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No. 75097-6-I

IN THE COURT OF APPEALS, DIVISION 1
OF THE STATE OF WASHINGTON

EDWARD AND MAYA ELEAZER, Husband and Wife,

Appellants/Plaintiffs,

v.

FIRST AMERICAN TITLE INSURANCE COMPANY, a foreign insurer doing business in Washington; THE TALON GROUP, a domestic Washington corporate entity or partnership, d/b/a Talon Group Escrow and/or Talon Title,

Respondents/Defendants.

BRIEF OF APPELLANT

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I. INTRODUCTION

This case concerns whether courts will enforce insurance regulations and the Insurance Fair Conduct Act to protect policyholders when an insurance company fails to defend, assist, investigate, and pay losses. The case also concerns an escrow and closing agent's contractual and fiduciary duties to a homebuyer to whom it provides services.

Plaintiffs Edward and Maya Eleazer respectfully submit this Brief showing that the trial court erred in dismissing their causes of action against First American Title Insurance Company and its division, The Talon Group. RAP 2.2(a)(3); RAP 3.1.

II. ASSIGNMENTS OF ERROR

Assignments of Error

1. The trial court erred in entering the order of March 24, 2016, denying Plaintiffs' motion for partial summary judgment on breaches of contract and insurance coverage, and dismissing their second amended complaint. CP 3.

2. The trial court erred in entering the order of March 24, 2016, granting Defendants' motion for summary judgment and counterclaim for declaratory relief of no insurance coverage. CP 3.

Issues Pertaining to Assignments of Error

A. A Closing Agreement and Escrow Instructions required Talon agreed to provide statements regarding encumbrances on the title of real property being purchased by Edward and Maya. Talon did not provide those statements. Did Talon breach the Instructions?

B. Fiduciary duties of scrupulous honesty, skill, and diligence governed Talon's conduct in the real estate transaction with Edward and Maya. Talon did not exercise diligence in acquiring and conveying statements regarding encumbrances on the title; Talon did not properly complete the statutory warranty deed; Talon did not inform Edward and Maya that the property was encumbered by documents recorded against the title. Did Talon breach its fiduciary duties?

C & D. First American acknowledged insurance coverage for the undisclosed documents recorded against the title to Edward and Maya's property. For 16 months, however, First American did not assist, investigate, or pay losses, despite Edward and Maya's requests for assistance and clarification on coverage. First American also did not defend the title while others used the recorded documents to restrict Edward and Maya's rights to their property and cause them losses. Did First American breach the insurance contract?

E. For 16 months, First American materially breached the insurance contract by not defending, assisting, investigating, or paying losses. Shortly after First American was sued for its 16 months of inaction, it withdrew coverage, citing policy provisions against Edward and Maya. Is First American barred from enforcing provisions in a contract that it materially breached?

F. Insurance coverage is premised on the undisclosed, 1993 recorded documents that encumber the property. But First American withdrew coverage, claiming that Edward and Maya created a "risk" in 2007 during pre-sale negotiations for an easement, which was not completed or recorded. First American's division, Talon, closed the transaction in 2007 without reserving the 1993 recorded documents, or any easement, on the deed. Does the efficient proximate cause doctrine mandate coverage and defeat the policy exclusion?

G. First American also withdrew coverage on the allegation that Edward and Maya withheld information relating to pre-sale negotiations for the property. The allegation is untrue. They responded to First American's questions and requests for documents. And the information that First American claims was withheld was already known to Talon years earlier, because Talon was party to the closing.

Was First American's excuse for withdrawing coverage unreasonable, frivolous, or unfounded?

H. First American's duties of good faith and fair dealing required it to take action on its insureds' behalf and not place its own interests above theirs. But for 16 months, First American provided no defense, assistance, investigation, or payment of losses. Then it withdrew coverage after Edward and Maya suffered additional substantial losses. Did First American breach its duties of good faith and fair dealing?

I. The insurance policy and Washington law requires an insurer to provide prompt defense, assistance, investigation, and payment of losses. Although First American acknowledged insurance coverage in February of 2012, it never provided any benefits. Has First American violated the Washington Insurance Fair Conduct Act and insurance regulations?

III. STATEMENT OF THE CASE

A. Identification of the Parties

Edward and Maya Eleazer are husband and wife. They bought a family home on real property located in Index, Washington. CP 450, 833-34.

Talon engages in real estate transactions in Washington as "Talon Group Escrow" and/or "Talon Title"; it is a division of First American Title Insurance Company. CP 452, 959. First American Title Insurance Company is a foreign insurer that engages in the business of insurance in Washington. CP 452, 1011, 970.

B. Overview of Rights

The case involves the Insurance Fair Conduct Act (IFCA) as well as two contracts between the parties: (1) Closing Agreement and Escrow Instructions by Talon that governed the sale of the real property to Edward and Maya Eleazer; and (2) a Title Insurance Policy that First American Title Insurance Company issued to Edward and Maya. CP 452, 456-61.

Because it handled the real estate transaction, Talon is a party to the Closing Agreement and Escrow Instructions. In that capacity, Talon owes contractual duties as well as fiduciary duties to Edward and Maya. CP 457.

Because the insurance company issued the Title Insurance Policy to Edward and Maya, First American Title owes contractual duties, quasi-fiduciary duties, and duties of good faith and fair dealing. CP 324, 460. First American conducts insurance business in Washington,

so the Insurance Fair Conduct Act and associated insurance regulations apply to its conduct. CP 329.

C. Talon's contractual duties to Edward and Maya

In the Town of Index in 2007, a property owner named Loyal Nordstrom sold real property to Edward and Maya. CP 454, 460. Talon handled the real estate transaction by acting as the closing and escrow agent for the parties. CP 457, 837. A contract entitled Closing Agreement and Escrow Instructions defined Talon's duties. CP 457, 837, 876-881 (Talon Contract). The Closing Agreement and Escrow Instructions incorporated the parties' Purchase and Sale Agreement by reference. CP 457, 876 (at "Terms of Sale" ¶).

Under the terms of the contract, Talon's duties to Edward and Maya included the preparation, handling, and deliverance of necessary documents: "The closing agent is instructed to select, prepare, complete, correct, receive, hold, record and deliver documents as necessary to close the transaction." CP 458, 876 (at "Documents" ¶).

Related to this duty, the contract required Talon to verify the status of existing encumbrances through written statements from the holders of any encumbrances:

> The closing agent is instructed to request a written statement from the holder of each existing encumbrance

> on the property, verifying its status, terms, balance owing and, if it will not be removed at closing, the requirements that must be met to obtain a waiver of any due-on-sale provisions.

CP 458, 876 (at "Verification of Existing Encumbrances" ¶). Connected to this duty by Talon, the parties' Purchase and Sale Agreement was "subject to Buyer's review of a preliminary commitment for title insurance, together with easements, covenants, conditions and restrictions of record, which are to be obtained by Buyer, to determine that they are consistent with Buyer's intended use of the Property." CP 456-57, 858. If Talon could not comply with any term of the contract, then Talon had a duty to notify Edward and Maya. CP 458, 877 (at "Inability to Comply with Instructions" ¶).

In short, the contract required Talon to (a) prepare, handle, and deliver documents; (b) verify existing encumbrances from the holder of each existing encumbrance; (c) deliver written statements regarding the same to Edward and Maya; and (d) notify them if Talon could not do so. The purpose was so that Edward and Maya could "determine that [easements, covenants, conditions and restrictions of record] are consistent with Buyer's intended use of the Property." CP 456-57, 858.

But Talon did not request a written statement from the seller regarding existing encumbrances. CP 458. Talon did not deliver to

Edward and Maya any written statement regarding existing encumbrances. CP 458. Talon did not inform them that it failed to fulfill these instructions. CP 458. Talon's nonperformance of these contractual provisions prevented Edward and Maya from learning that the real property they were purchasing was actually encumbered by documents recorded against the title in 1993. CP 476. Edward and Maya did not learn that their property was encumbered by the 1993 recorded documents until three years after they purchased it. CP 462.

Receiving notice of the 1993 recorded documents would have allowed Edward and Maya to take steps to remedy or remove them while the property was under contract in 2007; or to negotiate a new sale price in light of the encumbrances; or to negotiate an easement agreeable to both parties and consistent with the seller's representations on the buyers' ability to use the real property in contrast with the encumbrances; or to reconsider the purchase as provided in the Real Estate Purchase and Sale Agreement. CP 848, 858. Talon's nonperformance of the contractual provisions deprived Edward and Maya of those options. CP 459. This caused them to suffer damages as shown below.

D. The real estate transaction by Talon closed without disclosure of encumbrances or any easement

The parties closed the real estate transaction. CP 460, 838. Edward and Maya received the seller's signed Certification that "all conditions of the purchase agreement for the above referenced property, including all subsequent addendums, have been met." CP 460, 883 (Certification). The seller conveyed title to the property to Edward and Maya through a statutory warranty deed. CP 460, 885 (Deed). Talon handled the preparation and completion of the deed. *Id.* In the statutory warranty deed, no easements or encumbrances of any kind were reserved. *Id.* Title passed to Edward and Maya and was duly recorded. *Id.* Talon never informed them that their title was encumbered. CP 459.

After buying the property, Edward and Maya invested time, money, and energy in renovations. CP 461. But three years later, they discovered the 1993 documents recorded against their title. CP 462.

One of the documents is a Declaration of Restrictive Covenants. The previous owner (Ms. Nordstrom, f/k/a McMillan) recorded the Restrictive Covenants in 1993 to encumber both the property purchased in 2007 by Edward and Maya, and a neighboring property known as The Bush House. CP 462. The terms of the Restrictive Covenants:

> do hereby bind said parties and all of their future grantees, assignes [sic] and successors to said covenants for the term hereinafter stated and as follows:

> 1) That all parcels of property as described above are to be considered as one total building lot.
> 2) That I have made application for developmental permit(s) for the construction of a building utilizing the above described lots as a single building lot.
>
> If the parties hereto, or any of them or their heirs, successors or assigns, shall violate or attempt to violate any of the Covenants herein, it shall be lawful for any minicipal [sic], County, or quasi-judicial agency to prosecute any proceedings at law or in equity against the person or persons violating or attempting to violate any such Covenant and either to prevent him or them from so doing or to recover damages or other dues for such violation."

CP 462-63, 496 (Restrictive Covenants). So the properties are "to be considered one total building lot" and any violation of the Restrictive Covenants can subject the parties to prosecution. This raised serious concerns for Edward and Maya. CP 463, 840.

The other document recorded against their title is a 1993 Snohomish Health District letter to The Bush House. CP 463, 499-500 (Letter). The letter lists conditions by the Health District related to the failure of the on-site septic system, and an application by The Bush House to build a new septic system across the adjacent property (which Edward and Maya purchased in 2007). CP 499-500.

One Health District condition in the letter is that "All components of onsite sewage facility on separate tax lots from the Bush House Restaurant must be tied to Bushhouse [sic] via recorded

easements." CP 500 (Letter at p. 2, ¶ J). This, however, was not done. CP 463. No easement was recorded, either in 1993 or 2007. Instead, in 1993 Ms. Nordstrom filed the Restrictive Covenants. CP 462. When the property was sold to Edward and Maya in 2007, they did not know about the 1993 documents recorded against their title that appeared to provide dominant control of their land to the neighboring Bush House. CP 294, 459.

Edward and Maya did know that the Bush House was connected to septic pipes in their own front yard. CP 294, 455-56. During a pre-sale inspection in 2007, the seller's real estate agent told Edward and Maya that the front-yard septic system was designed to be large enough for their home's use as well as the Bush House's use, in case their home's current septic system (located in the backyard) ever failed. CP 456. The agent stated that Edward and Maya would need to initial a paper that they would be willing to sign an easement for the pipes in the front yard that were connected to the Bush House. CP 456. This was a pre-sale Form 34 for a proposed easement to "grant access for

maintenance of OSS to Bush House… in the form of a recorded easement agreeable to both parties."[1] CP 456, 859 (Form 34).

Although the seller and Talon disregarded the Form 34 through their subsequent inaction, Edward and Maya did follow up with Talon before closing, which was appropriate because Talon was the closing agent. CP 459, 838. Edward and Maya asked Talon agents about the Bush House septic system easement issue. *Id.* The Talon agents looked through all the paperwork to see if they had missed anything; they said they did not find anything in the paperwork that mentioned the Bush House septic system. *Id.*

In response to Edward and Maya's questions, the Talon agents stated they had "no idea" what they were talking about, and that the home and property were theirs after closing because the seller already signed the house and property over to them, and only their signatures were required to complete the transaction. *Id.* Edward and Maya then concluded that there was no need for a septic system easement after all,

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[1] The Form 34 was "an agreement to do something which requires a further meeting of the minds of the parties and without which it would not be complete." *Keystone Land & Dev. Co. v. Xerox Corp.*, 152 Wn.2d 171, 175, 94 P.3d 945 (2004). While potentially useful in negotiations, "[a]greements to agree are unenforceable in Washington. *Id.* at 176. This is designed to "avoid trapping parties in surprise contractual obligations." *Id.* at 178. Therefore, "for a contract to form, the parties must objectively manifest their mutual assent" and "the terms assented to must be sufficiently definite." *Id.* at 177-78.

and that the seller's agent had been mistaken at the pre-sale inspection. *Id.*

E. First American issued the Title Insurance Policy

When the title was recorded, First American issued the title insurance policy to Edward and Maya. CP 460, 485-494 (Insurance Policy). It provides for indemnification and defense. CP 485. The policy has been in force: "Your insurance is effective on the Policy Date [May 10, 2007]." CP 485, 488. It protects them against actual losses for covered risks: "This Policy insures You against actual loss, including any costs, attorneys' fees and expenses provided under this Policy, resulting from the Covered Risks set forth below…" CP 460, 485.

> "Covered Risks" include:
> "5. Someone else has a right to limit Your use of the Land; and
> "9. Someone else has as [sic] encumbrance on Your Title."

CP 460, 485. The insurance policy also promises to defend Edward and Maya against adverse claims: "OUR DUTY TO DEFEND AGAINST LEGAL ACTIONS: We will defend Your Title in any legal actions only as to that part of the action which is based on a Covered Risk." CP 485. So the insurance policy promises to indemnify and defend Edward and Maya's title when "Someone else has a right to limit [their] use of the

Land" and when "Someone else has an encumbrance on [their] Title." CP 485.

F. Edward and Maya incur actual losses from covered risks

During the 2010 to 2011 time period, the septic system to Edward and Maya's home failed. (This was the older system in the backyard.) CP 465-66. To correct the problem, they applied to the Snohomish Health District to connect to the newer septic system that existed in their front yard. CP 466. The Health District denied the application. CP 466. The basis for the denial was that the previous owner installed the front-yard septic system on the property (Lots 25-28) for the neighboring Bush House (Lots 29-33), and filed the Declaration of Restrictive Covenants. CP 466, 910 (Denial Letter).

The Health District denied Edward and Maya's application to use their own land to repair their own septic system, stating that,

> Although the Declaration of Restrictive Covenants may just be some sort of cloud on the title of Lots 25 through 28, it also may be a legal instrument granting dominate control of the existing OSS [on-site septic system] pressure bed and portions of Lots 25 thru 28 to the property owner of Lots 29 thru 33. Until this situation can be adequately resolved, it is not readily clear who has ownership/control of the OSS pressure bed and the immediate area.

CP 910. So the Health District found that Edward and Maya did not have clear ownership of their own land due to the Restrictive Covenants. The Health District later threatened them with prosecution for their failing septic system. CP 468. Meanwhile, a prospective new owner of The Bush House, together with seller Nordstrom, threatened to sue Edward and Maya for not giving rights to their own land in favor of The Bush House. CP 463-65.

By this time, Edward and Maya tendered their defense to First American. CP 466. Their attorney, Kem Hunter, sent the insurance company a letter: "REMEDY REQUESTED: Initiate legal action to remove the restrictive covenants, and nullify the Snohomish Health District letter; take other appropriate action to protect owner's title to property." CP 892. Claims counsel for First American responded two months later, acknowledging that "the undisclosed declaration of restrictive covenant may constitute an encumbrance on your title." CP 466, 907. But the insurance company denied that a covered loss existed, and declined to initiate any action to protect the insured title. CP 910.

G. First American acknowledges coverage for actual losses due to the undisclosed recorded documents

The insurance company reversed course after the Health District denied the application to repair the septic system. CP 467, 921 ("present

circumstances reported by the Eleazers do trigger coverage under their title policy"). Edward and Maya also resubmitted their insurance claims, including claims under Covered Risk No. 5 ("Someone else has a right to limit Your use of the Land") and Covered Risk No. 9 (encumbrance on title). CP 467, 915.

First American responded, acknowledging that the 1993 recorded documents trigger coverage under Covered Risks Nos. 5 and 9:

> Declaration of Restrictive Covenants and the SHD letter recorded in 1993 have an ambiguous impact on the Eleazers' use of their property; solely for purposes of the present claim, however, First American accepts that they are recorded documents within the scope of Covered Risks Nos. 5 and 9 in that they limit the location where the Eleazers can install a septic system on their property.

CP 467, 926 (middle ¶). This acknowledgment of coverage required the insurance company to defend, assist, investigate, and provide benefits.

Instead, First American "suggest[ed] a different method for resolving this, although, strictly speaking, it is not an appropriate measure of damages under the title policy." CP 926. First American informed Edward and Maya that a diminution-in-value appraisal could involve months of delay. *Id.* Instead of doing the appraisal, First American only offered "to pay the difference between a low-pressure and high-pressure septic system." *Id.* (The expensive and smaller, high-

pressure septic system was necessary because the Health District denied the application for Edward and Maya to use the drain field on their own land. CP 467, 470.)

H. For 16 months, First American provides no defense, assistance, investigation, or benefits

After First American acknowledged coverage in February of 2012, Edward and Maya again requested help in the quiet title dispute. CP 296, 335. The request was for the abstracts of title to the encumbered properties. But First American did not respond. In March of 2012, Edward and Maya again requested help, and also requested clarification of coverage. CP 296, 338. First American still did not respond to the request for help and the request for clarification of coverage. This information was important in the defense of the title and in understanding First American's coverage position, but First American Title never responded.

First American conducted no investigation or damages appraisal in 2012. CP 467. First American also provided no defense or assistance to their insureds in the quiet title disputes. CP 467. The time period in which First American acknowledge coverage was February of 2012 through June of 2013. CP 82. This was a period of 16 months. During this time period, First American provided no defense, assistance,

investigation of losses, or payment of losses to Edward and Maya. CP 467, 470.

I. Edward and Maya incur significant losses

Edward and Maya were forced to self-finance the legal disputes with the Health District, seller Nordstrom, and The Bush House. CP 468. Nordstrom and The Bush House brought claims against Edward and Maya for specific performance and breach of contract based in part on the 1993 recorded documents that encumbered Edward and Maya's title. CP 468. Again, First American provided no defense or assistance.

The quiet-title trial court denied Edward and Maya's attempt to quiet their title, granted Nordstrom's claims, and ordered an eight-page drain field and septic system easement recorded against Edward and Maya's title. CP 280, 468-69. Edward and Maya lost control of roughly three-quarters of their land in favor of the neighboring Bush House. CP 469. This was not what they bargained for six years earlier. One year later, the Court of Appeals reversed the trial court's grant of specific performance of the easement in an unpublished decision.[2] CP 470. Since that time, Edward and Maya have made good faith compromise offers of

[2] *See Eleazer v. Bush House, LLC*, 183 Wn. App. 1007 (2014) (unpublished decision).

easements, although those offers have been rejected by Nordstrom and The Bush House. CP 470. No party seeks rescission.

To be clear, this appeal is not about the quiet title dispute; this appeal concerns Defendants First American and Talon, and Edward and Maya's rights under those contracts and Washington law. Again, in February of 2012 First American acknowledged coverage for losses in the quiet title dispute. But First American did not respond to its insureds' requests for assistance through 2012.

Ten months passed before First American responded. CP 296. Counsel for First American (who was acting as claims handler) wrote, "It's been some time since we communicated about this matter. (I dropped the ball in that regard.)" CP 296, 341 (coverage/defense counsel e-mail). Although First American was referred to Edward and Maya's new quiet title counsel, First American still did not provide assistance, defense, or investigate and pay losses to Edward and Maya. CP 297.

First American did not commission the damages appraisal for another five months, which was fifteen months after initially acknowledging coverage for losses. CP 297, 343. In May of 2013, First American retained an appraiser to perform a diminution-in-value report.

CP 343. To its appraiser, the insurer stated that "First American has agreed that the 1993 SHD Letter and the Declaration of Restrictive Covenants, both of which are recorded, have the detrimental effect of restricting the locations on the Eleazers' property where they can install a septic system to serve their home." CP 345.

Edward and Maya cooperated with scheduling the property inspection, although the inspection did not occur until August of 2013, and the First American appraisal report was not released to them until November of 2013. CP 363 (Report). The report found $125,000.00 in property diminution-in-value losses. CP 363. The report did not consider other consequential losses or damages, including the expensive high-pressure septic system, as well as the quiet title attorney fees, costs, and expenses, all of which Edward and Maya were forced to self-finance. Apart from the August of 2013 appraisal inspection, no one on behalf of First American has ever interviewed, examined, or deposed Edward and Maya to assess their losses. CP 295.

J. After Edward and Maya sued First American—and lost the quiet title case—First American withdrew coverage

By the time First American released the appraiser report, however, First American had already "withdrawn coverage." CP 82,

1582.

In May of 2013, Edward and Maya were forced to sue First American and Talon for First American's lack of action on their behalf. CP 1018. In that same month, Edward and Maya lost in the quiet title trial court. CP 280.

In June of 2013, First American withdrew coverage, citing both of those events in its letter withdrawing coverage. CP 766. This was 16 months after correctly acknowledging coverage, but taking no action.

K. First American cited two insurance policy provisions

In its June of 2013 letter withdrawing coverage, First American cited only two provisions. CP 765. First American cited Exclusion 4(a), which provides that "You are not insured against loss, costs, attorneys' fees, and expenses resulting from… Risks… that are created, allowed, or agreed to by You, whether or not they appear in the Public Records." CP 765. First American also cited a policy condition, Condition No. 5, which states, "You must cooperate with Us in handling any claim or legal action and give Us all relevant information." CP 765. The withdrawal of coverage letter failed to note, however, that Condition No. 5 would not reduce or end coverage under the facts of this case: "If You fail or refuse to cooperate with Us, Your coverage will be reduced

or ended, but only to the extent Your failure or refusal affects Our ability to resolve the claim or defend You." CP 493.

First American has never paid any losses or taken any action to help Edward and Maya. CP 467.

IV. SUMMARY OF ARGUMENT

Coverage. There is insurance coverage in this case if the Court does not condone First American enforcing the insurance contract against Edward and Maya after First American itself had been in breach of the same contract for 16 months.

Second, there is insurance coverage if the Court applies the efficient proximate cause doctrine, which provides coverage for all losses stemming from the 1993 recorded documents, including the unconsummated easement.

Third, there is insurance coverage even if the Court allows First American to cite the two policy provisions, because they do not apply to deprive Edward and Maya of coverage for their losses.

Talon's breaches. At the time of the sale, Talon breached the Closing Agreement and Escrow Instructions—and its fiduciary duty to Edward and Maya—by not providing them with written statements verifying the status of the 1993 recorded documents. Talon's breaches

meant that Edward and Maya unknowingly bought a property encumbered by the 1993 recorded documents, causing them damages.

The insurance contract, good faith, and IFCA. For 16 months, First American correctly acknowledged coverage, but took no action to defend, assist, investigate or pay losses. As a consequence, First American breached the insurance contract, and has been in breach since 2012. Also as a consequence, First American violated its duty of good faith and fair dealing. Because of First American's unreasonable denial of claim for coverage (since withdrawing coverage), unreasonable denial of payment of benefits (since accepting coverage), and violations of Washington insurance regulations, First American violated the Insurance Fair Conduct Act.

The law entitles Edward and Maya to payment for their damages along with attorney fees and costs for bringing this action.

V. LEGAL AUTHORITY AND DISCUSSION

The trial court erred when it dismissed on summary judgment Edward and Maya's causes of action against First American and Talon. The trial court erred when it granted First American and Talon's

motion for summary judgment. The standard of review is de novo on all issues.[3]

A. Talon breached the contract because it did not act strictly in accordance with its provisions

Escrow instructions constitute a valid, written contract that is enforceable against the escrow agent.[4] The escrow agent's duties are defined by his instructions.[5] "Escrow agents must act strictly in accordance with the provisions of the escrow agreement; they must comply with instructions."[6] "Thus, it is the rule that an escrow agent or holder becomes liable to his principals for damage proximately resulting from his breach of the instructions, or from his exceeding the authority conferred on him by the instructions."[7]

Under the contract, Talon's duties to Edward and Maya included

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[3] *Durland v. San Juan County*, 182 Wn.2d 55, 69, 340 P.3d 191 (2014) (summary judgment determinations are reviewed de novo); *Expedia, Inc. v. Steadfast Ins. Co.*, 180 Wn.2d 793, 802, 329 P.3d 59 (2014) (courts interpret language in an insurance policy as a matter of law; review is de novo).

[4] *Sanwick v. Puget Sound Title Insurance Co.*, 70 Wn.2d 438, 442-43, 423 P.2d 624 (1967).

[5] *National Bank of Washington v. Equity Investors*, 81 Wn.2d 886, 910, 506 P.2d 20 (1973).

[6] *Id.* at 910; *see also Styrk v. Cornerstone Investments, Inc.*, 61 Wn. App. 463, 472, 810 P.2d 1366 (1991) ("An escrow agent can be held liable to his principals for damage proximately caused from his breach of the escrow instructions.").

[7] *Equity Investors*, 81 Wn.2d at 910, *citing Sanwick v. Puget Sound Title Ins. Co*, 70 Wn.2d 438, 423 P.2d 624 (1967).

the preparation, handling, and deliverance of necessary documents. CP 458, 876 (at "Documents" ¶). The contract required Talon to verify the status of existing encumbrances through written statements from the holders of any encumbrances. CP 458, 876 (at "Verification of Existing Encumbrances" ¶). The purpose was so that Edward and Maya could "determine that [easements, covenants, conditions and restrictions of record] are consistent with Buyer's intended use of the Property." CP 456-57, 858. If Talon could not comply with the contract, then it had a duty to notify Edward and Maya. CP 458, 877 (at "Inability to Comply with Instructions" ¶).

Talon did not do these things. CP 458. That is undisputed. Talon's failures are the opposite of acting in strict accordance with the provisions. (These provisions are not ambiguous, although if they were, they must be construed against Talon as the drafter.)

Talon's nonperformance prevented Edward and Maya from learning that the real property they were purchasing was actually encumbered by documents recorded against the title in 1993. CP 476. Receiving notice of the 1993 recorded documents would have allowed Edward and Maya to take steps to remedy or remove them; to negotiate a new sale price; to negotiate an easement agreeable to both parties; to

negotiate an easement consistent with the seller's representations on the buyers' rights to use the real property; or to reconsider the purchase altogether, as provided in the Real Estate Purchase and Sale Agreement. CP 848, 858. Talon's nonperformance deprived Edward and Maya of these options and proximately caused them damages since the sale. CP 459.

The trial court erred when it did not hold that Talon is liable for those damages proximately caused by its breaches of contract.

B. Talon breached its fiduciary duties of scrupulous honesty, skill, and diligence

Talon owed Edward and Maya fiduciary duties: "As a general rule, the escrow holder must act strictly in accordance with the provisions of the escrow agreement; he must comply strictly with the instructions of the parties, and it is his duty to exercise ordinary skill and diligence, and due or reasonable care in his employment. In his fiduciary capacity, he must conduct the affairs with which he is entrusted with scrupulous honesty, skill, and diligence."[8]

Escrow and title insurance law provides that "Every title insurance company and title insurance agent conducting the business of

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[8] *Equity Investors*, 81 Wn.2d at 910.

an escrow agent… shall (a) Keep adequate records."[9] An escrow agent is required to keep "[t]ransaction files containing all agreements, contracts, documents, leases, escrow instructions, closing statements and correspondence for each transaction," and all records "must be accurate."[10] "An escrow agent must perform all acts required of the escrow agent as expeditiously as possible and within any time period identified in the escrow instructions. Intentional or negligent delay in such performance is a violation of RCW 18.44.301…"[11] The "designated escrow officer is responsible for the custody, safety, and accuracy of entries of all required escrow records."[12]

Talon, as escrow and closing agent for Edward and Maya, owed them fiduciary duties that included strict compliance with instructions and "scrupulous honesty, skill, and diligence." But Talon cannot be found to have acted as such because it did not follow the contract provisions. CP 458. Talon did not create and keep accurate records, as required by the law. CP 460, 885. Talon did not request a written statement from the seller regarding the 1993 recorded documents that

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[9] RCW 48.29.190. Conducting business as escrow agent — Requirements — Violation, penalties.
[10] WAC 208-680-530(1)(a), (3).
[11] WAC 208-680-550.
[12] WAC 208-680-174(1).

encumbered the property, and convey such disclosure to Edward and Maya. CP 458. Talon did not inform Edward and Maya that it had failed to do these things. CP 458.

When they asked Talon about the Bush House septic system easement issue, Talon responded that there was nothing in the paperwork that mentioned it, they had no idea what they were talking about, and the property was theirs upon closing. CP 459, 838. That inaccurate information was the result of Talon's lack of diligence. It is also imputed to First American.[13]

Talon allowed the sale to close without Edward and Maya's review of "a preliminary commitment for title insurance, **together with easements, covenants, conditions and restrictions of record**"—which necessarily should have included the 1993 recorded documents. (Emphasis added.) CP 459, 476. Finally, Talon did not accurately prepare the statutory warranty deed, which did not include the 1993 recorded documents that encumbered the title. CP 460, 885. Talon's

[13] An insurance company is bound also by the acts, contracts, or representations of its agent that are within the scope of the agent's apparent authority. *Fletcher v. West Amer. Ins. Co.*, 59 Wn. App. 553, 558 (1990), citing *Fanning v. Guardian Life Ins. Co.*, 59 Wn.2d 101, 104 (1961). *See also C-1031 Properties, Inc. v. First American Title Insur. Co.*, 175 Wn. App. 27, 32, 301 P.3d 500 (2013) (it was reasonable for an insured to rely on expert services for discovering encumbrances recorded in the public record).

work is not an example of strict compliance with instructions or scrupulous honesty, skill, or diligence. Talon breached its fiduciary duties to Edward and Maya. The trial court erred when it dismissed the claim.

Talon is not and was not a separate corporation, but a division of First American Title Insurance Company. CP 452, 959. It was reasonable as a matter of law for Edward and Maya to rely on Talon's escrow and closing work: "By paying consideration to a title insurer for their expert services in uncovering defects in title, it is reasonable for the insured to believe and rely upon the fact that the insurer has discovered any encumbrances recorded in the public record."[14] "The role of the title insurer is to insure title. Title insurance is a guaranty of the accuracy of a company search and record title on a specific property."[15]

C. First American correctly acknowledged coverage for the 1993 recorded documents

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[14] *C-1031 Properties, Inc. v. First American Title Insur. Co.*, 175 Wn. App. 27, 32, 301 P.3d 500 (2013), citing *Kim v. Lee*, 145 Wn.2d 79, 91-92, 31 P.3d 665 (2001).

[15] *C-1031 Properties, Inc. v. First American Title Insur. Co.*, 175 Wn. App. 27, 33, 301 P.3d 500 (2013), citing *Kiniski v. Archway Motel*, 21 Wn. App. 555, 560, 586 P.2d 502 (1978).

"Title insurance protects against financial loss from defects in insured titles of real property."[16] Washington courts "liberally construe insurance policies to provide coverage wherever possible."[17] CP 474. Coverage exclusions, however, are "contrary to the fundamental protective purpose of insurance" and are strictly construed against the insurer.[18] Washington law disfavors interpretations of policy terms that render coverage illusory.[19] CP 475.

In exchange for the insurance premium, First American issued to Edward and Maya an insurance policy. It protects against actual losses caused by Covered Risks, including "5. Someone else has a right to limit Your use of the Land," and "9. Someone else has an encumbrance on Your Title." CP 460, 485-494 (Insurance Policy). First American acknowledged coverage in February of 2012 for the 1993 recorded documents. CP 467, 921. That determination was correct.

Although First American acknowledged coverage, it never provided benefits required by the contract and Washington law. CP 467, 470. Sixteen months later—after Edward and Maya were forced to sue

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[16] WAC 284-29A-010.
[17] *Bordeaux, Inc. v. Am. Safety Ins. Co.*, 145 Wn. App. 687, 694, 186 P.3d 1188 (2008).
[18] *Id.*
[19] *Olympic S.S. Co., Inc. v. Centennial Ins. Co.*, 117 Wn.2d 37, 50-51, 811 P.2d 673, 680 (1991).

First American for its inaction, and after they got clobbered in the quiet title case—First American cited policy provisions against them and withdrew coverage. CP 1018, 280, 766.

D. First American accepted coverage for 16 months, but breached the contract by not providing benefits

Between February of 2012 through June of 2013—a period of roughly 16 months—First American acknowledged there was coverage under the insurance contract. CP 467, 921. The contract provides for indemnification and defense. CP 485. It protects them against actual losses for covered risks: "This Policy insures You against actual loss, including any costs, attorneys' fees and expenses provided under this Policy, resulting from the Covered Risks set forth below…" CP 460, 485. "Covered Risks" include:

> "5. Someone else has a right to limit Your use of the Land; and
> "9. Someone else has as [sic] encumbrance on Your Title."

CP 460, 485. The contract also promises to defend Edward and Maya against adverse claims: "OUR DUTY TO DEFEND AGAINST LEGAL ACTIONS: We will defend Your Title in any legal actions only as to that part of the action which is based on a Covered Risk." CP 485. So the insurance policy promises to indemnify and defend Edward

and Maya's title when "Someone else has a right to limit [their] use of the Land" and when "Someone else has an encumbrance on [their] Title." CP 485.

But First American neither indemnified nor defended Edward and Maya when others had rights to limit their use of their land and had an encumbrance on their title.[20] Because First American took no action as required by the contract, First American breached the contract. The trial court erred.

E. Its breach of the insurance contract bars First American from enforcing it against Edward and Maya

First American's position is that it should be permitted to withdraw coverage after being in breach of contract for over one year. The Court should not condone this. Black letter law precludes any policy exclusion in this case: "one who seeks to enforce the terms of a contract against another or to recover damages for the breach of a contract by another must show that there has been no breach on his own part. This is on the theory that one who has himself breached a contract

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[20] "[I]f the company wrongfully denies coverage and refuses to defend, so that the insured has to defend personally, then the insured is entitled to reimbursement from the company for his reasonable fees and costs of defending." 18 Wash. Prac., Real Estate § 14.20: The title insurance policy—Specific clauses (2d ed. 2012), citing *Baumann v. Puget Sound Title Insurance Co.,* 184 Wash. 9, 49 P.2d 914 (1935); *Nautilus, Inc. v. Transamerica Title Insurance Co.*, 13 Wn. App. 345, 534 P.2d 1388 (1975).

can not thereafter enforce the contract against the other party."[21] CP 85.

More recent decisions enforce the same rule: "A party is barred from enforcing a contract that it has materially breached."[22] Because First American Title materially breached the insurance policy by not providing benefits under the policy provisions or the law, First American Title is barred from enforcing policy provisions against its insureds, including Exclusion 4(a) or Section 5 of Conditions. CP 85.

The Court should not condone First American's breach of over one year, and then allow First American to cite policy provisions to withdraw coverage. First American should be barred from doing so. CP 85. The trial court erred when it ignored black letter law, but instead denied Edward and Maya's motion for summary judgment, and granted First American's counterclaim of no coverage.

F. First American's withdrawal of coverage violates the efficient proximate cause rule that mandates coverage

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[21] *Downs v. Smith*, 169 Wn.2d. 203, 206 (1932), citing *Reddish v. Smith*, 10 Wash. 178, 38 Pac. 1003 (1894).

[22] *Rosen v. Ascentry Technologies, Inc.*, 143 Wn. App. 364, 369 (2008) (defendant is precluded from enforcing a settlement agreement on which it had not made payment to plaintiff for over one year), citing *Bailie Commcn's, Ltd. v. Trend Bus. Sys.*, 53 Wn. App. 77, 81, 765 P.2d 339 (1998), and *Jacks v. Blazer*, 39 Wn.2d 277, 235 P.2d 187 (1951) ("[F]ailure to make… payment… was a breach of the contract, so material in nature that it operated as a discharge of it.").

First American cites two—and only two—provisions for withdrawing coverage: Exclusion 4(a); and Section 5 of the Conditions. CP 765. First American may not cite other provisions or make other arguments to withdraw coverage.[23] CP 314. Even if the Court were to condone the citation of these two provisions, they are insufficient as a matter of law to deny coverage.

Exclusion 4(a) excludes coverage for "Risks: a. that are created, allowed, or agreed to by You, whether or not they appear in the Public Records." CP 765, 492. Citing to this exclusion shows First American's misdirection: the 1993 recorded documents are ***not*** risks that Edward and Maya "created, allowed, or agreed to." As First American has known, the 1993 recorded documents were solely "created, allowed, or agreed to" by the seller. CP 88, 315, 480. The same documents were disregarded by Talon, and then not disclosed to Edward and Maya. Exclusion 4(a) does not apply.

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[23] "A provision must be asserted as a basis for denying coverage, and during litigation insurers may be precluded from asserting new grounds for denying coverage." *Vision One v. Philadelphia Indem.*, 174 Wn.2d 501, 520, 276 P.2d 300 (2012); WAC 284-30-380(1) ("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."). For First American to now do otherwise, would be tantamount to bad faith shifting of its position to "mend the hold" against Edward and Maya.

First American may argue instead that the exclusion applies to the pre-sale Form 34 "agreement to agree" to an easement. But this never materialized as an easement created or reserved on the statutory warranty deed, despite Edward and Maya asking Talon about The Bush House easement issue at closing. CP 459, 838. And the transaction closed with the seller certifying that all conditions to the sale had been met. CP 460, 838.

In hindsight, it may be understandable that the seller requested the Form 34 "agreement to agree" in light of the 1993 recorded documents. The Form 34 was a document set in motion by the 1993 recorded documents, which contemplated the two properties being treated as one total building lot, with the Bush House to retain dominant control over the septic system and reserve area land located on the adjacent lots. CP 496-500. As a result, it was objectively foreseeable that the seller may include the Form 34 in the pre-sale negotiations when she separated the building lots. This was foreseeable to Talon and First American, who knew or should have known in 2007 about the 1993 recorded documents, even while Edward and Maya had been kept in the dark about them.

Regardless, the efficient proximate cause rule is a controlling

rule of insurance contract interpretation that precludes the application of Exclusion 4(a) to the Form 34. CP 88, 480. The rule mandates coverage even if an excluded event (allegedly the Form 34) appears in the chain of causation that ultimately produces the loss. CP 88.

Under Washington law, "where a peril specifically insured against sets other causes in motion which, in an unbroken sequence and connection between the act and final loss, produce the result for which recovery is sought, the insured peril is regarded as the 'proximate cause' of the entire loss."[24] It is the efficient or predominant cause that sets into motion the chain of events producing the loss which is regarded as the proximate cause, not necessarily the last act in a chain of events.[25] "[W]here there is one cause which sets other causes in motion, there is coverage for the loss if the cause which set the others in motion is an included risk under the terms of the policy. This is so even if there might be an excluded risk which also contributed to the loss or damage."[26]

The 1993 recorded documents are insured risks that set into motion other causes, such as the 2007 Form 34 and the subsequent

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[24] *Graham v. PEMCO*, 98 Wn.2d 533, 538, 656 P.2d 1077 (1983).
[25] *Id.*; *see also Vision One, LLC v. Philadelphia Indemnity Ins. Co.*, 174 Wn.2d 501, 520, 276 P.2d 300 (2012) (determined on other grounds and held that "efficient proximate cause" did not provide the insurer with a defense but reiterated that the efficient proximate cause rule is a "controlling rule of insurance contract interpretation").
[26] *Villella v. PEMCO*, 106 Wn.2d 806, 816, 725 P.2d 957 (1986).

demands and litigation (by the seller and the Bush House) for an easement. CP 480. There is coverage for the losses, regardless of whether First American argues the Form 34 and easement demands might be excluded risks that also contributed to the losses.

The trial court erred when it ignored this rule that mandates coverage, but instead denied Edward and Maya's motion for summary judgment, and granted First American's counterclaim of no coverage.

G. First American's coverage withdrawal under Section 5 of Conditions is unreasonable, frivolous, or unfounded

Section 5 of the Conditions also cannot bar coverage. Section 5 reads as follows:

> 5. Handling a Claim or Legal Action
>
> a. You must cooperate with Us in handling any claim or legal action and give Us all relevant information.
>
> b. If You fail or refuse to cooperate with Us, Your coverage will be reduced or ended, but only to the extent Your failure or refusal affects Our ability to resolve the claim or defend You.

CP 493. With respect to 5(a), Edward and Maya cooperated with First American by providing it with the information and documents that it requested. CP 295, 321. For example, in December of 2011, Edward and Maya responded to the insurer's November 2011 request for the Form

17 documents. CP 321-22. First American's allegation to the contrary is unfounded.

Secondly, First American already knew or should have known about the relevant information that it alleges Edward and Maya withheld, because Talon had that information since 2007. CP 316. An insurer will be held vicariously liable based on an agent's actions according to common law principles of agency.[27] If an agent is acting within the scope of his or her authority, the agent's knowledge will be imputed to the insurer.[28] As escrow and closing agent, Talon knew about the uncompleted Form 34 "agreement to agree" to an easement. This knowledge is imputed to First American.

Thirdly, First American produced no 2011 or 2012 insurance claim forms, investigation documents, or interview statements that would suggest relevant information was withheld from them. CP 316. There are no such documents because First American did not conduct an insurance investigation; this violated the law.[29] CP 316. The quiet

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[27] *Chicago Title Ins. Co. v. Wash. State Office of the Ins. Comm'r*, 178 Wn.2d 120, 309 P.3d 372 (2013).

[28] *Am. Fid. & Cas. Co. v. Backstrom*, 47 Wn.2d 77, 82, 287 P.2d 124 (1955).

[29] This violated WAC 284-30-360(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

title action had been pending for over a year when First American claimed surprise—as soon as Edward and Maya lost—that other people sought an easement against them.

Finally, the allegation of withholding information could not have affected First American's "ability to resolve the claim or defend" Edward and Maya (*see* Condition 5(b), above), because First American had done nothing to resolve the claim or defend them. Under subsection (b) of the Condition, the Condition could not apply under the facts of this case. The trial court erred when it ruled otherwise.

H. First American's inaction, and withdrawal of coverage, violated its duties of good faith and fair dealing

Special statutory duties of good faith, honesty, and equity apply to insurance companies.[30] CP 323-24. "A fiduciary or quasi-fiduciary relationship exists between an insurer and its insured. An insurer has an enhanced fiduciary obligation that rises to a level higher than that of mere honesty and lawfulness of purpose. It requires an insurer to deal fairly with an insured, giving equal consideration in all matters to the

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requirements."). This also violated WAC 284-30-370 ("Every insurer must complete its investigation of a claim within thirty days after notification of claim"). Thus, First American's investigation should have been completed by March of 2012 at the latest, which was fifteen months before it withdrew coverage.

[30] RCW 48.01.030.

insured's interests as well as its own."[31] CP 324.

"As a result of this special relationship, the courts will generally hold that an insurer cannot place its interests ahead of those of the insured, and will scrutinize the insurer's actions or inactions in light of this standard."[32] CP 324. An insurer's duties of good faith include an affirmative duty to communicate, promptly investigate claims, and attempt to effectuate fair and equitable settlements, without resort to litigation, arbitration, or appraisal.[33] CP 324.

The Washington Pattern Instruction 320.02, Insurer's Duty of Good Faith, is attached as Appendix A. It provides as follows:

> An insurer has a duty to act in good faith. This duty requires an insurer to deal fairly with its insured. [The insurer must give equal consideration to its insured's interests and its own interests, and must not engage in any action that demonstrates a greater concern for its own financial interests than its insured's financial risk.] An insurer who does not deal fairly with its insured [, or who does not give equal consideration to its insured's interests,] fails to act in good faith. In proving that an insurer failed to act in good faith, an insured must prove that the insurer's conduct was [unreasonable] [frivolous] [or] [unfounded]. The insured is not required to prove that the insurer acted dishonestly or that the insurer intended to act in bad faith.

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[31] *Van Noy v. State Farm Mut. Auto Ins. Co.*, 142 Wn.2d 784, 791, 16 P.3d 574 (2001); *St. Paul Fire and Marine Ins. Co. v. Onvia, Inc.*, 165 Wn.2d 122, 196 P.3d 664 (2008).
[32] 14 Couch on Ins. § 198:7 (2013).
[33] WAC 284-30-330(2), (6), and (7); WAC 284-30-360.

CP 324; Appendix A.

Insurers can act in bad faith even where they properly deny coverage or compensation to their insureds.[34] Moreover, a violation of Washington's insurance regulations may, in some circumstances, constitute bad faith regardless of the coverage determination.[35] "The implied covenant of good faith and fair dealing in the policy requires the insurer to conduct any necessary investigation in a timely fashion and to conduct a reasonable investigation before denying coverage. In the event the insurer fails in either regard, it will have breached the covenant and, therefore, the policy."[36]

The Washington Pattern Instruction, 320.06, Violations of Insurance Regulations Related to Settlement of Claims, is attached as Appendix B. It provides that

> A violation, if any, of one or more of the following statutory or regulatory requirements is [a breach of the duty of good faith] [an unfair method of competition] [an unfair or deceptive act or practice in the business of insurance] [and] [a breach of the insurance contract] [listing regulations at WAC 284-30].

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[34] *Coventry Assocs. v. Am. States Ins. Co.*, 136 Wn.2d 269, 277-80, 961 P.2d 933 (1998) (reviewing examples of bad faith liability despite proper claim denial).
[35] *Tank v. State Farm Fire & Cas. Co.,* 105 Wn.2d 381, 386 (1996).
[36] *Coventry Assocs. v. Am. States Ins. Co.*, 136 Wn.2d 269, 281, 961 P.2d 933 (1998).

CP 324-325; Appendix B.

Related to this, "an insurer's interpretation of law is not necessarily in good faith simply because the insurer takes an arguable position with respect to existing law. It is still a question as to whether the position, though arguable, was reasonable."[37] "It is possible for a jury to conclude that the insurer acted in bad faith even if, at the time of the denial of coverage, the question of coverage appears debatable or even doubtful."[38] CP 325. The Washington Pattern Instruction, 320.04, Insurer's Failure to Act in Good Faith—Denial of First-Party Claims, is attached as Appendix C. It provides as follows:

> The duty of good faith requires an insurer to conduct a reasonable investigation before refusing to pay a claim submitted by its insured. An insurer must also have a reasonable justification before refusing to pay a claim. An insurer who refuses to pay a claim, without conducting a reasonable investigation or without having a reasonable justification, fails to act in good faith.

Appendix C.

The trial court was required to view the evidence in the light

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[37] 25 Wash. Prac., Contract Law And Practice § 5:14 (2d ed. 2013), citing *Mulcahy v. Farmers Ins. Co. of Washington*, 152 Wn. 2d 92, 95 P.3d 313 (2004).

[38] 25 Wash. Prac., Contract Law And Practice § 5:14 (2d ed. 2013), citing *Fireman's Fund Ins. Companies v. Alaskan Pride Partnership*, 106 F.3d 1465 (9th Cir. 1997) (insured was entitled to recover bad faith damages from insurer when insurer denied coverage for loss of vessel that sank after inexplicably taking on water).

most favorable to Edward and Maya. Instead, the trial court disregarded the evidence of bad faith conduct by First American, and improperly dismissed the claim. The trial court erred.

Viewed in the light most favorable to the insureds, First American placed their own interests first, and engaged in bad faith conduct with their insureds, in the following ways:

- When the claim was submitted in 2011, First American did not assign the claim to an insurance adjuster, but instead to an in-house attorney, who assigned outside counsel to handle the insurance claim and defend First American. Outside counsel was adverse to Edward and Maya. CP 325-26.
- Despite policy language requiring the insurer to defend, First American never hired counsel to defend Edward and Maya's title when others cited the 1993 encumbrances to restrict rights to their property. Edward and Maya had to self-finance their defense. CP 326.
- First American provided no assistance at all in the quiet title dispute, despite knowing that the genesis of the dispute was in Talon's mishandling of the transaction. Talon is First American's own division. CP 326.

- First American ignored Edward and Maya's requests for help in the quiet title case, which included requests for abstracts of title regarding the encumbered properties. CP 327.
- First American Title accepted coverage, made an "election" to pay actual losses, but then failed to investigate and pay any losses during the 16 month period in which it had accepted coverage. CP 326.
- First American's coverage counsel attempted a low-ball settlement in February of 2012, which he wrote was "not" appropriate under the terms of the policy. He pushed the low-ball settlement by essentially threatening a delayed appraisal and payment. CP 326, 926.
- After First American acknowledged coverage in February of 2012, it ignored Edward and Maya requested clarification on coverage. The requests for information and clarification occurred in February and March of 2012. CP 296, 326, 338.
- Washington insurance regulations require prompt communication, assistance, investigation, and payment of losses. Because First American violated these regulations by its inaction over a 16 month period, it breached its duties of good

faith and fair dealing.[39]

- First American did nothing. It did not respond to requests for assistance and information. It did not conduct an investigation of losses. It did not respond for ten months. In December of 2012, First American's counsel admitted that he "dropped the ball." CP 296, 341.
- Despite admitting that it dropped the ball, First American still did not conduct an investigation, order the diminution-in-value appraisal, or provide assistance. CP 297, 326.
- First American did not order the diminution-in-value appraisal until May of 2013, which was fifteen months after accepting coverage. CP 327.
- First American withdrew coverage shortly after Edward and Maya sued it for its 16 months of inaction. CP 1018. Viewed in the light most favorable to the insureds, the inference is that the insurance company's withdrawal of coverage was retaliation, or, more coldly, a new bargaining position.
- First American also withdrew coverage shortly after Edward and Maya lost in the quiet title trial court. CP 280. Viewed in

[39] *See St. Paul Fire & Marine Ins. Co. v. Onvia, Inc.*, 165 Wn.2d 122, 196 P.3d 664 (2008).

the light most favorable to the insureds, the inference is that the insurance company abandoned them to their losses after already failing to defend them in the title dispute.

- When First American withdrew coverage in June of 2013, it gave an unreasonable, frivolous, or unfounded excuse for doing so, alleging that Edward and Maya created the "risk" and withheld information—information that they had, in fact, given to Talon in 2007. CP 326-27. First American knew that the "risk" of the 1993 recorded documents were not created by Edward or Maya.
- Although First American alleges that Edward and Maya failed to cooperate in its investigation, First American did not conduct an investigation. It did not interview them or even request an interview from their attorney; take statements; or provide claim forms, instructions, or reasonable assistance. CP 327-28.
- Because Talon's incomplete work caused the subsequent quiet title dispute, First American Title's withdrawal of coverage was all the more unreasonable. CP 327.
- The loss report by the First American appraiser did not issue until November of 2013. It found $125,000 in damage to the

market value of Edward and Maya's property. The report did not investigate other consequential losses, including attorney fees, costs, and the expense of a much more costly septic system installed on the little land that remained under their control. Regardless, First American paid no benefits.

- First American argued to the trial court that the 1993 encumbrances caused no losses, despite acknowledging in its previous letters that the 1993 encumbrances caused losses. CP 313, 327. This argument does not comply with the statutory duty of honesty.
- The efficient proximate cause rule is a controlling rule of insurance contract interpretation that mandates coverage even if an excluded event (allegedly the uncompleted Form 34 "agreement to agree" to an easement) appears in the chain of causation that ultimately produces the loss. First American ignores this rule in its coverage analysis. CP 327.

The trial court was required to view this evidence in the light most favorable to Edward and Maya. CP 328. First American breached its duties of good faith and fair dealing. The trial court erred when it ruled otherwise and dismissed this claim.

I. First American's inaction violated the Insurance Fair Conduct Act and Washington insurance regulations

The Insurance Fair Conduct Act (IFCA) provides for treble damages, attorney fees, and costs for an insurer's unreasonable denial of coverage, unreasonable denial of payment of benefits, or violations of statutes or regulations governing the business of insurance. CP 329. The Washington Pattern Instruction, 320.06.01, Insurance Fair Conduct Act, is attached as Appendix D. It provides (modified) that:

> *Edward and Maya Eleazer* claim that *First American Title Insurance Company* has violated the Washington Insurance Fair Conduct Act. To prove this claim, *Edward and Maya Eleazer* have the burden of proving each of the following propositions:
>
> (1) That *First American Title Insurance Company* (a) unreasonably denied a claim for coverage, (b) unreasonably denied payment of benefits, or (c) violated a statute or regulation governing the business of insurance claims handling;
>
> (2) That *Edward and Maya Eleazer* were damaged; and
>
> (3) That *First American Title Insurance Company's* act or practice was a proximate cause of *Edward and Maya's damages*.
>
> If you find from your consideration of all of the evidence that each of these propositions has been proved, your verdict on this claim should be for *Edward and Maya Eleazer*. On the other hand, if any of these propositions has not been proved, your verdict on this claim should be for *First American Title Insurance Company.*

So IFCA provides a remedy for an insurer's unreasonable denial of coverage, as when First American withdrew coverage in June of 2013. IFCA provides a remedy for an insurer's unreasonable denial of payment of benefits, starting in February of 2012, when First American acknowledged coverage. And IFCA provides a remedy for violations of insurance regulations, when First American failed to defend, assist, investigate, and pay losses, from February of 2012 forward.

"Under Washington law every insurer has a duty to act promptly, in both communication and investigation, in response to a claim or tender of defense. WAC 284-30-330(2)-(4), -360(1), (3), -370… insurers have not only a general duty of good faith, RCW 48.01.030, but also a specific duty to act with reasonable promptness in investigation and communication with their insureds following notice of a claim and tender of defense. These are necessarily obligations read into every policy."[40] The standard of "reasonable promptness" includes an obligation that "an appropriate reply must be provided within ten working days."[41] An investigation must be completed within 30 days

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[40] *St. Paul Fire & Marine Ins. Co. v. Onvia, Inc.*, 165 Wn.2d 122, 196 P.3d 664 (2008).
[41] *See* WAC 284-30-360(3).

after notification of a claim.[42] WAC 284-30-330, -360, and -370 are attached as Appendix E.

First American never defended; responded to requests for the abstracts of title to assist in the quiet title dispute; responded to the March 2012 request for clarification of coverage; conducted an investigation in 2012 or the first half of 2013; or paid any losses. As a logical and legal consequence, the insurer breached the Insurance Fair Conduct Act. The trial court erred when it ruled otherwise.

Under IFCA and the *Olympic Steamship* Doctrine, Edward and Maya should be entitled to their attorney fees and costs for having to bring this lawsuit and appeal against First American to enforce their rights. RCW 48.30.015; *Olympic S.S. Co., Inc. v. Centennial Ins. Co.*, 117 Wn.2d 37, 50-51, 811 P.2d 673, 680 (1991); RAP 18.1(a).

VI. CONCLUSION

Edward and Maya respectfully request that the Court reverse the trial court's denial of their motion for summary judgment, and reverse the trial court's granting of First American and Talon's motion for summary judgment. Edward and Maya also request their fees and costs on appeal. RAP 18.1(a).

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[42] *See* WAC 284-30-370.

Dated: July 11, 2016

Respectfully submitted,

Sean J. Gamble
Attorney for Appellants Edward and Maya Eleazer
Washington State Bar Association No. 41733

VII. APPENDICES

Appendix A

WPI 320.02 Insurer's Duty of Good Faith—General Duty

Appendix B

WPI 320.06 Violations of Insurance Regulations Related to Settlement of Claims

Appendix C

WPI 320.04 Insurer's Failure to Act in Good Faith—Denial of First-Party Claims

Appendix D

WPI 320.06.01 Insurance Fair Conduct Act

Appendix E

WAC 284-30-330, -360, -370

CERTIFICATE OF SERVICE

I hereby certify that on July 11, 2016, the foregoing document was served by emailing a true and correct copy to:

Thomas F. Peterson: tpeterson@sociuslaw.com

Linda McKenzie: lmckenzie@sociuslaw.com

in accordance with the Stipulation re Service by Email signed by the parties.

Nori Skretta

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WPI320.02Insurer's Duty of Good Faith—General Duty

Washington Practice Series TM
Washington Pattern Jury Instructions--Civil

6A Wash. Prac., Wash. Pattern Jury Instr. Civ. WPI 320.02 (6th ed.)

Washington Practice Series TM
Washington Pattern Jury Instructions--Civil
Database updated June 2013
Washington State Supreme Court Committee on Jury Instructions
Part XV. Insurance Bad Faith
Chapter 320. Insurance Bad Faith Actions

WPI 320.02 Insurer's Duty of Good Faith—General Duty

An insurer has a duty to act in good faith. This duty requires an insurer to deal fairly with its insured. [The insurer must give equal consideration to its insured's interests and its own interests, and must not engage in any action that demonstrates a greater concern for its own financial interests than its insured's financial risk.] An insurer who does not deal fairly with its insured [, or who does not give equal consideration to its insured's interests,] fails to act in good faith.

In proving that an insurer failed to act in good faith, an insured must prove that the insurer's conduct was [unreasonable] [frivolous] [or] [unfounded]. The insured is not required to prove that the insurer acted dishonestly or that the insurer intended to act in bad faith.

NOTE ON USE

Use the bracketed language in the first paragraph for cases in which the duty of equal consideration applies. Use the bracketed language in the last paragraph as appropriate. See the Comment below.

The instruction may be incorporated with one of the more specific pattern instructions that are designed to apply to particular duties of the insurer.

COMMENT

RCW 48.01.030 sets forth the duty of good faith, providing:

> 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, and their representatives rests the duty of preserving inviolate the integrity of insurance.

RCW 48.01.030 is relied on by almost every appellate court that has decided issues involving insurance bad faith. It is the legislative cornerstone of insurance bad faith actions in this state. Instructions based on the statute were approved in Safeco Ins. Co. v. JMG Rests., 37 Wn.App. 1, 680 P.2d 409 (1984). See Tank v. State Farm Fire & Cas. Co., 105 Wn.2d 381, 715 P.2d 1133 (1986).

Prior to 2004, the instruction directly quoted this statutory language. The instruction was rewritten in 2004 in order to use clearer language, to more completely state the insurer's duty, and to focus the jurors on the issues in the particular case at hand. In an appropriate case, however, the court may wish to quote the statutory language.

Equal consideration. The test for equal consideration was set out in *Tank* and continues to be followed. See Mutual of Enumclaw Ins. Co. v. Dan Paulson Constr., Inc., 161 Wn.2d 903, 169 P.3d 1 (2007). At first, the duty of equal consideration was discussed in cases involving an enhanced duty of good faith, such as reservation of rights cases. Recent case law, however, has applied the duty more broadly. See, e.g., St. Paul Fire & Marine Ins. Co., v. Onvia, Inc.,

165 Wn.2d 122, 129, 196 P.3d 664 (2008) (type of case: bad faith claim handling under a liability insurance policy); Am. States Ins. Co. v. Symes of Silverdale, Inc., 150 Wn.2d 462, 470,78 P.3d 1266 (2003) (type of case: bad faith denial of coverage under a property insurance policy); Sharbono v. Universal Underwriters Ins. Co., 139 Wn.App. 383, 411, 161 P.3d 406 (2007) (type of case: liability insurer's bad faith refusal to produce underwriting file); see also Tom Harris, Washington Insurance Law, § 2.02 (3rd ed.); DeWolf & Allen, 16A Washington Practice, Tort Law & Practice § 27.2 (3d ed.).

In 2013, the committee supplemented the instruction's bracketed sentence on the duty of equal consideration by adding the requirement that the insurer must not engage in activities that demonstrate greater concern for its own financial interests than for the insured's. This language is taken from case law, with slight alteration for ease of understanding. See, e.g., Mutual of Enumclaw Ins. Co. v. Dan Paulson Constr. Co., 161 Wn.2d at 915; Tank v. State Farm Fire & Cas. Co, 105 Wn.2d at 388.

General duty of good faith. To prove bad faith, the policyholder must show that the insurer's conduct was "unreasonable, frivolous, or unfounded." Am. Best Food, Inc. v. Alea London, Ltd., 168 Wn.2d 398, 412–13, 229 P.3d 693 (2010) (specially noting the disjunctive nature of this standard); Smith v. Safeco Ins. Co. 150 Wn.2d 478, 78 P.3d 1274 (2003); Am. States Ins. Co. v. Symes of Silverdale, Inc., 150 Wn.2d at 469; Barstad v. Stewart Title Guar. Co, 145 Wn.2d 528, 543, 39 P.3d 984 (2002); Griffin v. Allstate Ins. Co., 108 Wn.App. 133, 143–44, 29 P.3d 777 (2001). The instruction was revised in 2013 to bracket the words "unreasonable," "frivolous," and "unfounded."

An insured need not prove that the insurer's bad faith was intentional or fraudulent. See Sharbono v. Universal Underwriters Ins. Co., 139 Wn.App. at 410–11 ("An insurer may breach its broad duty to act in good faith by conduct short of intentional bad faith or fraud, although not by a good faith mistake."); Int'l Ultimate, Inc. v. St. Paul Fire & Marine Ins. Co., 122 Wn.App. 736, 756, 87 P.3d 774 (2004).

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WPI320.06Violations of Insurance Regulations Related to Settlement of Claims

Washington Practice Series TMWashington Pattern Jury Instructions--Civil
6A Wash. Prac., Wash. Pattern Jury Instr. Civ. WPI 320.06 (6th ed.)
Washington Practice Series TM
Washington Pattern Jury Instructions--Civil
Database updated June 2013
Washington State Supreme Court Committee on Jury Instructions
Part XV. Insurance Bad Faith
Chapter 320. Insurance Bad Faith Actions

WPI 320.06 Violations of Insurance Regulations Related to Settlement of Claims

A violation, if any, of one or more of the following statutory or regulatory requirements is [a breach of the duty of good faith] [an unfair method of competition] [an unfair or deceptive act or practice in the business of insurance] [and] [a breach of the insurance contract]:

[Misrepresenting pertinent facts or insurance policy provisions.]

[Failing to acknowledge and act reasonably promptly upon communications with respect to claims arising under insurance policies.]

[Failing to adopt and implement reasonable standards for the prompt investigation of claims arising under insurance policies.]

[Refusing to pay claims without conducting a reasonable investigation.]

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

[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.]

[Compelling an insured 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.]

[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.]

[Making a claim payment to an insured or beneficiary not accompanied by a statement setting forth the coverage under which the payment is being made.]

[Asserting to an insured that it is the insurer's policy to appeal from arbitration awards in favor of insureds for the purpose of compelling them to accept settlements or compromises less than the amount awarded in arbitrations.]

[Delaying the investigation or payment of claims by requiring an insured or his or her physician to submit a preliminary claim report and then requiring subsequent submissions which contain substantially the same information.]

[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.]

[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.]

[Unfairly discriminating against claimants because they are represented by a public adjuster.]

[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.]

[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 that 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 an insured or claimant, it must do so within twenty working days after a settlement has been reached.]

[Delaying appraisals or adding to their cost under insurance policy appraisal provisions through the use of appraisers from outside 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.]

[Failing to make a good faith effort to settle a claim before exercising a contract right to an appraisal.]

[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 an insured claimant to identify the claimant or to obtain details concerning the claim.]

NOTE ON USE

Use the brackets as appropriate depending on the causes of action alleged and facts of the case. This instruction should be given with WPI 310.03 in consumer protection actions, and with WPI 60.03 in negligence actions.

COMMENT

RCW 48.30.010(1) prohibits any person engaged in insurance from using unfair or deceptive acts or practices in the conduct of such business. RCW 48.30.010(2) authorizes the Insurance Commissioner to promulgate regulations that define certain minimal standards. The duties outlined are taken from WAC 284-30-330, which was amended in 2011 to clarify existing language. See WSR 09-11-129.

Additional duties may be drawn from appropriate statutes or other insurance claims handling regulations found in WAC 284-30-300 through 284-30-800, which define minimal standards that become part of every insurance contract. St. Paul Fire & Marine Ins. Co., v. Onvia, Inc., 165 Wn.2d 122, 196 P.3d 664 (2008).

Single violations of WAC 284-30-330, et seq., are unfair and deceptive acts or practices as a matter of law, and are *per se* violations of the Consumer Protection Act (CPA). RCW 19.86.020–.080. Truck Ins. Exch. v. Vanport Homes, Inc., 147 Wn.2d 751, 58 P.3d 276 (2002); Leingang v. Pierce Co. Med. Bureau, 131 Wn.2d 133, 151, 930 P.2d 288 (1997); Industrial Indem. Co. v. Kallevig, 114 Wn.2d 907, 923, 792 P.2d 520 (1990). RCW 48.30.010(2). Some are also unfair methods of competition. See the discussion of *per se* violations of the Consumer Protection Act in WPI 320.00 (Insurance Bad Faith—Introduction); see also WPI 310.00 (Consumer Protection Act—Introduction) and WPI 310.03 (*Per Se* Violation of the Consumer Protection Act) and its Comment.

In 2013, the committee expanded the instruction so that it applies not only to CPA claims, but also to negligence claims and bad faith claims. The instruction was also revised to reflect changes to the underlying language from WAC 284-30-330.

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WPI320.04Insurer's Failure to Act in Good Faith—Denial of First-Party Claims

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6A Wash. Prac., Wash. Pattern Jury Instr. Civ. WPI 320.04 (6th ed.)
Washington Practice Series TM
Washington Pattern Jury Instructions--Civil
Database updated June 2013
Washington State Supreme Court Committee on Jury Instructions
Part XV. Insurance Bad Faith
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WPI 320.04 Insurer's Failure to Act in Good Faith—Denial of First-Party Claims

The duty of good faith requires an insurer to conduct a reasonable investigation before refusing to pay a claim submitted by its insured. An insurer must also have a reasonable justification before refusing to pay a claim.

An insurer who refuses to pay a claim, without conducting a reasonable investigation or without having a reasonable justification, fails to act in good faith.

NOTE ON USE

Use this instruction when an insurance company is being sued by an insured for a bad faith refusal to pay a claim.

The instruction should be incorporated at the end of WPI 320.02 (Insurer's Duty of Good Faith—General Duty), which more generally describes the insurer's duty. If not incorporated into WPI 320.02, the instruction above should begin with a statement that the insurer has a duty to act in good faith when dealing with its insured.

COMMENT

This instruction is based on the language in Industrial Indem. Co. v. Kallevig, 114 Wn.2d 907, 792 P.2d 520 (1990).

The court in *Kallevig* specifically limited its holding to first-party claims, i.e., claims by named insureds against their insurers for coverage. The instruction in *Kallevig*stated that "an insurer must make a *good faith* investigation ...." 114 Wn.2d at 917 (emphasis

added). The pattern instruction above uses "reasonable" instead of "good faith" to avoid circular reasoning and because the committee did not believe it changed the basic meaning of the sentence.

Single violations of the claims handling responsibilities of insurers pursuant to RCW 48.30.010 and WAC 284-30-330 constitute *per se* unfair trade practices by virtue of RCW 19.86.170. Industrial Indem. Co. Kallevig, 114 Wn.2d at 925. See also the discussion in WPI 320.00 (Introduction).

Cases involving bad faith denial of coverage claims include: Am. States Ins. Co. v. Symes of Silverdale, Inc., 150 Wn.2d 462, 78 P.3d 1266 (2003) (2002) (denial of coverage due to suspected arson by insured); Ellwein v. Hartford Acc. & Ins. Co., 142 Wn.2d 766, 15 P.3d 640 (2001) (automobile insurer litigated in bad faith by misappropriating insured's expert witness and making low settlement offers), overruled on other grounds in Smith v. Safeco Ins. Co., 150 Wn.2d 478, 78 P.3d 1274 (2003); Coventry Assocs. v. Am. States Ins. Co., 136 Wn.2d 269, 961 P.2d 933 (1998) (property insurer may be liable for bad faith investigation into coverage issues even if coverage was properly denied); and Industrial Indem. Co. v. Kallevig, supra (denial of fire insurance coverage because insurer suspected insured set fire).

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WPI320.06.01Insurance Fair Conduct Act
Washington Practice Series TMWashington Pattern Jury Instructions--Civil
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WPI 320.06.01 Insurance Fair Conduct Act

(Name of plaintiff) claims that (name of insurer) has violated the Washington Insurance Fair Conduct Act. To prove this claim, (name of plaintiff) has the burden of proving each of the following propositions:

(1) That (name of insurer) [unreasonably denied a claim for coverage] [unreasonably denied payment of benefits] [or] [violated a statute or regulation governing the business of insurance claims handling];

(2) That (name of plaintiff) was [injured] [damaged]; and

(3) That (name of insurer's) act or practice was a proximate cause of (name of plaintiff's) [injury] [damage].

If you find from your consideration of all of the evidence that each of these propositions has been proved, your verdict [on this claim] should be for (name of plaintiff). On the other hand, if any of these propositions has not been proved, your verdict [on this claim] should be for (name of insurer).

NOTE ON USE
The instruction applies to cases filed under the Insurance Fair Conduct Act (IFCA). The first element includes a bracketed clause that can be used when *per se* violations of the act are claimed.

COMMENT

The pattern instruction was added in 2013 to incorporate IFCA provisions. See RCW 48.30.010(7); RCW 48.30.015. The act was adopted by a voter referendum in November 2007.

Recovery under IFCA is limited to first-party claimants. RCW 48.30.010(7). A first-party claimant is defined as an individual or entity "asserting a right of 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). If the plaintiff's status as a first-party claimant is in dispute, then a jury instruction can be crafted based on this statutory definition.

Claims under IFCA are similar to, but not identical with, related bad faith or Consumer Protection Act (CPA) claims. The elements differ slightly (compare this instruction with WPI 320.01) and an IFCA claimant may recover triple damages and reasonable attorney fees without having to prove a violation of the CPA. See RCW 48.30.015.

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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.

[Statutory Authority: RCW 48.02.060 and 48.30.010. WSR 09-11-129 (Matter No. R 2007-08), § 284-30-330, filed 5/20/09, effective 8/21/09. Statutory Authority: RCW48.02.060, 48.44.050 and 48.46.200. WSR 87-09-071 (Order R 87-5), § 284-30-330, filed 4/21/87. Statutory Authority: RCW 48.02.060 and 48.30.010. WSR 78-08-082 (Order R 78-3), § 284-30-330, filed 7/27/78, effective 9/1/78.]

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.

[Statutory Authority: RCW 48.02.060, 48.44.050, 48.46.200, and 48.30.010. WSR 13-12-079 (Matter No. R 2013-05), § 284-30-360, filed 6/5/13, effective 1/1/14. Statutory Authority: RCW 48.02.060 and 48.30.010. WSR 09-11-129 (Matter No. R 2007-08), § 284-30-360, filed 5/20/09, effective 8/21/09; WSR 78-08-082 (Order R 78-3), § 284-30-360, filed 7/27/78, effective 9/1/78.]

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.

[Statutory Authority: RCW 48.02.060 and 48.30.010. WSR 09-11-129 (Matter No. R 2007-08), § 284-30-370, filed 5/20/09, effective 8/21/09; WSR 78-08-082 (Order R 78-3), § 284-30-370, filed 7/27/78, effective 9/1/78.]