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NO. 67126-0

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION I

Emily Johnson,

Appellant,

v.

State Farm Mutual Automobile Insurance Company,

Respondent.

BRIEF OF RESPONDENT

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2012 AUG 29 PM 3:55

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I. ISSUES ON APPEAL

1. Does a person with no personal stake in the outcome of the lawsuit lack standing to sue for an injunction under the Consumer Protection Act?

2. If the answer to issue 1. is "no," then do the plaintiff's allegations of inadequate investigation and a low offer of settlement for her underinsured motorist claim state a claim for injunctive relief?

II. STATEMENT OF THE CASE

A. Procedural Background

This case relates to an underinsured motorist ("UIM") insurance dispute between plaintiff Emily Johnson and defendant State Farm Mutual Automobile Insurance Company ("State Farm"). This case began as a broader action, *Johnson v. State Farm Mut. Auto. Ins. Co.*, King County Superior Court Cause No. 10-2-32502-6, with both damages and injunction claims. See CP 148-157. It was removed to federal court, where it was assigned Case No. 10-01650 TSZ. (*Id.*) Plaintiff asserted that she likely lacked standing under the federal constitution to seek injunctive relief against State Farm because she has no personal stake in the outcome and would derive no benefit from injunctive relief. (*Id.*) Among other things, she was no longer a State Farm insured and had also moved to California. (*Id.*) Because she had no personal interest in State

Farm's future conduct, her case was governed by *Hangarter v. Provident Life & Acc. Ins. Co.*, 373 F.3d 998, 1021 (9th Cir. 2004) (insured lacked standing to seek injunction against former insurer). The federal court agreed that there was no standing and dismissed the injunctive relief claim without prejudice. CP 159. Plaintiff then filed a second Superior Court action, 11-2-01817-2 SEA, seeking only injunctive relief. (CP 1-57)

State Farm moved to dismiss the separate state court action under CR 12(b)(6). (CP 58) The trial court granted the motion. CP 217. The trial court entered a handwritten note on the order to the effect that plaintiff has and is pursuing a remedy at law in the U.S. District Court. *Id.* The Order did not say that the existence of the other action was the "reason" for granting the motion.

B. Plaintiff's Complaint for Injunctive Relief

The UIM portion of the insurance contract between State Farm and plaintiff promises to pay "compensatory damages" the insured is "legally entitled to recover" from the underinsured party. CP 34. As in the case of ordinary tort claims, the amount of recovery, if any is decided either by an agreement between the parties or by the insured filing suit to determine the amount of recoverable damages. CP 35.

But plaintiff's complaint commencing this action seeks only injunctive relief. Though her complaint was 59 paragraphs long and quite

detailed, plaintiff pointed to no particular conduct or practice she wanted the Superior Court to enjoin. The complaint told the story of a car accident she was involved in, her injuries, her course of treatment, a list of her various diagnoses, a long list of her medications and why she is taking them, her move to California, her negotiations with State Farm over potential out-of-court settlement, and the allegedly inadequate settlement offer State Farm made. The complaint more or less asserts that Ms. Johnson's condition is sufficiently clear and sufficiently bad that State Farm should have offered more money sooner. *Id.*

The Complaint then lists insurance regulations. *See* CP 8-11. Almost all of the regulations set forth general standards based on reasonableness. For example:[1]

> **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] Although some of the quoted regulations do not contain the word "reasonable," this is of no moment. The regulations were drafted with the general conduct of the insurer in mind instead of being the basis for a cause of action. When viewed as applicable to individual claims, losing an arbitration or an appraisal could be seen as a violation. To make the regulations more suitable for use in causes of action, courts imply reasonableness qualifications into the regulations that do not specifically contain them. *E.g., American Mfrs. Mut. Ins. Co. v. Osborn*, 104 Wn. App. 686, 699, 17 P.3d 1229 (2001).

> (2) Failing to acknowledge and act *reasonably promptly* upon communications with respect to claims arising under insurance policies.
>
> *..*..*
>
> **WAC 284-30-360**
>
> Standards for the insurer to acknowledge pertinent communications. . . .
>
> (4) Upon receiving notification of a claim, every insurer must *promptly provide* necessary claim forms, instructions, and *reasonable* assistance so that first party claimants can comply with the policy conditions and the insurer's *reasonable requirements*. Compliance with this paragraph within the time limits specified in subsection (1) of this section constitutes compliance with that subsection.
>
> *..*..*
>
> **WAC 284-30-370**
>
> Standards for prompt investigation of a claim. . . .
>
> Every insurer must complete its investigation of a claim within thirty days after notification of claim, *unless the investigation cannot reasonably be completed within that time*. All persons involved in the investigation of a claim must provide *reasonable assistance* to the insurer in order to facilitate compliance with this provision.

(Emphasis added.)

Plaintiff's request for relief generally asked the Superior Court to enjoin State Farm from doing anything that violates the Washington Administrative Code or Washington State statutes and asked the court to order State Farm to "enact procedures" that are not otherwise specified:

> 3.3 State Farm should be enjoined from any further acts that violate the Washington Administrative Code or Washington State statutes and should further be required to enact procedures that live up to its legal obligation to perform a full and fair investigation into plaintiff's claims, and to comply with WAC 284-30 *et seq.*

CP 11.

III. SUMMARY OF ARGUMENT

While Washington courts are not bound by Article III of the federal constitution, there is no meaningful difference between the two court systems when it come to standing. Washington courts have recognized the necessity for standing, including the requirement that plaintiff have a "personal stake" in the outcome of a dispute as a limitation on the right to bring suit. This Court should consider whether in this context, Washington courts have the power to issue injunctions where plaintiff lacks an interest in the outcome of the "case." Such basic limitations are inherent in the concept of judicial power and should be followed by Washington courts. Like the federal court, this Court should hold that Ms. Johnson lacks standing to seek injunctive relief and affirm the trial court.

Even if plaintiff need not have a stake in the outcome, injunctive relief, by its nature, is inappropriate for plaintiff's grievance. The subject matter of insurance claim handling and settlement offers are necessarily governed by general standards of reasonableness and fairness. It is

impossible to put these standards into the concrete, specific terms that injunctions must have. Because courts do not enter vague injunctions to "obey the law" and do not enjoin thoughts or internal speech or order insurers to adopt and implement "reasonable" standards for evaluating claims, the trial court properly dismissed plaintiff's complaint with prejudice.

IV. ARGUMENT

A. Standard of Review and CR 12(b)(6) Dismissal

An order dismissing a complaint for failure to state a claim is reviewed *de novo*. *San Juan County v. No New Gas Tax*, 160 Wn.2d 141, 164, 157 P.3d 831 (2007). Under CR 12(b)(6), dismissal is appropriate only when it appears beyond doubt that the claimant can prove no set of facts, consistent with the complaint, which would justify recovery. *Bravo v. Dolsen Cos.*, 125 Wn.2d 745, 750, 888 P.2d 147 (1995).

Here, plaintiff's complaint fails under this standard because there is no way a court could or would grant the relief she seeks; the trial court therefore properly granted dismissal with prejudice at the outset.

This case presents a special situation under CR 12(b)(6). The facts pleaded would survive a CR 12(b)(6) motion if pled as a damages action under contract law or other bases. But this is not a damages action; a damages action is being pursued in a separate lawsuit in federal court as

the trial court noted. The sole question before the Superior Court below and this Court is whether the allegations state a claim for injunctive relief.

B. The Consumer Protection Act Injunction Provision

Plaintiff's injunction claim is based upon Washington's Consumer Protection Act ("CPA"). RCW 19.86.020 *et seq.* The statute authorizes a private plaintiff to bring a civil action to "enjoin further violations" and to seek damages:

> Any person who is injured in his or her business or property by a violation of RCW 19.86.020, 19.86.030, 19.86.040, 19.86.050, or 19.86.060, or any person so injured because he or she refuses to accede to a proposal for an arrangement which, if consummated, would be in violation of RCW 19.86. 030, 19.86.040, 19.86.050, or 19.86.060, may bring a civil action in superior court to enjoin further violations, to recover the actual damages sustained by him or her, or both, together with the costs of the suit, including a reasonable attorney's fee.

RCW 19.86.090. Most private actions seek damages and attorney fees and there is very little Washington case law on CPA injunctions. One such case is *Hockley v. Hargitt*, 82 Wn. 2d 337, 340, 510 P.2d 1123 (1973). In *Hockley*, the plaintiff was a purchaser of a franchise in a company known as "Divorce, Inc.," and the purchaser complained that the company's concept violated Washington law and that the seller was selling additional franchises to other Washington residents that overlapped with the plaintiff's territory. Speaking in general terms, the court stated

that any injunctive relief need not be tailored only to plaintiff's particular situation but may also apply to other consumers:

> By the very language of the statute, plaintiff may obtain injunctive relief in addition to recovering actual damages. However, defendants further argue that plaintiff may enjoin future violations only as to himself, thus protecting his own interests, but that he may not protect the public interest as well. Such a constriction of the scope of injunctive relief provided to the individual by RCW 19.86.090 is inconsistent with both the language of that section and the spirit and purpose of the consumer protection act.
>
> RCW 19.86.090 authorizes an injured person to recover only the 'actual damages sustained by him' but imposes no such limitation upon injunctive relief. Had the legislature desired to so limit the injunction they could have easily done so, as they did with damages.
>
> *..*..*
>
> This broad public policy is best served by permitting an injured individual to enjoin future violations of RCW 19.86, even if such violations would not directly affect the individual's own private rights.

Hockley, 82 Wn.2d 337, 350-351, 510 P.2d at 1133. The merits in *Hockley* were not fully developed, but the holding of the court was stated as "We hold that under RCW 19.86.090 an individual may seek and obtain an injunction that would, ***besides protecting his own interests***, protect the public interest." *Hockley*, 82 Wn.2d at 351 (emphasis added). The court clearly stated that the <u>scope</u> of any injunction may include future, unrelated conduct of the defendant; it need not be limited to "Hargitt must not do X to Hockley," and may instead say "Hargitt must not do X at all."

It is not the holding, however, that past, isolated injury alone is sufficient for a private party to seek an injunction.

C. To the Extent Subject Matter Jurisdiction or the CPA Requires Plaintiff to Have a Personal Stake in the Outcome, then Plaintiff Lacks Standing to Pursue an Injunction

Washington law on standing is somewhat murky and State Farm did not raise it as one of the bases for its dismissal of the complaint. However, the Court may affirm the trial court on any ground supported by the record, and may review subject matter jurisdiction at any time. RAP 2.5(a). If traditional standing is jurisdictional, then the result in Washington courts should not differ from the result in the federal court on that issue. State court systems need not have the same standing requirements as the federal system, but it is uncertain whether Washington does or does not have such a requirement. Division Two and recently Division Three have opined that standing is not truly a limitation on the subject matter jurisdiction of Washington courts. *To-Ro Trade Shows v. Collins*, 100 Wn. App. 483, 489, 997 P.2d 960 (2000) *aff'd, To-Ro Trade Shows v. Collins*, 144 Wn.2d 403, 424, 27 P.3d 1149 (2001);[2] *Ullery v. Fulleton*, _____ Wn. App. _____, 256 P.3d 406, 411 (2011). Division Three's very recent opinion in *Ullery* reasoned in *dicta* that standing is not

[2] In *To-Ro*, the Supreme Court did not discuss Division Two's constitutional observation regarding standing but simply affirmed because standing was indeed lacking.

in fact a jurisdictional issue but something else. It reasoned that unlike the federal courts, which are limited by Article III to hearing "cases or controversies," "article IV, section 6 of the Washington Constitution does not exclude any sort of causes from the jurisdiction of its superior courts." *Ullery v. Fulleton*, _____ Wn. App. _____, 256 P.3d 406, 411 (2011). Division Three had earlier reached the opposite conclusion. *International Ass'n of Firefighters, Local 1789 v. Spokane Airports*, 103 Wn. App. 764, 768, 14 P.3d 193 (2000) ("Because standing is a jurisdictional issue, however, it may be raised for the first time in appellate court.").

There is actually nothing in the difference in the language of the two constitutions that justifies a different standing doctrine. In fact, the Supreme Court has taken guidance from federal decisions to determine what components of standing are "constitutional" and which are "judicially self-imposed" or prudential. *International Ass'n of Firefighters, Local 1789 v. Spokane Airports*, 146 Wn.2d 207, 215, 45 P.3d 186, 190 (2002); *see also*, *Teamsters Local Union No. 117 v. State, Dept. of Corrections*, 145 Wn. App. 507, 512, 187 P.3d 754, (2008). The U.S. Constitution states:

> The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;--to all Cases affecting Ambassadors, other public Ministers and Consuls;--to all Cases of

> admiralty and maritime Jurisdiction;--to Controversies to which the United States shall be a Party;--to Controversies between two or more States;--between a State and Citizens of another State;--between Citizens of different States;--between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

U.S. Const. Art. III § 2, cl. 1. In this case, the federal court held, essentially, that the plaintiff's claim for an injunction is not a "controver[sy] . . . between Citizens of different States." Article IV, section 6 of the Washington Constitution refers to "cases," "proceedings" and sometimes to "matters" in areas special areas such as divorce or probate:

> § 6. Jurisdiction of Superior Courts
>
> Superior courts and district courts have concurrent jurisdiction in cases in equity. The superior court shall have original jurisdiction in all cases at law which involve the title or possession of real property, or the legality of any tax, impost, assessment, toll, or municipal fine, and in all other cases in which the demand or the value of the property in controversy amounts to three thousand dollars or as otherwise determined by law, or a lesser sum in excess of the jurisdiction granted to justices of the peace and other inferior courts, and in all criminal cases amounting to felony, and in all cases of misdemeanor not otherwise provided for by law; of actions of forcible entry and detainer; of proceedings in insolvency; of actions to prevent or abate a nuisance; of all matters of probate, of divorce, and for annulment of marriage; and for such special cases and proceedings as are not otherwise provided for. The superior court shall also have original jurisdiction in all cases and of all proceedings in which jurisdiction shall not have been by law vested exclusively in some other court; and said court shall have the power of naturalization

> and to issue papers therefor. They shall have such appellate jurisdiction in cases arising in justices' and other inferior courts in their respective counties as may be prescribed by law. They shall always be open, except on nonjudicial days, and their process shall extend to all parts of the state. Said courts and their judges shall have power to issue writs of mandamus, quo warranto, review, certiorari, prohibition, and writs of habeas corpus, on petition by or on behalf of any person in actual custody in their respective counties. Injunctions and writs of prohibition and of habeas corpus may be issued and served on legal holidays and nonjudicial days.

Wash. Const. Art. 4, § 6. The question under the Washington constitution is whether this is a "case" in law or equity or not under the first two sentences of § 6. Superior courts may no doubt hear more *types* of cases than federal courts and thus have broader subject matter jurisdiction in that sense, but it does not follow that the civil legal disputes that come into superior court do not have to be *cases* at all. The two appellate courts commenting on this alleged difference rely on an article written by former Justice Talmadge: Philip A. Talmadge, *Understanding the Limits of Power: Judicial Restraint in General Jurisdiction Court Systems*, 22 SEATTLE U.L.REV. 695 (1999). In the article, Mr. Talmadge writes "Section 6, like Article III, Section 2 of the United States Constitution, enumerates the various cases over which the superior court 'shall have original jurisdiction.' No 'case or controversy' requirement appears in the text of the constitutional grant of jurisdiction, however, and our courts

have never implied any." *Id.* at 708-709. This observation is self-contradictory because it begs the question "what is a case?" and is belied by the historical behavior of Washington courts.

Washington courts have consistently held that a litigant must have a "personal stake in the outcome of the controversy." *Jeckle v. Crotty*, 120 Wn. App. 374, 382, 85 P.3d 931, 936 (2004). The Supreme Court once described this requirement as "'one seeking relief must show a clear legal or equitable right and a well-grounded fear of immediate invasion of that right.'" *Gustafson v. Gustafson*, 47 Wn. App. 272, 276, 734 P.2d 949, 952-953 (1987). Washington courts, from an early date have treated standing as a non-waivable jurisdictional requirement:

> Although the parties have stipulated that appellants have a sufficient interest in the present litigation to enable them to maintain this action, parties cannot stipulate that a justiciable controversy exists **so as to clothe this court with jurisdiction**, when it does not, in fact, exist under the pleadings and the record as made.

Adams v. City of Walla Walla, 196 Wn. 268, 271, 82 P.2d 584 (1938) (emphasis added). *See also*, *Ajax v. Gregory*, 177 Wash. 465, 470-471, 32 P.2d 560 (1934) ("There is no allegation in the complaint in this case that the appellant was denied a permit, or that, one having been granted, it had either been revoked or that its revocation was threatened. Until one of these situations arises . . . the appellant is in no position to call upon a

court, in the exercise of its equity powers, to grant an injunction."). Just a decade after this state was founded the Supreme Court recognized what we now call standing as a limit on its power it issue injunctions:

> The complainant who seeks an injunction must be able to specify some particular act, the performance of which will damnify him, and it is such an act alone that he can restrain. This court has no power to examine an act of the legislature generally, and declare it unconstitutional. **The limit of our authority** in this respect is to disregard, as in violation of the constitution, any act or part of an act which stands in the way of the legal rights of a suitor before us; but a suitor who calls upon a court of chancery to arrest the performance of a duty imposed by the legislature upon a public officer must show conclusively, not only that the act about to be performed is unconstitutional, but also that it will inflict a direct injury upon him."

Birmingham v. Cheetham, 19 Wash. 657, 667-668, 54 P. 37 (1898) (emphasis added). Washington courts have traditionally limited their powers through the standing doctrine. Division Two and Division Three were incorrect in claiming otherwise.

Even federal courts admit that tracing the standing doctrine to Article III's reference to "cases" and "controversies" is "tenuous" and that the best justifications for the standing doctrine are practical. *American Bottom Conservancy v. U.S. Army Corps of Engineers*, _____ F.3d _____ 2011 WL 2314757, 2 (7th Cir. 2011) (citing cases, scholarship and articles on the issue and concluding that practical concerns require that a plaintiff show that "the relief he seeks will if granted avert or mitigate or

compensate *him* for an injury—though not necessarily a great injury—caused or likely to be caused by the defendant."). The concept of standing is not directly derived from the words of a constitution, but as a need for a "means of limiting the role played by courts in society." Wright & Miller, Federal Practice and Procedure § 3531.3 (2011).

Granting standing to Ms. Johnson illustrates the bizarre results that can emerge if standing is abandoned. She actually has less interest in State Farm's future conduct than present State Farm insureds who have never brought a claim under their policies. The Court should therefore hold that Ms. Johnson, who admittedly is not threatened in any way by State Farm's future conduct, lacks standing to seek an injunction regulating that conduct. And, having held that she lacks standing, affirm dismissal of her suit. The lack of any tie to threatened injury results in the strange, opened-ended injunction claim discussed below.

D. Even if Ms. Johnson Has Standing, Courts Hold That Injunctions to "Obey the Law" are Not Available

Apart from jurisdictional issues, Ms. Johnson's dispute with State Farm is not an appropriate one for injunctive relief. The only imaginable injunctions consistent with her complaint are principle-based general standards that closely track existing regulations. But Washington courts have held that one cannot enjoin in vague general terms all possible

violations of the law in the general conduct of a business. In 1935, the Washington Supreme Court reached this conclusion in interpreting the Sherman Act, a precursor of the CPA:

> 'The law [Sherman Anti-Trust Act] has been upheld, and therefore we are bound to enforce it notwithstanding these difficulties. On the other hand, we equally are bound, by the first principles of justice, not to sanction a decree so vague as to put the whole conduct of the defendants' business at the peril of a summons for contempt. We cannot issue a general injunction against all possible breaches of the law.' Swift & Co. v. United States, 196 U. S. 375, 25 S. Ct. 276, 279, 49 L. Ed. 518.
>
> The last quotation is peculiarly applicable here, where it is sought by a permanent injunction to place the future course of business of the appellant at the hazard of summary contempt proceedings for any casual act which may be thought a violation of law. Violations of the public service law are punishable as misdemeanors, by fine and imprisonment. While this fact will not of itself be ground for denying an injunction under section 10442, the use of the summary provisions of that section should be invoked only in cases falling strictly within its letter. A reading of the section clearly indicates that it is intended to restrain an existing or a threatened specific violation. It cannot be used as a corrective for past abuses nor to enjoin a future general course of conduct.

State ex rel. Dept. of Public Works of Washington v. Skagit River Nav. & Trading Co., 181 Wn. 642, 646-647, 45 P.2d 27 (1935).

Here, plaintiff's complaint does not ask the Court to enjoin specific ongoing or threatened violations of the law, but asks the Court to generally enjoin State Farm from violating any of the laws that regulate insurance.

But the Civil Rules contain a specificity requirement for injunctions which prohibits the very type of injunction plaintiff seeks. CR 65(d) states:

> **(d) Form and Scope.** Every order granting an injunction and every restraining order shall set forth the reasons for its issuance; shall be specific in terms; shall describe in reasonable detail, and not by reference to the complaint or other document, the act or acts sought to be restrained; and is binding only upon the parties to the action, their officers, agents, servants, employees, and attorneys, and upon those persons in active concert or participation with them who receive actual notice of the order by personal service or otherwise.

The federal rule is substantially the same. *See* Fed. R. Civ. P. 65(d). While the rule does not specifically apply to initial pleadings, and State Farm does not argue that it should, there is no reason to allow the complaint to go forward if no viable injunction could be crafted in compliance with the rule.

Courts have held that general injunctions to obey laws or general standards (like the order plaintiff seeks) fall short of the "specific in its terms" and "reasonable detail" requirement for several reasons. The specificity requirements are not "mere technical requirements" and they "prevent uncertainty and confusion on the part of those faced with injunctive orders and . . . avoid the possible founding of a contempt citation on a decree too vague to be understood." *Schmidt v. Lessard*, 414 U.S. 473, 476, 94 S. Ct. 713, 38 L. Ed. 2d 661 (1974). Since "an

injunctive order prohibits conduct under threat of judicial punishment, basic fairness requires that those enjoined receive explicit notice of precisely what conduct is outlawed." *Id.* "A person enjoined by court order should only be required to look within the four corners of the injunction to determine what he must do or refrain from doing." *Hughey v. JMS Dev. Corp.*, 78 F.3d 1523, 1532, n.12 (11th Cir. 1996); *see Burton v. City of Belle Glade*, 178 F.3d 1175, 1201 (11th Cir. 1999); *American Red Cross v. Palm Beach Blood Bank, Inc.*, 143 F.3d 1407, 1411-12 (11th Cir. 1998) (Birch, J.) (citing *Hughey* and stating that "[t]he district court may not simply order Palm Beach to 'obey the law.'"); *see also*, *Daniels v. Woodbury County, Iowa*, 742 F.2d 1128, 1134 (8th Cir. 1984) ("[A]n injunction which does little or nothing more than order the defendants to obey the law is not specific enough."). *See also*, *Sanders v. Air Line Pilots Ass'n, Intern.*, 473 F.2d 244, 247 (2nd Cir. 1972) (district court properly refused to enjoin breach of "duty of fair representation" as such an order would be "only an abstract conclusion of law, not an operative command capable of 'enforcement'").

Because plaintiff seeks an injunction not only to obey a specific law, but to obey entire chapters of laws and regulations directing reasonable and fair conduct, plaintiff's request for an injunction is patently absurd. It is one thing to award damages for a defendant's failure to meet

a "reasonableness" standard; it is quite another thing to make the failure to meet such a standard grounds for contempt.

E. Even if State Farm Defaulted, No Relief Could be Given

The complaint states a claim for relief that cannot be granted and therefore dismissal under CR 12(b)(6) was proper. It is easy to see why if one considers what would have happened if State Farm had simply defaulted in this case. Under CR 55(c), the trial court could only grant the relief prayed for in the complaint; that is, an injunction to obey Title 48 RCW and WAC 284. But the Court cannot do that because CR 65(d) prohibits it from doing so. *E.g., In re Xerox Corp. ERISA Litigation*, 483 F. Supp. 2d 206, 221 (D. Conn. 2007) (dismissing claim in complaint for order enjoining defendants "from continuing to violate their fiduciary duties under ERISA."). Because plaintiff's complaint asks for relief the Court cannot grant, the trial court properly dismissed the complaint.

F. The Defects in Plaintiff's Complaint are Incapable of Cure Through Amendment Because They are Inherent in the Nature of Her Claim

Given the liberality of pleading rules, it may well be excusable for plaintiff to formally request relief that is not available, if proper relief could be given. An example would be a complaint stating "my neighbor is building a fence on my property without my permission," but that asks the court to "order defendant to be a fair and reasonable." In that situation,

the trial court could easily craft an injunction that would satisfy CR 65 (remove the fence), even though the order requested in the prayer for relief would not be valid. Here, by contrast, plaintiff requested general, abstract relief because general abstractions are inherent in the type of claim she is bringing. In other words, this is not a pleading defect, but a defect inherent in the claim itself. Plaintiff complains that State Farm breached general standards of good faith and fair dealing, and wants the court to order State Farm to be fair and act in good faith in the future. Plaintiff claims State Farm should have offered her more money for her UIM claim, and that State Farm should have done a better job investigating her claim. The alleged wrongful conduct is simply not the type of conduct that is amenable to injunction, especially an injunction applicable only to <u>future claims</u> that have not been made yet.

One can only speak in general terms before the fact about how to investigate and evaluate a motor vehicle personal injury claim and such standards rarely get more specific than "do X reasonably in light of all of the relevant facts and circumstances" or "complete task X within Y days unless more time is needed." Transforming these standards into an injunctive decree would be like ordering the defendant in an auto accident case to drive better in the future or ordering a lawyer or a surgeon in a

malpractice case to make better arguments in court or better decisions in the operating room. It simply makes no sense.

Prospective descriptions of an insurance company's duties in handling claims (WAC chapter 284-30 regulations) are *necessarily* vague, general, and standard-based. The reasonableness of an offer of settlement, for example, can only be decided retrospectively. Any prospective injunction a court could grant in the area of claim evaluation and investigation would necessarily also be vague, general, and standard-based because the facts and circumstances of future claims are unknown. An injunction that would meet the specificity requirements such as "always pay the policy limits in response to every claim" would be easy to follow but would also be absurd. Because the only possible remedy for unfair settlement offers or claim handling is damages, the trial court's decision should be affirmed.

G. The Injunctions Sought Could Not be Enforced Fairly

Contempt proceedings resulting in sanctions would also be arbitrary in this context of claim settlement negotiations. First, the court would have to determine whether contempt had occurred. Assume that an insurer[3] had already been subject to an injunction against making

[3] We use a hypothetical UIM insurer here because in reality, such an injunction could apply to any of the dozens of them which offer such coverage in this state.

"unreasonably low" settlement offers and plaintiff's claim was a case of alleged contempt for violating that injunction by making a low offer. In deciding whether the insurer is in contempt, the Court would have to weigh factors such as: (1) the credibility of plaintiff's claims of chronic pain and accident-related psychological problems; (2) whether the jury verdict or settlement reports relied on by the insurer were "really" similar to plaintiff's case; and (3) the credibility of plaintiff's claim to be unable to work in the future. The insurer would supposedly be in contempt if the court decided the offer did not reflect a "reasonable" assessment of such factors. Or alternatively, if such circumstances would not be contempt, then the injunction would be meaningless.

Assuming the insurer was found in contempt; at that point, sanctions would be imposed. As remedial sanctions, the court could imprison the party for as long as imprisonment serves a "coercive purpose," order a monetary forfeiture, or order compensatory damages. RCW 7.21.030. Punitive sanctions for contempt may include up to a year imprisonment, a $5,000 fine, or both. RCW 7.21.040. The CPA also authorizes a $25,000 civil penalty (RCW 19.86.140) and courts also have inherent contempt powers of their own. *Keller v. Keller*, 52 Wn. 2d 84, 88, 323 P.2d 231 (1958).

If we apply these remedies to plaintiff's proposed injunction, the results are absurd. The insurer (or its employees) would be subject to such measures for differences in opinion or judgment. The insurer and its employees could be sanctioned daily (through jailing of an adjuster with settlement authority or daily fines) until their opinions or judgments regarding the value of the UIM claim matched the court's opinion or judgment on value.

Beyond the unfairness to the insurer, claims for such injunctions do the courts no favors. In order to determine the reasonableness of the offer, and whether the insurer was in contempt, a court would have to replicate the process undertaken by adjusters and by lawyers for claimants. Adjustment and negotiation of claims are not any court's business. Such tasks are the courts' business only when they are presiding over personal injury bench trials. Finally, undertaking this process, ultimately resulting in penalizing negotiation offers, usurps the province of juries to determine damages, because the adequacy of an offer in the court's eyes purges the contempt and essentially sets a claim value.

Compare such a case to the typical injunction that courts order, such as removing a fence that encroaches on a neighbor's property. Determining how to comply is easy, as is determining how to purge contempt. Consumer claims can also be a proper subject of injunctive

relief; provided they are based on a specific act that must be done or not done instead of a general directive to conduct business lawfully and fairly. For example, if an auto repair business is enjoined from using salvaged parts in repairs and passing them off as new parts, it is easy for the business to know prospectively what it must avoid doing to avoid contempt.

Because any injunction would violate the Civil Rules and be either unfair, or meaningless, or both, the trial court should be affirmed.

H. An Injunction to Make Higher Settlement Offers Would be Contrary to Public Policy

Even if there were no other problems with plaintiff's injunction claim, an injunction such as that sought by plaintiff is not in the public interest. Ordinarily, the penalty for making unreasonably low offers or engaging in bad faith conduct is exposure to tort damages and the insured's attorney fees. These measures are designed in part as a deterrent against such conduct. But Washington courts have refused to go beyond them. *E.g., Anderson v. State Farm Mut. Ins. Co.*, 101 Wn. App. 323, 338, 2 P.3d 1029 (2000) (refusing to allow claim over policy limits as a remedy because "The extra-contractual remedies of Consumer Protection Act attorney fees and damages for emotional distress should serve as a sufficient disincentive to future bad faith conduct.").

Plaintiff wants to increase the sanction for bad faith to contempt in all future State Farm claims in Washington. Because there is always a risk a fact-finder will, in hindsight, find an offer to be unreasonable, there is no way to avoid the danger of contempt without always offering the policy limits in response to every claim. But it is not desirable for State Farm or any insurance company to behave that way because insurance would be too expensive and the market would fail.

Such an overkill remedy would especially frustrate the purpose of UIM insurance because the public policy behind UIM contemplates the insured and insurer will often behave in an adversarial manner. *See Ellwein v. Hartford Acc. & Indem. Co.*, 142 Wn.2d 766, 779 (2001), *overruled on other grounds, Smith v. Safeco Ins. Co.*, 150 Wn. 2d 478 (2003) ("UIM coverage requires that a UIM insurer be free to be adversarial within the confines of the normal rules of procedure and ethics. To require otherwise would contradict the very nature of UIM coverage."). But how could State Farm's adjusters negotiate or litigate claims if they risk contempt (even jail) if their offers are deemed too low? Moreover, if an insurer is not free to be adversarial, what check is there upon the insured's self-serving demand for the policy limits, even for the most minor of injuries? Because plaintiff's injunction would thwart the

adversarial nature of UIM insurance, the trial court properly dismissed the complaint.

I. Plaintiff's Hypothetical Injunctions Only Reinforce State Farm's Point

Plaintiff attempts to seize upon the availability of "hypothetical" scenarios to defeat 12(b)(6) motions. In doing so, plaintiff merely confirms that it is impossible to even imagine a valid injunction consistent with her complaint. Starting on page 13 of her brief, plaintiff sets forth a series of hypothetical injunctions. Plaintiff appears to realize that though she cannot obtain a injunction that simply orders State Farm to obey regulations, all plaintiff does is propose exactly such an order in different words. The proposals are simply restatements of the claims regulations meant to appear as something else. In fact, the gloss put on them through rephrasing actually makes the injunctions even more untenable.

The first proposal is an injunction prohibiting "instruction to UIM claims handlers that is proper to delay investigation of UIM claims." First, merely saying that something is proper (even if the statement is erroneous) would not violate the CPA or insurance regulations. Second, it sometimes is proper to delay investigation of a UIM claim if the situation warrants it. Some claims cannot be evaluated until the claimant has had time to recover from her injuries and the prognosis is known. Even

plaintiff's attorneys often delay bringing suit until the end of the statute of limitations period for this reason. This is nothing more than a restatement of the general imperative to perform a reasonable investigation.

The second proposal is an injunction against "instruction or tolerance for discrimination (in the form of delay or low offers) against claims in which the insured does not have an attorney." This proposal suffers from the same problems as the previous one. If the insured is not entitled to a general injunction against "delay" or "low offers," then she is also not entitled to an injunction against "delay" or "low offers" with respect to a subset of claimants (those who do not have an attorney). Moreover, even when an insurer is as even-handed as it can be, it could well be the case that hiring a professional advocate would tend to get one a better offer and a quicker resolution on a personal injury damages claim (if not, why hire one?). But to say that the existence of such a trend should not be tolerated on pain of contempt is absurd.

The next proposal is "instruction to UIM claims handlers that claims-handling regulations do not apply to UIM claims." This is a prior restraint on expressing a legal or political viewpoint. Holding or expressing erroneous legal views does not violate the CPA and a court could not constitutionally enter this injunction.

The next proposal is against "company policies for extending offers known to be lower than the fair value of the claim as a step in a 'dance' during the handling of a UIM claim." This is a prohibition on negotiating dressed up in mocking language. The value of a personal injury claim is a matter of judgment and the insured and insurer are adversaries when in UIM valuation. The payment on tort claims is determined either by negotiation or litigation. There is no set standard for what is a "fair" offer — if there were, plaintiff would have quoted it. At bottom, this is at best a injunction against "low offers" dressed up in other words.

Finally, the plaintiff wishes a ban on "company policies that encourage claims handlers to compel UIM insureds into litigation by extending low offers." This again is an injunction against low offers dressed up as an injunction against company policies. Company policies cannot violate the CPA, only practices can violate the CPA.

These prohibitory injunction proposals are followed up with a list of proposals for court-supervised reformation of State Farm's internal policies and procedures, training course content, and management structure. Notably, the failure to do any of the "specific" things listed does not violate the CPA. But beyond that, the superior court would have to actually create specific procedures for running a large insurance

company and training its employees. It would also have to approve updates or changes to these procedures based on company and legal developments over time. Nothing in the CPA gives the superior court this authority. Nor, one assumes, would the court want such a burden. As this court has recognized, damages are an adequate remedy for bad faith, in fact bad faith will often give rise to both punitive and compensatory remedies under two common law theories (bad faith and breach of contract) and two statutory theories (the CPA and the Insurance Fair Conduct Act).

V. CONCLUSION

Because plaintiff's complaint is doomed from the beginning, both for lack of any redressible injury and for lack of any conceivable injunction that could be entered, the trial court correctly dismissed plaintiff's complaint. State Farm respectfully requests that the Court of Appeals affirm the trial court.

RESPECTFULLY SUBMITTED this 29th day of August, 2011.

BETTS, PATTERSON & MINES, P.S.

By:

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CERTIFICATE OF SERVICE

I, Valerie D. Marsh, declare as follows:

1) I am a citizen of the United States and a resident of the State of Washington. I am over the age of 18 years and not a party to the within entitled cause. I am employed by the law firm of Betts, Patterson & Mines, P.S., whose address is Betts Patterson & Mines, One Convention Place, Suite 1400, 701 Pike Street, Seattle, Washington 98101-3927.

2) By the end of the business day on August 29, 2011, I caused to be served upon counsel of record at the addresses and in the manner described below, the following documents:

- **Brief Of Respondent; and**
- **Certificate of Service.**

William C. Smart	☐	U.S. Mail
Keller Rohrback, L.L.P.	☒	Hand Delivery
1201 Third Avenue, Suite 3200	☐	Telefax
Seattle, WA 98101-3052	☐	UPS

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I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 29th day of August, 2011.

Valerie D. Marsh