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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

REPLY BRIEF

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Table of Contents

Introduction.....1

Argument1

 Omni and Praxis Each Committed an Unfair Act.....1

 The Positions of Omni and Praxis1

 The Other Arguments Should Be Rejected.7

 Praxis and Omni Misconstrue the “Make Whole”
 Rule.7

 A PIP Insurer Can Easily Protect Its Interest against
 the Running of the Period of Limitation. 9

 Praxis Was Not Merely Putting USAA
 on Notice.....10

 The Necessary Procedures11

 Omni Is Responsible for the Acts of Praxis.....12

 Praxis Committed an Unfair Act by Attempting to Collect When It
 Was Not Licensed to Do So.13

 Praxis Was Attempting to Collect a “Claim”. 13

 Praxis Is a Collection Agency.14

 The Trade or Commerce Requirement Is Satisfied.....16

 The Public Interest Requirement Has Been Satisfied.16

 Ms. Kosovan Suffered Injury Caused by Omni and Praxis.17

Ms. Kosovan Is Entitled to an Award of Attorney’s Fees on Appeal	24
Conclusion	25
Appendix of Washington Materials	26
Appendix of Oregon Materials	28

Table of Authorities

Washington Cases:

<i>Adams v. Department of Labor and Industries</i> , 128 Wn.2d 224, 905 P.2d 1220 (1995)	1
<i>Boag v. Farmers Insurance Co.</i> , 117 Wn.App. 116, 69 P.3d 370 (1998)	5
<i>Britton v. Safeco Insurance Co.</i> , 104 Wn.2d 518, 707 P.2d 125 (1985)	5
<i>Coventry Associates v. American States Ins. Co.</i> 136 W.2d 269, 961 P.2d 933 (1998)	16
<i>Daniels v. State Farm Mutual Automobile Insurance Co.</i> , 193 Wn.2d 564, 444P.3d 582 (2019)	8, 9
<i>Durant v State Farm Mutual Automobile Insurance Co.</i> , 191 Wn.2d 1, 419 P.3d 400 (2018)	5
<i>Fisher v. Aldi Tire, Inc.</i> , 78 Wn.App. 902, 902 P.2d 166 (1995).....	7
<i>Goodyear Tire & Rubber Co., v. Whiteman Tire</i> , 86 Wn.App. 732, 935 P.2d 628 (1997)	16
<i>Hamilton v. Farmers Insurance Co.</i> , 107 Wn.2d 721, 733 P.2d 213 (1987)	4, 7, 8
<i>Indoor Billboard/Washington, Inc. v. Integra Telecom of Washington, Inc.</i> 162 Wn.2d 59, 170 P.3d 10 (2007)	23
<i>Jonson v. Chicago, Milwaukie, St. Paul & Pacific Railroad</i> , 24 Wn.App. 377, 601 P.2d 951 (1979)	24
<i>Mahler v. Szucs</i> , 135 Wn.2d 398, 957 P.2d 632 (1998)	3, 4, 6, 7, 11, 13
<i>Meas v. State Farm First & Casualty Co.</i> , 130 Wn.App. 527, 123 P.3d 519 (2005)	9

<i>Morris v. Maks</i> , 69 Wn.App. 875, 850 P.2d 1357 (1993)	20
<i>Panag v. Farmers Insurance Company of Washington</i> , 166 Wn.2d 27, 204 P.3d 885 (2009)	13
<i>Personal Restraint of Smith</i> , 139 Wn.2d 199, 986 P.2d 131 (1999)	15
<i>Raborn v. Hayton</i> , 34 Wn.2d 105, 208 P.2d 133 (1949)	21
<i>State v. Bunker</i> , 169 Wn.2d 571, 238 P.3d 487 (2010)	15
<i>State v. Young</i> , 160 Wn.2d 799, 161 P.3d 967 (2007)	21
<i>Thiringer v. American Motors Insurance Co.</i> , 92 Wn.2d 215, 219, 588 P.2d 191 (1978)	6
<i>Washington State Physicians Insurance Exchange & Association v. Fisons Corp.</i> , 122 Wn.2d 299, 858 P.2d 1054 (1993)	24

Federal Cases:

<i>New York v. Hendrickson Bros. Inc.</i> , 840 F.2d 1065 (2 nd Cir. 1988)	20
<i>Mueller v. Abdnor</i> , 972 F.2d 931, 937 (8 th Cir. 1991)	20
<i>NLRB v. Koch & Sons</i> , 578 F.2d 1287 (9 th Cir. 1978)	20
<i>Creaghe v. Iowa Home Mutual Casualty</i> , 323 F.2d 981 (10 th Cir. 1963)	20

Washington Statutes:

RCW 4.16.170	9, 26
RCW 19.16.100(2)	13, 26
RCW 19.16.100(4)(a)	13, 14, 26

RCW 19.16.100(5)(c)	14, 15, 26
RCW 19.16.250(10)(a)	17, 27
RCW 19.16.440	17, 27
RCW 48.22.040(3).....	4, 5, 6
RCW 48.22.085(1).....	5
Washington Rules:	
ER 801(c).....	20, 27
ER 803(a)(3)	20, 21
Washington Regulation	
WAC 284-30-393	9, 28
Oregon Statute:	
ORS 12.020.....	9, 28
Other Authority:	
WPI 15.01	23, 24, 28
Tegland, <i>Evidence Law and Practice</i> 5C Wash.Prac. Section 803.12.....	21
5 <i>Weinstein's Federal Evidence</i> section 801.11(3).....	20

INTRODUCTION

This brief will respond to the arguments raised by Omni Insurance Company (Omni) and Praxis Consulting, Inc. (Praxis) in their respective briefs. Many of the arguments they have made were anticipated and dealt with in the Brief of Appellant. Every effort will be made to avoid repeating that discussion, and the failure to address a matter should be interpreted as reliance on what was said in the Brief of Appellant. Any factual rejoinder will be combined with argument on the point presented.

For their part, Omni and Praxis have not responded to many of the arguments made in the Brief of Appellant. They run a great risk by doing so because the Court can make its decision based on the argument and record before it. *Adams v. Department of Labor and Industries*, 128 Wn.2d 224, 229, 905 P.2d 1220 (1995) The lack of a response on these points should be deemed an implicit concession as will be pointed out below.

ARGUMENT

- I. Omni and Praxis Each Committed an Unfair Act.
 - a. The Positions of Omni and Praxis

Omni and Praxis do not dispute Ms. Kosovan's discussion of what amounts to an unfair act for the purposes of the Consumer Protection Act at pps.13-15 of the Brief of Appellant. They also do not

dispute that they acted or did not act in the ways discussed in the Brief of Appellant, pps. 20-25 They do not discuss or explain why it took them until late April of 2018 to “back off” in writing from pursuing reimbursement of Personal Injury Protection (PIP) benefits when it was clear that Ms. Kosovan was trying to resolve her personal injury claim and that her damages exceeded policy limits. Rather they claim that the Omni policy gives them an unfettered, or as counsel for Praxis has stated, an “absolute” right of subrogation. (CP 127) Omni claims that Washington insurers can “attempt to recover” and put an adverse insurer “on notice” by “invoking a right of subrogation.” Omni’s Brief, pps. 11-17 Apparently, they believe that they can send whatever correspondence they desire to a liability insurer regardless of whether a PIP insured is pursuing her own claim and then refuse to withdraw that claim as they see fit. They base their arguments on the first relevant paragraph of the Omni policy. It reads in pertinent part:

A, If we 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.. .

(CP 52) They claim that this language allows them to seek reimbursement of benefits paid at any time. Their argument ignores the subrogation principles discussed in *Mahler v. Szucs*, 135 Wn.2d 398, 957 P.2d 632 (1998)

First, the Omni policy does not contain a subrogation clause passing Ms. Kosovan's claim to Omni. The policy under consideration in *Mahler v. Szucs, supra*, contained a clause stating, "Under all other coverages the right of recovery of any party we pay passes to us." The Court stated that such an assignment of rights is a proper, classical subrogation clause. 135 Wn.2d at 421 There is no similar clause in the Omni policy.

Even if the Omni policy contained a subrogation clause, Omni and Praxis could not have invoked it to make claim against Mr. Roland and USAA here. Subrogation allows the insurer to "step into the shoes" of the insured to collect what is due from the tortfeasor. *Mahler v. Szucs, supra*, 135 Wn.2d at 413. When the insured is pursuing his or her own claim for personal injuries, the insured may include the amounts paid as PIP benefits and does not abandon them to the insurer. At that point, the insurer has no shoes to step into. As the Court stated:

. . .By contrast with a property loss case, where the damages are all economic and usually readily determinable, so that the insured can be made whole by the payment of

money, in a personal injury case, the claimed noneconomic damages typically amount to many multiples of the economic damages and are almost always disputed because they are not objectively ascertainable. Thus, rather than stepping aside and allowing the insurer to pursue the tortfeasor by means of subrogation for the money it paid its insured, the injured insured will often sue the tortfeasor to recover noneconomic damages, and include in the claim the medical expenses and other special damages he or she has incurred as a result of the injury. In effect, the injured insured does not abandon its shoes, and its insurer thus has no shoes to step into to pursue subrogation.

135 Wn.2d at 414 In short, the insured is master of his or her claim, and the insurer providing PIP benefits cannot interfere. This is stated in *Mahler v. Szucs, supra*, as a rule of law that applies regardless of policy language.

This approach was nothing new or controversial. In *Hamilton v. Farmers Insurance Co.*, 107 Wn.2d 721, 733 P.2d 213 (1987), the underinsured motorists insurer that was concerned about prejudice to its subrogation rights when its insured settled with the tortfeasor conceded that it had no right to interfere with such a settlement. 110 Wn.2d at 728

More importantly, and as the Court also pointed out in *Hamilton v. Farmers Insurance Co., supra*, there can be no subrogation in this context. The Court noted that the relevant statute, RCW 48.22.040(3), allowed reimbursement of underinsured motorists benefits only. It expressed its agreement with an Attorney General's Opinion

stating that subrogation as such was not allowed by the statute and therefore could not be enforced. 107 Wn.2d at 729-32

This reasoning is applicable here. As it currently reads, RCW 48.22.040(3) contains the following pertinent language:

In the event of payment to an insured under the coverage required by this chapter and subject to the terms and conditions of such coverage, the insurer making such payment shall, to the extent thereof, be entitled to the proceeds of any settlement or judgment resulting from the exercise of any rights of recovery of such insured against any person or organization legally responsible for the bodily injury, death, or property damage for which such payment is made . . .

(Emphasis added) This section applies to PIP because that coverage is required by RCW 48.22.085(1), a statute within chapter 48.22, which states:

No new automobile liability insurance policy or renewal of such an existing policy may be issued unless personal injury protection coverage is offered as an optional coverage.

Policy provisions that are at odds with statutory requirements are void and cannot be enforced. *Britton v. Safeco Insurance Co.*, 104 Wn.2d 518, 531, 707 P.2d 125 (1985); *Durant v State Farm Mutual Automobile Insurance Co.*, 191 Wn.2d 1, 11, 419 P.3d 400 (2018); *Boag v. Farmers Insurance Co.*, 117 Wn.App. 116, 69 P.3d 370 (1998) If the Omni provision allows the insurer a remedy other or more than the reimbursement allowed by

RCW 48.22.040(3), it is void to that extent. The provision must be limited to contractual reimbursement.

Even if the interpretation that Omni and Praxis want to give to the Praxis paragraph A of the Omni policy were adopted, Omni would still not be entitled to reimbursement until after Ms. Kosovan resolved her personal injury claim because of paragraph E of the Omni policy which provides:

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

(CP 53) The policy under consideration in *Mahler v. Szucs, supra*, said the same thing in the following way:

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 419 The language of paragraph E precludes any attempt at recovery by the PIP carrier until after resolution because it cannot be known if the insured is fully compensated until after the case is concluded.

As the Court stated:

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 Neither Praxis nor Omni discuss this provision and its effect in their respective briefs. In fact, neither has even set out paragraph E in its brief. Omni's Brief, p. 3 and p.14; Praxis' Brief, p. 5

Paragraph E applies regardless of what Praxis and Omni believe that the law is. In the subrogation context, the parties can alter legal rules by contract. *Fisher v. Aldi Tire, Inc.*, 78 Wn.App. 902, 908, 902 P.2d 166 (1995)

In short, the arguments made by Omni and Praxis must be rejected because they are at odds with the law as set out in *Mahler v. Szucs, supra*. Omni had no claim it could pursue for reimbursement or subrogation before Ms. Kosovan had settled with USAA and Mr. Roland.

b. The Other Arguments Should Be Rejected.

i. Praxis and Omni Misconstrue the "Make Whole" Rule.

Both Praxis and Omni have argued that an insurer may seek subrogation at any time "so long as it applies the proceeds first to its insured's uncompensated damages." Omni's Brief, p. 17-18; Praxis' Brief, pps. 25-28 They cite *Hamilton v. Farmers Insurance Co., supra*, and

Daniels v. State Farm Mutual Automobile Insurance Co., 193 Wn.2d 564, 444P.3d 582 (2019), in support of its argument. Neither is applicable here.

Hamilton v. Farmers Insurance Co., *supra*, does not support Praxis' contention. It holds that when an injured party pursues his or her own claim against the tortfeasor and reaches a settlement, the injured party's underinsured motorists insurer can pursue the tortfeasor only if it tenders to its insured the settlement amount. And, if it happens to recover more than the settlement amount, that sum must be paid over to its insured until the insured is made whole. 107 Wn.2d at 734 In that case, the injured party has pursued a personal injury claim to conclusion without interference from the underinsured carrier. That is not the case here. Ms. Kosovan's ability to consummate her settlement was frustrated by Praxis' actions. Furthermore, the underinsured carrier entitled to pursue subrogation has "stepped into the shoes" by paying the amount of the proffered settlement. Praxis did not do that or even offer to do that. And it does not claim that if it had received payment from USAA, it would have paid it over to Ms. Kosovan to make her whole. Rather, it told the trial court that USAA would have had to pay the \$10,000.00 again to Ms. Kosovan. (CP 378-79)

In *Daniels v. State Farm Mutual Automobile Insurance Co.*, *supra*, the Court held that when an insurer recovers for

money it paid for its insured's property damage, it must reimburse the insured the entirety of the insured's deductible as required by WAC 284-30-393.. But as the Court pointed out in *Meas v. State Farm First & Casualty Co.*, 130 Wn.App. 527, 534, 123 P.3d 519 (2005), the rules in *Mahler v. Szucs, supra*, do not apply when a subrogation claim is made for property damage because the conflicts between the insured and insurer in the personal injury context do not arise.

ii. A PIP Insurer Can Easily Protect Its Interest against the Running of the Period of Limitation.

Omni and Praxis have expressed concern about how an insurer is supposed to protect its interest when the statute of limitations is about to expire. There are simple steps to take if it is assumed that an insurer has a claim to pursue. When its insured is represented by counsel, as here, it can ask counsel what is going to occur, with a reminder that the end of the limitation period is approaching. If its insured is unrepresented, it can ask its insured what the insured intends to do about resolving the claim. If it is not satisfied with the answer that it receives, it can do what every other plaintiff seeking relief does—file suit and effectuate service within the period set out in RCW 4.16.170 if the matter is filed in Washington or ORS 12.020 if the matter is filed in Oregon—and litigate

the claim. And if its insured also pursues a claim, it must “back off” as counsel for Omni told the trial court. (CP 607-608)

What Praxis did here was the worst of both worlds. It made a direct claim against USAA for \$10,000.00 when Omni did not have such a claim because Ms. Kosovan was pursuing her own claim and the matter had not yet been resolved. It could also not expect USAA to pay the claim since USAA would be exposed to double liability if it did so since Ms. Kosovan had not yet settled. (CP 378-79) And the letter it wrote did not protect it from the running of the statute of limitations because only the timely filing of suit can do that.

It is unclear if Praxis and Omni are complaining that they did not know that the end of the limitation period was approaching. Praxis’ Debra Ryan was advised of the issue by a legal assistant working with counsel for Ms. Kosovan in early November 2017. (CP 143) Praxis had ample time to take the necessary steps.

iii. Praxis Was Not Merely Putting USAA on Notice.

Praxis and Omni have suggested that Praxis’ October 19, 2017, letter was merely an “attempt to recover” or a notification Omni’s interest. They suggest that this is typically done without pointing where in the record the nature of this practice is fleshed

out. They ignore what counsel for Omni told the trial court about the practice since *Mahler v. Szucs, supra*, was decided—that the PIP insurer “backs off” when the insured is pursuing his or her own claim.

Even so, Praxis did much more than simply assert that there might be some claim made at some point in the future. It did not simply ask for communication at the time of settlement. It did not—as would be consistent with the Omni policy—say that no claim would be asserted if Ms. Kosovan’s damages exceeded the USAA policy limits or that any amount due should be reduced proportionally by Ms. Kosovan’s attorney’s fees. It directed USAA to pay it \$10,000.00. In doing so, it asserted a claim that did not exist because (1) Omni had not “stepped into Ms. Kosovan’s shoes” since she was pursuing her own personal injury claim; and (2) since settlement had not been reached, it was unknown whether the settlement made Ms. Kosovan whole.

iv. The Necessary Procedures.

Praxis claims to be unaware of the simple procedures that would have avoided what happened here. Omni should not forward claims to Praxis when it has knowledge that its insured is pursuing a claim for personal injuries. If Omni forwards such a claim, it should let Praxis know so that Praxis can limit its action to contacts with the insured or the insured’s attorney to check the progress of the claim.

Finally, and as counsel for Omni told the trial court, if either Omni or Praxis knows that an insured is pursuing a claim, all efforts to seek reimbursement from the liability carrier should stop.

Omni knew that Ms. Kosovan was pursuing a claim. (CP 584-85) And Praxis had full access to Omni's claim system. (CP 406-408) Had the procedures suggested above been followed, there would have been no interference with Ms. Kosovan's resolution of her claim

II. Omni Is Responsible for the Acts of Praxis.

Omni asserts that it is not responsible for the acts of Praxis because Praxis is an independent contractor. Omni's Brief, pps. 25-27 But Omni does not dispute or even address the arguments made by Ms. Kosovan at pps. 26-28 of the Brief of Appellant that Omni continues to be responsible because of its statutory duty to use good faith, its quasi-fiduciary relationship with Ms. Kosovan, and its contractual relationship with Ms. Kosovan. It also does not respond to the argument that an issue of fact exists as to the independent contractor status of Praxis since Praxis claims that it "acted on the direction and information received from Omni." (CP 591)

In short, Omni is responsible for what Praxis did and did not do.

III. Praxis Committed an Unfair Act by Attempting to Collect When It was Not Licensed to Do So.

a. Praxis Was Attempting to Collect a “Claim”.

As discussed in the Brief of Appellant, p. 32, Praxis is required to be licensed as a collection agency if it is “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 defined as “any obligation for the payment of money or thing of value arising out of any agreement or contact, express or implied.” RCW 19.16.100(2)

Relying on *Panag v. Farmers Insurance Company of Washington*, 166 Wn.2d 27, 52, 204 P.3d 885 (2009), Praxis argues that it was not attempting to collect a “claim” but was pursuing a tort claim through subrogation as Omni had right to do by “operation of law.” Praxis’ Brief, pps. 31-32 Looking at the matter objectively, Praxis could not have been collecting a tort claim. As a matter of law, and as the Court stated in *Mahler v. Szucs, supra*, Omni had no subrogation rights because it had not “stepped into Ms. Kosovan’s shoes” since she was pursuing her own personal injury claim. Furthermore, it could take no action until Ms. Kosovan had settled her claim as the Court also stated in *Mahler v. Szucs, supra* and because any reimbursement rights Omni had could not be determined until that claim was resolved. See pps. 1-7 above.

Moreover, and as discussed above, the Omni policy does not contain a proper subrogation clause. It does not contain a provision assigning all the insured's rights to Omni upon payment of benefits. Therefore, Omni did not obtain Ms. Kosovan's rights when it paid PIP benefits for her.

Then, objectively speaking, what was Praxis doing? The only possible explanation is that it was attempting to collect money that Omni might assert it was entitled to under the reimbursement provisions of its policy. It was also competing with Ms. Kosovan for this money by attempting to recover the PIP benefits Omni had paid without regard to whether Ms. Kosovan had been made whole or without proportional reduction for her attorney's fees. This is a claim arising out of a contract and therefore a "claim" for the purposes of RCW 19.16.100(4)(a).

b. Praxis Is a Collection Agency.

Praxis claims that RCW 19.16.100(5)(c) excludes it from the definition of agency. The discussion in the Brief of Appellant, pps. 33-40 shows that Praxis' argument should not be adopted. Those arguments will not be repeated.

In its brief, Praxis relies on the Last Antecedent Rule to argue that the second requirement in RCW 19.16.100(5)(c)—that its collection activities must be "confined and directly related to the operation of a

business other than that of a collection agency—must modify or apply to its collection activities. Praxis’ Brief, p. 37 The Last Antecedent Rule does not help Praxis. It is a rule of statutory construction that provides that, unless a contrary intention appears in the statute, qualifying words and phrases refer to the last antecedent. It is merely another aid to discovery of intent or meaning and is not inflexible or uniformly binding. *Personal Restraint of Smith*, 139 Wn.2d 199, 205-206, 986 P.2d 131 (1999) It is not applied if the result would be at odds with the legislative intent if applying the rule would result in an absurd or nonsensical interpretation. *State v. Bunker*, 169 Wn.2d 571, 578, 238 P.3d 487 (2010)

In this case, the Last Antecedent Rule is not necessary. There is no confusion. The second exemption requirement in RCW 19.16.100(5)(c) does concern and apply to Praxis’ collection activities. It requires that those activities be “confined and directly related to the operation of a business other than that of a collection agency.” As discussed in depth above, that requirement is not met here because Praxis does not engage in any other business than that of a collector. Applying the Last Antecedent Rule to relieve Praxis of the licensing requirement would lead to absurd results as discussed in Brief of Appellant, pps. 39-40

IV. The Trade or Commerce Requirement.

Neither Omni nor Praxis disputes that their actions occurred in the course of a trade or commerce. This element of a claim under the Consumer Protection Act is satisfied. See Brief of Appellant, p. 41

V. The Public Interest Requirement Has Been Satisfied.

Praxis and Omni have not addressed Ms. Kosovan's arguments concerning the public interest requirement made at pps. 42-44 of the Brief of Appellant. Rather, they claim that the public interest requirement is not met because Praxis sent the October 19, 2017, letter to USAA; Praxis and USAA are sophisticated parties; and the letter was not seen by either Ms. Kosovan or Mr. Roland. Praxis' Brief, pps 42-43; Omni's Brief, pps. 23-25

It has been held that the Consumer Protection Act does not apply to dealings among and between people with sophisticated business experience in what have been described as "private transactions." See, e.g. *Goodyear Tire & Rubber Co., v. Whiteman Tire*, 86 Wn.App. 732, 745, 935 P.2d 628 (1997) In the insurance context, however, an insured is not deprived of relief under the Consumer Protection Act by its business sophistication. See, e.g., *Coventry Associates v. American States Ins. Co.* 136 W.2d 269, 961 P.2d 933 (1998)—developer entitled to Consumer Protection Act relief.

In any event, no one would seriously claim that a consumer adversely affected by a communication made between two sophisticated parties would not have a Consumer Protection Act claim. For example, if a debt collector sent a notice to a credit reporting agency in violation of RCW 19.16.250(10(a) that injured the debtor, that debtor would be entitled to relief under the Consumer Protection Act by RCW 19.16.440. In our case, Ms. Kosovan was injured by a communication from Praxis to USAA as has been discussed coupled with Praxis' other acts. The public interest requirement is met by virtue of the violation of the duty of good faith. See Brief of Appellant, pps. 42-44

VI. Ms. Kosovan Suffered Injury Caused by Omni and Praxis.

Neither Omni nor Praxis dispute that the holding up of Ms. Kosovan's settlement is sufficient injury for the purpose of the Consumer Protection Act. It is clear that their actions caused this delay.

On November 8, 2017, Alexandra Langness of USAA wrote to counsel for Ms. Kosovan to extend a policy limits offer of \$25,000.00. The letter included the declaration sheets of the USAA insured, Joseph Roland. It also included a claim of lien filed by Northwest Injury & Rehab Center and Praxis' letter to USAA of October 19, 2017. The letter discussed the offer and the included the following language:

This is a total offer which would include any and all liens. I have attached a copy of the dec sheet. Also we received a PIP subrogation in the amount of \$10,000.00. If you are able to have get (sic) Omni/Praxis to waive the subrogation, please have them fax USAA a letter. I also attached a lien from NW Injury and Rehab.

(CP 191-99) Counsel for Ms. Kosovan followed up with Ms. Langness. She told him that she could not settle this case until Omni withdrew the demand for PIP reimbursement. (CP 165) Northwest Injury & Rehab shortly sent a note to USAA authorizing payment to counsel for Ms. Kosovan. (CP 203)

Upon receiving the Complaint in this matter, Praxis' Debra Ryan contacted counsel for Ms. Kosovan by e-mail. During the exchange of messages, Ms. Ryan stated that Praxis would have "closed its file" upon learning that USAA had tendered policy limits. (CP 139) She then stated that Praxis would send a written statement withdrawing any reimbursement claim if the case was dismissed. (CP 138) Contrary to what has been asserted, Ms. Ryan did not unconditionally offer to send the written claim withdrawal and "back off." On February 19, 2018, Ms. Ryan contacted USAA. The person with whom she spoke told her that Ms. Kosovan's damages exceeded the USAA policy limits. She orally stated that Praxis would not pursue any further claim but apparently did not follow up with anything in writing. (CP 131) Apparently, the writing did

not follow because counsel for Ms. Kosovan had not agreed to dismiss this action.

Ms. Kosovan was deposed on April 24, 2018. (CP 75) A substantial portion of the deposition was devoted to questions about the incident and her injuries and damages. (CP 79-90) After Ms. Kosovan was deposed, and on April 25, 2018, counsel for Praxis sent a letter to counsel for Ms. Kosovan which included the following language:

. . .(T)o make it perfectly clear to you and your client, Praxis is not pursuing any recovery of the \$10000 in policy limits paid by Omni to your client.

Accordingly, your client is free to accept the USAA policy limits tender and/or any other offers from any other parties. All claims for reimbursement which could be potentially raised are waived by both Praxis and Omni. Praxis has confirmed this with Omni's counsel as well. .

(CP 127) Counsel for Ms. Kosovan provided this letter to USAA and the settlement was consummated. (CP 166)

Praxis and Omni argue that the statement by Ms. Kosovan's lawyer to the effect that the USAA adjuster told him that she could not settle until the demand for PIP reimbursement was withdrawn is inadmissible hearsay.¹ The statement is admissible.

¹ Praxis raised this objection in a Motion to Strike. (CP 328-29) Omni did not raise it. IN any event, the trial court considered the entirety of the declaration in which the statement was made and did not sustain any such objection. (CP 334; CP 615)

First, the statement is not hearsay since it amounts to a verbal act on a matter in issue not offered for the truth of the matter asserted. See ER 801(c) The settlement of a dispute is contractual in nature. Contract principles are used to determine the terms. *Morris v. Maks*, 69 Wn.App. 875, 868, 850 P.2d 1357 (1993) Ms. Langness's statement that the case would not be settled without the waiver of the reimbursement claim tends to show that USAA's offer to settle required a release from Omni/Praxis. Where the content of an offer or an acceptance is at issue, a statement about what was said is not hearsay but a verbal act. *Creaghe v. Iowa Home Mutual Casualty*, 323 F.2d 981, 984-85 (10th Cir. 1963); *NLRB v. Koch & Sons*, 578 F.2d 1287, 1290-91 (9th Cir. 1978); *New York v. Hendrickson Bros. Inc.*, 840 F.2d 1065, 1075 (2nd Cir. 1988); 5 *Weinstein's Federal Evidence* section 801.11(3)² Furthermore, Ms. Langness' oral statement could be construed as discussing the terms of the proposed settlement. Statements concerning the terms of a contract are also not hearsay. *Mueller v. Abdnor*, 972 F.2d 931, 937 (8th Cir. 1991)

Alternatively, the statement from Ms. Langness is admissible under ER 803(a)(3) as a statement of her intent not to consummate any settlement until Praxis/Omni withdrew the claim for reimbursement. That

² This treatise has been relied upon by Washington appellate courts. See, e.g. *State v. Young*, 160 Wn.2d 799, 815, 161 P.3d 967 (2007)

rule states that “(A) statement of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health) . . .” is not excluded by the hearsay rule. (Emphasis added)

Our situation is similar to the leading pre-rule case, *Raborn v. Hayton*, 34 Wn.2d 105, 208 P.2d 133 (1949). In that case, an estranged couple agreed that the wife would deed real estate to the husband in exchange for \$20,000.00. The wife executed the deed but held it. She told her attorney that she would not deliver it until she received the \$20,000.00. The husband then murdered the wife, took the deed, and recorded it. The Court held that the statement to the attorney was admissible to show the wife’s intent and to rebut any claim that delivery had occurred. See Tegland, *Evidence Law and Practice* 5C Wash.Prac. Section 803.12

These facts establish causation. The consummation of the settlement was held up because Praxis made its claim.

Causation is conclusively established even in the absence of the statement made by Ms. Langness. Praxis sent the October 19, 2017, letter to USAA. It is also undisputed that USAA referred to the claim made in that letter when it tendered its policy limits on November 8, 2017. Northwest Injury & Rehab, who had the other claim mentioned in the

letter promptly submitted a statement authorizing payment to counsel for Ms. Kosovan. There is no dispute that counsel for Praxis sent a letter to counsel for Ms. Kosovan withdrawing the claim on April 24, 2018, and that the settlement was then promptly consummated. No other reason has been given for the delay in resolving the matter.

Praxis' failure to "back off" when it learned that Ms. Kosovan was pursuing her own claim was also a proximate cause of the delay. This was clear when Ms. Ryan was conferring in early November 2017 with a legal assistant working with counsel for Ms. Kosovan and was acknowledged by Ms. Ryan on January 23, 2018. Ms. Ryan also understood that Praxis should "back off" by sending a written withdrawal of the claim to USAA. No written withdrawal was sent until late April of 2018, because, apparently, this suit was not dismissed.

Finally, there is no doubt that Omni's forwarding the matter to Praxis when it knew that Ms. Kosovan was pursuing her own claim was the first step toward causing the delay. Had that not occurred, the October 19, 2017, letter would never have been written.

Praxis and Omni refer to the e-mail exchange between Ms. Ryan and counsel for Ms. Kosovan to complain that no pre-filing demand to "back off" was made. They cite nothing to show that such a demand must precede an action under the Consumer Protection Act.

Praxis claims that the October 19, 2017, letter did not interfere with any settlement because USAA had not tendered policy limits at that time. It is beyond doubt, however, that if it had not sent the letter that consummation of the settlement would not have been held up until late April of 2018.

Praxis wants to lay the blame for the delay at the feet of USAA saying that it should have known that its liability would be extinguished by settling. Praxis' Brief, pps. 45-46 In its October 19, 2017, letter, Praxis directed USAA to send it \$10,000.00. Praxis is now arguing that USAA should have ignored that letter and risked litigation with Praxis/Omni before settling. Liability insurers, including Omni, are interested in having all claims resolved through settlement and with no possible claims against them outstanding.

Finally, had Praxis done nothing—because it was not licensed as a collection agency—it would not have delayed the consummation of Ms. Kosovan's settlement

Causation is made out by showing that but for the unfair or deceptive act, the plaintiff would not have suffered the injury. The proximate cause standard embodied in WPI 15.01 governs causation determinations. *Indoor Billboard/Washington, Inc. v. Integra Telecom of Washington, Inc.* 162 Wn.2d 59, 84, 170 P.3d 10 (2007) As that standard

instruction allows, there can be more than one proximate cause of an injury or damage. See *Jonson v. Chicago, Milwaukie, St. Paul & Pacific Railroad*, 24 Wn.App. 377, 379-80, 601 P.2d 951 (1979) Clearly, the acts of Praxis and Omni were a cause of the delay in the consummation of the settlement. Reasonable people would reach no other conclusion.

Praxis and Omni also contend that the expense of sending the notice to the Insurance Commissioner cannot amount to injury on the basis that it was part of this action. It is not. No pre-suit notice is required for Consumer Protection Act claims. Sending the notice was a response to the acts of Praxis and Omni. Brief of Appellant, pps. 45-46

VII. Ms. Kosovan Is Entitled to an Award of Attorney's Fees on Appeal.

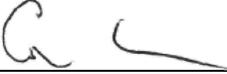
Omni and Praxis claim that Ms. Kosovan should not receive attorney's fees on appeal. Attorney's fees on appeal are recoverable under the Consumer Protection Act. *Washington State Physicians Insurance Exchange & Association v. Fisons Corp.*, 122 Wn.2d 299, 336, 858 P.2d 1054 (1993) Omni and Praxis contend that they can only be awarded when a successful plaintiff defends an award on appeal. Counsel's research has not found authority—one way or another—concerning such a proposed limitation. Ms. Kosovan's position is simple—the Court should rule that she is entitled to relief under the Consumer Protection Act with the matter

remanded solely to determine the amount of her damages. Since she should prevail in that manner, she should receive attorney's fees on appeal.

CONCLUSION

Ms. Kosovan has established all the requirements of a Consumer Protection Act claim. Reasonable people could reach no other conclusion. Therefore, the trial court's decision should be reversed, and the matter should be remanded for consideration of the amount of Ms. Kosovan's damages. Ms. Kosovan should also be allowed her attorney's fees and costs on appeal.

RESPECTFULLY SUBMITTED this 8th day of October, 2020.



Gideon Caron Of Attorneys for Plaintiff/Appellant

APPENDIX OF WASHINGTON MATERIALS

RCW 4.16.170

For the purpose of tolling any statute of limitations an action shall be deemed commenced when the complaint is filed or summons is served whichever occurs first. If service has not been had on the defendant prior to the filing of the complaint, the plaintiff shall cause one or more of the defendants to be served personally, or commence service by publication within ninety days from the date of filing the complaint. If the action is commenced by service on one or more of the defendants or by publication, the plaintiff shall file the summons and complaint within ninety days from the date of service. If following service, the complaint is not so filed, or following filing, service is not so made, the action shall be deemed to not have been commenced for purposes of tolling the statute of limitations.

RCW 19.16.100 (Portions cited)

Unless a different meaning is plainly required by the context, the following words and phrases as hereinafter used in this chapter shall have the following meanings . . .

(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 . . .

(5) “Collection agency” does not mean and does not include. . .

(c) Any person whose collection activities are carried on in his, her, or its true name and are confined and are 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 . . .

RCW 19.16.250(10(a))

No licensee or employee of a licensee shall:

(10) Communicate or threaten to communicate, the existence of a claim to a person other than one who might be reasonably expected to be liable on the claim in any manner other than through proper legal action, process, or proceedings except under the following conditions:

(a) Except as provided in subsection (28)(c) of this section, a licensee or employee of a licensee may inform a credit reporting bureau of the existence of a claim. If the licensee or employee of a licensee reports a claim to a credit reporting bureau, the licensee shall, upon receipt of written notice from the debtor that any part of the claim is disputed, notify the credit reporting bureau of the dispute by written or electronic means and create a record of the fact of the notification and when the notification was provided;

RCW 19.16.440

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 19.16.250](#) or 19.16.260 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.

ER 801(c)

Hearsay. "Hearsay" is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.

WPI 15.01

The term “proximate cause” means a cause which in a direct sequence [unbroken by any superseding cause,] produces the [injury] [event] complained of and without which such [injury] [event] would not have happened.

[There may be more than one proximate cause of an [injury] [event].]

WAC 284-30-393

The insurer must include the insured's deductible, if any, in its subrogation demands. Any recoveries must be allocated first to the insured for any deductible(s) incurred in the loss, less applicable comparable fault. Deductions for expenses must not be made from the deductible recovery unless an outside attorney is retained to collect the recovery. The deduction may then be made only as a pro rata share of the allocated loss adjustment expense. The insurer must keep its insured regularly informed of its efforts related to the progress of subrogation claims. "Regularly informed" means that the insurer must contact its insured within sixty days after the start of the subrogation process, and no less frequently than every one hundred eighty days until the insured's interest is resolved.

APPENDIX OF OREGON MATERIALS

ORS 12.020

(1) Except as provided in subsection (2) of this section, for the purpose of determining whether an action has been commenced within the time limited, an action shall be deemed commenced as to each defendant, when the complaint is filed, and the summons served on the defendant, or on a codefendant who is a joint contractor, or otherwise united in interest with the defendant.

(2) If the first publication of summons or other service of summons in an action occurs before the expiration of 60 days after the date on which the complaint in the action was filed, the action against each person of whom the court by such service has acquired jurisdiction shall be deemed to have been commenced upon the date on which the complaint in the action was filed.

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 electronic mail:

Counsel for Respondent Omni Insurance Company
Scott M. Collins E-mail: scott@smcollinslaw.com

Counsel for Respondent Praxis Consulting, Inc.
Thomas Lether E-mail: tlether@letherlaw.com

DATED at Vancouver, Washington on the 8th day of October, 2020.

 /s/ Roselyn Moore
Roselyn Moore, legal assistant

CARON, COLVEN, ROBISON & SHAFTON PS

October 08, 2020 - 3:50 PM

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