cir. 1995), authored by then-retired U.S. Supreme Court Justice Byron White, sitting by designation. (*See* 340 F.3d at 134-135.) On the basis of these precedents, the dissent urged that autoerotic asphyxiation cases be viewed not according to whether the insured intended to engage in the activity that led to death but whether the insured subjectively intended to suffer significant permanent injury from the activity. *See* 340 F.3d at 135-137 ("[i]n the present case, it seems undisputed that Critchlow's death was subjectively unexpected and unintended." Also noting expert testimony to the effect that this activity does not normally result in serious injury or death and criticizing lower court and majority for ignoring this expert evidence).

The divide between the majority and dissenting opinions is supported by precedent on both sides of the issue. During the past decade, it has appeared as though the emerging judicial view was more in accord with that of the dissent. In addition, older decisions have a connotation of criticism of the seemingly deviant behavior resulting in death that is at odds with the modern tolerance for diverse, even bizarre, sexual practices so long as participation is voluntary. However, the *Critchlow* opinion suggests support for the traditional viewpoint—that putting a noose around your neck is too inherently risky to qualify as anything other than self-inflicted injury if things go wrong and the procedure results in death rather than excitement.

One unanswered question that both sides in the debate tend to ignore is the degree to which the issue could be put to rest conclusively by insurers through simple revision of the policy. An exclusion for any and all injuries "arising out of" autoerotic stimulation activities would presumably be clear and enforceable. But insurers have for at least two decades largely relied on the more generic "self-inflicted injury" and "expected or intended injury" exclusions to attempt to defeat such claims. During this time period, the case law is roughly evenly divided between insurers and policyholders. Against this historical backdrop, one might fairly ask why insurers do not simply act to resolve the dispute universally through clearly exclusionary language.

GRAMM–LEACH–BILEY ACT HELD TO PRECLUDE DISCOVERY OF INFORMATION ABOUT PURCHASES OF "VANISHING PREMIUM" INSURANCE BY POLICYHOLDERS OTHER THAN PLAINTIFF

Equitable Life Assurance Society v. Irving, So.2d, 2003 Miss. LEXIS 408 (Supreme Court of Mississippi—September 11, 2003)

In a case with potentially significant implications for certain types of insurance litigation, the Mississippi Supreme Court, often a friendly forum for policyholder plaintiffs, refused to permit plaintiff to discovery the names of others sold "vanishing premium" life insurance policies by the defendant insurer. The plaintiff sought the information on the grounds of attempting to establish a pattern or practice of deceptive marketing and sales of vanishing premium products, which are popular and attractive when interest rate projections are high but fall from favor in times of reduced interest, frequently leading to policyholders feeling deceived when they must continue to pay the premiums that supposedly would vanish.

Without commenting on the discoverability of the information under ordinary civil rules (such as questions over the reasonableness and burdensomeness of the discovery), the Court held that the requested information was forbidden to be disclosed because of the Gramm–Leach–Biley Act ("GLBA"), which prohibits the release by financial institutions of private information absent an exception to the bar on disclosure. (*See id.* at * 5; 15 U.S.C. § 6802(a).) According to the Court:

> Equitable is considered a financial institution under the Act. The information sought by [plaintiff] Irving is clearly the type the statute seeks to protect. The GLBA, as a federal statute, will preempt any state law which conflicts with it under the Supremacy Clause. Similarly, a federal law will bar state courts from issuing orders that conflict with the statute.

See id. at *6 (citations omitted).

Plaintiff argued that exceptions in the statute applied to permit the requested disclosure. Specifically, Plaintiff argued that the following exceptions would permit a court to exercise discretion to order discovery notwithstanding the general GLBA prohibition on sharing private data:

1. "to protect against or prevent actual or potential fraud";
2. "for resolving customer disputes or inquiries";
3. "persons that are assessing the licensee's compliance with industry standards";
4. "for an investigation on a matter related to public safety."

See id. at *5 (citations omitted).

The *Equitable v. Irving* Court found none of the exceptions to apply. It gave a particularly narrow construction to the fraud exception, finding that the exception applied only if the customer with protected privacy was perpetrating a fraud. The assertion that the insurer was perpetrating a fraud through the deceptive sales of vanishing premium policies was not considered by the Court to be the type of asserted fraud that would justify invoking the statutory exception. (*See id.* at *7.)

The *Equitable v. Irving* Court also found the "customer dispute" exception inapplicable because the lawsuit did not involve a dispute between the customer with protected information and the financial institution. (*See id.* at *7–*8.) Similarly, the Court found that the claims of fraud in the sale of the vanishing premiums, "while serious, have no relation to public safety" or the regulation of insurers as financial institutions. (*See id.* at *8.)

The Court also rejected plaintiff's argument that an exception in the statute for compliance with state and local laws or regulation supported disclosure as part of Mississippi's interest in policing the insurer–policyholder relationship. (*See id.* at *8–*9.) In reaching this determination, the Court found itself constrained by ground rules of statutory construction that counsel against expanding exceptions to the statutory protection of privacy created by GLBA.

> [T]o allow a private plaintiff to circumvent the privacy protections placed the act would negate much of its effectiveness. There is nothing in the statute or in the Congressional record that reflects an intent, through the exceptions to the GLBA, to allow a private plaintiff an easier time in establishing a pattern of behavior by financial institutions or to create a windfall of clients for the plaintiff's counsel . . .
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> The intent of the GLBA is to protect the customers of financial institutions from invasions of their privacy. Part of the purpose of this Act was to stop solicitations generated by customer lists, and this would include solicitation by an attorney to be a witness or for any other purpose. Thus, the GLBA preempts the issuance of the [requested discovery order].

See id. at *9–*10.

Although privacy is a wonderful thing, the *Equitable v. Irving* case raises the issue of whether the GLBA is an overdose of a good thing, or whether the court engaged in an overly rigid reading of a statute. The GBLA was obviously enacted in response to concerns that financial institutions were too lax with customer information (e.g., selling mailing lists). But it seems inherently doubtful that Congress when passing the law intended to work a sea change in the ordinary rules of discovery in civil litigation. Under these ordinary ground rules of civil discovery, Plaintiff Irving's request might be considered too burdensome in relation to the information sought. But, prior to passage of the GLBA, there was no question that a trial court could order such discovery if it thought it valuable in illuminating charges of fraud or misrepresentation (or most anything else).

Another ground rule of statutory interpretation, one not really addressed by the *Equitable v. Irving* Court, is that statutes should not be construed to change the *status quo* by accident without some significant evidence that the legislature was aware that language it adopted, if construed literally, would effect such a change. If the Court had invoked this rule of construction rather than the rule of construction against too readily implying or expanding exceptions to the main prohibition of the statute, it might well have seen its application of the GBLA as too drastic a curtailment of the trial court's traditional power over discovery matters.

Presumably, the same consideration would apply for federal court power as well, perhaps more so in that one can argue that courts should be more hesitant to interpret a federal statute as constricting traditional federal court powers due to the separation of powers provisions of the Constitution as opposed to the Supremacy Clause, which generally permits considerable latitude for the national government to constrict state powers once federal power over the subject matter has been established.

Regardless of whether *Equitable v. Irving* is right or wrong, it will surely be cited frequently by insurers seeking to resist discovery by plaintiffs in civil suits. To the extent that other courts agree with the Mississippi Supreme Court, insurers will have a powerful tool for limiting plaintiff access to information and to prevent plaintiffs from seeking to build a case for systemic misconduct by the insurer toward its customer pool.

INSURED CO-TENANT MAY RECOVER MORE THAN VALUE OF FRACTIONAL LEGAL INTEREST IN THE PROPERTY WHERE CO-TENANT OCCUPIES PROPERTY AND INSURES TO FULL VALUE

Delk v. Markel American Ins. Co., P.3d, 2003 Okla. LEXIS 104 (Supreme Court of Oklahoma—October 21, 2003)

In 1998, James Delk executed a warranty deed conveying equal fractional interests in his residence to six relatives, including his daughter, Debra, who became the plaintiff in this case, as well as grandson John (Debra's son), and children Julian, Cheyenne, Tanner (Mabry), and nephew Cody. Debra lived with John and his family in the home until it was destroyed by fire in September 2001. (*See id.* at *3–*4.)

The home was insured under a Markell American Insurance Company policy with limits of $104,000 issued to Debra Delk as the "sole named insured." The application "did not ask [Debra] about the nature or extent of her legal title." (*Id.* at *4.) Debra took over the policy from her father and made the premium payments of $786.00 per year. After the fire, Debra made a claim for benefits. On investigation, the insurer was willing to pay her only one-sixth of the benefits, reflecting her share of interest in the burned property.

Debra sued for the full policy benefits in an action commenced in federal court in Oklahoma. The federal court was unable to determine Oklahoma law on the subject and certified to the Oklahoma Supreme Court a question as to whether a policyholder was limited to recovering only up to the amount of her percentage interest in the property, the procedure was established and permitted by the Oklahoma Revised Uniform Certification of Questions of Law Act, 20 O.S. 2000 §§ 1601, 1602. The Supreme Court reformulated the question sent to it by the federal court to read:

> May an insured co-tenant who occupies the insured property as her home and who has insured the property for its full value recover (within the policy limits) more than the value of her fractional legal interest in the property?

See id. at *2.

The Court answered "yes" to the question, finding that Debra had sufficient insurable interest under the facts of the case to qualify as an insured subject to full policy benefits.

In making this determination, the *Delk v. Markell* Court applied the prevailing "factual expectancy" test for determining the existence of an insurable interest and concluded that Debra clearly met the test as someone who was a tenant in the home, procured the policy, paid the premiums, and appeared to be the family member charged with arranging to apply the policy benefits to rebuilding or replacing the home in which she and several family members resided. Although Debra was technically only a one-sixth owner, the Supreme Court found this not to be an impediment to recovery in light of the facts of the case.

> The ordinary person purchasing insurance cannot be expected to understand a term of art such as insurable interest in a policy of insurance. All the insured knows is that he (or she) has paid money to secure protection for the insured property and in case it is destroyed the insurer will cover the loss. The policy of insurance in this case states that it covers "your [the insured's] dwelling." On the eleventh page of the policy, fifth among a list of fifteen conditions, is the insurable interest limitation. The insurer never asked the insured about her legal interest in the insured property. The policy limits and the premium paid by this insured clearly demonstrate her intent that more than her bare legal interest be insured. An insurer cannot lead an unsophisticated insured into believing that protection of the family home has been procured and then after the occurrence of the insured event deny full coverage.
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> The objection could be raised that a co-tenant who could recover all the insurance proceeds upon a total loss of the common property might be tempted to destroy the property and then either keep the proceeds or use them to rebuild, excluding the former co-tentants from ownership of the new premises. Co-tenancy principles preclude this result. Just as the acquisition of an adverse title inures to the benefit of other joint owners, so, too, must the recovery of insurance proceeds. The insuring co-tenant in possession must account to the other joint owners for their share of the insurance proceeds and a suit to impress a constructive trust on the proceeds would be available to the other co-tenants if the insuring co-tenant fails to make the required accounting.

See id. at *28, *33 (footnotes omitted).

SEXUAL ASSAULT NOT CONSTRUED AS ARISING OUT OF USE OF AUTOMOBILE

State Farm Mutual Automobile Insurance Co. v. Kastner. P.3d, 2003 Colo. LEXIS 870 (Supreme Court of Colorado—October 14, 2003))

The Colorado Supreme Court that imposed duties on third-party insurance administrators in *Cary v. United*, discussed above, aligned itself with the auto insurance industry on the issue of when a crime involving an automobile is one "arising out of the use" of an automobile for purposes of determining whether coverage exits. Christina Kastner was kidnapped and taken in her own car to a remote location where she was

sexually assaulted. She sought coverage under her auto policy. The trial court found in her favor, as did the intermediate court of appeals. The state Supreme Court reversed and ruled in favor of the insurer, holding that:

1. where the motor vehicle is being used in a manner reasonably foreseeable at the time the parties contracted for the insurance; and
2. the "use" of the vehicle is inextricably linked to plaintiff's injury, the plaintiff is entitled to recover, both because we conclude that the use was not reasonably foreseeable and because we conclude that the sexual assault had an insufficient causal nexus with the sue of the vehicle, we now hold that Kastner's State Farm policy did not cover her injuries.

See id. at *3–*4.

In reaching this determination, the Court appeared to find it critical that Kastner was abducted while outside her car in a shopping center parking lot. Although she was on the way to her car, the vehicle appeared not to have played a role in the assailant's selection of her as a victim. (*See id.* at *5–*6.) However, the car was used to transport her to a secluded section of Palmer Park in Colorado Springs, where the assault took place, and was also used by the assailant to return to a more urban location where he abandoned Kastner in the car and escaped. In addition, Kastner had attempted to escape while in the Park but was thwarted in part by the automatic seat belt in the vehicle.

Perhaps unsurprisingly, three Justices dissented, a close split in the Colorado Supreme Court that mirrors the close split of courts across the nation in these types of cases. To the dissenters, the majority's construction of "arising out of the use" was too narrow. The dissent's view was that the "test should be whether an injury originates in, grows out of, or flows from the sue of a car." The "ongoing assault, kidnapping, and rape were causally related to the transportation use of the car." (*See id.* at *35.) In addition, the dissent held the view that without access to Kastner's car, perpetration of the crime would have been far more difficult and that the vehicle was not only the "*situs* for an injury" but also contributed to the injury. (*See id.* at *43–*44.)