

FILED

No. 339297

JUL 22 2016

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

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

WILLIAM MERRIMAN AND COLLEEN MERRIMAN, husband and
wife,

Plaintiffs-Appellants,

v.

AMERICAN GUARANTEE & LIABILITY INSURANCE COMPANY;
YORK RISK SERVICES GROUP, INC.; PARTNERS CLAIM
SERVICES INC.; BERND MOVING SYSTEMS, INC.; a Washington
Corporation; DOUGLAS A. BERND AND JANE DOE BERND; and
JOHN DOES 1-5,

Defendants-Respondents.

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I. INTRODUCTION AND SUMMARY

York knew within two days of the fire that the policy covered the owners' property. CP 84. It knew the cardinal rule of claims handling that an insurer must disclose pertinent coverages to first-party claimants. WAC 284-30-350(1). But York said nothing to the owners about their coverage.

York's many excuses for its conduct all fail. Under the plain language of the policy, the property owners are insureds and first-party claimants. York owed them candor under the statutory duty "requiring that all persons be actuated by good faith, abstain from deception, and practice honesty and equity in all insurance matters." RCW 48.01.030.

II. ARGUMENT IN REPLY

A. The Merrimans are insureds and first-party claimants.

York's principal argument on appeal is that the Merrimans are not insureds and not first-party claimants, and that York owed no duties to them for that reason. This argument is incorrect. The plain language and structure of the policy make the Merrimans insureds, and they qualify as first-party claimants under the Washington Administrative Code and the Insurance Fair Conduct Act.

1. The Merrimans are insureds.

The Merrimans are insureds for a simple reason: they are owed direct payment under the policy when their insured property is damaged.

York’s contrary arguments avoid mentioning this fact, and instead focus on irrelevant matters.

An *insured* is simply “the person or entity that will receive a certain sum upon the happening of a specified contingency or event.”³ Steven Plitt et al., *Couch on Insurance* § 40.1 (3d ed. 2016) (hereinafter *Couch*).¹ Under this uncontroversial definition, the Merrimans are insureds. The policy here provides for payment to the Merrimans upon the happening of a specified contingency or event—namely, “loss of or damage to” their “personal property” in the “care, custody and control” of Bernd. CP 84, 88. And the policy requires that this payment go directly to the Merrimans: “[O]ur payment . . . will *only* be for the account owner of the property.” CP 225 (emphasis added). This payment is not optional; it is mandatory. *See* CP 1985 (citing CP 225, 379–80).

An insured “does not have to be specifically named” in the policy, so long as “the description of the insured within the policy is sufficient to identify who is protected.”³ *Couch, supra*, § 40.3. A policy may, for example, identify the insured by “description[s] such as ‘employee,’ ‘dependent,’ ‘resident,’ or ‘member’ of a household, ‘owner,’ or ‘eligible debtor.’” *Id.* (footnotes omitted). Here the policy identifies the Merrimans

¹ *Couch* has been called the “preeminent treatise” on insurance law. *Frank Coluccio Constr. Co. v. King Cty.*, 136 Wn. App. 751, 773, 150 P.3d 1147 (2007).

as insureds by extending coverage to the “personal property of others” in the “care, custody and control” of Bernd. CP 84, 88. Indeed, by providing that payment for damage go to the “account owner of the [personal] property,” the policy uses one of the terms mentioned in *Couch* to refer to the Merrimans and other customers of Bernd. CP 225.

York points out that Bernd was the only named insured, York Br. 15, but as *Couch* notes, an insured “does not have to be specifically named” in the policy. 3 *Couch, supra*, § 40.3. It is not unusual for a policy to identify and cover an insured but not pick out the insured by name. A spouse or other family member may be covered by a named insured’s auto insurance simply by being identified as the “resident of the same household.” *Hawaiian Ins. & Guar. Co. v. Fed. Am. Ins. Co.*, 13 Wn. App. 7, 9, 534 P.2d 48 (1975). An insurance policy may also define the current driver of the named insured’s car—whoever that may happen to be—as a “covered person,” and thus include that driver as an insured. *See Rones v. Safeco Ins. Co. of Am.*, 119 Wn.2d 650, 652, 835 P.2d 1036 (1992).

York also argues that the Merrimans cannot be insureds because the damage to both Bernd’s and its customers’ property exceeded the policy limit. York Br. 15, 17–18. But York points to nothing indicating

that the policy contemplated that the limit would cover all possible loss.² Policy limits often do not cover the full amount of loss, and Washington courts allow an insurer to “limit[] its liability to a specified dollar amount,” even when that limit prevents “full compensation for insureds.” *Certain Underwriters at Lloyd’s London v. Valiant Ins. Co.*, 155 Wn. App. 469, 478, 229 P.3d 930 (2010). It would be remarkable indeed if a sufficiently large loss could negate one’s status as an insured. The policy limits have nothing do with whether the Merrimans are insureds.

York next maintains that if the Merrimans are insureds, then American Guarantee “owed conflicting duties” to Bernd on the one hand and the Merrimans and other Bernd customers on the other. York Br. 18. This possibility of conflicting duties, however, cannot override the plain language of the policy, under which the Merrimans are insureds. *See, e.g., Farmers Ins. Co. of Wash. v. Miller*, 87 Wn.2d 70, 73, 549 P.2d 9 (1976) (courts cannot remove contract “language which the parties thereto have put into it,” or “create a contract for the parties which they did not make themselves”). In any event, insurers *often* have duties to more than one insured. *See, e.g., Metlife Capital Corp. v. Water Quality Ins. Syndicate*, 100 F. Supp. 2d 90, 93 n.3 (D.P.R. 2000) (noting that “two or more

² York says that the “limit of insurance was ostensibly the replacement cost of Bernd’s building and its business personal property,” York Br. 15, but cites nothing in the insurance policy equating the actual replacement cost with the policy limit.

insureds with adverse interests” is “[o]ne of the most common conflicts of interest”). Because this conflict is common in the insurance industry, there is also a standard practice to deal with it: insurers—and their agents—assign separate adjusters to protect the interests of each insured.³ This is precisely what York did, assigning the owners to one department, and Bernd to another. CP 935–36, 946, 951–52, 957, 966; *see also* CP 2497 (York’s promise to provide claims adjusting services and to “comply with all applicable laws . . . and judicial authority”). York cites no case that has relied on everyday conflicts of interest to rewrite an insurance policy.

Finally, York insists that the Merrimans cannot be insureds because the policy gave American Guarantee the option of defending Bernd “against suits arising from claims of owners of property.” York Br. 19. The provision of the policy that York cites, however, is not the provision that grants the Merrimans the status of insureds. Instead, the provision that York cites merely shows that the Merrimans *also* have a third-party claim on the policy insofar as they sued and have received a judgment against Bernd. Their judgment may be enforced against any asset of Bernd, including any liability coverage. This fact, however, does not erase the language of the policy that directly insured them as property

³ *See, e.g.*, Rina Carmel & Barbara A. O’Donnell, *The Initial Stages of Handling Complex Claims* 18, in Defense Research Inst., *Insurance Coverage and Claims* (2013), available at www.dri.org/dri/course-materials/2013-icci/pdfs/2013-icci.pdf.

owners. It is uncontroversial that the same person may occupy more than one role under an insurance policy. An insured, for example, may become a third party in certain cases—as when an insured car owner rides in his own car as a passenger and is then injured by the negligence of the driver. *See Ronex*, 119 Wn.2d at 655. Thus, while the Merrimans may have been third parties insofar as their claim against Bernd was concerned, they were *also* insureds under the policy’s direct coverage of their property damage.⁴

This has been the rule for decades. Warehouse policies using this or similar language have been held to cover warehouse depositors for more than a century.⁵ If insurers meant to cover something other than the owners’ property, they could say so. *Boeing Co. v. Aetna Cas. & Sur. Co.*, 113 Wn.2d 869, 887, 784 P.2d 507 (1990) (“The industry knows how to

⁴ The irony here is that the Merrimans might never have sued Bernd if they had known what York concealed from them: that they were covered directly under the policy. The Merrimans became third parties because York concealed their first-party coverage. In the end, York harmed both the Merrimans *and* Bernd.

⁵ *See Peters v. Emp’rs Mut. Cas. Co.*, 853 S.W.2d 300, 301–02 (Mo. 1993) (owners of property lost in a fire had the right to sue the insurer for coverage); *B.N. Exton & Co. v. Home Fire & Marine Ins. Co.*, 164 N.E. 43, 44 (N.Y. 1928) (same); *Farney v. Hauser*, 198 P. 178, 181–82 (Kan. 1921) (warehouseman taking out policy on property held in trust holds insurance proceeds in trust for customer); *Boyd v. McKee*, 37 S.E. 810 (Va. 1901) (same); *Snow v. Carr*, 61 Ala. 363, 369 (1878) (same); *S. Cold Storage & Produce Co. v. A.F. Dechman & Co.*, 73 S.W. 545, 547 (Tex. Civ. App. 1903) (same); *Trico Servs. Corp. v. Houston Gen. Ins. Co.*, 414 So. 2d 1313, 1318–19 (La. Ct. App. 1982) (owner of property could recover as an unnamed insured); *cf. Couch, supra*, § 68:40 (“Where the bailee or warehouseman has effected insurance in favor of the bailor, the latter is entitled to the proceeds to the extent of his or her insurable interest, without regard to whether the bailee or warehouseman procured the policy voluntarily, or pursuant to an agreement, express or implied, to carry insurance.”).

protect itself . . .”). The promise to pay the owners’ loss is not ambiguous, but even if it were, York’s contortionist acrobatics in pointing to the “structure” of the policy, York Br. 14, are exactly what a court never does to undermine an insurer’s promise to pay. *See, e.g., Kaplan v. Nw. Mut. Life Ins. Co.*, 115 Wn. App. 791, 800, 65 P.3d 16 (2003) (“If policy language is ambiguous, and no genuine issues of material fact are placed in dispute, summary judgment should be entered in favor of the insured.”).

2. *The Merrimans are first-party claimants.*

Merrimans are also first-party claimants under Washington law. Their status is clear both from the relevant regulation and statute and from the record evidence.

Both IFCA and the regulations defining unfair insurance practices define a “first-party claimant” as “an individual, corporation, association, partnership or other legal entity asserting a right to payment as a covered person under an insurance policy or insurance contract arising out of the occurrence of the contingency or loss covered by such a policy or contract.” RCW 48.30.015(4); *see* WAC 284-30-320(6). The Merrimans fit this definition to a tee. The policy here covers the Merrimans’ interest in their personal property, *see supra* pp. 2–3, so they are “covered persons.” RCW 48.30.015(4); WAC 284-30-320(6). The policy provides that payment shall go only to the Merrimans, CP 225, so they are

“asserting a right to payment . . . under an insurance policy.” RCW 48.30.015(4); WAC 284-30-320(6). And the policy makes that right to payment contingent on “loss of or damage to” that property, CP 88, so their right to payment arises “out of the occurrence of the contingency or loss covered by” the policy. RCW 48.30.015(4); WAC 284-30-320(6).

American Guarantee’s CR 30(b)(6) designee admitted that the Merrimans had first-party coverage under the policy. He admitted that, for the Merrimans, “*under the first party coverages, property in the insured’s care, custody or control, there is coverage available, subject to the limits and exclusions.*” CP 543 at 249:25–250:23 (emphasis added). This admission finds further confirmation in expert testimony. For example, former Insurance Commissioner Deborah Senn testified that if a policy “extends coverage for damage or loss to property, and if the policy calls for payment to the owner of the property”—both true here—“the owner is an ‘insured’ and a ‘first party claimant.’” CP 607, ¶ 11; *see also* CP 39, ¶ 11 (expert testimony from Gerald Hartmann, former Vice President of Claims with Safeco, that the Merrimans “are clearly first-party claimants under the American Guarantee first party coverages”).

Trying to counter this straightforward analysis, York relies on *Postlewait Construction, Inc. v. Great American Insurance Cos.*, 106 Wn.2d 96, 720 P.2d 805 (1986) (cited by York Br. 23–24), and *Tank v.*

State Farm Fire & Casualty Co., 105 Wn.2d 381, 715 P.2d 1133 (1986) (cited by York Br. 24–26). York’s reliance is misplaced. *Tank* involved two classic third parties: one was the victim of an insured’s assault, and the other was injured by the insured in a car crash. 105 Wn.2d at 384, 392. In such cases, the injured party’s only direct claim to payment is against the insured, not the insurer; a right to payment from the insurer belongs to the insured, and is contingent on the insured’s being found liable. Here, by contrast, the language of the policy gives the Merrimans a direct right to payment against the insurer, and it is not contingent on Bernd’s being found liable. In *Postlewait*, the court held that a construction company could not maintain an action against an insurer, where the policy did not call for payment to the construction company. *See* 106 Wn.2d at 99 (stating, as dispositive, that the policy “neither named the lessor as an additional insured *nor as a loss payee*” (emphasis added)). In this case, however, the policy states that it insures the owners’ property in the care, custody and control of Bernd, and that, in case of loss or damage thereto, payment shall be made to the owners.⁶

⁶ The trial court ruled more than once that the insurance policy made the owners insureds and first-party claimants. CP 613; CP 2312 (Order on Motions for Summary Judgment).

B. York owed a duty of good faith to the Merrimans.

York argues that even if the Merrimans were insureds and first-party claimants, it owed no duty of good faith to them because it is not an insurer. York Br. 8–10. Nowhere, however, does York say a word to deny what the Merrimans set out in their opening brief.

The duty of good faith, as the Merrimans have noted, is established by statute. *See* Br. of Appellants 20–21. And this statute imposes the duty of good faith on “all persons” in the “business of insurance”—not just insurers, but also “**their representatives.**” RCW 48.01.030 (emphasis added). And this statutory duty, like the rest of the Insurance Code, applies explicitly to York. The Code states: “All insurance and insurance transactions in this state, . . . and **all persons having to do therewith** are governed by this code.” RCW 48.01.020 (emphasis added). And “[p]erson,” under the insurance code, is not limited to insurance companies—to the contrary, it includes an “insurer” as well as an “individual,” “company,” “association,” “organization,” or “corporation.” RCW 48.01.070.

Because York was a person concededly involved in the insurance business and was representing the interests of American Guarantee, the insurer, *see* York Br. 9, it owed a duty of good faith to the Merrimans. This is simply the logical result of Washington statutory law.

York denies none of this, and instead changes the subject. It first points out that it was working as an adjuster. But the statutory definition of “adjuster,” RCW 48.17.010(1) (quoted by York Br. 8–9) cannot negate the duty of good faith that York owed to the Merrimans. Acting “on behalf solely of” one entity, American Guarantee, RCW 48.17.010(1), does not negate duties to others that the law may impose. If it did, the consequences would be absurd. It would mean that York’s status as an adjuster would allow it to commit *any* tort in the course of its work. With no duties to anyone but the insurer, York could convert others’ chattels at will, trespass on their land with impunity, and defame them without fear of liability. This cannot be what the framers of the insurance code had in mind when they defined “adjuster.” Indeed, the insurance code itself shows that acting on behalf of an insurer does not negate duties to the insured. The insurance code imposes a duty of good faith not just on the insurer, but also on the insurer’s “representatives.” RCW 48.01.030. And a “representative” is simply a person who “acts *on behalf of* another.” *Black’s Law Dictionary* (10th ed. 2014) (emphasis added). Thus, the insurance code itself confirms that a person who acts on behalf of the insurer must still operate under a duty of good faith.

York next suggests that the duty of good faith arises solely out of an insurance contract. York Br. 9–10. That is incorrect. The duty is

imposed by statute and decisional law and is independent of the contract. See Br. of Appellants 22.

Finally, York says that the Merrimans' bad-faith claim must fail because "certain statutory unfair practices" apply only to insurers. York Br. 10. But the bad-faith claim does not rely on specific statutory prohibitions. They rely on a breach of the underlying duty "to deal fairly with an insured, giving equal consideration to the insured's interests." *Anderson v. State Farm Mut. Ins. Co.*, 101 Wn. App. 323, 329, 2 P.3d 1029 (2000). Dealing fairly with an insured requires candor, including the duty to inform the insured of pertinent coverage. Because York failed to inform the Merrimans of their coverage, it breached its duty of good faith. At the very least, a jury could so find. See *Smith v. Safeco Ins. Co.*, 150 Wn.2d 478, 485, 78 P.3d 1274 (2003) (bad faith is a question of fact).

C. York owed a duty of care to the Merrimans.

1. York owed a duty of care under the common law.

York owed a duty of care to the Merrimans under the common law. If adjusters like York did not owe a duty of care to insureds, insurers would have no incentive to hire honest adjusters, and adjusters would lack any incentive to be honest on their own. A duty of care is therefore mandated by considerations of "logic, common sense, justice, [and] policy." *Affiliated FM Ins. Co. v. LTK Consulting Servs., Inc.*, 170 Wn.2d

442, 449; 243 P.3d 521 (2010) (articulating “duty considerations”). Even if this were not the case, Washington precedent already holds that York was under a duty of care to the Merrimans. *See id.*

a. Imposing a duty on independent adjusters like York is the only way to ensure that adjusters are honest with insureds.

Recognizing that York owed a duty to the Merrimans is dictated by Washington’s duty considerations. Washington law recognizes that “all persons” in the business of insurance must behave honestly. *See Salois v. Mut. of Omaha Ins. Co.*, 90 Wn.2d 355, 359, 581 P.2d 1349 (1978) (legislature has “clear[ly] declar[ed] that there is a public interest in the business of insurance and that [it] is to be conducted in good faith and free from deception”). And the only way to prevent adjusters from being *dishonest* is to ensure that adjusters face liability for lack of candor.

If adjusters owe no enforceable duty of candor to insureds, then an adjuster may conceal coverage from an insured without worrying about liability. And, if this concealment has its likely effect, then the insured will never figure out the truth—and the insurer can escape paying a claim. A rational insurer will thus have no financial incentive to hire an honest adjuster. What is more, the adjusters that this rational insurer hires will have no incentive to be honest on their own—in fact, they will be encouraged *not* to be honest. Because insurers will be incentivized to hire

less-than-truthful adjusters, truthfulness will lose adjusters an insurer's repeat business. Adjusters will also lack any affirmative incentive to be honest, for even if their concealment is discovered, adjusters themselves would face no liability. The law is not meant to provide immunity to insurance adjusters. Hence, the only way to create the proper incentives is for the *adjuster itself* to face liability.

York, however, argues that, even after being duped by an adjuster, insureds would still be able to recover from their insurer. York Br. 39. This argument fails because it assumes, unrealistically, that duped insureds will somehow figure out the truth. *See* York Br. 39. The more realistic assumption is that only a small fraction of duped insureds will figure out the truth about their coverage. The Merrimans figured out the truth only because, being told they had no coverage at York's direction, they retained counsel, sued Bernd in a last-ditch effort to recover something on their massive loss, and obtained a copy of Bernd's policy fortuitously under Washington's civil discovery rules. *See* CR 26(b)(2).

York also emphasizes that it had a contract with American Guarantee, and that tort duties must arise independently of contract. York Br. 30–33. While York may have become American Guarantee's adjuster via a contract, that is unexceptional. This is clear from the reasoning of *Affiliated FM*. There, our Supreme Court observed that damage to

property interests is one of the interests that tort law protects. That these “enumerated property interests” may be “conveyed . . . in a contract is unexceptional,” and does not negate duties imposed independently by tort. *Affiliated FM*, 170 Wn.2d at 460. Similarly, the mere fact that a contract may station a party in a role does not negate the duties that tort law independently imposes on that role. The duty that York owed to the Merrimans is of this kind, because it arises from the duties that the law places on an independent adjuster.

York also observes that it caused no “physical damage” to the Merrimans. York Br. 34. York is wrong if it is arguing that the only kind of injury that is compensable in tort is physical damage. Rigid categories of injury do not define the different domains of contract and tort. *See Eastwood v. Horse Harbor Found., Inc.*, 170 Wn.2d 380, 396–98, 241 P.3d 1256 (2010). The financial nature of this loss does not exempt persons in the insurance business from being sued in tort. *See Safeco Ins. Co. of Am. v. Butler*, 118 Wn.2d 383, 389, 823 P.2d 499 (1992) (“An action for bad faith . . . sounds in tort.”).⁷

⁷ York’s references to the plaintiff class’s settlements with American Guarantee and Partners are irrelevant. Both blamed York as a party at fault, and, under RCW 4.22.070(1), Washington requires that the trier of fact “shall” apportion fault to all at-fault parties. The allocation of liabilities between settling and nonsettling defendants is governed by *Washburn v. Beatt Equipment Co.*, 120 Wn.2d 246, 296, 840 P.2d 860 (1992), which makes York liable for its percentage share of fault notwithstanding settlements by other parties of their own liabilities.

It may be that York is relying on the comment in the two-justice lead opinion of *Affiliated FM*, which would have allowed a tort claim (for an economic loss) based on the danger posed by the underlying conduct “with respect to safety risks of physical damage.” 170 Wn.2d at 456. A majority of the court did not sign this opinion, though a majority agreed with the result. Regardless, in the additional authority recently submitted by York, a unanimous court held that in determining duty, the court looks not to the risk specifically of “physical damage,” but simply “harm” to the plaintiff (among other factors). *Centurion Props. III, LLC v. Chi. Title Ins. Co.*, No. 91932-1, slip op. at 12–13 (Wash. July 14, 2016).

To the extent it is relevant at all, *Centurion Properties* does not help York. It held that a title insurer, which already had no duty to research title defects for its customer, had no liability to a third party when it recorded a facially valid encumbrance as an accommodation. First, the court said the “analysis of the duty owed by title insurance companies” follows the “nature of the service at issue.” *Id.* at 7. The nature of an independent adjuster’s service is far different from that of a title insurer recording documents as an accommodation. But further, none of the title insurer’s services were intended to benefit the plaintiff in that case, a co-investor in the real estate that lost money when the encumbrances entitled a senior lender to call its note. *Id.* at 13. In contrast, the very purpose of

adjusting an insurance claim is to benefit both the insurer and the insured by fully, fairly, and accurately investigating and settling the loss. An adjuster who declines to mention coverage the adjuster knows of, let alone investigate and settle the loss, is guaranteed to harm the insured. That is just what York did here. In this case, that harm was nonpayment of property loss; in other cases, it could be this plus lack of housing or lack of medical care. Independent adjusters like York are commonly retained to adjust homeowner's fire claims, bodily injury claims, and medical pay claims. *Centurion Properties* supports a duty of care in this case.

b. Precedent already recognizes a duty of care.

In *Aldrich & Hedman, Inc. v. Blakely*, 31 Wn. App. 16, 639 P.2d 235 (1982), this Court recognized that adjusters owe insureds a duty of care. Contrary to York, *see* York Br. 45, this Court *necessarily* recognized a duty of care in *Aldrich*. There, an adjusting firm had selected an unqualified contractor to repair the insured's fire damage, which then led to litigation between the insured and another party. The insured then sued the adjusting firm for the attorney fees incurred in that suit with another party. This Court held that the adjusting firm was liable to the insured for those fees under an equitable rule. *See* 31 Wn. App. at 20. And for this rule to have allowed the award of fees, there had to have been "a wrongful act or omission" by the adjusting firm against the insured. *Id.* There can be

no wrong, however, without a duty and a breach thereof—and *Aldrich* plainly determined that the adjusting firm had breached a duty. *See id.* (“[T]he first element [of the equitable rule] is established by the [adjusting firm] wrongfully omitting to investigate [the contractor’s] credentials before recommending him for the job.”). As mere matter of logic, then, *Aldrich* found a duty running from adjusting firm to insured.

Nor is *Aldrich* undercut by *International Ultimate, Inc. v. St. Paul Fire & Marine Insurance Co.*, 122 Wn. App. 736, 87 P.3d 774 (2004) (cited by York Br. 43). There, Division One determined that the insured could not bring a CPA claim against an adjuster employed by the insurer in the adjuster’s personal capacity. The court held that “the CPA does not contemplate suits against employees of insurers.” *Id.* at 758. That holding says nothing about the Merrimans’ claim against a non-employee independent adjusting firm such as York. In any event, *International Ultimate*’s reasoning makes little sense. The court seemed to suggest that there could be no CPA claim against the adjuster in her personal capacity because, “[t]o be liable under the CPA, there must be a contractual relationship between the parties.” *Id.* That statement is incorrect. Our Supreme Court has made clear that, “contractual privity ordinarily is not required to bring a CPA claim.” *Panag v. Farmers Ins. Co. of Wash.*, 166 Wn.2d 27, 43 n.6, 204 P.3d 885 (2009).

York appeals to law from foreign jurisdictions. York Br. 40–43.

York’s reliance on these other jurisdictions is simply misplaced. California does hold adjusters liable for the conduct the Merrimans allege against York here. In *Bock v. Hansen*, 170 Cal. Rptr. 3d 293, 302–05 (Ct. App. 2014), the California Court of Appeal held that an insurance adjuster may be liable to an insured for negligent misrepresentation when the adjuster materially misstates the insured’s coverage. *See also Bodenhamer v. Superior Court*, 223 Cal. Rptr 486 (1986) (insureds may sue independent insurance adjusters under the Unfair Trade Practices Act of the California Insurance Code). Similarly, Texas recognizes claims against adjusters directly under the state’s insurance code—including that code’s prohibition against misrepresenting coverage. *See Esteban v. State Farm Lloyds*, 23 F. Supp. 3d 723, 728–29 (N.D. Tex. 2014).

More generally, the body of insurance law from several of the other jurisdictions is too different from Washington’s to be of much guidance. Whereas Washington imposes a broad duty of good faith on all persons in insurance matters—a duty that sounds in tort⁸—some of the jurisdictions that York cites conceive of good faith in narrowly contractual terms. Indiana, New York, South Carolina, and Florida recognize a duty of

⁸ *Butler*, 118 Wn.2d at 389.

good faith in insurance matters, but this duty arises *solely* out of contract. *Allstate Ins. Co. v. Regar*, 942 So. 2d 969, 972 (Fla. Dist. Ct. App. 2006); *Troxell v. Am. States Ins. Co.*, 596 N.E.2d 921, 925 (Ind. Ct. App. 1992) (cited by York Br. 42); *Acquista v. N.Y. Life Ins. Co.*, 730 N.Y.S.2d 272, 278 (App. Div. 2001); *Charleston Dry Cleaners & Laundry, Inc. v. Zurich Am. Ins. Co.*, 586 S.E.2d 586, 618 (S.C. 2003) (cited by York Br. 42–43). Arizona recognizes only a limited extracontractual duty of good faith, *Rawlings v. Apodaca*, 726 P.2d 565, 576–77 (Ariz. 1986) (requiring an “intentional act” and an “evil hand”)—again, unlike Washington, *see, e.g., Indus. Indem. Co. of Nw. v. Kallevig*, 114 Wn.2d 907, 916–17, 792 P.2d 520 (1990) (duty of good faith “may be breached by conduct short of intentional bad faith or fraud”). These states’ conception of insurance law makes them unwilling to recognize duties outside the insurance contract between insurer and insured. This conception is not Washington’s, however, and it is to Washington law that this Court must look to decide this case. And, as the Merrimans have explained Washington law already recognizes a duty of care running from adjuster to insured.

2. York owed a duty of care created by statute.

Applying *Restatement (Second) of Torts* § 286 (1965), the Merrimans have explained why RCW 48.01.030 and 48.30.010 create a duty of care here. Br. of Appellants 33–35. York fails to counter the

Merrimans' analysis head-on. Instead, it argues that portions of the insurance code make it impossible that the legislature intended to impose any standard of care on adjusters. York Br. 34–36. This analysis, however, assumes that merely because York was a representative of American Guarantee alone, it owed no duties to anyone else. Both practical and legal considerations show that assumption to be false. *See supra* pp. 11–12.

More fundamentally, Washington's insurance law would be radically undermined if the competing interests of insurers and insureds were enough to preclude a duty of care. Insurers, after all, have an interest in their own bottom line, and yet they must weigh that interest equally with the interests of their insureds. *See, e.g., St. Paul Fire & Marine Ins. Co. v. Onvia, Inc.*, 165 Wn.2d 122, 129, 196 P.3d 664 (2008) (requiring “equal consideration to the insured’s interests” (citation and internal quotation marks omitted)). The obligation to hold the insured’s interests equal, sometimes called the Golden Rule of Insurance, is the foundation of proper claims adjusting. York’s “loyalties” to the insurer, York Br. at 37, cannot undermine the legal requirements for adjusting a claim.⁹

⁹ Many adjusting firms are subsidiaries of large property/casualty groups. These subsidiaries are assigned adjusting duties by the corporate parent on whose paper the policy is written. If York is held not to have duties toward insureds like the Merrimans, these adjusting subsidiaries will have no duties either.

D. The trial court erred in dismissing the CPA claim against York.

1. The Merrimans' CPA claim is independent from their negligence claim.

York misconstrues the elements of a CPA claim, contending that the Merrimans' CPA claim is equivalent to a negligence claim. This is not the law. Rather:

To prevail in a private CPA claim, the plaintiff must prove (1) an unfair or deceptive act or practice, (2) occurring in trade or commerce, (3) affecting the public interest, (4) injury to a person's business or property, and (5) causation.

Panag, 166 Wn.2d at 37 (citing RCW 19.86.090). A violation of the CPA is established when the above five elements are met. The Merrimans' CPA claim does not rest on their negligent claims handling claim.

2. A statutory or regulatory violation is not the only way to establish a CPA violation.

York also fails to recognize that a regulatory violation is not required to prove a CPA claim. In *Klem v. Washington Mutual Bank*, the Court explained: "To resolve any confusion, we hold that a claim under the Washington CPA may be predicated upon 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." 176 Wn.2d 771, 787, 295 P.3d 1179 (2013) (emphasis added). Thus, even if the Court finds that the insurance statutes and regulations do not apply to York (which they do, *see supra*

pp. 10–11), the Merrimans CPA claim may proceed based on York’s “unfair or deceptive act or practice.” *Klem*, 176 Wn.2d at 787.

Industry standards are evidence of an unfair or deceptive act or practice under the CPA. *Griffith v. Centex Real Estate Corp.*, 93 Wn. App. 202, 217 n.7, 969 P.2d 486 (1998). Washington courts routinely allow evidence concerning industry standards. *Veit ex rel. Nelson v. Burlington N. Santa Fe Corp.*, 171 Wn.2d 88, 97, 249 P.3d 607 (2011) (expert testimony regarding industry standard for road design); *Brotherton v. Kralman Steel Structures, Inc.*, 165 Wn. App. 727, 735, 269 P.3d 307 (2011) (industry standards relating to the construction of a driveway); *Shah v. Allstate Ins. Co.*, 130 Wn. App. 74, 81, 121 P.3d 1204 (2005) (standard of care of an insurance agent); *Alpine Indus., Inc. v. Gohl*, 30 Wn. App. 750, 757, 637 P.2d 998 (1981) (expert testimony regarding industry standards in a construction-defect case). Here, sufficient evidence shows that York violated industry standards for claims handling.

3. Insurance claims adjusting occurs in trade or commerce.

York is engaged in the business of insurance claims handling with Washington consumers. Its business, therefore, falls squarely within the CPA’s definition of “trade or commerce.” York cites *Ramos v. Arnold*, 141 Wn. App. 11, 169 P.3d 482 (2007) for the proposition that it was providing “professional services” and that it did not engage in “trade or

commerce.” But *Ramos* was not an insurance case and did not involve did not involve claims handling issues. Rather, it was a lawsuit against an appraiser and appraisal company hired by the plaintiffs’ lender to determine the value of their home prior to purchase. *Id.* at 21. The court discussed the term “trade” under the CPA in the context of providing professional services, not within the insurance industry. York ignored Washington’s long history of precedent in which Washington courts have applied the CPA to insurance transactions and insurance claims handling violations. *See, e.g., Coventry Assocs. v. Am. States Ins. Co.*, 136 Wn.2d 269, 279, 961 P.2d 933 (1998) (holding that “an insured may maintain an action against its insurer for . . . violation of the CPA” even when it is later found that there is no coverage for the claim); *Kallevig*, 114 Wn.2d at 921 (CPA violation for unfair or deceptive acts in the business of insurance); *Shah*, 130 Wn. App. at 86 (CPA violation based on insurance agent’s failure to correctly insure property).

E. The trial court erred in decertifying the class claims against York.

York musters one argument to defend the trial court’s decertification order: Because York owed “no class wide duty to the class members to disclose coverage,” common questions do not remain, making certification under CR 23(b)(3) inappropriate. York Br. 49. This argument is wrong even on its own terms, since York *did* owe a duty to all owners

of personal property in the care, custody or control of Bernd. York's argument suffers from a more fundamental defect, however. York is injecting a merits question—whether it owed a duty to insureds—into the class-certification analysis. That is erroneous as a matter of law. *See, e.g., Wash. Educ. Ass'n v. Shelton Sch. Dist. No. 309*, 93 Wn.2d 783, 790, 613 P.2d 769 (1980) (“[T]he certification of a class is to be undertaken with no consideration of the merits of the plaintiffs’ claims . . .”).

III. CONCLUSION

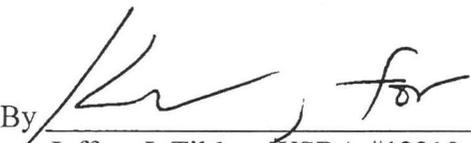
On behalf of a proposed class of the property owners, the Merrimans ask that the claims against York be reinstated and remanded.

RESPECTFULLY SUBMITTED this 22nd day of July, 2016.

KELLER ROHRBACK L.L.P.

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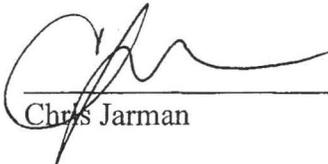
CERTIFICATE OF SERVICE

I certify that on this 22nd day of July, 2016. I cause the foregoing to be filed in the Court of Appeals Division III, Spokane, Washington and a true and correct copy to be served on the following below via email per agreement.

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