98274-1

No. 79676-3-I

DIVISION I, COURT OF APPEALS
OF THE STATE OF WASHINGTON

WEST BEACH CONDOMINIUM, a Washington non-profit corporation,

Respondent,

v.

COMMONWEALTH INSURANCE COMPANY OF AMERICA,
a foreign insurance company,

Petitioner.

PROPOSED BRIEF OF *AMICUS CURIAE* COMPLEX INSURANCE CLAIMS LITIGATION ASSOCIATION IN SUPPORT OF COMMONWEALTH INSURANCE COMPANY'S PETITION FOR REVIEW

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

INTEREST OF AMICUS CURIAE

The Complex Insurance Claims Litigation Association ("CICLA") is a trade association of major property and casualty insurance companies.[1] CICLA seeks to assist courts addressing important coverage issues that are of great consequence to insurers, policyholders, and the public, such as the enforcement of suit-limitation clauses and standards for extra-contractual liability under Washington law. CICLA's members regularly issue insurance policies within the state of Washington, many of which contain the same or similar suit-limitation clauses at issue in this case. CICLA is thus vitally interested in this case.

STATEMENT OF THE CASE

CICLA incorporates by reference, as if fully set forth herein, Section IV of Commonwealth Insurance Company of America's ("Commonwealth") Petition for Review.

SUMMARY OF ARGUMENT

Review of this case is warranted to resolve issues of substantial public importance, R.A.P.13.4(b)(4), and to reconcile conflicting case law. R.A.P. 13.4(b)(1),(2). The questions for review, as articulated by Commonwealth, are:

[1] This motion and amicus curiae brief is filed on behalf of CICLA, which is an incorporated trade association, not its individual members.

1. Is an insured foreclosed from pursuing extra-contractual claims under the Consumer Protection Act ("CPA") or Insurance Fair Conduct Act ("IFCA") to recover benefits allegedly due under a first-party insurance policy when (a) the insured's coverage claim was properly dismissed as untimely under an enforceable suit limitation clause, and (b) the insured asserts no wrongful conduct by the insurer other than reliance on the suit limitation clause and no damages other than the loss of benefits allegedly due under the insurance policy?

2. Even if an insured can bring extra-contractual claims to recover breach-of-policy damages otherwise foreclosed by a suit limitation clause, did Commonwealth act reasonably as a matter of law when it relied on a justifiable interpretation of existing federal and state case law to deny coverage on the basis of the suit limitation clause?

This Court should grant review to resolve these questions. The Court of Appeals committed grave error by rendering the enforcement of suit-limitation provisions — which Washington courts have upheld for decades — meaningless. It also erred in failing to grant judgment as a matter of law that Commonwealth acted reasonably when, at the time Commonwealth denied West Beach Condominium's ("West Beach") claim, existing Washington law held that suit-limitation clauses barred an insured from obtaining coverage and from pursuing extra-contractual claims for coverage in the form of damages. The Petition for Review presents questions of substantial public importance, RAP 13.4(b)(4), and review is needed to reconcile conflicting rulings on Washington law. R.A.P. 13.4(b) (1) and (2).

ARGUMENT

I. THE COURT SHOULD ACCEPT REVIEW TO RESOLVE ISSUES OF SUBSTANTIAL PUBLIC IMPORTANCE.

Regarding the first issue for review, the Court of Appeals' decision allowing the policyholder to evade the consequences of the suit limitation in the policy will have serious and immediate consequences. The decision below would essentially negate a key term of the insurance contract — the suit-limitation clause — in Washington. If left to stand, the Court of Appeals' decision will permit policyholders to evade the fact that they have no right to seek coverage under the contract and allow extra-contractual claims seeking *the same relief* to go forward. This error must be corrected. The suit-limitation clause is a key provision in insurance agreements. Policies are underwritten based on the fact the suit-limitation clause affords complete repose from claims for policy benefits not made within the proscribed period. The Court of Appeals' decision does not just govern the parties to this dispute. It impacts all insurance contracts subject to Washington law.

The policies at issue in this case contain widely-used language in their suit-limitation clauses:

> No suit, action or proceeding for the recovery of any claim under this Policy shall be sustainable in any court of law or equity unless the same be commenced within Twelve (12) months next after discovery by the Insured of the occurrence which gives rise to the

claim…

The same or substantially similar language is found in hundreds of other policies in the state of Washington. *See* RCW 48.18.200(1)(c) (permitting insurers to establish contractual limitations periods for at least one year).

Suit-limitation clauses unambiguously and permissibly shorten the time within which a policyholder may commence a suit to recover policy benefits. These provisions enable an insurer to rely on the non-assertion of claims for policy benefits after a reasonable time has passed, ensure the insurer is aware of the extent of asserted losses, and allow for a speedy resolution of claims. Through suit-limitation clauses, parties to an insurance policy agree to a modification of the statute of limitations period that eliminates an insurer's exposure to later claims.

Washington courts have upheld and enforced such agreements under longstanding law. Review of the ruling below is critical because the Court of Appeals' decision creates a back door for recovering policy benefits even when the suit limitation period has passed. It effectively renders suit-limitation clauses meaningless, eviscerating this clear policy language barring late claims.

Here, West Beach admits it did not commence suit for coverage within the prescribed one-year period of the suit-limitation clause. CP 325-458. Yet the Court of Appeals' ruling allowed the insured to recover

the otherwise unavailable policy proceeds as "damages" on extra-contractual claims. Indeed, West Beach's only claimed damages were the loss of whatever coverage might have existed under the policy, had it timely made a claim for policy benefits (which it did not). West Beach and other insureds should not be permitted to circumvent their policies' suit-limitation claims and recover policy benefits by another avenue — bringing statutory claims for its insurer's reliance on a valid suit-limitations clause to deny coverage.

Review of the issues here is important. Insurers rely on the effect of suit-limitation clauses in their policies in Washington, as they do in other states.[2] The outcome here signals that, if Washington law applies, then insurers cannot necessarily rely on policy terms that are important to their contract. Nor can insurers rely on the right to repose, contracted for through suit-limitation clauses that establish the time after which a claim for policy benefits is barred. Leaving uncertain what effect the suit-limitation clause has in Washington creates intolerable confusion about the rights and responsibilities of insurers and their policyholders.

[2] *See, e.g., Zuckerman v. Transamerica Ins. Co.*, 650 P.2d 441, 447-448 (Ariz. 1982); *Closser v. Penn Mut. Fire Ins. Co.*, 457 A.2d 1081, 1083 (Del. 1983); *Scheetz v. IMT Ins. Co.*, 324 N.W.2d 302 (Iowa 1982); *Gremillion v. Travelers Indem. Co.*, 240 So. 2d 727, 731 (La. 1970); *Proc v. Home Ins. Co.*, 217 N.E.2d 136, 138 (1966); *Gen. State Auth. v. Planet Ins. Co.*, 346 A.2d 265, 267 (Pa. 1975); *Bell v. Quaker City Fire & Marine Ins. Co.*, 370 P.2d 219, 222 (Or. 1962).

The second question posed by Commonwealth, whether it was entitled to judgment as a matter of law that it acted reasonably by relying on then-existing law in denying a claim presented after the suit limitation period expired, is also of great public importance. It too will impact all insurers subject to Washington law, not just the parties to this case. An insurer should not be penalized for acting consistently with the law that exists at the time of its action, even if ultimately determined to be incorrect. Insurers act appropriately by taking positions with a reasonable justification at the time they are reached — even *if* an insurer's position is ultimately found to be incorrect.

Here, this Court should accept review and find that Commonwealth was reasonably justified in the belief that it had no obligation to West Beach based on the suit-limitation clause. Commonwealth reasonably denied West Beach's claim based on the one-year suit-limitation provision and existing Washington law. Two Court of Appeals rulings supported Commonwealth's position when it was taken: *Schaeffer v. Farmers Ins. Exch*., 2002 WL 662889, *5 (Wn. App. Apr. 22, 2002) and *Hunter v. Regence BlueShield*, 2006 WL 2396643, *6 n.5 (Wn. App. Aug. 21, 2006). The extra-contractual claims in this case therefore should have been denied as a matter of law.

This Court should grant review to make clear that Commonwealth

correctly concluded it had no obligation with respect to a time-barred claim, and — *even if* Commonwealth were ultimately determined to be incorrect on the law — Commonwealth acted reasonably as a matter of law. Granting review to address this question is of great importance to insurers, policyholders, and the public.

II. THE COURT SHOULD ACCEPT REVIEW TO PROVIDE NEEDED GUIDANCE TO COURTS APPLYING WASHINGTON LAW, AS WELL AS TO INSURERS AND POLICYHOLDERS, AS THE COURT OF APPEALS' DECISION CREATED AN IRRECONCILABLE CONFLICT IN THE LAW.

Review should be granted for the independent reason that the Court of Appeals' decision creates an intolerable conflict in Washington law, of which this Court is the ultimate arbiter. The Court of Appeals' decision conflicts with a prior ruling of this Court, as well as prior rulings of the Court of Appeals, on significant questions of Washington law.

The Petition for Review presents questions involving the interplay of approved insurance policy language, Washington common-law on suit-limitation clauses, and the application of Washington statutes providing for extra-contractual relief. The Court should review the Court of Appeals' ruling here to correct the decision below and provide guidance to all lower courts applying Washington law.

First, by allowing West Beach to recover extra-contractually

precisely the policy benefits it cannot recover under the terms of its insurance policy, the ruling below directly contradicts *Coventry Assocs. v. Am. States Ins. Co.*, 136 Wn.2d 269, 279, 961 P.2d 933 (1998). In *Coventry*, this Court held that an insurer's statutory obligations to act in good faith can be violated even when there is no coverage under the insurance policy for the claim presented. But the Court also made clear that an insurer that commits bad faith while handling a claim "is **not** liable for the policy benefits." 136 Wn.2d at 284 (Emphasis added). "[I]nstead, [such an insurer] is liable for the consequential damages to the insured" arising from its bad faith conduct in violation of the statute. *Id.* The decision below conflicts with *Coventry* by holding that West Beach is entitled to policy benefits, when the loss of those benefits resulted from the insured's failure to timely present its claim, and were not the consequence of some act of bad faith.

Under this Court's prior ruling in *Coventry*, although policy benefits *may* be recovered as damages for statutory bad faith, such benefits are only potentially recoverable when the losses are proximately caused by the insurer's violations. *See Coventry*, 136 Wn.2d at 284 (holding that "[o]nce an insured has established harm resulting from the bad faith investigation, the insured is entitled to an appropriate remedy"). The "appropriate remedy," according to *Coventry*, is "the consequential

damages to the insured *as a result of the insurer's breach* of its contractual and statutory obligations." *Id.* (Emphasis added). Here, Commonwealth's denial of coverage pursuant to the suit-limitation clause was not a breach of its contractual obligations, or unreasonable or bad faith conduct.[3] Nor was West Beach's loss of policy benefits a consequence of Commonwealth's conduct — it resulted from West Beach's own failure to present its claim before the suit limitation period expired.[4] This Court should grant review to correct the ruling below and clarify that *Coventry* remains the law in Washington.[5]

Moreover, in refusing to grant Commonwealth judgment as a matter of law that it had not acted in bad faith, the court below

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[3] *See Coventry*, 136 Wn.2d at 280 ("As long as the insurance company acts with honesty, bases its decision on adequate information, and does not overemphasize its own interests, an insured is not entitled to base a bad faith or CPA claim against its insurer on the basis of a good faith mistake."); *Hunter v. Regence BlueShield*, 2006 WL 2396643, at *6 n.5 (Wn. App. Aug. 21, 2006) (noting that insured "provid[ed] no authority to support the argument that merely imposing [a contractual] limitation period is, in itself, an act of bad faith… [the insurer] could not have acted in bad faith in imposing an enforceable contractual limitation provision.").

[4] *See Schaeffer v. Farmers Ins. Exch.*, 2002 WL 662889, at *5 (Wn. App. Apr. 22, 2002) (holding that, while limitation clause did not bar CPA and bad faith claims, the insured failed to show it was harmed apart from stating the insurer wrongfully denied coverage).

[5] West Beach attempts to distinguish *Coventry* on the basis that, in *Coventry*, the trial court had found no coverage, whereas here, the trial court ultimately ruled that two of Commonwealth's policies did in fact provide coverage. CP 9. But *Coventry* held that "an insured may maintain an action against its insurer for bad faith investigation of the insured's claim and violation of the CPA *regardless* of whether the insurer was ultimately correct in determining coverage did not exist." *Id.* at 279. (emphasis added). Thus, West Beach's attempt to distinguish *Coventry* is refuted by the decision itself.

contradicted two prior Court of Appeals panels that held that an insurer's refusal to pay a time-barred claim was both correct, and reasonable as a matter of law so as to preclude bad faith claims.

In *Schaeffer v. Farmers Ins. Exch.*, 2002 WL 662889 (Wn. App. Apr. 22, 2002) and *Hunter v. Regence BlueShield*, 2006 WL 2396643 (Wn. App. Aug. 21, 2006), the Court of Appeals held that an insurer could not have acted in bad faith in imposing an enforceable contractual limitation provision in denying a claim. Yet the decision below declined to hold that Commonwealth's conduct was justified as a matter of law such that a bad faith claim could not stand. This Court should accept review to make clear to Washington courts, policyholders, and insurers that an insurer that acts based on existing court rulings acts reasonably as a matter of law and cannot be liable for extra-contractual damages.

CONCLUSION

Because the petition presents questions of substantial public importance to the insurance system, and because the ruling below conflicts with existing rulings of this Court and the Court of Appeals, it is critical for this Court to review the decision below. CICLA respectfully submits that this Court should grant the Petition for Review.

RESPECTFULLY SUBMITTED this 11th day of May.

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DATED this 11th day of May.

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May 11, 2020 - 3:16 PM

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