

FILED  
Court of Appeals  
Division II  
State of Washington  
12/28/2018 12:51 PM  
NO. 52364-7-II

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

---

ALIONA KOSOVAN,

Plaintiff/Appellant,

v.

OMNI INSURANCE COMPANY and PRAXIS CONSULTING, INC

Defendants/Respondents,

---

APPEAL FROM THE SUPERIOR COURT OF CLARK COUNTY  
CAUSE No. 18-2-00084-3

---

AMENDED BRIEF OF APPELLANT

---

THOMAS HOJEM  
GIDEON CARON  
Attorneys for Plaintiff/Appellant  
Caron, Colven, Robison & Shafton  
900 Washington Street, Suite 1000  
Vancouver, WA 98660  
(360) 699-3001

**Table of Contents**

Introduction.....1

Assignments of Error .....2

Issues Presented .....2

Statement of the Case.....2

Argument .....6

Standard of Review.....6

Required Elements of a Consumer Protection Act Claim.....4

Omni Committed an Unfair or Deceptive Act .....7

Praxis Committed an Unfair or Deceptive Act .....14

The Other Requirements for a Consumer Protection Act Claim  
Are Satisfied.....18

The Acts Occurred in the Course of a Trade or  
Commerce.....18

The Public Interest Requirement Is Satisfied.....20

Ms. Kosovan Suffered Injury That Was Caused by the Acts  
of Omni and Praxis .....23

Conclusion.....25

Statement Pursuant to RAP 18.1(a) .....25

Conclusion.....26

**Table of Authorities**

**Washington Cases:**

*Anderson v. State Farm Mutual Automobile Insurance Co.*, 101 Wn.App. 323, 2 P.3d 1029 (2000) .....23

*Deturk v. State Farm Mut. Auto Ins.*, 94 Wn.App. 364, 967 P.2d 994 (1998).....9

*Frias v. Asset Foreclosure Servs., Inc.*, 181 Wn.2d 412, 334 P.3d 529 (2014).....23, 24

*Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co.*, 105 Wn.2d 778, 719 P.2d 531 (1986) .....7, 8, 20

*Harris v. Drake*, 116 Wn. App. 261, 65 P.3d 350 (2003)..... 11

*Impecoven v. Department of Revenue*, 120 Wn.2d 357, 841 P.2d 752 (1992).....6

*Industrial Insurance Co. v. Kallevig*, 114 Wn.2d 907, 792 P.2d 920 (1990).....11, 13, 20

*Klem v. Washington Mutual Bank*, 176 Wn.2d 771, 295 P.3d 1179 (2013).....7, 24

*Mahler v. Szucs*, 135 Wn.2d 398, 957 P.2d 632 (1998).....9, 11, 12, 14, 22, 26

*Mason v. Mortgage America, Inc.*, 114 Wn.2d 842, 792 P. 2d 142 (1990).....23

*Nelson v. GEICO Gen. Ins. Co.*, No. 72632-3-I, 2016 Wash. App. LEXIS 15 (Ct. App. Jan. 11, 2016).....23

*Panag v. Farmers Ins. Co. of Wash.*, 166 Wn.2d 27, 204 P.3d 885 (2009).....19, 20 24

*Rockrock Group, LLC v. Value Logic, LLC*, 194 Wn.App. 904,

|  |            |
|--|------------|
| 380 P.3d 345 (2016) .....  | 6          |
| <i>Salois v. Mutual of Omaha</i> , 90 Wn.2d 355, 581 P.2d 1349 (1978).....   | 20         |
| <i>Sign-O-Lite Signs v. DeLaurenti Florists</i> , 64 Wn.App. 553, 825 P.2d 714<br>(1992).....                          | 24, 26     |
| <i>Sorrel v. Eagle Healthcare, Inc.</i> , 110 Wn.App. 290, 38 P.3d 1024<br>(2002).....                                 | 23         |
| <i>Thiringer v. Am. Motors Ins. Co.</i> , 91 Wn2d 215, 588 P.2d 191<br>(1978).....                                     | 9, 12, 22  |
| <i>Trust Fund Services v. Aro Glass Co.</i> , 89 Wn2d 758, 575 P.2d 716<br>(1978).....                                 | 16         |
| <i>Unigard Insurance Company v. Leven</i> , 97 Wn.App. 417, 983 P.2d 1155<br>(1999).....                               | 8          |
| <i>University of Washington v. Government Employees Insurance Company</i><br>200 Wn.App. 455, 404 P3d 559 (2017) ..... | 24         |
| <b>Federal Cases:</b>  |            |
| <i>Mandelas v. Gordon</i> , 785 F. Supp. 2d 951, 954<br>(W.D. Wash. 2011).....   | 16, 17     |
| <i>Paris v. Steinberg</i> , 828 F. Supp. 2d 1212 (W.D. Wash. 2011).....  | 17         |
| <b>Statutes:</b>   |            |
| RCW 19.16.100(2).....  | 14         |
| RCW 19.16.100(4)(a) .....  | 14         |
| RCW 19.16.100(5)(c) .....  | 15, 16, 17 |
| RCW 19.16.110 .....  | 14, 15, 21 |
| RCW 19.16.440 .....  | 15, 17, 21 |
| RCW 19.86.010(2).....  | 18         |

|                                  |            |
|----------------------------------|------------|
| RCW 19.86.090 .....              | 25         |
| RCW 19.86.093 .....              | 21         |
| RCW 19.86.093(1).....            | 22         |
| RCW 19.86.093(2).....            | 22         |
| RCW 19.86.093(3)(b) and (c)..... | 22         |
| RCW 19.86.170 .....              | 18         |
| RCW 48.01.030 .....              | 11, 20, 22 |

**Regulations**

|                         |    |
|-------------------------|----|
| WAC 284-30-330(3) ..... | 12 |
|-------------------------|----|

## INTRODUCTION

Plaintiff Aliona Kosovan was seriously injured in a motor vehicle collision that occurred on December 6, 2015. Her insurer, Omni Insurance Company (Omni), paid \$10,000.00 in Personal Injury Protection (PIP) benefits as a result of that collision. Omni then engaged Praxis Consulting, Inc. (Praxis) to attempt to collect that sum from the liability insurer of the person who caused Ms. Kosovan's injuries. Praxis did so without any prior notice to Ms. Kosovan and without any consideration of whether Ms. Kosovan had been fully compensated by the combination of liability and PIP. These actions violated the Consumer Protection Act. The trial court erred by ruling to the contrary and dismissing Ms. Kosovan's claims on summary judgment.

///

///

///

///

///

///

///

## ASSIGNMENTS OF ERROR

ASSIGNMENT OF ERROR NO. 1: THE TRIAL COURT ERRED BY ENTERING THE ORDER ON DEFENDANT PRAXIS' MOTION FOR SUMMARY JUDGMENT.

ASSIGNMENT OF ERROR NO. 2: THE TRIAL COURT ERRED BY ENTERING THE THIRD ORDER GRANTING DEFENDANT PRAXIS' MOTION FOR SUMMARY JUDGMENT.

## ISSUES PRESENTED.

1. Can an insurer seek reimbursement of PIP benefits it has paid directly from the tortfeasor's insurer when its insured has made a claim against the tortfeasor?

2. Did Praxis' actions in attempting to collect Omni's reimbursement interest violate the Consumer Protection Act because, at the time, Praxis was not licensed in Washington as a debt collector?

3. Did the attempt by Omni and Praxis to recover reimbursement violate the Consumer Protection Act?

## STATEMENT OF THE CASE

The facts stated in this section are largely undisputed.

On December 6, 2015, Aliona Kosovan was driving her car when she was rear ended. (CP 85) The driver of the other vehicle was insured by

USAA with liability policy limits of \$25,000 for injuries to any one person in any one incident. (CP 187)

Ms. Kosovan was injured in the collision. She suffered injuries to her back, her knee, and her jaw. She also sustained a concussion. (CP 85) Her hip and jaw were injured. (CP 86) She was given a plastic guard to wear to keep her jaw in place. When she was deposed on April 24, 2018, she was still using that guard. (CP 79, 88) She obtained chiropractic care from Northwest Injury and Rehabilitation for approximately eighteen months. (CP 89) She also saw a neurologist to address the residuals of her concussion. (CP 89) Ms. Kosovan incurred approximately \$40,000.00 for the care she obtained after the collision. (CP 91)

At the time of the collision, Ms. Kosovan was employed as a medical assistant by Multnomah County, Oregon, making \$17.86 per hour for a forty-hour week. (CP 84, 93) She was off work after the collision until July or August of 2016. (CP 93)

At the time of the incident, Ms. Kosovan was insured with Omni. The policy provided PIP coverage with a \$10,000.00 limit for treatment expenses. Omni paid that limit to Northwest Injury and Rehabilitation on October 11, 2017. (CP 185-86)

Praxis is a corporation that collects subrogation claims for insurance companies. (CP 172-175, CP 177) It entered into an agreement with Omni to collect subrogation claims on a contingent basis. (CP 181-83) Praxis did not, however, have a license to operate as a collection agency in Washington. (CP 178)

Praxis and Omni are separate companies. They have no relationship other than principal and agent. There is no common ownership among the two companies. They do not share office space. (CP 314)

Praxis contacted USAA directly on October 19, 2017 instructing USAA to send \$10,000 to it related to Personal Injury Payment benefits (PIP) paid by Omni for Ms. Kosovan (CP 189-190). Prior to contacting USAA demanding PIP reimbursement, Praxis did not contact Ms. Kosovan to determine if she was bringing a claim or to learn anything about her injuries. (CP 135). This should not be considered surprising. Praxis never contacts the PIP insureds and does nothing to learn about the extent of their damages before attempting PIP recovery. (CP 179)

Ms. Kosovan was represented by attorney Thomas Hojem in her personal injury claim. On November 8, 2017, USAA offered its \$25,000 policy limits to settle, contingent on releases from "Omni/Praxis" and Northwest Injury and Rehabilitation. (CP 195). Northwest Injury and

Rehabilitation released its lien by approximately November 30, 2017, leaving release of the Omni/Praxis claim as the sole limitation on release of the \$25,000 limits to plaintiff. (CP 206-207).

Meanwhile, and on November 22, 2017, Ms. Kosovan wrote to the Insurance Commissioner to complain about Omni's insistence on recovering its reimbursement interest. (CP 170, 205) On January 10, 2018, Ms. Kosovan filed this action against Omni and Praxis to resolve the matter. (CP 1-2)

After the filing of this suit, Praxis again consulted USAA directly. On February 19, 2018, USAA advised Praxis that it was not going to pay anything to Praxis or Omni because Ms. Kosovan's damages exceeded the USAA policy limits. As it concedes, Praxis was previously unaware of the extent of Ms. Kosovan's injuries and damages. (CP 135)

Ms. Kosovan's deposition was taken on April 24, 2018. (CP 79) The next day, counsel for Praxis wrote Ms. Kosovan's attorney and indicated that Praxis would not be pursuing any reimbursement claim. (CP 130-31) Ms. Kosovan's attorney sent the letter to USAA. With that assurance, USAA disbursed its entire policy limit to Ms. Kosovan. (CP 179).

Praxis then moved for summary judgment. (CP 148-67) Omni joined in the motion. (CP 231-33) The trial court ultimately granted the

summary judgment motion and dismissed the claims against both defendants. (CP 339-44) Ms. Kosovan appealed.

## ARGUMENT

### I. Standard of Review.

The appellate court reviews a summary judgment order *de novo*, engaging in the same inquiry as the trial court. As CR 56(c) makes clear, a summary judgment motion can be granted only if “the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” In this context, a material fact is one upon which the outcome of the litigation depends in whole or in part. All facts and all reasonable inferences from those facts are viewed in the light most favorable to the nonmoving party. Summary judgment is appropriate only if reasonable persons could reach but one conclusion from all the evidence. *Rockrock Group, LLC v. Value Logic, LLC*, 194 Wn.App. 904, 913, 380 P.3d 545 (2016)

Summary judgment can be awarded to the nonmoving party if the facts are sufficiently clear. *Impecoven v. Department of Revenue*, 120 Wn.2d 357, 365, 841 P.2d 752 (1992)

In this case, there is at least a genuine issue of material fact precluding summary judgment. Furthermore, the undisputed facts show that Omni and Praxis violated the Consumer Protection Act by seeking reimbursement directly from USAA and holding up Ms. Kovoan's ability to receive the settlement that USAA offered. Therefore, the trial court erred by granting summary judgment dismissing Ms. Kosvan's suit. It should have granted partial summary judgment in Ms. Kosovan's favor and then determined the amount of her damages.

II. Required Elements of a Consumer Protection Act Claim.

A party seeking relief under Washington's Consumer Protection Act, RCW 19.86, must demonstrate the presence of five elements. These are (1) an unfair or deceptive act; (2) done in the course of a trade or commerce; (3) that affects the public interest; and (4) injury to the plaintiff; (5) proximately caused by the unfair or deceptive act. *Hangman Ridge Training Stables v. Safeco Title Insurance Co.* 105 Wn.2d 778, 780, 719 P.2d 531 (1986)

The critical issue in this case is the first element, the presence of an unfair or deceptive act. This element is established by a per se violation of statute, an act or practice that has the capacity to deceive substantial portions of the public, or an unfair or deceptive act or practice not regulated by statute but in violation of public interest. *Klem v. Washington*

*Mutual Bank*, 176 Wn.2d 771, 787, 195 P.3d 1179 (2013) The element will be satisfied by an act that is unfair, deceptive, or both. *Hangman Ridge Training Stables v. Safeco Title Insurance Co.*, *supra*, 105 Wn.2d at 785 *Klem v. Washington Mutual Bank*, *supra*, 176 Wn.2d at 787

As will be discussed below, the acts of Omni and Praxis satisfy the first element. The other elements are satisfied as well.

### III. Omni Committed an Unfair or Deceptive Act.

In general terms, an insurance company violates the Consumer Protection Act if it acts without reasonable justification in handling a claim by its insured. *Unigard Insurance Company v. Leven*, 97 Wn.App. 417, 434, 983 P.2d 1155 (1999) Omni's directing Praxis to collect directly from USAA the PIP benefits it had paid on behalf of Ms. Kosovan was at odds with Omni's policy and decisions on the subject by Washington courts. It therefore amounted to an unfair or deceptive act.

The extent of an insurer's right to recover reimbursement for PIP payments that it makes has been made clear in several decisions. First of all, the PIP carrier can pursue reimbursement directly from the tortfeasor or the tortfeasor's insurer only if the insured makes no claim for damages. If the insured does make claim against the tortfeasor and the tortfeasor's insurer, the PIP carrier must await the resolution of that claim before seeking reimbursement and can only seek reimbursement from the

proceeds of the recovery. Secondly, the PIP carrier is entitled to reimbursement only when the insured is made whole from the recovery from the tortfeasor. Third, the PIP carrier must pay its proportionate share of attorney's fees and costs that its insured incurs to make the recovery. *Thiringer v. American Motors Insurance Co.*, 92 Wn.2d 215, 219, 588 P.2d 191 (1978); *Mahler v. Szucs*, 135 Wn.2d 398, 424, 957 P.2d 632 (1998); *DeTurk v. State Farm Mutual Automobile Insurance Co.*, 94 Wn.App. 364, 369-70, 967 P.2d 994 (1998)

Omni's policy reflects these rules. It provides as follows in pertinent part:

A, If we<sup>1</sup> make a payment under this policy and the person to or for whom payment was made has a right to recover damages from another we shall be subrogated to that right. That person shall do:

- 1, Whatever is necessary to enable us to exercise our rights; and
2. Nothing to prejudice them.

B. If we make a payment under this policy and the person to or for whom payment was made recovers damages from another, that person shall:

1. Hold in trust for us the proceeds of the recovery; and
  2. Reimburse us to the extent of our payment.
- However, any reimbursement due to us shall be reduced by our pro rata share of any reasonable and necessary costs

---

<sup>1</sup> All references to "we" and "us" in the policy refer to Omni. (CP 21)

and expenses, including deposition costs, witness fees and attorney's fees, incurred in bringing the claim. . .

D. We shall be entitled to a recovery under Paragraph (A.) or (B.) only after the person has been fully compensated for damages.

(CP 56-57) In other words, Omni's policy provides that it is entitled to seek subrogation directly from the tortfeasor's insurer under paragraph (A) when its insured makes no claim. But it is limited to reimbursement from the proceeds of the settlement when the insured does make a claim as paragraph B makes clear. Finally, as paragraph D provides, there can be no recovery until and unless the insured is made whole.

Ms. Kosovan was clearly pursuing a claim against the tortfeasor. Nonetheless, Omni violated its own policy provisions and the rules set out in the cases cited above by pursuing reimbursement directly from USAA. Omni made no effort to determine whether Ms. Kosovan was pursuing her own claim against the tortfeasor. Neither did Praxis. It would have been very easy to find this out. Either Omni or Praxis could have called Ms. Kosovan and asked her. There is also no indication that Omni determined whether Ms, Kosovan's recovery would make her whole. That also would have been a simple matter. It could have ordered medical records to see the nature of her injuries and care. It was entitled to do so by the following provision in its policy:

A person seeking any coverage must. . .

4. Authorize us to obtain. . .Medical reports and records. .

(CP 18) The failure to make this investigation violated Omni's duty to Ms. Kosovan.

All parties to the insurance contract have a duty to use good faith. This duty stems from RCW 48.01.030 which provides:

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

This statute imposes a fiduciary duty on the insurer relating to its insureds requiring the insurer to give equal consideration in all matters to the insured's interests as well as its own. *Mahler v. Szucs, supra*, 135 Wn.2d at 414; *Harris v. Drake*, 116 Wn.App. 261, 285, 65 P.3d 350 (2003), affirmed, 152 Wn.2d 480, 99 P.3d 872 (2004) At a minimum, that fiduciary duty requires some limited investigation on the part of Omni to determine what part or parts of its policy should govern its reimbursement rights. After all, an insurer cannot make a claims decision adverse to an insured without conducting a reasonable investigation. *Industrial Indemnity Co. v. Kallevig*, 114 Wn.2d 907, 917, 792 P.2d 920, 923 (1990)

Omni's failure to conduct that investigation is a breach of this fiduciary duty.

Omni's apparent failure to have any procedures in place to make this investigation also violates WAC 284-30-330(3) which provides as follows:

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. . .

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

The attempt to collect reimbursement in this fashion must first be considered deceptive since the act would tend to deceive a substantial portion of the public. Most consumers are unaware of the rules set out in *Thiringer v. American Motors Insurance Co, supra*, and *Mahler v. Szucs, supra*. If their insurer told them that the right of reimbursement was absolute, they would have no reason to doubt that.

The act is also unfair since it amounts to a violation of Omni's policy and well-established precedent. It has the capacity to cause substantial injury as this case shows. Had Praxis and Omni been successful in their gambit to recover the PIP benefits that were paid, Ms. Kosovan would have received \$10,000.00 less than the sum to which she

was entitled. This was not something that Ms. Kosovan was able to avoid on her own. She was able to receive that to which she was entitled only after she filed suit. And Praxis and Omni can point to no countervailing benefit from their violation of clearly stated rules in Washington decisional law which have been memorialized in Omni's policy.

Finally, the unfair or deceptive act is made out by the apparent failure to have procedures in place to determine whether the insured is actually pursuing a claim against the tortfeasor and whether the insured's injuries exceed the policy limits. As noted above, that failure violates the Insurance Commissioner's regulations. Such a violation amounts to an unfair or deceptive act. *Industrial Indemnity Co. v. Kallevig, supra*

In the final analysis, the discussion above shows that Omni acted without reasonable justification in handling Ms. Kosovan's claim. This is a violation of the Consumer Protection Act. Therefore, the evidence presents at least a genuine issue of fact as to whether Omni and Praxis committed an unfair or deceptive act. But since these facts are undisputed, the existence of an unfair or deceptive should be established.

///

///

///

///

IV. Praxis Committed an Unfair or Deceptive Act.

Praxis agreed to collect from USAA what Omni had paid for PIP benefits while it was not licensed to do so. This amounts to an unfair or deceptive act since it violates RCW 19.16.110. That statute states:

No person shall act, assume to act, or advertise as a collection agency or out-of-state collection agency as defined in this chapter, except as authorized by this chapter without first having applied and obtained a license from the director.<sup>2</sup>

Praxis is and was a collection agency. The definition of a “collection agency” includes, “Any person...engaged in...collecting or attempting to collect claims owed or due or asserted to be owed or due another person.” RCW 19.16.100(4)(a). A “claim” is “any obligation for the payment of money or thing of value arising out of any agreement or contract, express or implied.” RCW 19.16.100(2). Omni’s reimbursement arises out of its contract with its insured. *Mahler v. Szucs, supra*, 135 Wn.2d at 436. There is no doubt that Praxis was attempting to collect a contractual obligation allegedly owed to Omni. Therefore, it was functioning as a collection agency. And as a collection agency, it was required to be licensed.

---

<sup>2</sup> In this context, the director is the Director of the Department of Licensing. RCW 19.16.100(8)

This violation of RCW 19.16.110 amounts to a *per se* violation of the Consumer Protection Act. As RCW 19.16.440 states:

The operation of a collection agency or out-of-state collection agency without a license as prohibited by RCW 19.16.110 and the commission by a licensee or an employee of a licensee of an act or practice prohibited by RCW 19.16.240 are declared to be unfair acts or practices or unfair methods of competition in the conduct of trade or commerce for the purpose of the application of the Consumer Protection Act found in chapter 19.86 RCW.

Praxis is expected to argue that it is exempt from licensing requirements based on RCW 19.16.100(5)(c) (hereinafter Subsection 5(c)). It provides as follows in pertinent part:

‘Collection agency’ does not mean and does not include:

Any person whose collection activities are carried on in his, her, or its true name and are confined and directly related to the operation of a business other than that of a collection agency such as but not limited to: Trust companies; savings and loan associations; building and loan associations; abstract companies doing an escrow business; real estate brokers; property management companies collecting assessments, charges, or fines on behalf of condominium unit owners associations, associations of apartment owners, or homeowners’ associations; public officers acting in their official capacities; persons acting under court order; lawyers; insurance companies; credit unions; loan or finance companies; mortgage banks; and banks.

Reduced to its lowest common denominator, Subsection 5(c), says that a business is not a collection agency if its “collection activities” are

“directly related” to a business other than a “collection agency.” In other words, an entity need not obtain a license to collect obligations owed to it.

In *Trust Fund Servs. v. Aro Glass Co.*, 89 Wn.2d 758, 575 P.2d 716 (1978), the Supreme Court held that a nonprofit corporation “created to provide a convenient means for a law firm to collect debts related to the firm’s business” was not a collection agency under a prior version of Subsection 5(c). 89 Wn.2d at 761-62 Its holding was based on how closely related the collecting entity was to a business “other than that of a collection agency.” The Court noted that the collecting entity “has no assets, no separate clients, no employees and no office. [It] is merely the alter ego of the law firm and its only activities are related directly to that firm’s business.” *Id.*, 89 Wn2d at 761-62. In other words, if two entities are so closely related that the situation amounts to an entity collecting its own debt, then the Subsection 5(c) exemption applies.

The facts at bar are totally different. Praxis is not the alter ego of Omni. They are separate and distinct. Praxis collects for multiple insurers; Omni and Praxis do not share office space; and Omni and Praxis do not have common ownership. Therefore, Praxis is not entitled to the exemption provided by Subsection 5(c).

Federal decisions make clear that the exemption applies only to entities collecting their own debts. In *Mandelas v. Gordon*, 785 F.Supp.2d

951, 960-61 (W.D. Wash. 2011) and *Paris v. Steinberg*, 828 F.Supp.2d 1212, 1219-20 (W.D. Wash. 2011), the Court ruled that the exemption for lawyers in Subsection 5(c) applies only when the lawyer is collecting obligations owed to himself or herself. As the Court stated in *Mandelas v. Gordon, supra*:

Although [the business] is nominally a law firm, its primary purpose is the collection of consumer debts. [The business] employs only two attorneys; but it employs 13 to 18 non-attorney 'collectors' in a 'collection department.' The collectors attempt to collect debt from consumers before any efforts are made to file suit. Under [the business's] standard processes, its non-attorney collectors attempt to collect debts on behalf of [the businesses] clients before [the business] ever files suit, and [the business] undertakes litigation only where 'voluntary collection isn't possible.' Gordon has directed the court to no evidence that it conducts any business that is unrelated to its collection activities. In light of this evidence, the instant case is distinguishable from *Carter*, in which the court affirmed summary judgment for the law firm in part because the plaintiff put forth no evidence supporting its assertion that the law firm employed "numerous employees that engage in collections work."

As indicated, Praxis' sole business is collecting. And it is not an alter ego of Omni, the creditor. Therefore, it is a collection agency and must be licensed.

Praxis' attempt to collect the reimbursement interest is a per se violation of the Consumer Protection Act as RCW 19.16.440 states. At

very least, a genuine issue of material fact has been presented as to whether Praxis' actions amount to an unfair or deceptive act.

IV. The Other Requirements for a Consumer Protection Act Claim Are Satisfied.

a. The Acts Occurred in the Course of a Trade or Commerce.

The term "trade or commerce" is defined as follows in RCW 19.86.010(2):

"Trade" and "commerce" shall include the sale of assets or services, and any commerce directly or indirectly affecting the people of the state of Washington.

Based on that broad definition, Praxis and Omni were both engaged in trade or commerce when they did that acts at issue here.

Furthermore, the insurance industry is subject to the Consumer Protection Act. As RCW 19.86.170 states:

Nothing in this chapter shall apply to actions or transactions otherwise permitted, prohibited or regulated under laws administered by the insurance commissioner of this state, the Washington utilities and transportation commission, the federal power commission or actions or transactions permitted by any other regulatory body or officer acting under statutory authority of this state or the United States: PROVIDED, HOWEVER, That actions and transactions prohibited or regulated under the laws administered by the insurance commissioner shall be subject to the provisions of RCW 19.86.020 and all sections of chapter 216, Laws of 1961 and chapter 19.86 RCW which provide for the implementation and enforcement of RCW 19.86.020 except that nothing

required or permitted to be done pursuant to Title 48 RCW shall be construed to be a violation of RCW 19.86.020. . .

Praxis cannot contend that this element is not satisfied because it had no direct relationship to Ms. Kosovan. An actionable violation of the Consumer Protection Act can occur without any consumer or business relationship between the particular plaintiff bringing a private cause of action under the CPA and the actor because 'trade or commerce' is not limited to such transactions. *Panag v. Farmers Insurance Company of Washington*, 166 Wn.2d 27, 39, 204 P.3d 885(2009). It is noteworthy that the Court has held that the acts of a collection agency in the collection of an insurer's subrogation claims were subject to the Consumer Protection Act in *Panag v. Farmers Insurance Company of Washington, supra*. As the Court stated at 166 Wn.2d 43:

Both the insurance industry and the debt collection industry are highly regulated fields. A primary purpose of the intensive regulation of these industries is to create public confidence in the honesty and reliability of those who engage in the business of insurance and the business of debt collection. Our legislature has declared that violations of the regulations applicable to either industry implicate the public interest and constitute a per se violation of the CPA.

In short, both Praxis and Omni were acting in the course of trade or commerce.

///

b. The Public Interest Requirement Is Satisfied.

This matter involves unfair or deceptive acts in the course of the insurance and debt collection businesses. The public interest requirement is satisfied *per se* as to both. The public interest requirement is also satisfied on the basis that the practices at issue here have the capacity to injure others.

In *Hangman Ridge Training Stables, Inc., v. Safeco Title Insurance Co., supra*, 105 Wn.2d at 791, the Court stated that the public interest requirement could be satisfied *per se* by showing violation of a statute that contains a legislative declaration of the public interest. It then found that the declaration of public interest found in RCW 48.01.030, was such a statute. On that basis, it ruled the public interest requirement is satisfied where unfair or deceptive conduct by insurers occurs. See also, *Salois v. Mutual of Omaha*, 90 Wn.2d 355, 581 P.2d 1349 (1978) The public interest requirement is also satisfied when, as here, an insurer breaches one of the Insurance Commissioner's regulations. *Industrial Indemnity Co. v. Kallevig, supra*. The public interest requirement is therefore satisfied as to Omni.

The Court in *Panag v. Farmers Insurance Company of Washington, supra*, 166 Wn.2d at 54-55, held that the public interest

requirement applies to both insurance and collection matters. The statement in RCW 19.16.440 to the effect that the failure to secure a license is a unfair or deceptive act for the purposes of the Consumer Protection Act also makes out the public interest requirement on a *per se* basis.

In 2009, the legislature codified the public interest requirement in RCW 19.86.093. That statute provides as follows:

In a private action in which an unfair or deceptive act or practice is alleged under RCW 19.86.020, a claimant may establish that the act or practice is injurious to the public interest because it:

- (1) Violates a statute that incorporates this chapter;
- (2) Violates a statute that contains a specific legislative declaration of public interest impact; or
- (3) (a) Injured other persons; (b) had the capacity to injure other persons; or (c) has the capacity to injure other persons.

The use of the word “may” in the first sentence indicates that the statute is not the exclusive method for proving the public interest requirement. In any event, the public interest requirement is satisfied for both Omni and Praxis under this statute.

Praxis violated RCW 19.16.110 by collecting without a license. RCW 19.16.440, which states that collecting without a license violates the

Consumer Protection Act provides the necessary incorporation required by RCW 19.86.093(1)

The public interest requirement is also satisfied against Omni by its failure to adhere to the terms of its own policy which incorporates the rules set out in *Thiringer v. American Motors Insurance, supra*, and *Mahler v. Szucs, supra*. This amounted to a breach of its duty of good faith. Omni also acted without reasonable justification in handling Ms. Kosovan's claim. Its actions amounted to a breach of RCW 48.01.030 which requires good faith in all insurance matters. That statute also states that insurance issues are matters of public interest. Omni therefore violated a statute that contains a declaration of the public interest. This satisfies the public interest requirement under RCW 19.86.093(2).

The acts of Omni and Praxis also satisfy the public interest requirement under RCW 19.86.093(3)(b) and (c)—activity that has or had the capacity to injure others. Neither Omni nor Praxis apparently has in place any procedures to determine whether an insured is pursuing a claim against the tortfeasor or has damages in excess of the tortfeasor's liability limits. The absence of these procedures means that other Omni insureds could have been or could be damaged in the same way as Ms. Kosovan.

In short, there can be little doubt that the public interest requirement has been satisfied.

c. Ms. Kosovan Has Suffered Injury That Was Caused by the Acts of Omni and Praxis.

The injury element of a Consumer Protection Act claim requires some injury to business or property. The scope of such injury is broad and includes being deprived of the use of the use and enjoyment of property. *Mason v. Mortgage American Inc.*, 114 Wn.2d 842, 854, 792 P.2d 142 (1990) The scope of injury is expansive and includes issues that may be minimal and temporary. *Frias v. Asset Foreclosure Services, Inc.*, 181 Wn.2d 412, 431, 334 P.3d 529 (2014).

Based on these notions, injury is made out when a person is deprived of property for a very short time. For example, in *Sorrel v. Eagle Healthcare, Inc.*, 110 WnApp. 290, 298-99, 38 P.3d 1024 (2002), the Court found sufficient injury when the plaintiff was deprived for two weeks of a refund to which he was entitled. And a delay in securing underinsured motorists benefits also made out sufficient injury in *Anderson v. State Farm Mutual Insurance Co.* 101 Wn.App. 323, 333, 2 P.3d 1029 (2000)<sup>3</sup> Under this test, Ms. Kosovan suffered injury. Her

---

<sup>3</sup> Division One came to a similar conclusion in *Nelson v. GEICO Gen. Ins. Co.*, No. 72632-3-I, 2016 Wn. App. LEXIS 15, at 21 (2016), an unpublished opinion.

settlement with USAA was held up for months by the improper reimbursement request made by Praxis and Omni.

Costs incurred in investigating an unfair or deceptive act are sufficient to establish injury. *Univ. of Wash. v. Gov't Emps. Ins. Co.*, 200 Wn. App. 455, 476(2017) These can include expenses incurred in consulting an attorney about the unfair or deceptive practice and out-of-pocket expenses for such things as postage and parking. *Panag v. Farmers Ins. Co. of Wash.*, *supra*, 166 Wn.2d at 62 They can also include time spent away from one's daily round in dealing with the unfair practice. *Sign-O-Lite Signs v. DeLaurenti Florists, Inc.*, 64 Wn.App. 552, 825 P.2d 714 (1992) And where a business demands payment not lawfully due, the consumer can claim injury for expenses he or she incurred in responding. *Frias v. Asset Foreclosure Servs., Inc.*, *supra*, 181 Wn.2d at 431.

Ms. Kosovan had to respond to the improper reimbursement demand made by Praxis and Omni. Her attorney had to take steps to deal with the unfair practice. She also spent time and postage on making a complaint to the insurance commissioner. This is sufficient to satisfy the injury requirement.

There can be little doubt that the delay in Ms. Kosovan's receiving the settlement from USAA was caused by the improper demand for reimbursement made by Praxis and on behalf of Omni. USAA delayed in

making payment until it was provided with a letter from Praxis' attorney that it was not seeking any reimbursement. Had the reimbursement demand not been made, there is every reason to believe that USAA would have paid the settlement—the entirety of its policy limit—in November of 2017 when the settlement was reached. No reasonable person could reach any other conclusion. At the very least, the evidence presents an issue of fact on this question.

V. Conclusion.

Ms. Kosovan produced sufficient evidence to create a genuine issue of fact on all elements of her Consumer Protection Act claim against both Omni and Praxis. In fact, the undisputed evidence shows that both Omni and Praxis are guilty of a violation of the Consumer Protection Act. The trial court erred by ruling to the contrary.

STATEMENT REQUIRED BY RAP 18.1(a)

Ms. Kosovan requests attorney's fees on appeal. A successful Consumer Protection Act claimant is entitled to an award of attorney's fees. As RCW 19.86.090 provides in pertinent part:

Any person who is injured in his or her business or property by a violation of RCW 19.86.020. . .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. . .

A claimant that prevails on appeal is allowed attorney's fees on appeal.

*Sign-O-Lite Signs v. DeLaurenti Florists, Inc.*, 64 Wn.App. 552, 825 P.2d 714 (1992) Since Ms. Kosovan should prevail on appeal, she is entitled to an award of attorney's fees.

### CONCLUSION

The practices used by Omni and Praxis to recovery reimbursement or subrogation interests violates the terms of Omni's policy and the clear direction given by the Court for dealing with such matters in *Mahler v. Szucs, supra*. These practices amount to an unfair or deceptive act in the course of trade or commerce that caused injury to Ms. Kosovah as discussed above. For those reasons, the trial court erred by dismissing Ms. Kosovan's claim against Omni and Praxis for violation of the Consumer Protection Act. Since all elements of such a claim have been established

///

///

///

///

///

///

///

by the undisputed facts, the trial court's decision should be reversed and the matter should be remanded to the Superior Court for determination of Ms. Kosovan's damages and other relief as appropriate.

RESPECTFULLY SUBMITTED this 28 day of December  
2018.



---

Tom Hojem Of Attorneys for Appellant

WSBA 45344

Tom Hojem for

---

Gideon Caron Of Attorneys for Appellant

## DECLARATION OF SERVICE

The undersigned certified that under penalty of perjury under the Laws of the State of Washington, that on the date below I caused to be served and filed the attached documents as follows:

*Via US Mail and electronic mail:*

*Counsel for Respondent Omni Insurance Company*  
Scott M. Collins  
Law Offices of Scott M. Collins, LLC  
7016 35<sup>th</sup> Ave. NE  
Seattle, WA. 98115-5917  
E-mail: [scott@smcollinslaw.com](mailto:scott@smcollinslaw.com)

*Counsel for Respondent Praxis Consulting, Inc.*  
Thomas Lether  
Westin McLean  
Lether & Associates PLLC  
1848 Westlake Ave. N, Ste. 100  
Seattle, WA. 98109  
E-mail for Mr. Lether: [tlether@letherlaw.com](mailto:tlether@letherlaw.com)  
E-mail for Mr. McLean: [wmclean@letherlaw.com](mailto:wmclean@letherlaw.com)

DATED at Vancouver, Washington on the 28 day of Dec., 2018.

  
\_\_\_\_\_  
Thomas Hojem

**CARON, COLVEN, ROBISON & SHAFTON PS**

**December 28, 2018 - 12:51 PM**

**Transmittal Information**

**Filed with Court:** Court of Appeals Division II  
**Appellate Court Case Number:** 52364-7  
**Appellate Court Case Title:** Aliona Kosovan, Appellant v. Omni Insurance Company, et al., Respondents  
**Superior Court Case Number:** 18-2-00084-3

**The following documents have been uploaded:**

- 523647\_Briefs\_20181228125027D2707233\_3434.pdf  
This File Contains:  
Briefs - Appellants - Modifier: Amended  
*The Original File Name was Amended Brief.pdf*

**A copy of the uploaded files will be sent to:**

- rmoore@ccrslaw.com
- scott@smcollinslaw.com
- tlether@letherlaw.com
- wmclean@letherlaw.com

**Comments:**

---

Sender Name: Roselyn Moore - Email: rmoore@ccrslaw.com

**Filing on Behalf of:** Thomas Eric Hojem - Email: thojem@ccrslaw.com (Alternate Email: )

Address:  
900 WASHINGTON ST STE 1000  
VANCOUVER, WA, 98660-3455  
Phone: (360) 699-3001

**Note: The Filing Id is 20181228125027D2707233**