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SUPREME COURT NO. 101576-3
COURT OF APPEALS NO. 82554-2-I

IN THE WASHINGTON SUPREME COURT

STAN SCHIFF, M.D., PH.D.,
Respondent,

v.

LIBERTY MUTUAL FIRE INSURANCE CO.,
and LIBERTY MUTUAL INSURANCE
COMPANY, foreign insurance companies,

Petitioners

MEMORANDUM OF AMICUS CURIAE AMERICAN PROPERTY CASUALTY INSURANCE ASSOCIATION IN SUPPORT OF PEITION FOR REVIEW

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

I. IDENTITY AND INTEREST OF AMICUS CURIAE 1

II. ISSUES OF CONCERN TO AMICUS..............................2

III. PROCEDURAL BACKGROUND & RULING.................4

IV. LEGAL DISCUSSION...6

A. The FAIR Health Database Enables Insurers to Effectively Assess the Reasonableness of Billed Charges While Still Complying With the Strict Time Deadlines Imposed by Washington's Insurance Regulations. 6

B. The Decision May Conflict With Washington State's Own Claims Database. 8

C. Databases Like FAIR Health Are Utilized Across the Country for Ensuring Timely Processing and Payment of Covered Claims.....................................10

D. The Decision's Potential Impact on Washington's Regulatory Landscape Necessitates Further Analysis. 13

V. CONCLUSION 17

TABLE OF AUTHORITIES

Page(s)

Washington Cases

Schiff v. Liberty Mut. Fire Ins. Co.,
__ Wn.App.2d ___, 520 P.3d 1085 (2022) .... *Passim*

Singleton v. Naegeli Reporting Corp.,
142 Wn. App. 598, 175 P.3d 594 (2008) 13, 14

Vogt v. Seattle–First Nat'l Bank,
117 Wn.2d 541, 817 P.2d 1364 (1991) 14

Other State Cases

GEICO Gen. Ins. Co. v. Green,
No. 107, 2021; 2022 WL 1052195; 276 A.3d
462 (Supreme Ct. Del. April 8, 2022)..............................12

Constitutional Provisions, Statutes and Court Rules

RCW 19.86.170 ....4, 13

RCW 41.05.690 9

RCW 43.371.020(1)..9

RCW 48.18.100(1)..15

RCW 48.22.005 16

WAC 284-30-330 ....6, 16

WAC 284-30-360(1)..1, 6

WAC 284-30-370 ....6, 8, 14

TABLE OF AUTHORITIES

Page(s)

Other Authorities

McCarthy, Douglas, *State All-Payer Claims Databases: Tools for Improving Health Care Value, Part 1*, The Commonwealth Fund (Dec. 2020), https://www.commonwealthfund.org/sites/default/files/2020-12/McCarthy_State_APCDs_Part1_Report_v2.pdf 10, 11

McCarthy, Douglas, *State All-Payer Claims Databases: Tools for Improving Health Care Value*, *Part 2*, The Commonwealth Fund (Dec. 2020), https://www.commonwealthfund.org/sites/default/files/2020-12/McCarthy_State_APCDs_Part2_v2.pdf 11

N.J.A.C. 11:3–29.4(e)(1) 12

I. IDENTITY AND INTEREST OF AMICUS CURIAE

Amicus Curiae is the American Property Casualty Insurance Association ("*Amicus*"), a national trade association representing property and casualty insurers writing business in Washington, nationwide, and globally.

Amicus has a continuing interest in cases affecting the insurance industry, consumers, and the regulation of insurance companies in Washington. At issue in this case is a Washington insurer's ability to rely on a FAIR Health, Inc. ("FAIR Health") database to assess the reasonableness of medical bills submitted for covered claims and provide prompt payment for medical providers. Claim databases, such as FAIR Health, are commonly relied on to assess the reasonableness of medical bills submitted in high-volume claims and comply with the strict deadlines imposed by Washington Insurance Regulations. *See, e.g.,* WAC 284-30-360(1). The holding in *Schiff v. Liberty Mut. Fire Ins. Co.*, __ Wn.App.2d ___, 520 P.3d 1085 (2022) (the "Decision") barring such reliance on FAIR Health is troubling for its

misapplication of Washington insurance law and the interference it exhibits by the Court of Appeals into the Office of the Insurance Commissioner's ("OIC") ability to effectively regulate this area for the benefit of Washington consumers.

More broadly, *Amicus* is concerned about its members' potential liability for continued use of the FAIR Health database in Washington, especially where such use is standard practice across the United States. The Decision not only will likely prevent the use of this database in Washington despite its prior approval, but it also raises serious concerns about liability for other practices that receive the specific approval of the regulating agency. *Amicus* supports review of the Decision to properly assess the applicable regulatory obligations and exemptions applicable to its members under Washington law.

II. ISSUES OF CONCERN TO AMICUS

The Court of Appeals misapprehended existing laws and regulations when it held that the Insurance Code and the OIC's implementing regulations bar insurers' reliance on the FAIR

Health database to process and pay covered claims. The FAIR Health database, and others like it, is utilized by insurance companies across the United States to determine the reasonableness of medical bills submitted by providers who treat their insureds in high-volume claims such as Personal Injury Protection ("PIP") and Medical Payments Coverage ("MedPay") coverages. Automobile insurers' use of this legally approved database enables prompt payment to medical providers and insurers can comply with the strict regulatory deadlines for the prompt investigation and payment of covered claims. The Decision creates uncertainty about the use of the FAIR Health database, potentially curtailing an industry-wide practice that assists with regulatory compliance and benefits the consumer.

Amicus is also concerned about the Court of Appeal's disregard of the OIC's regulatory determination that an insurer's reliance on FAIR Health under these circumstances satisfies an insurer's statutory and regulatory obligations. The Washington OIC is the agency tasked with regulating this conduct and, in this

case, had explicitly authorized Petitioners' use of FAIR Health. The Decision leaves the OIC less capable of effectively regulating the insurance industry through the forms-approval process and undermines the reliance interests of insurers across the State who have had their own claims-review practices expressly approved by the OIC. Review should be granted to provide clarity to an important issue that is unsettled by the Decision.

III. PROCEDURAL BACKGROUND & RULING

The underlying case concerns the trial court's denial of the parties' cross motions for summary judgment on respondent Stan Schiff, M.D., Ph.D. ("Dr. Schiff") under the Washington Consumer Protection Act ("CPA") (RCW 19.86.170) challenging Petitioners' use of the FAIR Health database for the purpose of analyzing the reasonableness of medical bills submitted for payment.

On discretionary review, the Court of Appeals affirmed the trial court's denial of Petitioner's motion and reversed its

denial of Dr. Schiff's motion. *Schiff v. Liberty Mutual Fire Ins. Co.*, __ Wn. App. 2d. __, 520 P.3d 1085 (2022). The Court of Appeals also determined that the CPA's "safe harbor" provision does not exempt Petitioners from CPA liability for using the FAIR Health database for the purpose of analyzing the reasonableness of Dr. Schiff's medical bills submitted for payment. This Memorandum addresses insurers' reliance on databases like FAIR Health and the OIC's approval of such practices by ensuring this Court is aware that other states recognize what the Court of Appeals here did not; namely the purpose of the FAIR Health database and the effect on high-volume PIP and MedPay claims handling without such a database.

IV. LEGAL DISCUSSION

A. The FAIR Health Database Enables Insurers to Effectively Assess the Reasonableness of Billed Charges While Still Complying With the Strict Time Deadlines Imposed by Washington's Insurance Regulations.

Washington insurance regulations impose strict deadlines for the investigation and payment of covered claims. An insurer is bound to promptly acknowledge, investigate, and resolve claims for the types of insurance at issue in this case, both PIP and MedPay. Each insurer must acknowledge receipt of a claim within 10 days for individual insurance policies, *see* WAC 284-30-360(1), and then must "complete its investigation of a claim within thirty days after notification," unless it cannot reasonably be completed in that time. WAC 284-30-370.

These regulations require adherence to their strict deadlines. The insurer is exposed to liability for unfair claims settlement practices if it fails to reasonably and promptly investigate a claim. *See* WAC 284-30-330. In other words, the

insurer has a variety of duties it must fulfill within the 30-day timeline.

The FAIR Health database enables insurers to promptly conduct the investigations required by these regulations which the OIC recognized when it affirmatively approved Petitioner's use of the FAIR Health database in 2016. *See* CP 4885-86, 4889-90.

The OIC's approval is logical in the context of PIP and MedPay claims: both are commonplace in Washington policies and are available to injured people without regard to fault, meaning such coverage is commonly sought and results in a high claims volume for insurers. These claims often involve the same injuries and treatments. Without the FAIR Health database, review of these claims for payment would drastically increase administrative costs and delay payment to the medical providers thereby placing significant upward pressure on premium costs for consumers.

Given that WAC 284-30-370 requires prompt acknowledgement and investigation of all claims within a strict 30-day deadline, it makes sense that the OIC would affirmatively approve the use of the FAIR Health database. Put simply, the automation offered with databases such as FAIR Health helps insurers fulfill their regulatory obligations for high-volume claims like PIP and MedPay. The Decision puts insurers in an untenable situation: obligated under Washington law to promptly investigate the reasonableness of billed charges, yet denied the database resources required to do so.

B. The Decision May Conflict With Washington State's Own Claims Database.

The OIC's approval of the FAIR Health claims database is consistent with the fact that the State of Washington has offered its own claims database for health care claims for nearly a decade. The Washington State All Payer Claims Database ("WA-APCD") "systematically collect[s] all medical claims and pharmacy claims from private and public payers, with ***data from***

all settings of care that permit the systematic analysis of health care delivery," just as the FAIR Health database aggregates claim information. *See* RCW 43.371.020(1) (emphasis added). The 2014 authorizing statute directed the Office of Financial Management to establish the WA-APCD to "support transparent public reporting of health care information," which includes the direction to use the WA-APCD to share best practices, performance, and "promote competition based on quality and cost." RCW 43.371.020(1); *see also* RCW 41.05.690. In 2014, the Washington State Legislature recognized the substantial value of aggregated claims databases when it directed its own state agency to prepare and utilize such a database.

While the Decision frames FAIR Health as contrary to the delivery of quality claims processing, a proper review of these practices in Washington demonstrates that the state legislature and state agencies have expressed affirmative approval for these sophisticated databases that provide effective claims analysis and

reduce costs for consumers, just as the OIC approved Petitioners' use of the FAIR Health database.

C. Databases Like FAIR Health Are Utilized Across the Country for Ensuring Timely Processing and Payment of Covered Claims.

In addition to the use of claims databases being well-recognized in Washington, these databases also serve an integral role in managing health care costs across the United States. All-payer claims databases, such as FAIR Health, are utilized in at least 21 states, as analyzed in a 2020 study by the Commonwealth Fund.[1] These 21 states utilize databases to collect and aggregate information on payment for health services, in a variety of manners:

- Reporting on health care spending, utilization, and performance;
- Enhancing state policy and regulatory analysis;
- Enabling value-based purchasing and health care improvement;

[1] McCarthy, Douglas, *State All-Payer Claims Databases: Tools for Improving Health Care Value, Part 1*, The Commonwealth Fund (Dec. 2020), https://www.commonwealthfund.org/sites/default/files/2020-12/McCarthy_State_APCDs_Part1_Report_v2.pdf.

- Supporting public health monitoring and improvement; and
- Providing reliable data for research and evaluation.[2]

These databases are used by policymakers, purchasers, providers, insurers, consumers, researchers, and consultants, among others. *Id*.

Use of these databases also enables cost containment, thereby protecting consumers.[3] When providing examples of the beneficial uses of these databases, the study identifies "enabl[ing] the efficient review of claims," which is the precise manner in which Petitioners use FAIR Health.[4] These databases are used across the country due to the many ways they improve

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[2] McCarthy, Douglas, *State All-Payer Claims Databases: Tools for Improving Health Care Value*, *Part 2*, at p. 3, The Commonwealth Fund (Dec. 2020), https://www.commonwealthfund.org/sites/default/files/2020-12/McCarthy_State_APCDs_Part2_v2.pdf.

[3] *Id.* at p. 8 (noting that insurers use these databases to "[e]xamine statewide medical cost structure, distribution of services, and utilization patterns to guide product and benefit designs to lower costs and meet needs.").

[4] *Id*. at p. 8.

the claims review process. Moreover, use of these databases has been upheld in other legal proceedings and even mandated by some states' insurance regulations. *See, e.g*., *GEICO Gen. Ins. Co. v. Green*, No. 107, 2021; 2022 WL 1052195 at *11; 276 A.3d 462, (Supreme Ct. Del. April 8, 2022)(Supreme Court of Delaware held that insurer's utilization of computer-based rules in adjusting PIP claims did not violate either its insurance contracts or Delaware's PIP statute.); N.J.A.C. 11:3–29.4(e)(1) (New Jersey regulation directing PIP insurers to use computerized databases, expressly including FAIR Health, to determine the reasonableness of medical providers' billed charges).

This nationwide information provides valuable context for why Petitioners use the FAIR Health database and why such use received OIC approval. These databases benefit the industry, the regulator, and the consumer by allowing the efficient and sophisticated review of claims. They also allow insurers to comply with OIC requirements.

D. The Decision's Potential Impact on Washington's Regulatory Landscape Necessitates Further Analysis.

The Decision's analysis of the CPA Safe Harbor provision will have serious repercussions for the regulation of insurance in Washington. The Court of Appeals' Decision fails to give the OIC's regulatory expertise and determination due consideration. Courts should not so casually usurp the OIC's regulatory role by rejecting its analysis without explanation and by denying insurers the ability to rely on the OIC's regulatory approval through invocation of the CPA's Safe Harbor exemption.

The Safe Harbor provision of the CPA exempts "actions or transactions specifically permitted within the statutory authority granted to any regulatory board or commission established within Title 18 RCW[.]" *See* RCW 19.86.170. For this exemption to be available, the agency must have approved it in "overt affirmative actions specifically to permit the actions or transactions engaged in by the person or entity involved in a Consumer Protection Act complaint." *Singleton v. Naegeli*

Reporting Corp., 142 Wn. App. 598, 607–08, 175 P.3d 594 (2008) (citing *Vogt v. Seattle–First Nat'l Bank*, 117 Wn.2d 541, 552, 817 P.2d 1364 (1991)).

The Decision's rejection of the Safe Harbor provisions fails to grapple with the OIC's scope of authority as a regulator. The Decision states that "our legislature's clear mandate [is] … that violations of the insurance regulations are subject to CPA liability." *Decision*, 520 P.3d at 1096. However, neither the Court of Appeals nor Dr. Schiff identify any explicit preclusion or limitation on the use of computerized bill review in Washington law.

It is unreasonable to read an implied prohibition on the use of claims databases into the regulatory scheme. Regulatory flexibility is especially important in areas where, as here, no express Insurance Code or WAC provision applies. In fact, given Washington's emphasis on promptly addressing the investigation of claims (WAC 284-30-370), the relevant regulations seem to encourage all appropriate methods to

increase speed and efficiency. As discussed in the prior section, claims databases are a common method for improving that efficiency, so this practice assists in compliance with the Washington Insurance Regulations.

Notably, it is undisputed here that the OIC ***provided*** approval under the applicable regulations. RCW 48.18.100(1) (requiring that insurance policy be "filed with and approved by the commissioner."). The Decision implies that the Court of Appeals will decide what constitutes a violation of the OIC's own provisions without any deference, analysis, or even meaningful acknowledgement of the OIC's opinion on the issue. *Decision*, 520 P.3d at 1097. However, the OIC has "concurrent authority with the courts" over actions that would violate the CPA. *Decision*, 520 P.3d at 1097. The OIC's authority to regulate insurers is now undermined by the Court of Appeals' attempt to unilaterally decide what constitutes a violation of the OIC's provisions. Further, the concept of a "Safe Harbor" provision for regulatory approval is entirely negated if the

regulating entity cannot control which industry actions qualify for the Safe Harbor.

The Decision asserts that "the plain language of RCW 48.18.100 undermines Liberty Mutual's contention that the regulatory approval of an insurance policy necessarily demonstrates that the OIC has deemed lawful each provision of that policy." *Decision*, 520 P.3d at 1101. However, even if this analysis were correct, this holding ignores that the factual record provides evidence of OIC approval beyond its standard regulatory approval. Here, the OIC Deputy Insurance Commissioner submitted a declaration affirming that "Liberty Mutual's use of the FAIR Health database is included, described, and approved with the OIC" and that the "[u]se of the FAIR Health database in accordance with Liberty Mutual's filings with the OIC does not violate WAC 284-30-330 et. seq., RCW 48.22.005, or other Washington insurance laws or regulations." CP 4885-86. The Decision does not engage with the full scope

of evidence demonstrating the OIC's affirmative use of the database, so this evidence must be properly assessed on review.

As it stands, the Decision creates serious doubt about whether claims databases such as FAIR Health are allowed in Washington, contravening both standard industry practices and the explicit stance of the OIC. The Decision usurps the OIC's role as a primary regulator of insurance conduct in Washington, and this significant expansion of the Court of Appeals' role and authority over the insurance market warrants meticulous review to assure that the full regulatory record is properly analyzed.

V. CONCLUSION

Amicus respectfully asks the Court to accept review.

This document contains 2,498 words, excluding the parts of the document exempted from the word count by RAP 18.17.

Respectfully submitted this 27th day of February, 2023.

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CERTIFICATE OF SERVICE

The undersigned certifies under penalty of perjury under the laws of the State of Washington that I am an employee at Carney Badley Spellman, P.S., over the age of 18 years, not a party to nor interested in the above-entitled action, and competent to be a witness herein. On the date stated below, I caused to be served a true and correct copy of the foregoing document on the below-listed attorney(s) of record by the method(s) noted:

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