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NO. 54904-2-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

BRIEF OF APPELLANT

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INTRODUCTION

Aliona Kosovan was seriously injured in a motor vehicle collision and sought damages from the person responsible and his insurer, USAA. Omni Insurance Company (Omni) paid her \$10,000.00 in Personal Injury Protection (PIP) benefits. Omni and its agent, Praxis Consulting, Inc. (Praxis,) interfered with Ms. Kosovan's ability to consummate a settlement with USAA by demanding payment of the \$10,000.00 before Ms. Kosovan had settled her claim. Their actions violated the rule clearly set out in *Mahler v. Szucs, infra*, that an insurer who pays Personal Injury Protection (PIP) benefits must wait for its insured to resolve a claim that is being made against the tortfeasor before it can seek reimbursement. It took several months and the filing of this action to get Omni and Praxis to back off. These actions render Praxis and Omni liable under the terms of the Consumer Protection Act. Praxis also violated the Consumer Protection Act by attempting to collect an obligation when it was not licensed to do so. The trial court erred by ruling to the contrary.

This case is important because it does not appear that either Praxis or Omni has procedures in place to avoid what occurred here.

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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 ORDER ON MOTION FOR SUMMARY JUDGMENT.

ISSUES PRESENTED.

1. Can an insurer seek reimbursement from the tortfeasor's insurer before its insured has resolved a claim against the tortfeasor?
2. Was Praxis required to be licensed as a collection agency?
3. Did the actions of Omni and Praxis subject them to liability under 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 by a vehicle driven by Joseph Roland. (CP 81) USAA insured Mr. Roland and his vehicle with liability policy limits of \$25,000 for injuries to any one person in any one incident. (CP 165)

Ms. Kosovan was seriously injured in the collision. She suffered injuries to her back, her hip, her knee, and her jaw. She also sustained a

concussion. (CP 85-86) 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 84) She obtained chiropractic care from Northwest Injury and Rehabilitation for approximately eighteen months. She also saw a neurologist to address the residuals of her concussion. (CP 85) Ms. Kosovan incurred approximately \$38,500.00 for the care she obtained after the collision. (CP 583)

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. She was off work after the collision until July or August of 2016. (CP 80, 89)

Omni provided auto insurance for Ms. Kosovan at the time of the incident. By December 15, 2015, Omni knew that USAA was accepting full responsibility for the collision. (CP 596) On January 26, 2016, Ryan Jennings, an attorney in Salem, Oregon, wrote to Omni concerning the collision. The letter began as follows:

Please be advised that my offices have been retained to represent Alena Kosovan, who was injured in an automobile collision that occurred on December 6, 2015. Please also be advised that my client is making a claim and may institute a cause of action against the at-fault driver, Joseph Roland and his insurance carrier, USAA.

(CP 584-85)

By September of 2017, Thomas Hojem was representing Ms. Kosovan on her personal injury claim. He looked into obtaining PIP benefits for her. Omni ultimately acknowledged its responsibility to pay up to \$10,000.00 for PIP medical benefits. In September of 2017, Mr. Hojem sent a PIP application to Omni showing medical expenses of \$38,566.23 and wage loss of approximately \$15,000.00. (CP 580, 583) By late September, Omni had accumulated over six hundred pages of treatment records and billings on Ms. Kosovan. (CP 551) In October of 2017, Omni paid the \$10,000 limit. (CP 581)

Praxis is a corporation that collects subrogation claims for insurance companies. (CP 168-171, CP 173) It entered into an agreement with Omni to collect subrogation claims on a contingent basis. (CP 177-79) Praxis did not, however, have a license to operate as a collection agency in Washington. (CP 174)

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 310)

During the course of summary judgment proceedings Omni produced the declaration of Jahn Landis, its Senior Director of Process, Training and QA. The declaration purports to describe the process by

which Omni transmits information about claims to Praxis. According to the declaration, (1) Omni would provide a list of claims to Praxis on a weekly basis; (2) this list includes PIP payments made on behalf of Omni insureds during the preceding week; (3) Praxis then evaluates those for the potential of subrogation recovery; (4) Praxis has access to Omni's claim system; and (5) after the weekly list is sent to Praxis, Omni has no further involvement in the matter. The declaration goes on to say that "Praxis has sole discretion over the collection of the claim and whether the claim should be pursued, compromised, or abandoned." (CP 406-408)

Praxis sees things a little differently. According to interrogatory responses given in April of 2018, "Praxis received a spreadsheet from Omni containing information regard Plaintiff's PIP claim. The information included the date of loss, basic facts of the accident, amount of PIP paid, and identify of the PIP insured. . ." (CP 590) It then acted "on the direction and information received from Omni and pursuant to its agreement with Omni." (CP 590)

The Recovery Services Agreement between Praxis and Omni discusses how information concerning claims will be transmitted from Omni to Praxis. Praxis maintains a website. Its clients can go to the website and locate a Subrogation Referral Form. The Client is required to complete the fields on this form and then upload the form onto the Praxis

server. A separate form is required for each claim. Praxis then retrieves the forms. (CP 613)

The referral form asks for information about the claim including the date of loss, name of insured, and facts of the loss; any information concerning the liability insurer and its position on liability; the types of benefits that Omni has paid, to include collision and PIP with amounts paid; whether certain types of liability documents are available such as recorded statements, scene photos, and police reports; and whether Omni has claim supporting documents such as total loss documents, medical bills, and damage estimates. The form does not ask whether the insured is pursuing a claim against the tortfeasor and whether the insured has retained counsel to do so. (CP 614)

On October 17, 2017, Omni sent Ms. Kosovan's claim to Praxis. (CP130) Praxis contacted USAA and confirmed that USAA was accepting liability. (CP 591) It then sent a letter to USAA on October 19, 2017, instructing USAA to send it a check for \$10,000.00 on account of the PIP benefits paid by Omni.PIP. As is pertinent, the letter reads as follows:

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Our investigation of the accident referenced below indicates that liability rests with your insured. Your files should now reflect that we are handling this file. On behalf of our client we now turn to you for reimbursement under the provisions of the Personal Injury Protection Law for benefits and expenses incurred by them to date in the amount of \$10,000. . .Please make your check payable to Praxis Consulting, Inc...and forward to the address above.

The letter referred to the collision between Ms. Kosovan and Mr. Roland and termed Ms. Kosovan as “Our Insured.” It did not mention Omni.

(CP 185)

In early November, 2017, Praxis’ Debra Ryan was in touch with personnel at Mr. Hojem’s office to discuss any reimbursement claim that might exist. The subject of the rapidly approaching expiration of the limitation was mentioned. (CP 140-43)

On November 8, 2017, USAA offered its \$25,000 policy limits to settle. The letter asked for a written release of the interest asserted by Praxis on behalf of Omni. It also referred to and enclosed a lien asserted by Northwest Injury and Rehabilitation. (CP 191). Northwest Injury and Rehabilitation released its lien by approximately November 30, 2017, leaving release of the Omni/Praxis claim as the sole limitation on payment of the \$25,000 limits to plaintiff. (CP 202-203).

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 166, 201)

When no release from Praxis was forthcoming, on January 10, 2018, Ms. Kosovan filed this action against Omni and Praxis to resolve the matter on January 10, 2018. (CP 1-2)

After the filing of this suit, Ms. Ryan again consulted USAA directly. On February 19, 2018, USAA advised her that Ms. Kosovan's damages exceeded the USAA policy limits. As she concedes, she was previously unaware of the extent of Ms. Kosovan's injuries and damages. (CP 131) Ms. Ryan states that she told USAA on February 19, 2018, that Praxis would not be seeking any reimbursement. (CP 131) She apparently did not follow up with the written release that USAA told counsel it wanted.

Ms. Kosovan's deposition was taken on April 24, 2018. (CP 75) The next day, counsel for Praxis wrote Ms. Kosovan's attorney and indicated that Praxis would not be pursuing any reimbursement claim. (CP 126-27) Ms. Kosovan's attorney sent the letter to USAA. With that assurance, USAA disbursed its entire policy limit to Ms. Kosovan, and the claim was finally settled. (CP 166).

Praxis then moved for summary judgment. (CP 144-62) Omni joined in the motion. (CP 227-28) The trial court ultimately granted the summary judgment motion and dismissed the claims against Praxis. It concluded that Praxis had done nothing deceptive because the October 19, 2017, letter was sent to USAA as opposed to Mr. Roland. (CP 383) The Order on Defendant Praxis' Motion for Summary Judgment dismissing all claims against Praxis was entered on July 27, 2018. (CP 333-35)

Omni later filed its own motion for summary judgment. The trial court granted that motion also, once again, on the basis that nothing deceptive had been done. (RP 35-36) The Order on Motion for Summary Judgment dismissing Omni was granted on May 15, 2020. (CP 615-16) 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 for either defendant. Furthermore, the undisputed facts show that Omni and Praxis violated the Consumer Protection Act by seeking reimbursement directly from USAA and holding up Ms. Kosovan’s ability to receive the settlement that USAA offered. Praxis also violated the Consumer Protection Act by attempting to collect a debt while not licensed to do so. Therefore, the trial court erred by granting summary judgment dismissing Ms. Kosovan’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 first element, the existence of an unfair or deceptive act, is based on RCW 19.86.020 which states that “. . . unfair or deceptive acts in the conduct of any trade or commerce are hereby declared unlawful.” Since the statute proscribes acts that are unfair or deceptive, the first element is satisfied by an act that is unfair, deceptive, or both. *Klem v. Washington Mutual Bank, supra*, 176 Wn.2d 771, 787, 195 P.3d 1179 (2013) This element is made out 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, 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 and Praxis Committed an Unfair or Deceptive Act.

a. Summary:

The October 19, 2017, letter from Praxis to USAA sought payment to Praxis of what Omni had paid in PIP benefits. At that time, Omni had no claim of any kind against USAA under the terms of its policy. It could recover its payments only after Ms. Kosovan had settled her claim and only if the settlement satisfied all her damages. And then there would have to be reduction for Ms. Kosovan's attorney's fees.

Praxis' assertion of this non-existent claim interfered with Ms. Kosovan's attempt to resolve her claim by holding up consummation of the settlement. Not surprisingly, USAA was unwilling to release the settlement amount without some sort of written release or retraction from Praxis to avoid having to pay more than once. Such double liability can happen if the tortfeasor's insurer pays the PIP carrier prior to settlement. (CP 376-77)

What occurred amounted to a breach of the duty of good faith and was therefore an unfair or deceptive act. Since Praxis' assertion of a claim was contrary to the Omni policy language and rules set out in *Mahler v. Szucs, infra*, there was no reasonable justification for making it. There was also no reasonable justification for its refusal for several months to send something in writing to USAA releasing or retracting the claim.

Finally, the pursuit of a claim against USAA impermissibly put the economic interests of Omni and Praxis ahead of those of Ms. Kosovan.

b. Nature of an Unfair or Deceptive Act in the Insurance Context.

An unfair or deceptive act for the purposes of the Consumer Protection Act is made out if an insurer acts without reasonable justification in handling a claim by its insured. *Villella v. Pemco*, 106 Wn.2d 806, 821, 725 P.2d 957 (1976); *Unigard Insurance Company v. Leven*, 97 Wn.App. 417, 434, 983 P.2d 1155 (1999)

An insurer occupies a quasi-fiduciary relationship to its insured that requires the insurer to act in good faith. This duty of good faith includes both a broad obligation of fair dealing and the duty to give equal consideration to the interests of the insured. *Tank v. State Farm Fire & Casualty Co.*, 105 Wn.2d 381, 385-6, 715 P.2d 1133 (1986) Conversely, an insurer can never put its own interests ahead of those of its insured. *Mutual of Enumclaw v. T & G Construction, Inc.*, 165 Wn.2d 255, 269, 199 P.3d 376 (2008) The duty of good faith inheres in Washington's common law and also in RCW 48.01.030, which provides as follows:

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.

See *Tank v. State Farm Fire & Casualty Co.*, *supra*, 105 Wn.2d at 386; *Barriga Figueroa v. Prieto Mariscal*, 193 Wn.2d 404, 412, 441 P.3d 818, 65 P.3d 350 (2019) This duty is owed to PIP insureds. *Barriga Figueroa v. Prieto Mariscal*, *supra*. It is well established that insureds may bring private Consumer Protection Act actions against their insurers for breach of the duty of good faith, and that such a violation amounts to a *per se* violation of the Consumer Protection Act. *Tank v. State Farm Fire & Casualty Co.*, *supra*, 105 Wn.2d at 394; *Peoples v. USAA*, 194 Wn.2d 771, 778, 452 P.3d 1218 (2019)

The duty of good faith is not limited to insurers such as Omni. As RCW 48.01.030 makes clear, all persons involved in insurance matters are obliged to use good faith. This explicitly includes “representatives and advisors” such as Praxis. Based upon the clear language of the statute, Courts have held that adjustment firms can be held liable for Consumer Protection Act violations. *Lease Crutcher Lewis WA, LLC, v. National Union Fire Insurance Company of Pittsburgh, PA.*, 2009 U.S. Dist Ct. Lexis 97899, 2009 W.L 3444762 (W.D. Wash. 2009); *Merriman v. American Guarantee and Liability Insurance Co.*, 198 Wn.App. 594, 396 P.3d 351 (2017) And a chiropractor who submitted fraudulent billings to a PIP carrier was held to have violated the duty of good faith in RCW

48.01.030 and therefore the Consumer Protection Act in *State Farm Fire & Casualty Co. v. Huynh*, 92 Wn.App. 454, 460-61, 96 P.3d 854 (1998)

c. An Insurer Has No Claim for Reimbursement of PIP Benefits Paid Until After Its Insured Makes Recovery and Then Only If the Insured Has Been Made Whole and After the Claim Has Been Reduced by the Insurer's Proportionate Share of Attorney's Fees.

A PIP insurer cannot simply direct the liability carrier to pay the total of PIP benefits that have been paid. If the PIP insured is making a claim for damages, the PIP insurer must wait until after that claim has been resolved. It cannot interfere with the insured's claim. The PIP insurer can be reimbursed only if the insured is made whole. And it must reduce its recovery by a proportionate share of attorney's fees.

These rules were made clear in *Mahler v. Szucs*, 135 Wn.2d 398, 957 P.2d 632 (1998). The Court dealt with the issue in context of a State Farm policy that read as follows in pertinent part:

b. Under personal injury protection and underinsured motor vehicle coverages, we are subrogated to the extent of our payments to the proceeds of any settlement the injured person recovers from any party liable for the bodily injury or property damage.

If the person to or for whom we have made payment has not recovered our payment from the party at fault, he or she shall:

(1) keep these rights in trust for us and do nothing to impair them;

(2) execute any legal papers we need; and

(3) when we ask, take legal action through our representative to recover our payments.

We are to be repaid our payments, costs and fees of collection out of any recovery.

d. Under all other coverages the right of recovery of any party we pay passes to us. Such party shall:

(1) not hurt our rights to recover; and

(2) help us get our money back.

d. If the insured recovers from the party at fault and we share in the recovery, we will pay our share of the legal expenses. Our share is that percent of the legal expenses that the amount we recover bears to the total recovery. This does not apply to any amounts recovered or recoverable by us from any other insurer under any inter-insurer arbitration agreement.

Our right to recover our payments applies only after the insured has been fully compensated for the bodily injury, property damage or loss.

135 Wn.2d at 418-19 The Court stated that this language allowed a PIP carrier to pursue reimbursement directly from the tortfeasor or the tortfeasor's insurer only if its 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. Second, 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. It stated:

Paragraph b of the State Farm policy establishes State Farm's right to reimbursement, but it articulates two distinct mechanisms for enforcement of the right.

In the first paragraph of Paragraph b, the phrase "[w]e are subrogated to the extent of our payments to the proceeds of any settlement the injured person recovers from any party liable for the bodily injury or property damage" is significant. First, this phrase refers only to the proceeds of settlements, and not to the proceeds of any judgments the insured might obtain. Second, the phrase speaks of the "proceeds of any settlement," thereby suggesting State Farm's contractual right to recover payments from its insureds under PIP or UIM coverage arises only *after* settlement. There are obviously no proceeds of a settlement until the settlement occurs.

The policy language says State Farm is "subrogated" to those proceeds. The meaning here is indistinct. "No right of subrogation can arise in favor of an insurer against its own insured since, by definition, subrogation exists only with respect to rights of the insurer against third persons to whom the insurer owes no duty." (Citations omitted) This language plainly does not contemplate State Farm will step into the shoes of its insureds and pursue their claims against the tortfeasors. Instead, State Farm has simply contracted for a right to reimbursement of its PIP payments *from its insureds* from the proceeds of a settlement.

(Emphasis in the original) 135 Wn.2d at 419-20. The Court went to state:

As noted above, State Farm contracted for a right to reimbursement from its insureds' settlement proceeds and a

traditional right of subrogation only if its insured did not seek recovery from a tortfeasor. As Fisher and Mahler sought such recovery, State Farm had only a right of reimbursement from its insureds from the proceeds of the settlements. More important, State Farm had to await the outcome of the settlement process before attempting any recovery from the tortfeasors' insurers, because, pursuant to *Thiringer (v. American Motors Insurance Co., 92 Wn.2d 215, 219, 588 P.2d 191 (1978))*, State Farm was not entitled to any recovery of its PIP payments until its insureds had been made whole. Until the settlement agreements became effective, however, there was no way to know if Mahler and Fisher had been made whole. Thus, State Farm could do nothing until the settlements were executed.

135 Wn.2d at 424 The Court of Appeals has expanded on these rules to state that a PIP carrier may not interfere with the insured's right to recover from the tortfeasor. *DeTurk v. State Farm Mutual Automobile Insurance Co., 94 Wn.App. 364, 369-70, 967 P.2d 494 (1998)*

Since these rules are set out in a respected treatise, they should be considered well established. See Harris, 1 *Washington Insurance Law* § 52.02 and § 52.03.

Omni's policy reflects these rules and is materially indistinguishable from the State Farm policy at issue in *Mahler v. Szucs, supra*. It provides as follows in pertinent part:

A, If we¹ 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 All references to "we" and "us" in the policy refer to Omni. (CP 21)

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 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. Critically, whatever right of reimbursement that it has accrues only after the Omni insured makes a recovery, and then only against its insured who has made the recovery, not against the tortfeasor or the tortfeasor's insurer. Finally, as paragraph D provides, there can be no recovery until and unless the insured is made whole.

As counsel for Omni has stated, it is now accepted that if a PIP insured is making a claim for damages, the PIP carrier “backs off” pursuing any claim for reimbursement. (CP 607-608)

e. Praxis and Omni Acted without Reasonable Justification.

Omni acted without reasonable justification by taking action contrary to the terms of its own policy and contrary to the interpretation of a virtually identical policy provision in *Mahler v. Szucs, supra*. Omni should not have passed the matter on to Praxis as it did. Omni knew by no later than January of 2016 and from a letter from her attorney that Ms. Kosovan was pursuing a claim against the tortfeasor. It had further contact with her attorney in September of 2017. Since Ms. Kosovan was pursuing her own damage claim, Omni had no claim against Mr. Roland or USAA for Praxis to pursue at that point. And any action that Praxis might take could—and indeed did—interfere with Ms. Kosovan’s ability to settle. If Omni did not want to be bothered with monitoring the matter any further, it could have advised Praxis that Ms. Kosovan was seeking damages from Mr. Roland and USAA and directed Praxis to limit its contact to her attorney to learn where the matter stood. There is no evidence that this was done. That is not surprising. The process by which Omni provides information to Praxis does not include any mention of whether or not the insured is pursuing a claim against the tortfeasor.

Omni could recover what it had paid in PIP only if Ms. Kosovan had been made whole through her settlement with Mr. Roland and USAA. But there was no way for Omni to know if she had been made whole until her claim with USAA and Mr. Roland had been resolved. Therefore, and as the Court said in *Mahler v. Szucs, supra*, 135 Wn.2d at 424, there could be no action directed at reimbursement until Ms. Kosovan's settlement had been consummated.

There was no reasonable justification for Praxis' actions either. First, Praxis had a source of knowledge that Ms. Kosovan was pursuing her own claim. As the Declaration of Jahn Landis states, Praxis had access to Omni's entire claim file. If it would have gone into that file, it would have seen the January 2016 letter stating that Ms. Kosovan intended to make a claim against Mr. Roland and his insurer. Praxis contacted USAA prior to sending its October letter. It should have asked whether Ms. Kosovan was pursuing a claim. The fact of the contact by itself creates an inference that it did learn that fact. On that basis, it should not have sent its October letter to USAA.

There was no reasonable justification for the letter that Praxis sent to USAA. First, the letter to USAA sought relief to which Omni was not entitled. It directed USAA to pay Praxis \$10,000.00. Once again, the letter stated in pertinent part:

Our investigation of the accident referenced below indicates that liability rests with your insured. Your files should now reflect that we are handling this file. On behalf of our client we now turn to you for reimbursement under the provisions of the Personal Injury Protection Law for benefits and expenses incurred by them to date in the amount of \$10,000. . .Please make your check payable to Praxis Consulting, Inc...and forward to the address above.

(CP 185) At that point, neither Omni nor Praxis had any claim to receive \$10,000.00 from anyone because Ms. Kosovan had not yet settled her claim and it could not be known if she had been made whole. The letter also ignored the provision of the Omni policy that reduces the amount to be paid by a pro rata share of attorney's fees and costs. Finally, the letter did not recognize that the Omni policy requires reimbursement only if the Omni insured has recovered all the insured's damages.

The Praxis letter implies that Ms. Kosovan is not making her own claim and that Praxis is pursuing a subrogation claim as is appropriate under paragraph (a) of the Omni policy set out above. That was simply not the case.

Praxis was also in touch with the office of Ms. Kosovan's attorney in early November of 2017 and could have—and should have—inferred that Ms. Kosovan was still intending to pursue a claim from the

mention that the statute of limitations would shortly run.² At that point, Praxis should have “backed off” and written to USAA to the effect that it was withdrawing any claim made in the October letter.

Action taken without any reasonable justification continued. Suit was filed on January 10, 2018, alleging that in fact Ms. Kosovan was pursuing a claim for her own injuries; that she had incurred over \$38,000.00 in medical expenses for treatment related to the collision; a resolution had been reached whereby USAA had agreed to pay its policy limits of \$25,000.00 but that “USAA has informed the Plaintiff that USAA will not pay the Plaintiff the \$10,000 that Defendant Omni has hired Defendant Praxis to collect.” (CP 1-2) Omni and Praxis denied allegations based on lack of knowledge and once again did not “back off.” (CP 641-42; CP 647-48)

On February 13, 2018, Ms. Ryan of Praxis called USAA and heard directly from USAA that Ms. Kosovan’s damages were greater than the USAA liability policy limits. Ms. Ryan states that she told USAA that she had no further interest in the matter. However, she appears not to have

² The incident in question occurred in Oregon. That state’s statute of limitations for matters of this type is two years. ORS 12.110(1)

given the written retraction or release of the claim that USAA required. There was no reasonable justification for her failure to do so.

Praxis delayed until after Ms. Kosovan's deposition, on April 25, 2018, before it was willing to commit to a writing that retracted its claim. Omni also did not do what it should have done. Ms. Kosovan's letter to the Insurance Commissioner sent on November 29, 2017, would have been forwarded to Omni as WAC 284-37-050 requires. Omni should have passed the letter on to Praxis and told Praxis to "back off." There is no indication that Omni took this step. There is no reasonable justification for this inaction.

In light of the clarity of the rules set out in *Mahler v. Szucs*, *supra*, there can be no argument that the actions taken here were somehow justified by an arguable interpretation of existing law. There was simply no reasonable justification for what occurred.

e. The Actions Placed Omni's Interests above Those of Ms. Kosovan.

Omni's sending its supposed claim to Praxis also breached its duty of good faith since it put Omni's interests above those of Ms. Kosovan. Omni had no right to reimbursement at that time since Ms. Kosovan had not resolved her claim against Mr. Roland. The submission of a demand to USAA for \$10,000.00 also put Omni's interests ahead of

those of Ms. Kosovan. As pointed out above, there simply was no claim to present and no claim could be made until after Ms. Kosovan had resolved her claim with USAA. If USAA complied with Praxis' direction, Omni/Praxis would recover \$10,000.00 regardless of whether Ms. Kosovan was made whole and without any proportional reduction for Ms. Kosovan's attorney's fees.

f. Praxis Interfered with Ms. Kosovan's Attempt to Resolve Her Claim.

As discussed above, a PIP carrier may not interfere with the insured's claim against the tortfeasor. That is precisely what Praxis did. It directed USAA to send it \$10,000.00 of the money that Ms. Kosovan would otherwise collect. USAA would not consummate the settlement until Praxis withdrew its claim in writing, which it did not do until April 25, 2018. This was months after the settlement was initially agreed upon and over two months after Praxis had determined that it should not pursue its claim. There was no reasonable justification for what Praxis did. The Court in *DeTurk v. State Farm Mutual Automobile Insurance Company, supra*, clearly stated that an insurer seeking reimbursement may not interfere with the insured's resolution of his or her claim. Praxis' interference therefore amounted to an unfair and deceptive act.

g. Omni Is Responsible for the Acts of Praxis.

Omni is likely to claim that it is not responsible for the acts of Praxis because it considers Praxis to be an independent contractor. Omni is in fact responsible for what Praxis did in this case because Omni's duty to Ms. Kosovan is based on contract and because Omni's duty to exercise good faith is not delegable.

There would be little question that Omni would be guilty of bad faith and subject to Consumer Protection Act remedies if it had done what Praxis did. As discussed above, Praxis' actions were done without reasonable justification under the terms of the Omni policy and put the interests of Omni and Praxis ahead of those of Ms. Kosovan.

Omni's duty to use good faith is a statutory duty imposed by RCW 48.01.030 as discussed above. Statutory duties cannot be delegated. The party on whom the duty is imposed remains liable even though that party has engaged an independent contractor to perform the duty. *Tauscher v. Pacific Power & Light Co*, 96 Wn.2d 274, 287, 635 P.2d 426 (1981); *Sea Farms v. Foster Marshall Realty*, 42 Wn.App. 308, 711 P.2d 1049 (1985); Restatement (Second) Torts § 424 Omni is therefore responsible for acts of bad faith committed by Praxis.

Omni also occupies a fiduciary relationship with its insureds. *Van Noy v. State Farm Mutual Automobile Insurance Company*, 142

Wn.2d 784, 16 P.3d 574 (2001) The insurer's duty is even higher than that of honesty and lawfulness of purpose. *Tank v. State Farm Fire & Casualty Company, supra*, 105 Wn.2d at 386 Omni concedes that it has this fiduciary duty. (CP 627) Fiduciaries are not allowed to avoid liability by delegating their duties. *Meck v. Behrens*, 141 Wash. 676, 682, 25 P. 91 (1927) Since Omni is a fiduciary, it is also responsible for the acts of Praxis.

Omni also cannot avoid liability because its duty to Ms. Kosovan is contractual in part. Ms. Kosovan's policy with Omni is a contract. As RCW 48.01.040 states, "Insurance is a contract whereby one undertakes to indemnify another or pay a specified amount upon determinable contingencies." See also; *City of Okanogan v. Cities Insurance Association*, 72 Wn.App. 697, 701, 865 P.2d 576 (1994) The policy sets out certain rules about how, when, and whether Omni will be reimbursed for any PIP or other benefits it has paid as discussed above. The Supreme Court referred to the right of reimbursement as contractual in *Mahler v. Szucs, supra*, 135 Wn.2d at 420, 424 Omni is contractually obliged to follow the rules in its policy. And a party cannot escape liability for nonperformance of a contractual duty that is delegated. *Lonsdale v. Chesterfield*, 99 Wn.2d 353, 359, 662 P.2d 385 (1983); Restatement (Second) Contracts § 318(3)

The following example is helpful to understand this point:

Best Insurance issues an automobile policy to Susan that includes PIP coverage that follows Washington law. It allows for payment of income continuation benefits accruing after two weeks after any incident. Best hires Acme Adjusters to deal with its PIP claims and gives Acme total discretion over how to handle them. Susan is badly injured in a wreck and must be off work for eight weeks. Acme will pay only for two weeks—weeks 7 and 8—and refuses to pay any other benefits.

No one would seriously argue that a breach of the Consumer Protection Act had not occurred since the decision to limit the amount of Susan's benefits had no reasonable basis. Susan is entitled to six weeks of income continuation benefits, not just two. The wrongful failure to pay benefits is a Consumer Protection Act violation. *Salois v. Mutual of Omaha* 90 Wn.2d 355, 581 P.2d 1349 (1978) And, no one could assert that Best had somehow escaped Consumer Protections Act liability because Acme made the claims decision.

In any event, there is at least an issue of fact as to Omni's vicarious liability. A principal is vicariously liable for the acts of an agent when the agent acts at the instance of and in some material degree under the direction and control of the principal. *Barker v. Skagit Speedway, Ins.* 119 Wn.App. 807, 814, 82 P.3d 244 (2003) In response to Interrogatory No. 3 propounded by Ms. Kosovan to Praxis, Praxis stated that it "acted on the direction and information received form Omni, and pursuant to its

contract with Omni.” In other words, Praxis is stating that it received direction from Omni as to what to do. (CP 591)

As pointed out above, Omni should never have submitted Ms. Kosovan’s claim to Praxis. This in and of itself was a breach of its contractual rights and duties as spelled out in the policy and as made clear by the Court in *Mahler v. Szucs, supra*. Its actions also amount to a separate Consumer Protection Act violation. Praxis took the action that it took. If we view Omni as a tortfeasor, Omni and Praxis should be considered joint tortfeasors or concurrent tortfeasors, each of whom is liable for the entire harm suffered by Ms. Kosovan. *Seattle First National Bank v. Shoreline Concrete Co*, 91 Wn.2d 230, 235, 588 P.2d 1308 (1978)

For these reasons, Omni cannot avoid responsibility based on its arrangement with Praxis. Furthermore, Omni is responsible for all acts of Praxis and their consequences.

h. Omni and Praxis Were Not Allowed to “Give Notice” under These Circumstances.

Omni and Praxis are likely to argue that Praxis’ letter to USAA was just a standard notice of interest. They may cite to *Stephens v. Omni Insurance Co.*, 138 Wn.App. 151, 159 P.3d 10 (2007), affirmed *sub. nom Panag v. Farmers Insurance Company of Washington*, 166 Wn.2d 27, 204 P.3d 885 (2009), for the proposition that an insurer can correspond with a

tortfeasor to demand payment. The statement was made in an entirely different context than here and therefore is not applicable.

In the *Stephens* and *Panag* cases, a Farmers insured and an Omni insured were involved in auto collisions. Each of the insurers paid property damage benefits to its insured, and Omni made PIP payments to its insured. The insurers then attempted to recover what they had paid from the other motorists involved in the collisions. Each utilized the service of a collection agency other than Praxis to do so. The collector sent notices to the uninsured motorists that were found to be deceptive. The Court held that the uninsured motorists had a viable Consumer Protection Act claim on that basis. There is no indication in the opinions that either the Farmers insured or the Omni insured were pursuing a claim against the motorists that received the collectors' notices. In that context, the Court of Appeals in *Stephens* allowed that an insurer could contact a tortfeasor in such a situation as long as the notices that were sent were not deceptive.

Stephens and *Panag* do not present the situation that we have here—a PIP carrier sending notice to the tortfeasor's liability insurer when its insured is pursuing his or her own claim.

The trial court referred to Omni/Praxis as "stakeholders" simply giving notice of their interest. (CP 383; RP 36) When Praxis sent

its October, 2017, letter, however, Omni and Praxis had no “stake.” Under the terms of the Omni policy as discussed in *Mahler v. Szucs, supra*, Omni had no claim until Ms. Kosovan made her recovery and were required to wait until after she had settled.

Furthermore, the letter from Praxis to USAA did much more than simply put USAA on notice. It asserted claim against USAA—which Omni and Praxis did not have—and specifically directed USAA to send \$10,000.00 to Praxis.

In any event, there was no reason for Praxis to send any communication to USAA. Omni had no claim against USAA since Ms. Kosovan had not settled her claim against Mr. Roland.

IV. Praxis Committed a Separate Unfair or Deceptive Act.

a. Summary.

When it was not licensed as a collection agency in Washington, Praxis attempted to collect a reimbursement claim on behalf of Omni. Praxis is also not exempt from being licensed. Its actions violated RCW 19.16.110, the statute that requires licensing. This violation is also a *per se* violation of the Consumer Protection Act.

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b. Praxis Was Required to Be Licensed.

No person can collect a debt without a license. As RCW 19.16.110

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.³

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 “person” is defined to include an “individual, firm, partnership, trust, joint venture, association, or corporation.” RCW 19.16.100(13) As a corporation, Praxis is a person. 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 right to reimbursement arises out of and is governed by its contract with its insured. *Mahler v. Szucs, supra*, 135 Wn.2d at 421. 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 was required to be licensed.

³ In this context, the director is the Director of the Department of Licensing. RCW 19.16.100(8), now codified as RCW 19.16.100(9)

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' failure to be licensed under RW 19.16 when it interjected itself into Ms. Kosovan's claim against Mr. Roland is, therefore, an unfair or deceptive act for the purposes of the Consumer Protection Act.

c. The Language of RCW 19.16.100(5)(c) Does Not Exclude Praxis from the Definition of Collection Agency.

Praxis argued to the trial court that it is not a collection agency, and therefore not required to be licensed. It relied on RCW 19.16.100(5)(c) (hereinafter Subsection 5(c)) which 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.

The statute must be interpreted to advance the legislative intent and in accordance with its plain meaning. *Department of Ecology v. Campbell & Gwinn, LLC*, 146 Wn.2d 1, 9-10, 43 P.3d 4 (2002) The plain meaning and the legislative intent does not allow Praxis the exclusion it seeks.

The plain meaning of Subsection 5(c) is very simple. It says that an entity is not a collection agency if its “collection activities” are “directly related” to a business other than a “collection agency.” In other words, if an entity has a business other than collecting and seeks to collect debts related to that business, it does not need a license.

This view has been adopted by the Courts that have considered the issue, primarily the United States District Courts for the Eastern and Western Districts of Washington. They have dealt with the question in determining whether law firms are exempt from licensing requirements. In what appears to be the first reported case, the Court interpreted the second requirement in the following way:

When read as a whole and in light of the interpreting case law, Washington's Collection Agency Act applies to entities such as JBC which seek to collect debts that are unrelated to JBC's (or its affiliated company's) non-debt collector business. If, for example, JBC were seeking to recover fees

owed to it by a client for legal services rendered, such activities would not make JBC a "collection agency."

Semper v. JBC Legal Group, 2005 W.L. 2172377, 2005 U.S. Dist. Lexis 33591 (W.D. Wash. 2005), at page 10⁴ 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." In other words, the focus of the second requirement is the entity's "non-debt collector" operations, if any it has, and not the operations of its customers.

⁴ At that time, RCW 19.16.100(5)(c) was codified as RCW 19.16.100(3)(c).

785 F.Supp.2d at 960-61

A close analysis of the exclusion in Subsection 5(c) shows that it does not apply to Praxis. The exclusion applies to “persons” and Praxis is a “person” as discussed above. The other two requirements are (1) the “person” must “carry on collection activities in his, her, or its own name;” and (2) those collection activities must be “confined and directly related to the operation of a business other than that of a collection agency.”⁵ If we assume that Praxis meets the first requirement, it does not meet the second.

Praxis claims that it satisfies the second requirement because it only works for insurance companies. The statute cannot be construed to get to that conclusion. As the Court stated in *Mandelas v. Gordon, supra*, “the focus of the second requirement is the entity’s “non-debt collector” operations, if any it has, and not the operations of its customers.

The Court’s view in *Mandelas v. Gordon, supra*, is borne out by the language of the subsection. The second requirement focuses on an

⁵ Interestingly, Credit Control Services, Inc., the collection agency at issue in *Panag v. Farmers Insurance Company of Washington, supra*, is a foreign corporation and has been licensed in Washington as a collection agency since 2003. This information is available from the website of the Department of Revenue. The Court may, if it chooses, take judicial notice of this fact since it is capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned. ER 201(b)(2); Teglund, *Evidence Law and Practice*, 5 Wash. Prac. § 2.17

entity's collection activities. The term "collection activities" is not defined in RCW 19.16. That allows the Court to consider the dictionary definition and the context to determine what the term should mean. *Department of Ecology v. Campbell & Gwinn, LLC, supra*, 146 Wn.2d at 11; *Cornu-Labatt v. Hospital District No. 2. of Grant County*, 177 Wn.2d 221, 231-32, 298 P.3d 741 (2013) The term "collection" refers to the "act of collecting." One of the meanings of the verb "collect" is "to claim as due and receive payment for." Merriam Webster Online Dictionary found at www.merriam-webster.com/dictionary. With these dictionary definitions, the term "collection activities" refers, then, to the things done to claim as due and to receive payment for certain claimed obligations. Praxis is clearly involved in collection activities.

Once again, the second requirement of the exclusion requires that collection activities be "confined and directly related to the operation of a business other than that of a collection agency." This requires an evaluation of the operations of the entity at issue, in this case, Praxis. It should be clear that Praxis' operations are limited to collecting money owed to others, and specifically to insurance companies. (CP 174-77) Therefore, it does not operate a business "other than that of a collection agency," and the exclusion in Subsection 5(c) does not apply.

Conversely, while the statute acknowledges that insurance companies can be exempt, Praxis is not an insurance company. As RCW 48.01.040 set out above states, insurance is a contract whereby one undertakes to indemnify another or pay a specified amount upon determinable contingencies. And an insurer is:

“Insurer” as used in this code includes every person engaged in the business of making contracts of insurance. .

RCW 48.01.050 Praxis is not an insurer because it does not enter into insurance contracts.

Praxis will contend that it meets the second requirement because it collects only for insurance companies and insurance companies are among the types of businesses listed as examples in RCW 19.16.100(5)(c). In other words, Praxis is attempting to exempt itself from the requirements of RCW 19.16 by contracting with entities listed in Subsection 5(c). This cannot be done as the Court in *Cavnar v. BounceBack, Inc.*, 2015 W.L. 4429095, 2015 U.S. Dist. Lexis 93525 (E.D. Wash. 2015), ruled. The defendant in that case, BounceBack, Inc., contracted with prosecuting attorneys to arrange for the collection of dishonored checks. It claimed to be exempt from RCW 19.16 because it worked only for Prosecuting Attorneys, and that prosecutors are “public

officers acting in their official capacities,” one of the types of entities listed in Subsection 5(c). The Court rejected that argument stating:

The Court finds that BounceBack has not established as a matter of law that it is exempt from the CAA (RCW 19.16). . . .(T)he CAA does not provide a means for a private entity to form a contract with a prosecuting attorney and thereby become exempt from the stringent regulations that apply to collections agencies.

This statement applies to Praxis. It cannot exempt itself from the licensing requirements of RCW 19.16 by contracting with an insurance company.

Praxis’ reasoning also must be rejected because it would make RCW 19.16 inapplicable to anyone doing business as a collection agency. Under Praxis’ interpretation of Subsection 5(c), any entity performing collection work for any of the types of businesses listed in the statute would be exempt from all requirements of RCW 19.16, including the duty to obtain a license. For example, collection agencies routinely collect credit card debt owed to banks or other financial institutions. Under Praxis’ view of Subsection 5(c), entities doing that work would not be subject to RCW 19.16 because the statute lists banks. Furthermore, a firm that did collection work for more than one of the types of entities would also be exempt. It might be argued that collectors who work for health care providers would still be subject to RCW 19.16. That argument cannot carry the day because the statute’s list of entities that might qualify for the

exemption is explicitly not exclusive—it is preceded by the phrase “such as but not limited to.”

Statutes cannot be read to avoid strained or absurd consequences. *In re Eaton*, 110 Wn.2d 892, 901, 757 P.2d 961 (1988); *Tingey v. Haisch*, 159 Wn.2d 652, 663-64, 152 P.3d 1020 (2007) Praxis’ interpretation of Subsection 5(c) qualifies as absurd or strained because it would allow the exclusion in Subsection 5(c) to swallow the whole of RCW 19.16.

Praxis isn’t helped by *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 a “mere alter ego of the law firm”. 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).

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

The “trade or commerce” element of a Consumer Protection Act claim is also satisfied as to both Omni and Praxis.

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.

This definition is broad and has been held to include the insurance industry since the Court’s decision in *Salois v. Mutual of Omaha, supra* It is also applicable here because Ms. Kosovan was a Washington resident at all material times. (CP 79)

The trade or commerce element is established where, as here, Praxis was operating without a license. As RCW 19.86.440, set out above states, “(t)he operation of a collection agency or out-of-state collection agency without a license as prohibited by RCW 19.16.110 . . . 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.”

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

VI. 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 when there is unfair or deceptive conduct by an insurer. See also, *Salois v. Mutual of Omaha*, *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 an 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 prevent what happened here—seeking reimbursement before the insured resolves a claim against the tortfeasor. The absence of these procedures means that other Omni insureds could have been or could be damaged in the same way as Ms. Kosovan.

There can be little doubt that the public interest requirement has been satisfied.

VII. 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

expansive. It includes being deprived of the use and enjoyment of property and issues that may be minimal and temporary. *Mason v. Mortgage American Inc.*, 114 Wn.2d 842, 854, 792 P.2d 142 (1990); *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.⁶ For example, in *Sorrel v. Eagle Healthcare, Inc.*, 110 Wn.App. 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)⁷ Under this test, Ms. Kosovan suffered injury. Her 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. *University of Washington v. Government Employees Insurance Company*, 200 Wn. App. 455, 476, 404 P.3d 559 (2017) These can include expenses incurred in consulting an attorney

⁶ The trial court believed that the delay demonstrated the necessary injury. (CP 605-606)

⁷ 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.

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. 553, 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.

To satisfy the element of causation, a plaintiff must establish that, but for the defendant's unfair or deceptive practice, the plaintiff would not have suffered an injury. *Indoor Billboard/Washington, Inc. v. Integra Telecom of Washington, Inc.*, 162 Wn.2d 59, 84, 170 P.3d 10 (2007) There can be little doubt that Ms. Kosvan's consummation of her settlement would not have been delayed had Omni not referred its non-existent claim to Praxis and if Praxis had not pursued this claim against USAA. USAA delayed in making payment until it was provided with a letter from Praxis'

attorney that it was not seeking any reimbursement. No reasonable person could reach any other conclusion. At the very least, the evidence presents an issue of fact on this question.

VIII. 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.

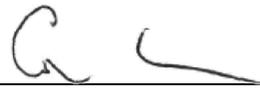
Sign-O-Lite Signs v. DeLaurenti Florists, Inc., supra, 64 Wn.App. at 568

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 recover reimbursement interests violate 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. Kosovan 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 18th day of August, 2020.



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APPENDIX

Washington Statutes:

RCW 19.16.100(2), (4)(a), (8), (13)

(2) “Claim” means any obligation for the payment of money or thing of value arising out of any agreement or contract, express or implied. . .

(4) “Collection agency” means and includes:

(a) Any person directly or indirectly engaged in soliciting claims for collection, or collecting or attempting to collect claims owed or due or asserted to be owed or due another person. . .

(9) “Director” means the director of licensing. . . .

(13) “Person” includes individual, firm, partnership, trust, joint venture, association, or corporation.

RCW 19.86.020

Unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce are hereby declared unlawful.

RCW 48.01.040

Insurance is a contract whereby one undertakes to indemnify another or pay a specified amount upon determinable contingencies.

Washington Regulation:

WAC 284-37-050

If a complaint is filed against an insurer, the commissioner will notify the insurer following this process. Whenever possible and appropriate, the commissioner will provide the notices detailed below to the insurer electronically.

(1) Initial notice to the insurer. The commissioner will send an initial notice to the insurer that identifies the name of the insurer against whom the complaint was filed using the insurer's name and NAIC number, and any other available identifying information as provided to the commissioner by the complainant. . .

Oregon Statute:

ORS 12.110(1)

An action for assault, battery, false imprisonment, or for any injury to the person or rights of another, not arising on contract, and not especially enumerated in this chapter, shall be commenced within two years; provided, that in an action at law based upon fraud or deceit, the limitation shall be deemed to commence only from the discovery of the fraud or deceit.

CARON, COLVEN, ROBISON & SHAFTON PS

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