Sedgwick LLP

Washington Bad Faith Law At A Glance

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FOREWORD

Washington state can be a difficult jurisdiction for insurers. Insurers' duties of care are sometimes interpreted or applied quite broadly, and if an insurer breaches those duties, it can be subjected to tort damages, coverage by estoppel, treble damages, and an award of reasonable attorneys' fees.

To help insurers avoid or mitigate their extra-contractual exposure, Sedgwick LLP's Bob Meyers prepared *Washington Bad Faith Law At A Glance*, arguably the seminal and most comprehensive resource on Washington insurance bad faith law. In his paper, Mr. Meyers cites notable Washington authorities relating to common law bad faith, the Consumer Protection Act, and the Insurance Fair Conduct Act. For insurers' ease of reference, he also includes excerpts from notable Washington insurance statutes and regulations.

In the Third Edition, Mr. Meyers addresses several recent developments about which any insurer with exposure in Washington should be aware, including [1] the Washington Supreme Court's conclusion that a regulatory violation is not independently actionable under the Insurance Fair Conduct Act, [2] the Ninth Circuit Court of Appeals' conclusion that an insured under a liability insurance policy is not a "first party claimant" with a right of action under the Insurance Fair Conduct Act, [3] a Washington Court of Appeals' reaffirmation that an insurer generally has the right to select defense counsel, [4] a federal judge's reaffirmation that estoppel cannot be used to create insurance coverage that never existed, and [5] a Washington Court of Appeals' conclusion that an insured may assert a bad faith claim against an insurer's claim adjuster. He also discusses recently filed Washington cases that address an insured's burden of proving bad faith, the presumption of harm, coverage by estoppel, privilege and work product issues, and damage issues.

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For regular updates on insurance law in Washington state and other jurisdictions, visit Sedgwick's Insurance Law Blog at www.SedgwickInsuranceLaw.com or follow us on Twitter @SedgwickLLP.

Bob Meyers has extensive experience representing U.S. and international insurers in complex, high-value insurance matters, including advising clients about their rights and obligations under insurance policies, bad faith law, and insurance statutes and regulations, and representing insurers in disputes and lawsuits. Mr. Meyers has experience with a wide variety of insurance coverages and insurance claims, including general liability, intellectual property, advertising injury, bodily injury liability, property damage liability, professional liability, directors & officers liability, errors & omissions liability, employment practices liability, environmental liability, sexual misconduct liability, homeowners liability, auto liability, fidelity bonds, first-party property, health, excess, and umbrella. He also has considerable experience handling and managing complex multi-jurisdictional disputes and lawsuits, long-tail insurance claims, and insurance claims involving "lost" policies. He has also assisted clients with claims and disputes that have a nexus to many different jurisdictions, including Washington, Oregon, California, Hawaii, Alaska, Montana, Colorado, Nevada, Idaho, New York, New Jersey, Texas, Illinois, Tennessee, and British Columbia.

Several publications have recognized Mr. Meyers for his legal services. Mr. Meyers has earned an AV peer-review and client-review rating from Martindale-Hubbell, he has been recognized as a "Super Lawyer" and "Rising Star" in Washington Law & Politics, he has been recognized as a "Top Lawyer" in Seattle Met, and he has earned a "Superb" rating from Avvo.

Mr. Meyers has lectured and published papers on a variety of legal topics, including insurance law, bad faith law, attorney-client privilege issues, and procedural and discovery issues.

He is admitted to practice in Washington, Oregon, the U.S. Supreme Court, the Ninth Circuit Court of Appeals, and the U.S. District Courts for the Western District of Washington, Eastern District of Washington, and District of Oregon.

Contents

§ 1. Common Law Bad Faith

§ 1.1. Duty — General

In all insurance matters, all persons owe a duty of good faith, to abstain from deception, to practice honesty and equity, and to preserve inviolate the integrity of insurance. RCW 48.01.030; **Appendix A.**

A cause of action for common law bad faith is a tort. *See, e.g., St. Paul Fire & Marine Ins. Co. v. Onvia, Inc.*, 165 Wn.2d 122, 130, 196 P.3d 664, 668 (2008).

§ 1.1.a. Duty and Breach — Insurers

An insurer owes its insured a duty of good faith. *See, e.g., St. Paul Fire & Marine Ins. Co. v. Onvia, Inc.*, 165 Wn.2d 122, 129-130, 196 P.3d 664, 667-668 (2008).

A third-party claimant does not have a direct right of action against an insurer for an alleged breach of the duty of good faith. *See, e.g., Tank v. State Farm Fire & Cas. Co.*, 105 Wn.2d 381, 391, 715 P.2d 1133, 1139 (1986). Likewise, at least one Washington judge has concluded that an insured's spouse and marital community do not have a direct right of action for insurance bad faith. *See, e.g., Staheli v. Chicago Insurance Company*, No. C16-0096-JCC, 2016 WL 2930444, at *4 (W.D. Wash. May 19, 2016). However, an insured may assign its bad faith claim, and as an assignee, a third party would "step into the shoes" of the insured. *See, e.g., Safeco Ins. Co. of Am. v. Butler*, 118 Wn.2d 383, 397-399, 823 P.2d 499, 507-509 (1992).

An insurer's duty of good faith applies to claims involving either first-party insurance or third-party insurance. *See, e.g., St. Paul Fire & Marine Ins. Co. v. Onvia, Inc.*, 165 Wn.2d 122, 130, 196 P.3d 664, 668 (2008).

An insurer's duty of good faith is separate from an insurer's duties under the insurance policy, and an insured may maintain a bad faith cause of action even if its insurer owes no duty to indemnify. *See, e.g., Coventry Associates v. American States Ins. Co.*, 136 Wn.2d 269, 279, 961 P.2d 933, 936-937 (1998) (involving first-party insurance); *St. Paul Fire & Marine Ins. Co. v. Onvia, Inc.*, 165 Wn.2d 122, 132, 196 P.3d 664, 669 (2008) (involving third-party insurance).

Fundamentally, an insurer's duty of good faith connotes a duty to consider an insured's interests equally. *See, e.g., Tank v. State Farm Fire & Cas. Co.*, 105 Wn.2d 381, 387, 391, 715 P.2d 1133, 1137, 1139 (1986).

The Washington Administrative Code (WAC) identifies various unfair claims settlement practices and prescribes minimum standards for acknowledging communications, investigating claims, and settling claims. **Appendix B.** An insurer's breach of these regulations is evidence of common law bad faith. *See, e.g., Coventry Associates v. American States Ins. Co.*, 136 Wn.2d 269, 276-279, 961 P.2d 933, 936-938 (1998); *St. Paul Fire & Marine Ins. Co. v. Onvia, Inc.*, 165 Wn.2d 122, 131-132, 196 P.3d 664, 668-669 (2008).

An insurer's breach of the insurance policy is evidence of common law bad faith. *See, e.g., Coventry Associates v. American States Ins. Co.*, 136 Wn.2d 269, 276-279, 961 P.2d 933, 935-938 (1998); *St. Paul Fire & Marine Ins. Co. v. Onvia, Inc.*, 165 Wn.2d 122, 132, 196 P.3d 664, 668-669 (2008).

To assert a viable cause of action for common law bad faith, an insured must prove that the insurer breached its duty of care and that the breach was "unreasonable, frivolous, or unfounded." *See, e.g., Lloyd v. Allstate Ins. Co.*, 167 Wn. App. 490, 496, 275 P.3d 323, 326 (2012). The Washington Supreme Court has recognized, "Claims of bad faith are not easy to establish, and an insured has a heavy burden to meet." *Overton v. Consolidated Ins. Co.*, 145 Wn.2d 417, 433, 38 P.3d 322, 329 (2002). *See also Bridgham-Morrison v. National General Assurance Company*, No. C15-927-RAJ, 2016 WL 2739452, at *4 (W.D. Wash. May 11, 2016); *Lear v. IDS Prop. Cas. Ins. Co.*, No. C14-1040-RAJ, 2017 U.S. Dist. LEXIS 4909, at *8 (W.D. Wash. Jan. 11, 2017).

Whether an insurer's alleged act or omission was unreasonable, frivolous, or unfounded depends on the facts and circumstances that existed at the time of the alleged act or omission. *See, e.g., Keller v. Allstate Ins. Co.*, 81 Wn. App. 624, 633-634, 915 P.2d 1140, 1145 (1996) ("To determine whether a defendant acted reasonably, fairly, or deceptively, it is necessary to consider the circumstances surrounding the allegedly improper act"); *Anderson v. State Farm Mut. Ins. Co.*, 101 Wn. App. 323, 329-330, 2 P.3d 1029, 1033 (2000); *Lloyd v. Allstate Ins. Co.*, 167 Wn. App. 490, 496, 275 P.3d 323, 326 (2012); *Lear v. IDS Prop. Cas. Ins. Co.*, No. C14-1040-RAJ, 2017 U.S. Dist. LEXIS 4909, at *8 (W.D. Wash. Jan. 11, 2017).

An insured does not have a viable common law bad faith claim if the insurer simply made a good faith mistake. *See, e.g., Coventry Associates v. American States Ins. Co.*, 136 Wn.2d 269, 280, 961 P.2d 933, 937-938 (1998) ("Of course, insurance companies, like every other organization, are going to make some mistakes. As long as the insurance

company acts with honesty, bases its decision on adequate information, and does not overemphasize its own interests, an insured is not entitled to base a bad faith or CPA claim against its insurer on the basis of a *good* faith mistake"); *Insurance Co. of State of Pennsylvania v. Highlands Ins. Co.*, 59 Wn. App. 782, 786-787, 801 P.2d 284, 286-287 (1990) ("[M]istakes and clumsiness alone do not amount to bad faith.… Neither denial of coverage because of a debatable coverage question nor delay, unaccompanied by an unfounded or frivolous reason, constitutes bad faith"); *Lear v. IDS Prop. Cas. Ins. Co.*, No. C14-1040-RAJ, 2017 U.S. Dist. LEXIS 4909, at *8 (W.D. Wash. Jan. 11, 2017).

Whether an insurer acted in bad faith is a question of fact. *See, e.g., St. Paul Fire & Marine Ins. Co. v. Onvia, Inc.*, 165 Wn.2d 122, 130, 196 P.3d 664, 668 (2008). As such, a court may resolve that question on summary judgment if a reasonable person could only conclude that the insurer's act or omission was reasonable or unreasonable. *Wichser v. Safeco Ins. Co.*, No. C15-738-RAJ, 2016 U.S. Dist. LEXIS 162929, at *9-*10 (W.D. Wash. Nov. 22, 2016).

§ 1.1.b. Duty — Insurers' Adjusters

Washington courts have reached different conclusions about whether an insured may assert a bad faith claim against an insurer's claim adjuster. *See, e.g.*, *Int'l Ultimate v. St. Paul Fire & Marine*, 122 Wn. App. 736, 757, 87 P.3d 774, 787 (2004) (finding that insured could not assert bad faith claim against insurer's adjuster); *Merriman v. Am. Guar. & Liab. Ins. Co.*, 198 Wn. App. 594, 611-613, 396 P.3d 351, 359-360 (2017) (declaring that insured could assert bad faith claim against insurer's adjuster). *See also Lease Crutcher Lewis WA, LLC v. National Union Fire Ins. Co. of Pittsburgh, PA*, No. C08-1862-RSL, 2009 U.S. Dist. LEXIS 97899, at *5-*7 (W.D. Wash. Oct. 20, 2009) (denying Rule 12(b)(6) motion to dismiss bad faith claim against insurer's adjuster, finding that an adjuster owes an insured a duty of good faith).

§ 1.1.c. Duty — Insureds

Insureds also owe a duty of good faith. RCW 48.01.030; **Appendix A**. *See also, Public Employees Mut. Ins. Co. v. Kelly*, 60 Wn. App. 610, 619, 805 P.2d 822, 827 (1991); *Cox v. Continental Cas. Co.*, No. C132288-MJP, 2014 WL 6632371, at *11 (W.D. Wash. Nov. 21, 2014) (denying insured's motion to dismiss an insurer's affirmative defense of comparative bad faith, observing that the Washington Administrative Code imposes burdens on insureds and that a Washington statute requires the trier of fact to consider comparative fault).

As an analytically distinct but related matter, if an insured's attorney pursues an insurance bad faith claim in bad faith, that attorney can be held personally liable for the attorneys' fees and costs that are reasonably attributable to the attorney's conduct. *See, e.g., Nielsen v. Unum Life Ins. Co. of America*, 166 F.Supp.3d 1193, 1197-1198 (W.D. Wash. 2016).

§ 1.2. Harm and Remedies

Harm is an essential element of a common law bad faith claim. *Safeco Ins. Co. v. Butler*, 118 Wn.2d 383, 389, 823 P.2d 499, 503 (1992).

§ 1.2.a. Tort Damages — Emotional Distress — Policy Benefits

Because bad faith is a tort, a plaintiff is not limited to economic damages, but may seek to recover tort damages. *See, e.g., Coventry v. American States Ins. Co.*, 136 Wn.2d 269, 284-285, 961 P.2d 933, 939–940 (1998).

In common law bad faith claims, certain Washington judges have allowed plaintiffs to seek and recover emotional distress damages as tort damages. *See, e.g., Miller v. Kenny*, 180 Wn. App. 772, 801–802, 325 P.3d 278, 293 (2014); *Anderson v. State Farm Mut. Ins. Co.*, 101 Wn. App. 323, 333, 2 P.3d 1029, 1035 (2000). In turn, certain of those Washington judges have allowed an insured to prove its emotional distress claim with only the insured's testimony. *See, e.g., Woo v. Fireman's Fund Ins. Co.*, 161 Wn.2d 43, 70, 164 P.3d 454, 467-468 (2007) (summarily affirming award of emotional distress damages that was supported only by the insured's testimony); *Scanlon v. Life Ins. Co. of North America*, 670 F.Supp.2d 1181 (W.D. Wash. 2009) ("[A] party can rely exclusively on his or her own testimony to establish emotional distress in a bad faith insurance case"). *See also Taladay v. Metropolitan Group Property and Casualty Insurance Company*, No. C14-1290-JPD, 2016 WL 3681469, at *21 (W.D. Wash. July 6, 2016) ("The evidentiary standard for bad faith emotional distress is different from the evidentiary standard for negligent infliction of emotional distress, which requires the emotional response to be corroborated by objective symptomology.… [U]nder Washington law, [insureds] may seek general damages for their emotional distress caused by [insurers'] bad faith without introducing expert testimony showing objective symptomology of that emotional distress").

That said, in October 2014, the Washington Supreme Court observed that [1] it has not yet determined whether emotional distress damages are recoverable in a claim for common law insurance bad faith, and [2] no lower court has specifically analyzed whether emotional distress damages are recoverable in such a claim. *See Schmidt v. Coogan*, 181 Wn.2d 661, 676, 335 P.3d 424, 433 (2014).

In a bad faith claim relating to first-party insurance, an insured may not recover policy benefits as damages. *See, e.g., Coventry Associates v. American States Ins. Co.*, 136 Wn.2d 269, 284, 961 P.2d 933, 939 (1998); *McGee-Grant v. American Family Mutual Insurance*, 157 F.Supp.3d 939, 943 (W.D. Wash. 2016) (declaring that an insured under a first-party PIP coverage was not entitled to recover her "contractual damages" under her bad faith claim).

§ 1.2.b. Presumption of Harm

In a bad faith claim relating to third-party insurance, if an insurer commits bad faith by breaching a fundamental duty in the insurance contract such as the duty to defend or indemnify, a Washington court might presume that the insured suffered harm. *See, e.g., Safeco Ins. Co. v. Butler*, 118 Wn.2d 383, 390, 823 P.2d 499, 503-504 (1992); *Kirk v. Mount Airy Ins. Co.*, 134 Wn.2d 558, 562-565, 951 P.2d 1124, 1126-1128 (1998); *St. Paul Fire & Marine Ins. Co. v. Onvia, Inc.*, 165 Wn.2d 122, 133, 196 P.3d 664, 669 (2008); *Mut. of Enumclaw Ins. Co. v. Day,* 197 Wn. App. 753, 761-763, 393 P.3d 786, 791-792 (2017).

A Washington court will not presume harm if an insurer's bad faith involved a "procedural misstep" rather than a breach of the insurer's duty to defend, settle, or indemnify. *See, e.g., St. Paul Fire & Marine Ins. Co. v. Onvia, Inc.*, 165 Wn.2d 122, 133, 196 P.3d 664, 669 (2008); *Mut. of Enumclaw Ins. Co. v. Day,* 197 Wn. App. 753, 763-764, 393 P.3d 786, 792 (2017); *Absher Const. Co. v. North Pacific Ins. Co.*, 861 F.Supp.2d 1236, 1243-1244 (W.D. Wash. 2012).

An insurer can rebut the presumption of harm by proving that its acts or omissions did not harm the insured. *See, e.g., Safeco Ins. Co. v. Butler*, 118 Wn.2d 383, 394, 823 P.2d 499, 506 (1992); *Mut. of Enumclaw Ins. Co. v. Day,* 197 Wn. App. 753, 763, 393 P.3d 786, 789, 792 (2017). Rebutting the presumption of harm can be a difficult burden. *Accord, see, e.g., Mutual of Enumclaw Ins. Co. v. Dan Paulson Const., Inc.*, 161 Wn.2d 903, 920-922, 169 P.3d 1, 10-12 (2007). However, there are examples in which Washington courts have declared that insurers have satisfied that burden. *See, e.g., Mut. of Enumclaw Ins. Co. v. Day,* 197 Wn. App. 753, 757, 761, 766, 393 P.3d 786, 789, 791, 793 (2017); *Cardenas v. Navigators Ins. Co.*, No. CI 1-5578-RJB, 2011 WL 6300253, at *7 (WD. Wash. Dec. 16, 2011).

A Washington court will not presume harm in a bad faith claim relating to first-party insurance. *See, e.g., Coventry Associates v. American States Ins. Co.*, 136 Wn.2d 269, 281, 961 P.2d 933, 938 (1998).

§ 1.2.c. Coverage by Estoppel

In a bad faith claim relating to third-party insurance, if an insurer commits bad faith by breaching its duty to defend, settle, or indemnify, and if the insured suffered harm, a Washington court might impose "coverage by estoppel," — i.e., preclude an insurer from asserting coverage defenses. *See, e.g., Coventry Associates v. American States Ins. Co.*, 136 Wn.2d 269, 284, 961 P.2d 933, 939 (1998); *Safeco Ins. Co. v. Butler*, 118 Wn.2d 383, 392, 823 P.2d 499, 505 (1992); *Kirk v. Mt. Airy Ins. Co.*, 134 Wn.2d 558, 563-565, 951 P.2d 1124, 1127-1128 (1998); *Truck Ins. Exch. v. Vanport Homes, Inc.*, 147 Wn.2d 751, 759, 764-766, 58 P.3d 276, 281, 284 (2002); *Ledcor Industries (USA), Inc. v. Mutual of Enumclaw Ins. Co.*, 150 Wn. App. 1, 10-11, 206 P.3d 1255, 1261 (2009).

A Washington court will not impose coverage by estoppel if an insurer's bad faith involved a "procedural misstep" rather than a breach of the insurer's duty to defend, settle, or indemnify. *See, e.g., St. Paul Fire & Marine Ins. Co. v. Onvia, Inc.*, 165 Wn.2d 122, 133, 196 P.3d 664, 669 (2008); *Mut. of Enumclaw Ins. Co. v. Day,* 197 Wn. App. 753, 763-764, 393 P.3d 786, 792 (2017); *Absher Const. Co. v. North Pacific Ins. Co.*, 861 F.Supp.2d 1236, 1243-1244 (W.D. Wash. 2012).

A Washington court will not use estoppel to expand coverage or to create coverage that never existed. *See, e.g., Saunders v. Lloyd's of London*, 113 Wn.2d 330, 335-343, 779 P.2d 249, 252-256 (1989); *United Servs. Auto. Ass'n v. Speed*, 179 Wn. App. 184, 201, 317 P.3d 532, 542 (2014) ("[I]nsurance coverage cannot be created by equitable estoppel"); *T-Mobile USA Inc. v. Selective Ins. Co. of Am.*, No. C15-1739-JLR, 2017 U.S. Dist. LEXIS 99857, at *21-*22 (W.D. Wash. June 27, 2017) ("Estoppel cannot be used to create what does not and never did exist").

A Washington court will not impose coverage by estoppel in a bad faith claim relating to first-party insurance. *See, e.g., Coventry Associates v. American States Ins. Co.*, 136 Wn.2d 269, 284, 961 P.2d 933, 939 (1998). *But see, Tarasyuk v. Mutual of Enumalw Ins. Co.*, No. 32389-7-III, 189 Wn. App. 1050, 2015 WL 5124861, at *7 (Sept. 1, 2015) (declaring in *dicta*, and in the context of a first-party property insurance dispute under a homeowners' policy, "[I]f bad faith is found, [the insurer] would be estopped from asserting the claim is outside the scope of the insurance coverage").

§ 1.2.d. Reasonable Attorneys' Fees

If an insured prevails in a common law bad faith claim, generally, it is not entitled to an award of reasonable attorneys' fees. *Accord, see, e.g.*, 35 Wa. Prac., Washington

Insurance Law and Litigation § 23:1 (2014-2015 ed.). *See generally Dayton v. Farmers Ins. Group.*, 124 Wn.2d 277, 280, 876 P.2d 896, 897-898 (2006) (observing that Washington follows the American rule *vis-a-vis* attorneys' fees, and that a Washington court may not award attorneys' fees to a prevailing party unless such an award is authorized by a contract, a statute, or a recognized ground in equity).

§ 1.3. Defenses

Reasonableness is a complete defense to an insured's common law bad faith claim. *See, e.g., Pleasant v. Regence Blue Shield*, 181 Wn. App. 252, 270, 325 P.3d 237, 247 (2014); *Dombrosky v. Farmers Ins. Co. of Wash.*, 84 Wn. App. 245, 260, 928 P.2d 1127, 1136 (1996).

An insured's fraud or intentional misrepresentation during an insurance claim is a complete defense to an insured's common law bad faith claim. *See, e.g., Mutual of Enumclaw Ins. Co. v. Cox*, 110 Wn.2d 643, 651-653, 757 P.2d 499, 504 (1988); *Johnson v. Safeco Ins. Co. of America*, 178 Wn. App. 828, 846-849, 316 P.3d 1054, 1062-1064 (2013).

§ 2. Consumer Protection Act (CPA) – RCW 19.86.020

§ 2.1. Purpose and Prima Facie Case

The Consumer Protection Act (CPA) serves broadly to prohibit "unfair or deceptive acts or practices in trade or commerce." RCW 19.86.020; **Appendix C**. It provides individuals and entities with a private right of action if they have sustained injury to business or property because of an unfair or deceptive act or practice. RCW 19.86.090; **Appendix C**.

The Washington Legislature enacted a statute that provides that unfair or deceptive acts in the business of insurance are actionable under the CPA, and specifically provides that it is an unfair or deceptive act to unreasonably deny coverage or payment of benefits to a first party claimant. RCW 48.30.010(7). **Appendix A**. *Accord, see, e.g., Industrial Indem. Co. of the Northwest, Inc. v. Kallevig*, 114 Wn.2d 907, 920-925, 792 P.2d 520, 528-530 (1990). The Legislature also empowered the Washington Insurance Commissioner to promulgate regulations that identify specific acts or omissions that are unfair or deceptive. RCW 48.30.010(2); **Appendix A**. Those regulations are the WAC claim handling regulations. **Appendix B**.

To prevail in a CPA claim, the plaintiff must establish five elements: [1] an unfair or deceptive act, [2] in trade or commerce, [3] that impacts the public interest, and [4] that proximately causes, [5] injury to business or property. *See, e.g., Industrial Indem. Co. of the Northwest, Inc. v. Kallevig*, 114 Wn.2d 907, 920-921, 792 P.2d 520, 528 (1990).

§ 2.2. Right of Action — Third Parties — Assignments

An insured has a direct right of action against its insurer under the CPA. *See, e.g., Tank v. State Farm Fire & Cas. Co.*, 105 Wn.2d 381, 394, 715 P.2d 1133, 1140 (1986).

A third-party claimant does not have a direct right of action against an insurer under the CPA. *See, e.g., Tank v. State Farm Fire & Cas. Co.*, 105 Wn.2d 381, 393-395, 715 P.2d 1133, 1140 (1986). Likewise, at least one Washington judge has concluded that an insured's spouse and marital community do not have a direct right of action against an insurer under the CPA. *See, e.g., Staheli v. Chicago Insurance Company*, No. C16-0096-JCC, 2016 WL 2930444, at *4 (WD. Wash. May 19, 2016). However, an insured may assign its CPA claim, and as an assignee, a third party would "step into the shoes" of the insured. *See, e.g., Steinmetz for benefit of Palmer v. Hall-Conway-Jackson, Inc.*, 49 Wn. App. 223, 227-229, 741 P.2d 1054, 1056-1057 (1987).

§ 2.3. Liability Elements

In the context of insurance, Washington courts have held that the following acts or omissions satisfy the first three elements of a *prima facie* CPA claim: [1] an unreasonable denial of coverage or payment of benefits, [2] an unreasonable violation of WAC § 284-30-330, and/or [3] common law bad faith. *See, e.g., James E. Torina Fine Homes, Inc. v. Mutual of Enumclaw Ins. Co.*, 118 Wn. App. 12, 20-21, 74 P.3d 648, 652-653 (2003) (an unreasonable denial of coverage or a violation of WAC § 284-30-330 satisfies the first three elements of a CPA claim); *Truck Ins. Exch. v. Vanport Homes, Inc.*, 147 Wn.2d 751, 764, 58 P.3d 276, 281-282 (2002) (a violation of WAC § 284-30-330 is a per se violation of the CPA); *Tank v. State Farm Fire & Cas. Co.*, 105 Wn.2d 381, 394, 715 P.2d 1133, 1140 (1986) (common law bad faith is a per se violation of the CPA); *Dees v. Allstate Ins. Co.*, 933 F.Supp.2d 1299, 1311 n. 11 (WD. Wash. 2013) (a finding of common law bad faith satisfies the first three elements of a CPA claim); *Ledcor Industries (USA) Inc. v. Virginia Sur. Co., Inc.*, No. C09-1807-RSM, 2011 WL 6140957, at *8-*9 (W.D. Wash. Dec. 9, 2011) (common law bad faith or a violation of WAC § 284-30-330 is a per se violation of the CPA); *Ki Sin Kim v. Allstate Ins. Co.*, 153 Wn. App. 339, 356 n. 4, 223 P.3d 1180, 1189 n. 4 (2009) ("If there is a reasonable basis for the insurer's actions, those actions are not in violation of the CPA").

A single violation of the WAC's claim handling regulations can give rise to a cause of action under the CPA. *See, e.g.,*

Industrial Indem. Co. of the Northwest, Inc. v. Kallevig, 114 Wn.2d 907, 923-924, 792 P.2d 520, 529-530 (1990).

The CPA does not apply to a good faith mistake. *See, e.g., Coventry Associates v. American States Ins. Co.*, 136 Wn.2d 269, 280, 961 P.2d 933, 937-938 (1998).

§ 2.4. Injury and Remedies

To prevail in a CPA claim, an insured must prove that a violation of the CPA proximately caused "injury to business or property." RCW 19.86.090; **Appendix C**.

A plaintiff need not demonstrate actual monetary damages to establish "injury to business or property." *See, e.g., Ledcor Industries (USA), Inc. v. Mutual of Enumclaw Ins. Co.*, 150 Wn. App. 1, 12 n. 18, 206 P.3d 1255, 1261 n. 18 (2009); *Dees v. Allstate Ins. Co.*, 933 F.Supp.2d 1299, 1310 (WD. Wash. 2013).

§ 2.4.a. Emotional Distress and Personal Injury

Emotional distress damages are not recoverable under the CPA. *See, e.g., Ledcor Industries (USA), Inc. v. Mutual of Enumclaw Ins. Co.*, 150 Wn. App. 1, 13, 206 P.3d 1255, 1262 (2009).

Likewise, under the CPA, a plaintiff may not recover damages for personal injuries, damages that are derivative of personal injuries (e.g., medical bills, insurance benefits for medical bills), or damages for economic injuries if the plaintiff sustains economic injuries and personal injuries in the same act. *See, e.g., Dees v. Allstate Ins. Co.*, 933 F.Supp.2d 1299, 1310 (W.D. Wash. 2013); *Kovarik v. State Farm Mut. Auto. Ins. Co.*, No. C15-1058-TSZ, 2016 U.S. Dist. LEXIS 118467, at *8-*9 (W.D. Wash. Aug. 31, 2016); *Heide v. State Farm Mutual Auto Ins. Co.*, No. C16-652-TSZ, 2017 U.S. Dist. LEXIS 81341, at *9 (W.D. Wash. May 26, 2017).

§ 2.4.b. Treble Damages

If the insured sustained actual damages, the CPA grants the court discretion to award treble damages of up to $25,000. RCW 19.86.090; **Appendix C**.

An award of treble damages must be based on "the award of damages … [for] the actual damages sustained." RCW 19.86.090; **Appendix C**. So, if multiple violations of the CPA result in the same actual damages, the Court has discretion to award exemplary damages only once. *North Seattle Health Center Corp. v. Allstate Fire & Casualty Insurance Company*, No. C14-1680-JLR, 2016 WL 1643979, at *5 n. 4 (W.D. Wash. April 26, 2016); *Edmonds v. John L. Scott Real Estate, Inc.*, 87 Wn. App. 834, 849-850, 942 P.2d 1072, 1080-1081 (1997).

Attorneys' fees do not constitute "actual damages" for purposes of calculating an award of treble damages under the CPA. *See, e.g., Sign-O-Lite Signs, Inc. v. DeLaurenti Florists, Inc.*, 64 Wn. App. 553, 565-566, 825 P.2d 714, 721 (1992); *Schreib v. American Family Mut. Ins. Co.*, 192 F.Supp.3d 1129, 1141 (W.D. Wash. 2015). *But see, Nelson v. Geico General Ins. Co.*, No. 72632-3-1, 192 Wn. App. 1007, 2016 WL 112475, at *7-*9 (Jan. 11, 2016) ("The attorney fees incurred in bringing a CPA claim do not qualify as a compensable injury. But the cost of investigating an unfair practice may qualify as an injury under appropriate circumstances.… [P]art of the cost of hiring an attorney may also be injury under the CPA. Looking at this case in the light most favorable to the insureds … [t]heir agreement with their attorney was both for investigation and prosecution of claims").

§ 2.4.c. Reasonable Attorneys' Fees

If an insured can satisfy all five elements of its prima facie case under the CPA, it is entitled to an award of reasonable attorneys' fees, regardless of whether it sustained actual damages. *See, e.g., Ledcor Industries (USA), Inc. v. Mutual of Enumclaw Ins. Co.*, 150 Wn. App. 1, 12 n. 18, 206 P.3d 1255, 1261 n. 18 (2009).

§ 2.5. Defenses

Reasonableness is a complete defense to an insured's CPA claim. *See, e.g., Pleasant v. Regence Blue Shield*, 181 Wn. App. 252, 270, 325 P.3d 237, 247 (2014); *Dombrosky v. Farmers Ins. Co. of Wash.*, 84 Wn. App. 245, 260, 928 P.2d 1127, 1136 (1996).

An insured's fraud or intentional misrepresentation during an insurance claim is a complete defense to an insured's CPA claim. *See, e.g., Mutual of Enumclaw Ins. Co. v. Cox*, 110 Wn.2d 643, 651-653, 757 P.2d 499, 504 (1988); *Johnson v. Safeco Ins. Co. of America*, 178 Wn. App. 828, 846-849, 316 P.3d 1054, 1062-1064 (2013).

§ 3. Insurance Fair Conduct Act (IFCA) – RCW 48.30.015

§ 3.1. "First Party Claimant"

IFCA grants a right of action only to a "first party claimant." RCW 40.30.015(1); **Appendix B**. The statute defines a first party claimant to mean "an individual, corporation, association, partnership, or other legal entity asserting a right to payment as a covered person under an insurance policy or insurance contract arising out of the occurrence of the contingency or loss covered by such a policy or contract." RCW 48.30.015(4); **Appendix B**.

§ 3.1.a. Insureds on Third-Party (Liability) Policies

As of the date of this publication, no Washington appellate court has published a decision that specifically evaluates whether an insured on a third-party (liability) insurance policy can constitute a "first party claimant" under IFCA. In *dicta*, the state appellate courts have summarily reached different conclusions. *See Tarasyuk v. Mut. of Enumclaw Ins. Co.,* No. 32389-7-III, 189 Wn. App. 1050, 2015 Wash. App. LEXIS 2124, at *21 (Sept. 1, 2015) (stating summarily and in *dicta*, "Washington's IFCA applies exclusively to first-party insurance contracts"); *Trinity Universal Ins. Co. of Kansas v. Ohio Cas. Ins. Co.*, 176 Wn. App. 185, 200-202, 312 P.3d 976, 985-986 (2013) (stating summarily and in *dicta* that a named insured assignor under a liability policy "m[et] [IFCA's] first party definition").

In federal court, the Ninth Circuit has concluded that an insured on a liability insurance policy is not a "first party claimant" under IFCA. *Cox v. Continental Cas. Co.*, No. 15-35517, No. 15-35525, 2017 U.S. App. LEXIS 11722, at *11-*12 (9th Cir. June 30, 2017) ("To bring an IFCA claim, a plaintiff must be a 'first party claimant.…' Here … the policy in question is not a first party policy; thus, the Plaintiffs … cannot be a first party claimant") *aff'g Cox v. Continental Cas. Co.*, No. C13-2288-MJP, 2014 WL 2011238, at *6 (W.D. Wash. May 16, 2014) *and aff'g Cox v. Continental Cas. Co.*, No. C13-2288-MJP, 2014 WL 2560433, at *2-*3 (W.D. Wash. June 6, 2014). The Ninth Circuit's decision appears to resolve a long-time split of authority among Washington federal district judges. *Compare, e.g.*, *Central Puget Sound Regional Transit Authority v. Lexington Ins. Co.*, No. C14-778-MJP, 2014 WL 5859321, at *2-*4 (WD. Wash. Nov. 12, 2014) (declaring that an insured under a third-party professional liability policy was not a first party claimant under IFCA); *King County v. Travelers Indem. Co.*, No. C14-1957-MJP, 2015 WL 1867098, at *1-*2 (WD. Wash. April 23, 2015) (declaring that an insured under a third-party liability policy was not a first party claimant under IFCA); *Merrill v. Crown Life Ins. Co.*, 22 F.Supp.3d 1137, 1148 (E.D. Wash. 2014) (observing that IFCA "applies exclusively to first-party insurance contracts") *with e.g.*, *City of Bothell v. Berkley Regional Specialty Ins. Co.*, No. C14-0791-RSL, 2014 WL 5110485, at *10 (W.D. Wash. Oct. 10, 2014) (declaring that an additional insured under a liability policy was a first party claimant under IFCA); *Cedar Grove Composting, Inc. v. Ironshore Specialty Ins. Co.*, No. C14-1443-RAJ, 2015 WL 3473465, at *6 (W.D. Wash. June 2, 2015) (declaring without prejudice to future briefing that an insured on a liability insurance policy was a first party claimant under IFCA "[w]ith respect to at least its demand for defense costs"); *Workland & Witherspoon, PLLC v. Evanston Ins. Co.*, 141 F.Supp.3d 1148, 1150-1151 (E.D. Wash. 2015) (declaring that an insured on a professional malpractice policy was a first party claimant under IFCA); *Navigators Specialty Ins. Co. v. Christensen Inc.*, 140 F.Supp.3d 1097, 1099-1102 (WD. Wash. 2015) (declaring that an insured under a liability policy was a first party claimant under IFCA).

§ 3.1.b. Assignees

As of the date of this publication, no Washington appellate court has published a decision that specifically evaluates whether an IFCA claim is assignable and whether the assignee may become a "first party claimant" under IFCA. *But see, Trinity Universal Ins. Co. of Kansas v. Ohio Cas. Ins. Co.*, 176 Wn. App. 185, 202, 312 P.3d 976, 985 (2013) (stating in *dicta*, "We see no reason to conclude that an IFCA claim should be treated differently than a CPA claim with respect to assignability. However, without express assignment, an insurer may not independently assert its insured's IFCA claims"); *Hopkins v. State Farm Mut. Auto. Ins. Co.*, No. C15-2014-JCC, 2017 U.S. Dist. LEXIS 31451, at *9 (W.D. Wash. March 6, 2017) (stating in *dicta*, "[The insured] had a right to sue Defendant under IFCA, and that right was assigned to Plaintiff. Plaintiff therefore has the right to bring an IFCA claim").

§ 3.1.c. Judgment Creditors

As of the date of this publication, no Washington appellate court has published a decision addressing whether a judgment creditor can be a "first party claimant" under IFCA.

In federal court, there has been a split of authority. *See, e.g., Ritchie v. Capitol Indem. Corp.*, No. C11-1903-RAJ, 2012 WL 3126809, at *7 (WD. Wash. July 31, 2012) (holding that once judgment creditor obtains rights under insurance policy, it can become a first party claimant for purposes of IFCA); *Morris v. Country Cas. Ins. Co.*, No. C11-719-RSM, 2011 WL 5166453, at *2 (WD. Wash. Oct. 31, 2011) (holding that judgment creditors are not first party claimants and have no rights under IFCA). Because the Ninth Circuit has concluded that an insured on a liability policy is not a "first party claimant" under IFCA, one can reasonably infer that the Ninth Circuit would conclude that a judgment creditor is not a "first party claimant" under IFCA. *Cox v. Continental Cas. Co.*, No. 15-35517, No. 15-35525, 2017 U.S. App. LEXIS 11722, at *11-*12 (9th Cir. June 30, 2017).

§ 3.1.d. Subrogees

An insurer does not become a "first party claimant" under IFCA and become equitably subrogated to an insured's rights to pursue an IFCA claim against another insurer by simply paying the insured's claim. *Trinity Universal Ins. Co. of Kansas v. Ohio Cas. Ins. Co.*, 176 Wn. App. 185, 200-205, 312 P.3d 976, 984-986 (2013).

§ 3.2. Actionable Conduct

IFCA provides that a first party claimant "who is unreasonably denied a claim for coverage or payment of benefits by an insurer" may bring an action under IFCA. RCW 48.30.015(1); **Appendix B**. IFCA also provides that a court may award treble damages and must award attorneys' fees if it finds that an insurer has violated certain provisions of the WAC. RCW 48.30.015(2),(3); **Appendix B**.

§ 3.2.a. Washington Administrative Code Violations

A cause of action under IFCA is viable only if an insurer has unreasonably denied coverage or payment of benefits; a violation of the Washington Administrative Code is not independently actionable under IFCA. *Perez-Crisantos v. State Farm Fire & Cas. Co.*, 187 Wn.2d 669, 680-684, 389 P.3d 476, 481-483 (2017); *Eleazer v. First Am. Title Ins. Co.*, No. 75097-6-I, 2017 Wash. App. LEXIS 731, at *21 (March 27, 2017); *Hanson v. State Farm Mut. Auto Ins. Co.*, No. C16-0568-JCC, 2017 U.S. Dist. LEXIS 86708, at *9 (W.D. Wash. June 6, 2017).

§ 3.2.b. Denial of Payment of Benefits

Certain Washington judges have interpreted "deni[al] [of] payment of benefits" to encompass "underpayments" and unreasonably low offers, even where the insurer had not denied coverage. *See, e.g., Ainsworth v. Progressive Cas. Ins. Co.*, 180 Wn. App. 52, 78-80, 322 P.3d 6, 19-21 (2014); *Morella v. Safeco Ins. Co. of Illinois*, No. C12-0672-RSL, 2013 WL 1562032, at *3-*4 (W.D. Wash. April 12, 2013) (holding that an insurer's offer of 10 percent of the insurer's internal valuation of the claim constituted a "denial of payment of benefits" under IFCA); *Heide v. State Farm Mutual Auto Ins. Co.*, No. C16-652-TSZ, 2017 U.S. Dist. LEXIS 81341, at *4-*7 (W.D. Wash. May 26, 2017).

Likewise, certain Washington judges have opined that refusing to pay a demand for coverage reasonably promptly can constitute a "deni[al] [of] payment of benefits," even if the insurer later pays the claim. *Cedar Grove Composting, Inc. v. Ironshore Specialty Ins. Co.*, No. C14-1443-RAJ, 2015 WL 3473465, at *5-*6 (WD. Wash. June 2, 2015); *Taladay v. Metropolitan Group Properol and Casualty Insurance Company*, No. C14-1290-JPD, 2016 WL 3681469, at *2, *20 (W.D. Wash. July 6, 2016). However, Washington judges have regularly recognized that if a delay in payment is due to a good faith dispute over the value of the claim, it does not constitute an actionable denial of benefits. *See, e.g., Bridgham-Morrison v. National General Assurance Company*, No. C15-927-RAJ, 2016 WL. 2739452, at *4 (WD. Wash. May 11, 2016).

§ 3.3. Damages and Remedies

§ 3.3.a. Actual Damages - Policy Benefits

IFCA provides for an award of "actual damages sustained." RCW 48.30.015(1); **Appendix B**.

As of the date of this publication, no Washington appellate court has published a decision addressing what constitutes "actual damages" under IFCA, or whether actual damages can include policy benefits.

One federal judge has interpreted "actual damages" to mean "the actual amount necessary to compensate the plaintiff for an injury or loss." *See, e.g., Morella v. Safeco Ins. Co. of Illinois*, No. C12-0672-RSL, 2013 WL 1562032, at *4-*5 (WD. Wash. April 12, 2013).

Certain Washington judges have interpreted "actual damages" to include insurance policy benefits. *Tavakoli v. Allstate Property & Cas. Ins. Co.*, No. C11-1587-RAJ, 2012 WL 6677766, at *8-*9 (W.D. Wash. Dec. 21, 2012); *Dees v. Allstate Ins. Co.*, 933 F.Supp.2d 1299, 1312-1313 (WD. Wash. 2013); *Schreib v. American Family Mut. Ins. Co.*, 192 F.Supp.3d 1129, 1137 (W.D. Wash. 2015) ("[A]n insured can recover policy benefits that were unreasonably denied, subject to the policy's limits and other applicable terms and conditions"). *See also Ainsworth v. Progressive Cas. Ins. Co.*, 180 Wn. App. 52, 80-81, 322 P.3d 6 (2014) (observing that trial court had interpreted "actual damages" to encompass policy benefits, and refusing to consider the issue because the insurer raised the issue for the first time on appeal).

Certain federal judges have declared that "actual damages" do not include attorneys' fees and litigation costs, as IFCA provides for a separate and distinct award of such fees and costs. *Schreib v. American Family Mut. Ins. Co.*, 192 F.Supp.3d 1129, 1141 (W.D. Wash. 2015); *Potter v. Am. Family Ins.*, No. C16-5406-BHS, 2016 U.S. Dist. LEXIS 176146, at *6-*7 (W.D. Wash. Dec. 20, 2016); *Bauman v. Am. Commerce Ins. Co.*, No. C15-1909-BJR, 2017 U.S. Dist. LEXIS 1030, at *9 (W.D. Wash. Jan. 4, 2017).

§ 3.3.b. Emotional Distress Damages

As of the date of this publication, no Washington appellate court has published a decision addressing whether emotional distress damages are recoverable under IFCA.

Certain federal judges in the Western District of Washington have declared that emotional distress damages are not recoverable under IFCA. *Schreib v. American Family Mut. Ins. Co.*, 192 F.Supp.3d 1129, 1139-1141 (W.D. Wash. 2015); *Taladay v. Metropolitan Group Property and Casualty Insurance Company*, No. C14-1290-JPD, 2016 WL 3681469, at *21 (WD. Wash. July 6, 2016); *Potter*

v. Am. Family Ins., No. C16-5406-BHS, 2016 U.S. Dist. LEXIS 176146, at *6 (W.D. Wash. Dec. 20, 2016).

§ 3.3.c. Treble Damages

IFCA grants the court discretion to "increase the total award of damages to an amount not exceeding three times the actual damages." RCW 48.30.015(2); **Appendix B**. As this language suggests, under IFCA, treble damages are uncapped.

Certain federal judges have declared that an award of treble damages includes the award of actual damages, and is not separate from an award of actual damages. *See, e.g., Hazzard v. Union Bankers Ins. Co.*, No. C13-1162-RSL, 2014 WL 773533 (W.D. Wash. Feb. 25, 2014); *Rain v. Ameriprise Auto & Home Ins. Agency, Inc.*, No. C14-5088-RJB, 2014 WL 1047244, at *3 (WD. Wash. March 18, 2014).

§ 3.3.d. Reasonable Attorneys' Fees

If a first party claimant can satisfy its prima facie case under IFCA, the court is required to award reasonable attorneys' fees. RCW 48.30.015(2); **Appendix B**.

§ 3.4. Statutory Notice

IFCA provides that a first party claimant must provide an insurer with 20 days' advanced written notice of "the basis of the cause of action," and it authorizes a first party claimant to assert a cause of action under IFCA only "[i]f the insurer fails to resolve the basis for the action within the twenty-day period." RCW 48.30.015(8); **Appendix B**.

At least one federal judge has applied the 20-day notice requirement to an amended complaint that includes a cause of action under IFCA. *See, e.g., MKB Constructors v. American Zurich Ins. Co.*, 49 F.Supp.3d 814, 839-840 (WD. Wash. 2014) (declaring that insured had satisfied IFCA's 20-day notice requirement by notifying the insurer about the basis of an action under IFCA at least 20 days before it amended its complaint to assert an IFCA cause of action).

Federal judges have dismissed causes of action under IFCA if an insurer has cured the defect that the insured specifically alleged in its IFCA notice. *See, e.g., Cardenas v. Navigators Ins. Co.*, No. C11-5578-RJB, 2011 WL 6300253, at *6-*7 (WD. Wash. Dec. 16, 2011) (In its IFCA notice, the insured stated that it had tendered its defense and "had not heard anything." The insurer responded by acknowledging the letter and advising that it was investigating. On summary judgment, the court declared that the insured did not have a basis for a cause of action under IFCA, because the insurer's acknowledgement had "cured" the specific defect that insured had alleged — i.e., that the insured "had not heard anything").

§ 4. Choice of Law

Extra-contractual insurance claims are torts. *See, e.g., St. Paul Fire & Marine Ins. Co. v. Onvia, Inc.*, 165 Wn.2d 122, 130, 196 P.3d 664, 668 (2008). If there is a material dispute about which state's law applies to an extra-contractual claim, a Washington court will evaluate the choice of law issues utilizing the "most significant relationship" test prescribed by Restatement (Second) of Conflict of Laws § 145. **Appendix D**. *See, e.g., Johnson v. Spider Staging Corp.*, 87 Wn.2d 577, 580, 55 P.2d 997, 1000 (1976); *Tilden-Coil Constructors, Inc. v. Landmark American Ins. Co.*, 721 F.Supp.2d 1007, 1012-1013, 1016 (W.D. Wash. 2010) (recognizing that Washington courts apply Restatement [Second] of Conflicts of Law §§ 6 and 145 to extra-contractual insurance claims); *MKB Constructors v. American Zurich Ins. Co.*, 49 F.Supp.3d 814, 832-833 (WD. Wash. 2014) (recognizing that Washington courts apply Restatement [Second] of Conflicts of Law § 145 to determine which state's law governs tort, IFCA, and CPA claims, and opining "Logically, when an insurance company acts in bad faith … its insured will experience that injury where the insured is located").

§ 5. Reservations of Rights

In lieu of denying coverage and risking contractual and extra-contractual exposure, in Washington, an insurer may agree to defend an insured subject to a reservation of rights. *See, e.g., Truck Ins. Exch. v. Vanport Homes, Inc.*, 147 Wn.2d 751, 761, 58 P.3d 276, 282 (2002). If an insurer defends its insured subject to a reservation of rights, the insured gets the benefit of a defense, while the insurer preserves its right to dispute coverage and to commence a lawsuit to determine whether it actually owes a duty to defend or indemnify. *Id.*; *Mutual of Enumclaw Ins. Co. v. Dan Paulson Const., Inc.*, 161 Wn.2d 903, 914, 169 P.3d 1, 7 (2007).

The purpose of a reservation of rights letter is to notify the insured about the insurer's current coverage position, enable the insured to protect its interests, and protect the insurer from bad faith if the insurance policy ultimately covers the claim. *See, e.g., Alaska Nat. Ins. Co. v. Bryan*, 125 Wn. App. 24, 38-39, 104 P.3d 1, 9 (2004).

§ 5.1. Requirements

A reservation of rights letter should be prompt, and should specifically and clearly identify the bases under which the

insurer is reserving its rights to limit or deny coverage. *See, e.g., Weber v. Biddle*, 4 Wn. App. 519, 524-525, 483 P.2d 155, 159 (1971); *Tank v. State Farm Fire & Cas. Co.*, 105 Wn.2d 381, 388, 715 P2d 1133, 1137 (1986); *Ledcor Industries (USA), Inc. v. Mutual of Enumclaw Ins. Co.*, 150 Wn. App. 1, 9, 206 P.3d 1255, 1260 (2009); *Specialty Surplus Ins. Co. v. Second Chance, Inc.*, No. CO3-09727-JCC, 2006 WL 2459092, at *8-*11 (W.D. Wash. Aug. 22, 2006).

§ 5.2. Equitable Estoppel

In a reservation of rights letter, if an insurer fails to assert a known policy defense specifically and in a timely manner, and if the insured has been prejudiced by that omission, a Washington court might equitably estop the insurer from asserting the defense. *See, e.g., Bosko v. Pitts & Still, Inc.*, 75 Wn.2d 856, 864-865, 454 P.2d 229, 234 (1969) ("[I]f an insurer denies liability under the policy for one reason, while having knowledge of other grounds for denying liability, it is estopped from later raising the other grounds in an attempt to escape liability, provided that the insured was prejudiced by the insurer's failure to initially raise the other grounds"); *Karpenski v. American General Life Companies, LLC*, 999 F.Supp.2d 1235, 1245-1246 (W.D. Wash. 2014); *Anderson v. Country Mut. Ins. Co.*, No. C14-0048-JLR, 2015 WL 687399, at *8-*10 (W.D. Wash. Feb. 18, 2015); *T-Mobile USA Inc. v. Selective Ins. Co. of Am.*, No. C15-1739-JLR, 2017 U.S. Dist. LEXIS 99857, at *19-*21 (W.D. Wash. June 27, 2017).

If an insurer's failure to assert a known policy defense in a reservation of rights letter rises to the level of bad faith, a court might estop the insurer from asserting that defense. *See, e.g., Hayden v. Mutual of Enumclaw Ins. Co.*, 141 Wn.2d 55, 63, 1 P.3d 1167, 1171 (2000); *Karpenski v. American General Life Companies, LLC*, 999 F.Supp.2d 1235, 1245-1246 (WD. Wash. 2014).

That said, a Washington court will not use estoppel to expand coverage or to create coverage that never existed. *See, e.g., Saunders v. Lloyd's of London*, 113 Wn.2d 330, 335-343, 779 P.2d 249, 252-256 (1989); *United Servs. Auto. Ass'n v. Speed*, 179 Wn. App. 184, 201, 317 P.3d 532, 542 (2014) ("[I]nsurance coverage cannot be created by equitable estoppel"); *T-Mobile USA Inc. v. Selective Ins. Co. of Am.*, No. C15-1739-JLR, 2017 U.S. Dist. LEXIS 99857, at *21-*22 (W.D. Wash. June 27, 2017) ("Estoppel cannot be used to create what does not and never did exist").

§ 5.3. Right to Select Defense Counsel

Even when an insurer is defending its insured subject to a reservation of rights, Washington courts have consistently held that an insurer has the right to select defense counsel for the insured. *See, e.g., Johnson v. Continental Cas. Co.*, 57 Wn. App. 359, 363, 788 P.2d 598, 601 (1990) ("In Washington, there is simply no presumption … that a reservation of rights situation creates an automatic conflict of interest. Therefore, the insurer has no obligation before-the-fact to pay for its insured's independently hired counsel"); *Weinstein & Riley, PS. v. Westport Ins. Corp.*, No. C08-1694-JLR, 2011 WL 887552, at *19-*20 (W.D. Wash. March 14, 2011) ("Washington does not recognize an entitlement to 'independent counsel' as it is understood under the *Cumis* model"). *See also, e.g., Kruger-Willis v. Hoffenburg*, 198 Wn. App. 408, 415-418, 393 P.3d 844 (2017) (recognizing "an insurer generally has the right to select the defense counsel who will represent its insured," and declaring that insurer-appointed defense counsel may represent an insured even if the insured itself has not specifically authorized defense counsel to represent the insured).

If an insurer is defending its insured subject to a reservation of rights, and if it allows its insured to retain defense counsel, the insurer [1] may demand that the insured's defense counsel comply with the insurer's reasonable litigation management guidelines and [2] may withhold payment of fees for tasks that violate those guidelines. *See, e.g., Evanston Insurance Company v. Clartre, Inc.*, 2:14-cv-00085-BJR, 2016 WL 1105799 (W.D. Wash. March 22, 2016).

§ 5.4. Splitting the File

As of the date of this publication, no Washington appellate court has declared that an insurer that is defending its insured subject to a reservation of rights must necessarily "split the file," i.e., assign separate representatives to oversee defense issues and coverage issues. *Accord see, e.g., Berkshire Hathaway Homestate Ins. Co. v. SQL Inc.*, 132 F.Supp.3d 1275, 1293-1294 (W.D. Wash. 2015); *American Capital Homes, Inc. v. Greenwich Ins. Co.*, No. C09-622–JCC, 2010 WL 3430495, at *5-*6 (W.D. Wash. Aug. 30, 2010) ("Plaintiffs argue that by commingling coverage and defense functions, Defendant breached its duty [of good faith]. This assertion has no support in Washington law").

§ 5.5. Commencing a Coverage Suit While Defending Subject to a Reservation of Rights — Potential Consequences

If an insurer is defending its insured subject to a reservation of rights, it may seek a judgment declaring that it owes no duty to defend or indemnify the insured. *Mutual of Enumclaw Ins. Co. v. Dan Paulson Const., Inc.*, 161 Wn.2d 903, 914-915, 169 P.3d 1, 7-8 (2007). However, in such an action, it might constitute bad faith if the insurer seeks to adjudicate factual matters that are disputed in the underlying lawsuit and that would directly prejudice the

insured's interests in the underlying lawsuit. *Id.* at 914-915, 918-919, 169 P.3d at 7-10 ("The insurer ... must avoid seeking adjudication of factual matters disputed in the underlying litigation because advocating a position adverse to its insured's interests would 'constitute bad faith on its part.…' [The insurer] sought to establish which defects were excluded from coverage because they resulted from work performed by [the insured]. Simultaneously, [the insured] was contesting liability for any defects in the underlying arbitration action. To the extent that [the insurer] prevailed, it would have directly prejudiced [the insured's] position in the arbitration, clearly an act of bad faith").

§ 6. Bad Faith Litigation – Discovery Issues

§ 6.1. Privilege and Work Product – *Cedell v. Farmers*

In 2013, a 5-4 majority of the Washington Supreme Court declared that it will presume that a first-party insurer in an insurance bad faith suit may not assert its attorney-client privilege or work-product protection; the insurer may rebut the presumption by demonstrating that the insurer's attorney "was not engaged in the quasi-fiduciary tasks of investigating and evaluating or processing the claim, but instead providing the insurer with counsel as to its own potential liability." If the insurer rebuts the presumption, the court will conduct an *in camera* review and redact content relating to the attorney's legal tasks. *Cedell v. Farmers Ins. Co. of Washington*, 176 Wn.2d 686, 295 P.3d 239 (2013).

§ 6.1.a. Application in Federal Court

Certain federal judges have held that *Cedell* does not apply in federal court to work product issues, and that the process prescribed by *Cedell* is not mandatory in federal court. *See, e.g., Lear v. IDS Property, Casualty Insurance Company*, No. C14-1040-RAJ, 2016 WL 3033599, at *1 n. 1 (W.D. Wash. May 27, 2016) ("[T]he court continues to question the applicability of *Cedell v. Farmers Ins. Co. of Wash.*, 176 Wash. 2d 686, 700 (2013) in federal court. Federal law, which governs the procedural aspects of this case, rests the determination of when to conduct an *in camera* review in the sound discretion of the court"); *Anderson v. Country Mut. Ins. Co.*, No. C14-0048-JLR, 2014 WL 3956709, at *2 (WD. Wash. Aug. 13, 2014); *Industrial Systems & Fabrication, Inc. v. Western Nat. Assur. Co.*, No. 2:14-CV-46-RMP, 2014 WL 5500381, at *2 (ED. Wash. Oct. 30, 2014); *Ingenco Holdings, LLC v. ACE American Ins. Co.*, No. C13-543-RAJ, 2014 WL 6908512, at *3 (WD. Wash. Dec. 8, 2014).

§ 6.1.b. Scope – Suits Relating to Liability Insurance – Suits by Assignees

As of the date of this publication, no Washington appellate court has published a decision that specifically evaluates whether the *Cedell* majority's presumption applies in the context of a bad faith suit relating to third-party (liability) insurance. In federal court, there is a split of authority among the judges who have specifically addressed this issue. *Compare, e.g., Ro v. Everest Indem. Ins. Co.*, No. C16-0664-RSL, 2017 U.S. Dist. LEXIS 11106, at *2 n. 1 (W.D. Wash. Jan. 25, 2017) ("The *Cedell* presumption that the attorney-client privilege does not apply as between an insurer and its insured reflects the quasi-fiduciary duties owed in the first-party insurance context. No quasi fiduciary duty arises in the third-party context presented here [under a professional liability policy], and the presumption that [sic] does not apply") *with Carolina Cas. Ins. Co. v. Omeros Corp.*, No. C12-287-RAJ, 2013 WL 1561963, at *3 (W.D. Wash. April 12, 2013) ("[The insurer] attempts to distinguish *Cedell* because it arose in the context of a bad faith claim from a first-party insured. The distinction is not persuasive"). There are other examples of cases in which Washington courts have summarily applied the *Cedell* majority's presumption in this context.

One Washington appellate court has declared that the *Cedell* majority's presumption applies in a bad faith suit that is being litigated by an insured's assignee, and that the insured's confidential attorney-client communications in the insurer's claim file are subject to an *in camera* review. *State Farm Fire & Cas. Co. v. Justus*, No. 47913-3-II, 2017 Wash. App. LEXIS 1523, at *26-29 (June 27, 2017). Likewise, at least one federal judge has declared that the *Cedell* majority's presumption applies in a bad faith suit relating to first-party insurance that is being litigated by the an insured's assignee. *Hawthorne v. Mid-Continent Cas. Co.*, No. C16-1948-RSL, 2017 U.S. Dist. LEXIS 83535, at *2 n. 2 (W.D. Wash. May 31, 2017).

§ 6.1.c. Quasi-fiduciary Tasks vs. Legal Tasks

As of the date of this publication, no Washington appellate court has published a decision that clarifies the *Cedell* majority's distinction between "quasi-fiduciary investigative" tasks and "legal" tasks. Federal judges have struggled with that distinction. *See, e.g., Philadelphia Indem. Ins. Co. v. Olympia Early Learning Center*, No. C12-5759-RBL, 2013 WL, 3338503, at *3 (WD. Wash. July 2, 2013) (opining that the Washington Supreme Court's framework "creates rather than alleviates confusion about what must be produced, and under what circumstances").

One federal judge has declared that an attorney's role in "ghost drafting" a coverage denial letter and in training the insurer's claim handlers encompassed quasi-fiduciary tasks, such that [1] the attorney-client privilege did not wholly apply to those activities, and [2] the insured could depose the insurer's attorney about her role in those activities. *Bagley v. Travelers Home and Marine Insurance Company*, No. C16-0706-JCC, 2016 WL 4494463, at *3-*4 (W.D. Wash. Aug. 25, 2016). That judge also declared that the insured could not ask the attorney questions about confidential information that the insurer had disclosed to the attorney for purposes of seeking legal advice, or about the advice that the attorney had given in response to those disclosures. *Id.*

One federal judge has opined that if an insurer's attorney has engaged in both quasi-fiduciary investigative tasks and legal tasks, the attorney-client privilege would unlikely apply to any of that attorney's communications with the insurer. *Palmer v. Sentinel Ins. Co., Ltd*, No. C12-5444-BHS, 2013 WL 3448128, at *2-*3 (W.D. Wash. July 9, 2013).

§ 6.1.d. Pre-Litigation vs. Litigation

Where an insurer had maintained just one claim file that included both the insurer's pre-litigation documents and the insurer's litigation-related documents, one federal judge interpreted *Cedell* to provide that the attorney-client privilege did not apply to the insurer's litigation-related attorney-client communications and that the entire claim file was discoverable. *Meier v. Travelers Home and Marine Insurance Company*, No. C15-0022-RSL, 2016 WL 4447050 (W.D. Wash. Aug. 24, 2016). However, the judge granted the insurer additional time to supplement its privilege log to demonstrate that its litigation-related documents were subject to work product protection under federal law. *Id.*

Likewise, another federal judge has opined that an analysis under *Cedell* is not necessarily limited to "pre-litigation activities," because an insurer can continue to adjust a claim after bad faith litigation has commenced. *Bagley v. Travelers Home and Marine Insurance Company*, No. C16-0706-JCC, 2016 WL 4494463, at *2 (WD. Wash. Aug. 25, 2016).

§ 6.1.e. Choice of Law

One federal judge has opined that *Cedell* should not govern attorney-client privilege issues between a non-Washington attorney and a non-Washington client. *Ingenco Holdings, LLC v. Ace American Ins. Co.*, No. C13-543-RAJ, 2014 WL 6908512, at *4 (W.D. Wash. Dec. 8, 2014) (opining that it would "seem an affront to intuition" to apply Washington state's attorney-client privilege law to attorney-client communications between a non-Washington client and a non-Washington attorney). *But see Hawthorne v. Mid-Continent Cas. Co.*, No. C16-1948-RSL, 2017 U.S. Dist. LEXIS 83535, at *4-*5 (W.D. Wash. May 31, 2017) (declaring that *Cedell* applied because the proponent of another state's law had not shown any "special reason to override the evidentiary policy of the forum state").

§ 6.2. Discoverability of Loss Reserves

In state court, as a general policy, the Washington Court of Appeals has declared that loss reserves should not be admitted into evidence. *Miller v. Kenny*, 180 Wn. App. 772, 812-813, 325 P.3d 278, 298 (2014). However, in an insurance bad faith lawsuit, a trial court has discretion to admit evidence of loss reserves if the probative value of the evidence is "high enough to overcome the policy concern." *Id.*

In federal court, Washington judges are split about whether loss reserves are discoverable in insurance bad faith lawsuits. *See, e.g., Heights at Issaquah Ridge Owners Ass'n v. Steadfast Ins. Co.*, No. C07-1045-RSM, 2007 WL 4410260, at *1-*4 (WD. Wash. Dec. 13, 2007) (declaring that loss reserves are generally irrelevant in insurance bad faith lawsuits); *Isilon Systems, Inc. v. Twin City Fire Ins. Co.*, No. C10-1392-MJP, 2012 WL 503852, at *2-*3 (W.D. Wash. Feb. 15, 2012) (declaring that loss reserves are generally relevant and discoverable in an insurance bad faith lawsuit, subject to work product protections); *Ingenco Holdings, LLC v. Ace American Ins. Co.*, No. C13-543-RAJ, 2014 WL 6908512, at *3 (W.D. Wash. Dec. 8, 2014) (declaring that loss reserves "can be" discoverable subject to the attorney client privilege or work product protection, if the reserves are probative of a party's claim or defense).

§ 6.3. Discoverability of Reinsurance

As of the date of this publication, no Washington appellate court has published a decision that addresses whether reinsurance-related documents and information are discoverable in insurance bad faith lawsuits.

In federal court, Washington judges have consistently declared that reinsurance policies are themselves discoverable under Federal Rule 26(a)(1) without a showing of relevance; however, other reinsurance-related documents and information are not discoverable unless the insured can prove that they are relevant to the bad faith claim. *See, e.g., Heights at Issaquah Ridge Owners Ass'n v. Steadfast Ins. Co.*, No. C07-1045-RSM, 2007 WL, 4410260, at *4 (W.D. Wash. Dec. 13, 2007) (observing that "reinsurance matters are rarely relevant to a claim of bad faith"); *Isilon Systems, Inc. v. Twin City Fire Ins. Co.*, No. C10-1392-MJP, 2012 WL 503852, at *3 (WD. Wash. Feb. 15, 2012).

§ 6.4. Discoverability of Other Claims

As of the date of this publication, no Washington appellate court has published a decision that addresses whether documents and information about other insurance claims (*i.e.*, insurance claims involving other insureds and other insurance policies) are discoverable in a bad faith lawsuit.

At least one federal judge has concluded that such documents and information are irrelevant to prove that an insurer had committed bad faith in the subject insurance claim. *See, e.g., Carolina Cas. Ins. Co. v. Omeros Corp.*, No. C12-287-RAJ, 2013 WL 1561963, at *1 (WD. Wash. April 12, 2013) (Declaring that "[such] requests seek information that is either irrelevant or so marginally relevant that they cannot justify the burden they would impose.… The question before the court is whether [the insurer] acted in bad faith *in this case*" [italics in original]).

That said, there are other contexts in which Washington federal judges have allowed some very narrow and targeted discovery relating to other claims. *See, e.g., Polygon Northwest Co., LLC v. Steadfast Ins. Co.*, No. C08-1294-RSL, 2009 WI. 1437565 (W.D. Wash. 2009) (in an insurance coverage dispute relating to the proper interpretation of an insurance policy's self-insured retention provision in the context of a construction defect claim spanning multiple policy years, the Court ordered the insurer to identify any insurance claims made during the preceding five years involving identical policy language and a construction defect claim spanning multiple policy years).

APPENDICES

APPENDIX A

Excerpts from RCW 48

RCW 48.01.030

Public interest.

The business of insurance is one affected by the public interest, requiring that all persons be actuated by good faith, abstain from deception, and practice honesty and equity in all insurance matters. Upon the insurer, the insured, their providers, and their representatives rests the duty of preserving inviolate the integrity of insurance.

RCW 48.30.010

Unfair practices in general — Remedies and penalties.

(1) No person engaged in the business of insurance shall engage in unfair methods of competition or in unfair or deceptive acts or practices in the conduct of such business as such methods, acts, or practices are defined pursuant to subsection (2) of this section.

(2) In addition to such unfair methods and unfair or deceptive acts or practices as are expressly defined and prohibited by this code, the commissioner may from time to time by regulation promulgated pursuant to chapter 34.05 RCW, define other methods of competition and other acts and practices in the conduct of such business reasonably found by the commissioner to be unfair or deceptive after a review of all comments received during the notice and comment rule-making period.

(3) (a) In defining other methods of competition and other acts and practices in the conduct of such business to be unfair or deceptive, and after reviewing all comments and documents received during the notice and comment rule-making period, the commissioner shall identify his or her reasons for defining the method of competition or other act or practice in the conduct of insurance to be unfair or deceptive and shall include a statement outlining these reasons as part of the adopted rule.

(b) The commissioner shall include a detailed description of facts upon which he or she relied and of facts upon which he or she failed to rely, in defining the method of competition or other act or practice in the conduct of insurance to be unfair or deceptive, in the concise explanatory statement prepared under RCW 34.05.325(6).

(c) Upon appeal, the superior court shall review the findings of fact upon which the regulation is based *de novo* on the record.

(4) No such regulation shall be made effective prior to the expiration of thirty days after the date of the order by which it is promulgated.

(5) If the commissioner has cause to believe that any person is violating any such regulation, the commissioner may order such person to cease and desist therefrom. The commissioner shall deliver such order to such person direct or mail it to the person by registered mail with return receipt requested. If the person violates the order after expiration of ten days after the cease and desist order has been received by him or her, he or she may be fined by the commissioner a sum not to exceed two hundred and fifty dollars for each violation committed thereafter.

(6) If any such regulation is violated, the commissioner may take such other or additional action as is permitted under the insurance code for violation of a regulation.

(7) An insurer engaged in the business of insurance may not unreasonably deny a claim for coverage or payment of benefits to any first party claimant. "First party claimant" has the same meaning as in RCW 48.30.015.

RCW 48.30.015 (Insurance Fair Conduct Act — IFCA)

Unreasonable denial of a claim for coverage or payment of benefits.

(1) Any first party claimant to a policy of insurance who is unreasonably denied a claim for coverage or payment of benefits by an insurer may bring an action in the superior court of this state to recover the actual damages sustained, together with the costs of the action, including reasonable attorneys' fees and litigation costs, as set forth in subsection (3) of this section.

(2) The superior court may, after finding that an insurer has acted unreasonably in denying a claim for coverage or payment of benefits or has violated a rule in subsection (5) of this section, increase the total award of damages to an amount not to exceed three times the actual damages.

(3) The superior court shall, after a finding of unreasonable denial of a claim for coverage or payment of benefits, or after a finding of a violation of a rule in subsection (5) of this section, award reasonable attorneys' fees and actual and statutory litigation costs, including expert witness fees, to the first party claimant of an insurance contract who is the prevailing party in such an action.

(4) "First party claimant" means an individual, corporation, association, partnership, or other legal entity asserting a right to payment as a covered person under an insurance policy or insurance contract arising out of the occurrence of the contingency or loss covered by such a policy or contract.

(5) A violation of any of the following is a violation for the purposes of subsections (2) and (3) of this section:

(a) WAC 284-30-330, captioned "specific unfair claims settlement practices defined";

(b) WAC 284-30-350, captioned "misrepresentation of policy provisions";

(c) WAC 284-30-360, captioned "failure to acknowledge pertinent communications";

(d) WAC 284-30-370, captioned "standards for prompt investigation of claims";

(e) WAC 284-30-380, captioned "standards for prompt, fair and equitable settlements applicable to all insurers"; or

(f) An unfair claims settlement practice rule adopted under RCW 48.30.010 by the insurance commissioner intending to implement this section. The rule must be codified in chapter 284-30 of the Washington Administrative Code.

(6) This section does not limit a court's existing ability to make any other determination regarding an action for an unfair or deceptive practice of an insurer or provide for any other remedy that is available at law.

(7) This section does not apply to a health plan offered by a health carrier. "Health plan" has the same meaning as in RCW 48.43.005. "Health carrier" has the same meaning as in RCW 48.43.005.

(8) (a) Twenty days prior to filing an action based on this section, a first party claimant must provide written notice of the basis for the cause of action to the insurer and office of the insurance commissioner. Notice may be provided by regular mail, registered mail, or certified mail with return receipt requested. Proof of notice by mail may be made in the same manner as prescribed by court rule or statute for proof of service by mail. The insurer and insurance commissioner are deemed to have received notice three business days after the notice is mailed.

(b) If the insurer fails to resolve the basis for the action within the twenty-day period after the written notice by the first party claimant, the first party claimant may bring the action without any further notice.

(c) The first party claimant may bring an action after the required period of time in (a) of this subsection has elapsed.

(d) If a written notice of claim is served under (a) of this subsection within the time prescribed for the filing of an action under this section, the statute of limitations for the action is tolled during the twenty-day period of time in (a) of this subsection.

APPENDIX B

Excerpts from WAC 284-30

WAC 284-30-330

Specific unfair claims settlement practices defined.

The following are hereby defined as unfair methods of competition and unfair or deceptive acts or practices of the insurer in the business of insurance, specifically applicable to the settlement of claims:

(1) Misrepresenting pertinent facts or insurance policy provisions.

(2) Failing to acknowledge and act reasonably promptly upon communications with respect to claims arising under insurance policies.

(3) Failing to adopt and implement reasonable standards for the prompt investigation of claims arising under insurance policies.

(4) Refusing to pay claims without conducting a reasonable investigation.

(5) Failing to affirm or deny coverage of claims within a reasonable time after fully completed proof of loss documentation has been submitted.

(6) Not attempting in good faith to effectuate prompt, fair and equitable settlements of claims in which liability has become reasonably clear. In particular, this includes an obligation to promptly pay property damage claims to innocent third parties in clear liability situations. If two or more insurers share liability, they should arrange to make appropriate payment, leaving to themselves the burden of apportioning liability.

(7) Compelling a first party claimant to initiate or submit to litigation, arbitration, or appraisal to recover amounts due under an insurance policy by offering substantially less than the amounts ultimately recovered in such actions or proceedings.

(8) Attempting to settle a claim for less than the amount to which a reasonable person would have believed he or she was entitled by reference to written or printed advertising material accompanying or made part of an application.

(9) Making a claim payment to a first party claimant or beneficiary not accompanied by a statement setting forth the coverage under which the payment is made.

(10) Asserting to a first party claimant a policy of appealing arbitration awards in favor of insureds or first party claimants for the purpose of compelling them to accept settlements or compromises less than the amount awarded in arbitration.

(11) Delaying the investigation or payment of claims by requiring a first party claimant or his or her physician to submit a preliminary claim report and then requiring subsequent submissions which contain substantially the same information.

(12) Failing to promptly settle claims, where liability has become reasonably clear, under one portion of the insurance policy coverage in order to influence settlements under other portions of the insurance policy coverage.

(13) Failing to promptly provide a reasonable explanation of the basis in the insurance policy in relation to the facts or applicable law for denial of a claim or for the offer of a compromise settlement.

(14) Unfairly discriminating against claimants because they are represented by a public adjuster.

(15) Failing to expeditiously honor drafts given in settlement of claims. A failure to honor a draft within three working days after notice of receipt by the payor bank will constitute a violation of this provision. Dishonor of a draft for valid reasons related to the settlement of the claim will not constitute a violation of this provision.

(16) Failing to adopt and implement reasonable standards for the processing and payment of claims after the obligation to pay has been established. Except as to those instances where the time for payment is governed by statute or rule or is set forth in an applicable contract, procedures which are not designed to deliver a check or draft to the payee in payment of a settled claim within fifteen business days after receipt by the insurer or its attorney of properly executed releases or other settlement documents are not acceptable. Where the insurer is obligated to furnish an appropriate release or settlement document to a claimant, it must do so within twenty working days after a settlement has been reached.

(17) Delaying appraisals or adding to their cost under insurance policy appraisal provisions through the use of appraisers from outside of the loss area. The use of appraisers from outside the loss area is appropriate only where the unique nature of the loss or a lack of competent local appraisers make the use of out-of-area appraisers necessary.

(18) Failing to make a good faith effort to settle a claim before exercising a contract right to an appraisal.

(19) Negotiating or settling a claim directly with any claimant known to be represented by an attorney without the attorney's knowledge and consent. This does not prohibit routine inquiries to a first party claimant to identify the claimant or to obtain details concerning the claim.

WAC 284-30-350

Misrepresentation of policy provisions.

(1) No insurer shall fail to fully disclose to first party claimants all pertinent benefits, coverages or other provisions of an insurance policy or insurance contract under which a claim is presented.

(2) No insurance producer or title insurance agent shall conceal from first party claimants benefits, coverages or other provisions of any insurance policy or insurance contract when such benefits, coverages or other provisions are pertinent to a claim.

(3) No insurer shall deny a claim for failure to exhibit the property without proof of demand and unfounded refusal by a claimant to do so.

(4) No insurer shall, except where there is a time limit specified in the policy, make statements, written or otherwise, requiring a claimant to give written notice of loss or proof of loss within a specified time limit and which seek to relieve the company of its obligations if such a time limit is not complied with unless the failure to comply with such time limit prejudices the insurer's rights.

(5) No insurer shall request a first party claimant to sign a release that extends beyond the subject matter that gave rise to the claim payment.

(6) No insurer shall issue checks or drafts in partial settlement of a loss or claim under a specific coverage which contain language which release the insurer or its insured from its total liability.

(7) No insurer shall make a payment of benefits without clearly advising the payee, in writing, that it may require reimbursement, when such is the case.

WAC 284-30-360

Standards for the insurer to acknowledge pertinent communications.

(1) Within ten working days after receiving notification of a claim under an individual insurance policy, or within fifteen working days with respect to claims arising under group insurance contracts, the insurer must acknowledge its receipt of the notice of claim.

(a) If payment is made within that period of time, acknowledgment by payment constitutes a satisfactory response.

(b) If an acknowledgment is made by means other than writing, an appropriate notation of the acknowledgment must be made in the claim file of the insurer describing how, when, and to whom the notice was made.

(c) Notification given to an agent of the insurer is notification to the insurer.

(2) Upon receipt of any inquiry from the commissioner concerning a complaint, every insurer must furnish the commissioner with an adequate response to the inquiry within fifteen working days after receipt of the commissioner's inquiry using the commissioner's electronic company complaint system.

(3) For all other pertinent communications from a claimant reasonably suggesting that a response is expected, an appropriate reply must be provided within ten working days for individual insurance policies, or fifteen working days with respect to communications arising under group insurance contracts.

(4) Upon receiving notification of a claim, every insurer must promptly provide necessary claim forms, instructions, and reasonable assistance so that first party claimants can comply with the policy conditions and the insurer's reasonable requirements. Compliance with this paragraph within the time limits specified in subsection (1) of this section constitutes compliance with that subsection.

WAC 284-30-370

Standards for prompt investigation of a claim.

Every insurer must complete its investigation of a claim within thirty days after notification of claim, unless the investigation cannot reasonably be completed within that time. All persons involved in the investigation of a claim must provide reasonable assistance to the insurer in order to facilitate compliance with this provision.

WAC 284-30-380

Settlement standards applicable to all insurers.

(1) Within fifteen working days after receipt by the insurer of fully completed and executed proofs of loss, the insurer must notify the first party claimant whether the claim has been accepted or denied. The insurer must not deny a claim on the grounds of a specific policy provision, condition, or exclusion unless reference to the specific provision, condition, or exclusion is included in the denial. The denial must be given to the claimant in writing and the claim file of the insurer must contain a copy of the denial.

(2) If a claim is denied for reasons other than those described in subsection (1) and is made by any other means than in writing, an appropriate notation must be made in the claim file of the insurer describing how, when, and to whom the notice was made.

(3) If the insurer needs more time to determine whether a first party claim should be accepted or denied, it must notify the first party claimant within fifteen working days after receipt of the proofs of loss giving the reasons more time is needed. If after that time the investigation remains incomplete, the insurer

must notify the first party claimant in writing stating the reason or reasons additional time is needed for investigation. This notification must be sent within forty-five days after the date of the initial notification and, if needed, additional notice must be provided every thirty days after that date explaining why the claim remains unresolved.

(4) Insurers must not fail to settle first party claims on the basis that responsibility for payment should be assumed by others except as may otherwise be provided by policy provisions.

(5) Insurers must not continue negotiations for settlement of a claim directly with a claimant who is neither an attorney nor represented by an attorney until the claimant's rights may be affected by a statute of limitations or a policy or contract time limit, without giving the claimant written notice that the time limit may be expiring and may affect the claimant's rights. This notice must be given to first party claimants thirty days and to third party claimants sixty days before the date on which any time limit may expire.

(6) The insurer must not make statements which indicate that the rights of a third party claimant may be impaired if a form or release is not completed within a specified period of time unless the statement is given for the purpose of notifying the third party claimant of the provision of a statute of limitations.

(7) Insurers are responsible for the accuracy of evaluations to determine actual cash value.

APPENDIX C

Excerpts from RCW 19.86

RCW 19.86.020

Unfair competition, practices, declared unlawful.

Unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce are hereby declared unlawful.

RCW 19.86.090 [Excerpt]

Civil action for damages — Treble damages authorized

Any person who is injured in his or her business or property by a violation of RCW 19.86.020, 19.86.030, 19.86.040, 19.86.050, or 19.86.060, or any person so injured because he or she refuses to accede to a proposal for an arrangement which, if consummated, would be in violation of RCW 19.86.030, 19.86.040, 19.86.050, or 19.86.060, may bring a civil action in superior court to enjoin further violations, to recover the actual damages sustained by him or her, or both, together with the costs of the suit, including a reasonable attorney's fee. In addition, the court may, in its discretion, increase the award of damages up to an amount not to exceed three times the actual damages sustained: PROVIDED, That such increased damage award for violation of RCW 19.86.020 may not exceed twenty-five thousand dollars: PROVIDED FURTHER, That such person may bring a civil action in the district court to recover his or her actual damages, except for damages which exceed the amount specified in RCW 3.66.020, and the costs of the suit, including reasonable attorneys' fees. The district court may, in its discretion, increase the award of damages to an amount not more than three times the actual damages sustained, but such increased damage award shall not exceed twenty-five thousand dollars. For the purpose of this section, "person" includes the counties, municipalities, and all political subdivisions of this state.

APPENDIX D

Restatement (Second) of Conflict of Laws § 145 (1971)

§ 145 The General Principle

(1) The rights and liabilities of the parties with respect to an issue in tort are determined by the local law of the state which, with respect to that issue, has the most significant relationship to the occurrence and the parties under the principles stated in § 6.

(2) Contacts to be taken into account in applying the principles of § 6 to determine the law applicable to an issue include:

(a) the place where the injury occurred,

(b) the place where the conduct causing the injury occurred,

(c) the domicile, residence, nationality, place of incorporation and place of business of the parties, and

(d) the place where the relationship, if any, between the parties is centered.

These contacts are to be evaluated according to their relative importance with respect to the particular issue.

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