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SUPREME COURT NO. 92267-5

SPOKANE COUNTY SUPERIOR COURT CAUSE NO. 12-2-02190-7

SUPREME COURT OF THE STATE OF WASHINGTON

ISIDORO PEREZ-CRISANTOS,

Appellant,

vs.

STATE FARM FIRE & CASUALTY COMPANY,

Respondent.

APPELLANT'S BRIEF

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- A. Final Bill Report ESSB 5726
- B. Referendum Measure 67 Passed by the Legislature and Ordered Referred by Petition
- C. RCW 48.30.015 Unreasonable Denial of a Claim for Coverage or Payment of Benefits.
- D. IFCA Notices Received from Washington State Insurance Commissioner

I INTRODUCTION

This case provides the Washington State Supreme Court with the opportunity to provide guidance to federal and state courts with regards to the Insurance Fair Conduct Act, RCW 48.30.015 (hereinafter “IFCA”). Currently, there is confusion and a split of authority on interpretation of IFCA as to whether a violation of specified unfair claim settlement practices regulations codified under chapter 284-30 of the Washington administrative code provide an independent cause of action as per se violations of IFCA.

In the present case, after a substandard underinsured motorist (hereinafter “UIM”) claim investigation by Respondent State Farm Fire & Casualty Co. (hereinafter “State Farm”), it offered Appellant Isidoro Perez-Crisantos’ (hereinafter “Perez”) \$0 (nil) on his claim for payment of UIM benefits, above the \$25,000.00 recovery of the adverse driver’s state minimum automobile insurance policy limits. Appellant Perez was compelled to litigate his UIM claim. Through litigation, he eventually recovered substantially more than the \$0 offer by State Farm, a violation of WAC 284-30-330(7). In doing so, he incurred significant increases in attorneys’ fees and litigation costs.

Despite the violation of WAC 284-30-330(7), as well as other specific factual allegations of unfair and unreasonable claims handling

practices by Respondent State Farm, and the need for continuing discovery, the trial court dismissed all of Appellant Perez' claims against State Farm. Dismissal included Appellant Perez' claims not only under IFCA, but for violation of the Consumer Protection Act, RCW 19.86 (hereinafter "CPA"), bad faith, breach of contract, breach of fiduciary duties and negligence.

II. IFCA OVERVIEW

IFCA, as bill ESSB 5726, was passed by the Washington State legislature in 2007. *See* Final Bill Report ESSB 5726, Appendix A. Subsequently, there were attempts to block IFCA from becoming law by requiring ESSB 5726 to be approved by Washington State voters. This attempt culminated in Referendum Measure 67. *See* Referendum Measure 67, Appendix B. In 2007, Washington State voters approved Referendum Measure 67, and IFCA became law. *See* IFCA, RCW 48.30.015, Appendix C.

IFCA provides first party claimants to a policy of insurance a cause of action when an insurer unreasonably denies a claim for coverage or payment of benefits. RCW 48.30.015(1). Damages may be trebled if the superior court finds "that an insurer acted unreasonably in denying a claim for coverage or payment of benefits, or violated a rule in subsection (5)". RCW 48.30.015(2). The court

“shall” award reasonable attorneys’ fees, as well as actual and statutory litigation costs, including expert witness fees, if it finds that an insurer acted unreasonably in denying a claim for coverage or payment of benefits, or violated a rule in subsection (5). RCW 48.30.015(3).

RCW 48.30.015(5) provides that a violation of WAC 284-30-330, WAC 284-30-350, WAC 284-30-360, WAC 284-30-370, WAC 284-30-380, or any unfair claims settlement practice rule adopted under RCW 48.30.010 by the Washington State Insurance Commissioner (hereinafter “Insurance Commissioner”) and codified under chapter 284-30 of the Washington Administrative Code, are specific violations of RCW 48.30.015(2) and (3). Violations of these specific WACs under IFCA allow the court the ability to treble the actual damages, and require the court to award reasonable attorneys’ fee and actual and statutory litigation costs, including expert witness fees. *See* RCW 48.30.015(2) and (3).

RCW 48.30.010 authorizes the Insurance Commissioner to define unfair and deceptive insurance trade practices. *See* WAC 284-30-300. The purpose of WAC 284-30-300 through WAC 284-30-400 is to define “**certain minimum standards** which, if violated with enough

frequency so as to become a general business practice is deemed to constitute an unfair claims settlement practice”. *Id.* Emphasis added.

IFCA requires a twenty (20) day notice be filed with the Insurance Commissioner allowing the insurer an opportunity to resolve the dispute within that twenty (20) day period before a claimant may file suit. *See* RCW 48.30.015(8)(a) and (b).

III. ASSIGNMENTS OF ERROR

- (1) The trial court erred when it granted summary judgment in favor of Respondent State Farm on August 21, 2015, dismissing all of Appellant Perez’ claims.
- (2) The trial court erred when it denied Appellant Perez’ motion for partial summary judgment on the IFCA and CPA claims on August 21, 2015.

A. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Does the violation of a regulation governing the business of insurance claims handling practices provide an independent cause of action under RCW 48.30.015 (IFCA)?
2. Was summary judgment in favor of State Farm inappropriate given State Farm’s violation of WAC 284-30-330(7) and RCW 48.30.015 (IFCA) as Appellant Perez was compelled by State Farm to submit to litigation to recover amounts due under his

insurance policy by offering substantially less than the amount ultimately recovered?

3. Was partial summary judgment in favor of Appellant Perez appropriate given State Farm's violation of WAC 284-30-330(7) and RCW 48.30.015 (IFCA) after Appellant Perez was compelled by State Farm to submit to litigation to recover amounts due under his insurance policy by offering substantially less than the amount ultimately recovered?
4. Was summary judgment in favor of State Farm inappropriate given specific issues of material fact shown by Appellant Perez evidencing State Farm's failure to conduct a reasonable investigation in the handling of his UIM claim and payment of his UIM benefits?
5. Was summary judgment in favor of State Farm inappropriate given the need for continuing discovery into factual issues of State Farm's incentive pay programs?

IV. STATEMENT OF THE CASE

On June 4, 2012, Appellant Perez brought causes of actions in the Spokane County Superior Court as a first party insured against his insurance company, Respondent State Farm, for payment of his UIM benefits, violations of IFCA, the CPA, bad faith, breach of contract,

breach of fiduciary duties and negligence resulting from its handling of his UIM claim. CP 2-10. Included in Appellant's first party claims are alleged per se violations of IFCA under the WAC. CP 7-8.

Appellant Perez' claims stem from a November 26, 2010, motor vehicle collision that occurred in Spokane County, Washington. CP 5. He sustained injuries to his neck, back and right arm/shoulder. CP 5, 232, 340-343. He was treated the following day at the emergency room, following up with chiropractic treatment and then orthopedic treatment and surgery. CP 337, 340-343. The surgery was a right shoulder arthroscopy for a superior labral tear from anterior to posterior (SLAP tear) performed on November 28, 2011. CP 67, 232. Appellant Perez missed time from work following the shoulder surgery. CP 6, 269, 231-232.

Appellant made claim for his Personal Injury Protection (hereinafter "PIP") benefits under his policy of automobile insurance with Respondent State Farm. CP 5-6, 262, 269. PIP coverage under his automobile insurance policy with State Farm "provides coverage for reasonable and necessary medical expenses that are incurred within (3) years of the accident" up to the \$10,000.00 policy limits. CP 262. Respondent State Farm paid medical and wage loss PIP benefits to Appellant Perez, including payment for benefits pertaining to his right shoulder injury, until the PIP benefits exhausted. CP 336-343, 264-267.

Appellant Perez subsequently resolved his third-party claim with the underinsured motorist carrier in exchange for payment of their \$25,000.00 minimum Washington State policy limits. CP 6. On January 13, 2012, he also made a UIM claim with Respondent State Farm under his contract of insurance. CP 6, 269-270. The UIM policy limits were \$50,000 per person and \$100,000.00 per occurrence. CP 4. The State Farm UIM claim was handled by adjuster Dennis Larson and supervised by team manager John Larrick. CP 115, 228, 234.

Mr. Larson was provided the medical records and given authority from Appellant to utilize State Farm's PIP file (and any other State Farm claims files) to help expedite the process. CP 269-270, 274. Medical provider records to State Farm documented shoulder symptoms as early as December 2, 2010, six (6) days after the collision, which continued throughout the early treatment records. CP 336-343. State Farm completed its UIM evaluation on February 14, 2012 and communicated the results to Appellant Perez on February 16, 2012. CP 272, 274. State Farm denied Appellant payment of any contractual UIM benefits available under his automobile insurance policy. *Id.*

State Farm had previously paid first party PIP benefits pertaining to the shoulder injury/surgery as reasonable and necessary accident related benefits under his automobile insurance policy. CP 248, 265, 272. It took the position on the UIM claim that the shoulder injury/surgery was

not accident related. CP 272, 231-234. The February 14, 2012, UIM evaluation was completed without any type of medical review or consultation. CP 231-234, 272. State Farm's UIM evaluation noted that "The records do not show a complaint of shoulder injury until 2/7/11", three (3) months after the accident. CP 232.

On February 16, 2012, Appellant Perez put in writing his issues of State Farm flip flopping on payment of first party benefits for the shoulder injury as well as with other specific UIM claims handling issues, including not fully and reasonably investigating his UIM claim. CP 272. Appellant Perez filed his required initial IFCA Notice with the Insurance Commissioner on or around February 21, 2012. *See* list of attached IFCA Notices received from Washington State Insurance Commissioner, Appendix D, pg. 167.

State Farm did not resolve Appellant's IFCA allegations within the statutory twenty (20) day requirement. CP 7. More than three (3) months later, on or around May 31, 2012, as Plaintiff was in the process of filing suit, State Farm forwarded a letter with a records review from Scot Youngblood, M.D., addressing the causation issue on the shoulder injury/surgery in State Farm's favor. CP 237.

Appellant's lawsuit was filed with the court on June 4, 2012, asserting claims for his UIM benefits, as well as violations of IFCA, CPA, and other causes of action based upon allegations of specific claims

handling practices in the UIM claim investigation and evaluation. CP 2-10. On or around September 24, 2012, the UIM claim was bifurcated from the extra-contractual and other claims, the latter of which were stayed pending conclusion of the UIM litigation. CP 11-13. The UIM claim then went through mandatory arbitration and Appellant was ultimately awarded \$51,202.79, which was reduced to \$26,202.79 after third-party offset. CP 360-361. He incurred significant increases in attorneys' fees and litigation costs having to go through court to obtain his UIM benefits. CP 334. On September 4, 2013, after the arbitration award had been satisfied by State Farm, the stay order was then lifted on the IFCA and other extra-contractual claims handling related causes of action. CP 362-364.

As the arbitration award was substantially more than the pre-litigation denial of payment of any UIM benefits to Appellant (\$0 offer), on September 16, 2013, Appellant Perez filed a new IFCA notice with the Insurance Commissioner for the latest violation of WAC 284-30-330(7). *See* Appendix D, p. 237. Appellant moved for leave of court to amend his complaint adding a per se claim for this particular violation of WAC 284-30-330(7) under IFCA. CP 14-27. This was granted on October 14, 2013. CP 28-29. Appellant Perez allowed the statutory twenty (20) day IFCA notice period to pass and filed his Amended Complaint with the court on December 4, 2013. CP 30-38. Specifically added to the

Amended Complaint were allegations regarding the latest IFCA violation under WAC 284-30-330(7). CP 34-36.

Subsequent discovery revealed additional various claims handling issues, including Respondent State Farm's incentive and other performance pay programs for its adjusters and supervisors that may influence claims handling, including Appellant's UIM claim. CP 129, 148-159. During discovery Plaintiff requested the personnel files for certain and specific State Farm employees involved in handling Appellant's PIP and UIM claims. CP 129. However, after Appellant moved to compel production of said personnel files, on March 28, 2014, the superior court granted State Farm a Protective Order shielding the personnel files from discovery, with the exception of some basic information (i.e. training, education). CP 189-195. The court did leave the door open for Appellant to modify the Order, requiring Appellant to come forward with more specific information pertaining to the salary/incentive programs before it would entertain modification. CP 195.

On October 10, 2014, Appellant Perez made a second motion to compel production of the personnel files of certain State Farm personnel involved in the handling of his PIP and UIM claims, modifying the March 28, 2014 order. CP 201-203. The Court required State Farm to produce general information and documentation pertaining to its

incentive and/or bonus programs in effect at the time of Appellant's UIM claim. CP 202. The Court denied Appellant access to specific information/documentation from the State Farm UIM personnel files involved in the handling of his UIM claim. CP 202-203. The Court reserved further rulings in this regard until the generalized incentive and/or bonus information and documentation was produced. CP 203.

In December 2014, State Farm produced voluminous generic information with regard to its incentive and bonus programs. CP 130 Appellant hired bad faith expert Stephen L. Strzelec to review these documents and provide expert opinions. *Id.* At the time of the Court decisions at issue, August 21, 2015, Appellant's Third (Amended) Motion to Compel was scheduled to be heard simultaneously with the competing summary judgment. CP 113-125. Appellant Perez sought to obtain specific information pertaining to State Farm's claims handling practices and incentive/bonus programs, including those specifically pertinent to Appellant's UIM claim, through relevant portions of the involved claims handler personnel files. *Id.*

As part of the August 21, 2015 Third Motion to Compel, in addition to specific factual allegations as to unreasonable claims handling and payment of UIM benefits, the Superior Court was provided with insurance expert Strzelec's Declaration. CP 130, 205-221. Mr. Strzelec indicated that incentive based pay has an influence on claims handling

and claims payments, but the personnel files of the involved adjusters were necessary to effectively evaluate its effect on the handling of Appellant's UIM claim. CP 212-214. Despite specific factual information before the superior court and Appellant attempting to fully investigate the relationship between incentive pay and his UIM claims handling, the court took an overly simplistic view of the evidence and the case as a simple disagreement as to UIM value, dismissing all of Appellant's claims. VRP 26-29

At the time of the August 21, 2015, motions at issue in this appeal, the discovery cutoff was March 21, 2016, seven (7) months out, and the trial scheduled for May 23, 2016. CP 111-112.

V. SUMMARY OF ARGUMENT

The only issue before the superior court ripe for determination on August 21, 2015 was State Farm's violation of IFCA and the CPA under WAC 284-30-330(7), for which partial summary judgment in favor of Appellant Perez was proper and appropriate. Otherwise, issues of fact and the need for continuing discovery materials from State Farm precluded summary judgment in its favor.

WAC 284-30-300 through WAC 284-30-400 are minimum standards of unfair claims settlement practices defined and enacted by the Insurance Commissioner pursuant to RCW 48.30.010. WAC 284-30-

330(7) makes it an unfair claims practices act for an insurance company to compel a first party claimant to initiate or submit to litigation to recover amounts due under and insurance policy by offering substantially less than the amounts ultimately recovered in such actions. An IFCA violation subjects a first party insurer to treble damages, actual damages, reasonable attorneys' fees, and litigations costs, including expert witnesses under RCW 48.30.015(2) and (3).

Additionally, a violation of the WACs are also a per se unfair or deceptive trade practice under the CPA. *See Anderson v. State Farm Mut. Ins. Co.*, 101 Wn. App. 323, 331, 2 P.3d 1029 (2000) citing *Industrial Indem. Co. v. Kallevig*, 114 Wn.2d 907, 924, 792 P.2d 520 (1990). To prevail in a private CPA action, the plaintiff must show that the defendant's conduct met the elements of the *Hangman Ridge* five-part test: (1) an unfair or deceptive act or practice, (2) occurring in trade or commerce, (3) impacting the public interest, (4) injuring plaintiff in his or her business or property, and (5) causation. *See Hangman Ridge Training Stables, Inc. v. Safeco Title Ins.Co.*, 105 Wn.2d 778, 719 P.2d 531 (1986). Showing a violation of the WACs and injury from the breach satisfy all elements of a private CPA claim. *See Am. Mfrs. Mut. Ins. v. Osborn*, 104 Wn. App. 686 at 697 (2001).

In the current case, after a substandard UIM claim evaluation completed by State Farm on February 14, 2012, Appellant was offered \$0 (nil) in UIM benefits by State Farm. CP 274. At the time of the superior court decision on August 21, 2015, specific issues of fact were present that State Farm unreasonably denied Appellant Perez payment of his UIM benefits as it failed to conduct a reasonable investigation of the UIM claim upon completion of the evaluation on February 14, 2012. CP 328-334. This included the State Farm UIM adjuster ignoring or discounting medical records that supported causation of the shoulder injury; ignoring State Farm's previous determination under PIP coverage of causation and payment of first party benefits; and a lack of basis for the medical causation determination by the UIM adjuster. *Id.*

After the substandard investigation and \$0 offer on his UIM claim, Appellant Perez was forced to litigate. Over a year later, on July 2, 2013, he was ultimately awarded \$51,202.79 for his UIM claim. CP 360-361. This was through mandatory arbitration and was reduced to \$26,202.79 after third-party offsets. *Id.* The award was satisfied by State Farm on or around September 4, 2013. CP 362-364. These facts subject State Farm to partial summary judgment for its violation of WAC 284-30-330(7) under IFCA and the CPA.

Moreover, discovery revealed incentive programs available to State Farm employees, including the UIM adjuster and supervisor in this case. Expert evidence provided to the court noted these having an influence on UIM claims handling, including Appellant Perez' claim, and the need for specific information from the involved State Farm personnel files to fully evaluate the full extent of any such influence in this particular case. CP 212-214.

In light of the evidence before the superior court, partial summary judgment in favor of Appellant Perez for the violation of IFCA and CPA through WAC 284-30-330(7) was appropriate, with a determination of the amount of damages and other statutory remedies at a later date. Alternatively, the specific factual allegations of unfair and unreasonable UIM claims handling before the Court precluded summary judgment in favor of Respondent State Farm.

Finally, the superior court should have allowed Appellant Perez to complete his discovery into State Farm's incentive and pay programs and their direct relationship in the handling of his UIM claim before prematurely concluding there was no such relationship, especially as there was still approximately seven (7) months left to complete discovery in this case.

VI. ARGUMENT/ANALYSIS

A. Standard of Review- De Novo

The Court reviews an order granting summary dismissal of a plaintiff's claims de novo. *Burton v. Twin Commander Aircraft, LLC*, 171 Wn.2d 204, 254 P.3d 778 (2011). The defendant bears the burden of establishing there are no genuine issues of material fact, and they are held to a strict standard. *Scott v. Pac. W. Mountain Resort*, 119 Wn.2d 484, 502-03, 834 P.2d 6 (1992). Any doubt as to the existence of a genuine issue of material fact will be resolved against the movant, and all inferences from the evidence must be construed in the light most favorable to the nonmoving party. *Magula v. Benton Franklin Title Co.*, 131 Wn.2d 171, 930 P.2d 307 (1997). The moving party bears the burden of showing that the plaintiff may not recover, as a matter of law, as to any of the claims or causes of action brought and that there is no genuine issue for trial on any such claims. *Young v. Key Pharm, Inc.*, 112 Wn.2d 216, 225, 77 P.2d 182 (1989).

B. State Farm Violated a Regulation Governing the Business of Insurance Claims Handling, Which Provides Appellant an Independent Cause of Action Under IFCA

1. Statutory Language

RCW 48.30.010(1) states, in pertinent part:

- (1) No person engaged in the business of insurance shall engage in unfair methods of competition or in unfair and deceptive acts or practices in the conduct of such business as such methods, acts, or practices are defined pursuant to subsection (2) of this section.

RCW 48.30.010(2) authorizes the Insurance Commissioner to define, with notice and comment periods, unfair and deceptive insurance acts or practices in the insurance industry. It also provides the Insurance Commissioner with remedies for violations. *See* RCW 48.30.010(5) and

- (6). WAC 284-30-300 notes:

RCW 48.30.010 authorizes the commissioner to define methods of competition and acts and practices in the conduct of the business of insurance which are unfair or deceptive. The purpose of this regulation, WAC 284-30-300 through 284-30-400, is to define **certain minimum standards** which, if violated with such frequency as to indicate a general business practice, will be deemed to constitute unfair claims settlement practices. This regulation may be cited and referred to as the unfair claims settlement practices regulation. (Emphasis Added).

The Insurance Commissioner through WAC 284-30-330(7) defines the following as unfair methods of competition and unfair or deceptive acts or practices in the business of insurance, specifically applicable to the settlement of claims:

- (7) Compelling a first party claimant to initiate or submit to litigation, arbitration, or appraisal to recover amounts due under an insurance policy by offering substantially less than the amounts ultimately recovered in such actions or proceedings.

IFCA, under RCW 48.30.015(1), provides that a first party claimant who is unreasonably denied (1) a claim for coverage or (2) payment of benefits, may bring suit in the superior court to recover actual damages, costs, including attorneys' fees and litigation costs. RCW 48.30.015(2) allows the court to treble the actual damages if it finds an insurer has acted "unreasonably in denying a claim for coverage or payment of benefits or has violated **a rule in subsection (5) of this section**". (Emphasis Added). For this same finding, RCW 48.30.015(3) requires the court to award reasonable attorneys' fees and actual and statutory litigation costs, including expert witness fees.

In addition to IFCA's generalized allowance of a cause of action for an unreasonable denial of a claim for coverage or payment of benefits, RCW 48.30.015(5) incorporates specific Insurance Commissioner previously defined unfair or deceptive violations of WAC 284-30-330 as violations of IFCA under RCW 48.30.015(2) and (3). Again, these particular WACs are minimum insurance standards defined by the Insurance Commissioner. Under RCW 48.30.015(2) and (3), if the court finds a violation of WAC 284-30-330, the court may allow trebling of the actual damages and shall award reasonable attorneys' fees, actual costs and statutory litigation costs, including expert witness fees. (Emphasis added).

The deterrent effect for a violation of WAC 284-30-330, as one of the Insurance Commissioner's certain specifically defined minimum unfair and deceptive insurance trade practice standards, is meant to provide an independent cause of action as a per se unreasonable denial of a claim for coverage or payment of benefits. It subjects an offending insurance company to having to pay treble the actual damages, as well as requiring the offending insurance company to pay reasonable attorneys' fees, actual costs and statutory litigation costs, including expert witness fees. Otherwise, the WAC violations enumerated under RCW 48.30.015(5) would be superfluous as the ability of a superior court to award treble damages under RCW 48.30.015(2) as well as attorneys' fees and litigation costs under RCW 48.30.015(3) are already available when a court finds that an insurance company unreasonably denied a claim for coverage or payment of benefits. Legislative history supports this as well.

2. IFCA Case Law

The federal removal process is used frequently to opt IFCA cases out of the Washington State judicial system. As a result, there are a significant number of federal IFCA case decisions compared to very few Washington State IFCA appellate decisions. The Court in *Langley v. GEICO Gen. Ins. Co.*, 89 F.Supp.3d 1083 (E.D. Wash. Feb. 24, 2015), points out the lack of precedent which has led to different interpretations

of whether RCW 48.30.015(5) provides an independent cause of action for violation of the enumerated WAC provisions.

The earlier federal cases tended to hold that a WAC violation under RCW 48.30.015(5) does not provide an independent cause of action to a first-party insured. However, the later cases, along with the 2013 Washington Pattern Jury Instruction, submit language consistent with a WAC violation providing an insured with an independent cause of action under IFCA.

a. Earlier Cases- No Independent Cause of Action Under IFCA for WAC Violations.

In *Bronsink v. Allied Prop. & Cas. Ins. Co.*, No. C09-751MJP, 2010 WL 2342538 at *5 (W.D. Wash. June 8, 2010), the Court noted that violations of the enumerated WAC provisions in IFCA trigger a violation of the statute. The case involved a homeowners personal property claim stemming from a commercial property fire loss. *Id.* at *2. The insured brought claims under the CPA, bad faith, breach of contract, and IFCA, including violations of WAC 284-30-330, 284-30-370 and WAC 284-30-380. *Id.* at *5-11.

In *Bronsink*, Plaintiff alleged his insurer misrepresented the extent of loss (WAC 284-30-330(1)), failed to adopt standards for the prompt investigation of claims (WAC 284-30-330(3)), failed to complete its

investigation within thirty (30) days (WAC 284-30-370), and failed to request additional time needed to complete its investigation in a timely fashion (WAC 284-30-380). *Id.* The court denied counter motions for summary judgment, including partial summary judgment by *Allied* on the IFCA claims, given the plethora of material facts in dispute. *Id.* at *27.

However, after several subsequent federal cases held that violations of the WACs are not per se violations of IFCA, the same judge from *Bronsink* held in a later case, *MK Lim, Inc. v. Greenwich Ins. Co.*, No. C10-374MJP, 2011 U.S. Dist. LEXIS 126395 *7-8 (W.D. Wash. May 23, 2011), that her prior ruling in *Bronsink* was not a proper reading of IFCA. While noting that WAC violations satisfy the first three (3) elements of a CPA claim, she ruled that IFCA requires proof of an unreasonable denial of coverage or payment, and that violations of the WAC may allow justification of treble damages and/or an award of attorneys' fees and costs, but not an independent cause of action. *Id.* at *4, 6-9.

The cases relied on by the Court in *MK Lim*, holding that violations of WAC 284-30-330 may justify treble damages, but do not allow a per se violation of IFCA, included: *Lease Crutcher Lewis WA, LLC v. Nat'l Union Fire Ins. Co.*, No. C081862 RSL, 2010 WL 4272453, at *5 (W.D. Wash. Oct. 15, 2010) and *Weinstein v. Riley, P.S. v. Westport Ins. Corp.*,

No. C08-1694JRL, 2011 WL 887552 at *30 (W.D. Wash. Mar. 14, 2011). Numerous other federal cases followed the precedent from these line of cases, including:

Cardenas v. Navigators, Inc., No. C11-5578 RJB, 2011 WL 6300253 (W.D. Wash. Dec. 16, 2011); *Babcock v. ING Life Ins. & Annuity Co.*, No. 12-CV-5093-TOR, 2013 WL 24372 (W.D. Wash. Jan. 2, 2013); *Morella v. Safeco Ins. Co. of Illinois*, No. C12-0672RSL, 2013 WL 1562032 (W.D. Wash. Apr. 12, 2013); *Kabrich v. Allstate Prop. & Cas. Ins. Co.*, No. CV-12-3052-LRS, 2014 WL 3925493 (E.D. Wash. Aug. 12, 2014). *See Langley*, 2015 WL 778619 at *3.

b. Recent Cases- Affirming an Independent Cause of Action Under IFCA for WAC Violations.

More recent federal cases reject the above decisions and provide language approving per se causes of action for violation of the Insurance Commissioner's claims handling regulations under IFCA. Those include *Merrill v. Crown Life Ins. Co.*, No. 13-CV-0110-TOR, 2014 WL 2159622 (E.D. Wash. May 23, 2014); *Hell Yeah Cycles v. Ohio Sec. Ins. Co.*, 16 F.Supp.3d 1224 (E.D. Wash. 2014); and *Hover v. State Farm Mut. Auto. Ins. Co.*, No. CV-13-05113-SMJ, 2014 WL 4239655 (E.D. Wash. Aug. 26, 2014) *reconsideration denied*, No. 13-CV-05113-SMJ 2014 WL 4546048.

The Court in *Langley v. GEICO Gen. Ins. Co.*, 89 F.Supp.3d 1083 (E.D. Wash. Feb. 24, 2015), noting the lack of Washington State appeals cases on the subject matter, attempted to evaluate the prior cases interpreting whether IFCA allowed an independent cause of action for a WAC violation. *Langley* was a dispute involving the value of a fire damaged RV purchased with a salvaged title, but restored and sold to Plaintiff for substantially more than the salvaged title original purchase. *Id.* at 1085. The main issue before the court was whether the Plaintiff could pursue an independent cause of action under IFCA for a WAC violation. *Id.* at 1084-1085. Defendant *GEICO* moved for partial summary judgment claiming IFCA did not permit this. *Id.*

The court looked to construe the provisions of IFCA. Noting no Washington State Supreme Court precedent, it looked to federal authorities to find out how they believe our Supreme Court would decide. *Id.* at 1086. The court noted the earlier line of cases finding no independent cause of action, but pointed out the lack of any analysis of statutory construction used to reach those conclusions and whether IFCA creates an implied cause of action for violating the enumerated WACs. *Id.* at 1088-1089.

The court then went through statutory analysis, including whether an implied cause of action was intended under IFCA. *Id.* at 1089-1092. It pointed out that the goal is to determine the intent of the legislature and that “all the words of the statute must be given effect, so that no provision is rendered meaningless or superfluous”. *Id.* at 1089. The Court next noted the first prong for an implied cause of action was satisfied as Plaintiff, a first party insured, was within the class for whose special benefit the statute was enacted. *Id.*

The court next went on to find that the second prong was also satisfied as there were two (2) sources of explicit legislative intent to create a claim for violating the enumerated WACs in the statute itself. *Id.* It notes how the enumerated WACs under RCW 48.30.015(5) would be superfluous and meaningless if only applying to the available remedies under sections (2) and (3) (treble damages, attorneys’ fees and litigation costs), as those are already available for unreasonable denials of coverage or payment of benefits under the statute regardless. *Id.* at 1089-1090. Also, subsections (2) and (3) are written in the disjunctive (“or”), thus they must give each disjunctive clause effect. *Id.* at 1090. As such, the only way for the mandated award of attorneys’ fees and litigation costs for a violation of the enumerated WACs of subsection (5) would be for Plaintiffs to have a cause of action for violations thereof. *Id.*

The court in *Langley* also points out that an IFCA independent cause of action for WAC violations is further supported by Referendum 67's explanatory statement written by the Secretary of State to Washington State voters indicating:

ESSB 5726 would authorize any first party claimant to bring a lawsuit in superior court against an insurer for unreasonably denying a claim for coverage or payment of benefits, or violation of specified insurance commissioner unfair claims handling practices regulations, to recover damages and reasonable attorney fees, and litigation costs.

Although not noted by the court in *Langley*, this is further supported by the legislative Final Bill Report, Appendix A, stating in pertinent part:

Damages are available to plaintiffs upon a finding that the insurer unreasonably denied coverage or payment. **A plaintiff may also recover damages upon a finding that the insurer violated one of five rules adopted by the Office of the Insurance Commissioner (OIC) and codified in chapter 284-30 of the Washington Administrative Code (WAC) or any additional rules that the OIC adopts that are intended to implement this act. (Emphasis Added).**

Since *Langley*, appellant has found one (1) subsequent federal case on the issue of an independent cause of action under IFCA for a WAC violation. This is *Workland & Witherspoon, PLLC v. Evanston Ins. Co.*, No.2-14-CV-403-RMP, 2015 U.S. Dist. Lexis 146950 (E.D. Wash. Oct. 29, 2015). This case stemmed from the defense of professional liability

lawsuits against a law firm regarding the purchase and sale of real estate. *Id.* at *1-2. On a 12(b)(6) motion to dismiss, the court recognized “the vexing relationship between subsections (2) and (3) and subsection (5)”, but disagreed with the court in *Langley* as it believed the language of IFCA could have expressly included independent causes of action in section (1). *Id.* at *16-18. As such, the court concluded that the language of the statute expressed the intent of the legislature not to do so. *Id.* at *17.

The court in *Workland* also noted the lack of Washington appellate cases on the issue, finding only two (2) Washington State appellate cases it felt on point. *Id.* at *18-19. The court notes that the language of the first case, *Ainsworth v. Progressive Cas. Ins. Co.*, 180 Wn.App. 52, 322 P.3d 6 (2014), lends support that the IFCA language does not allow an per se violation, whereas the second case, an unpublished Div. 3 opinion from 2015, supports a WAC per se violation. *Id.* at *18-19. It dismissed the second unpublished case being made without an analysis and relying on a previous federal case, *Merrill v. Crown Life Ins. Co.*, No. 13-CV-0110-TOR, 2014 WL 2159622 (E.D. Wash. May 23, 2014), also without analysis of how it came to find an independent cause of action.

However, the *Ainsworth* case did not involve the issue of whether RCW 48.15.030(5) provided an independent cause of action under IFCA or any interpretation of the IFCA language for a WAC violation. It was based upon wage loss claimed under PIP coverage and the insurer's failure to pay his secondary income source (pizza business), which the insurer knew and had documentation supporting. *Progressive* provided no reasonable basis for denying its insured those benefits and the court found as a matter of law that it unreasonably denied coverage and payment of benefits under IFCA. *Id.* at *79-80.

The *Langley* analysis and decision is consistent with the intent of the legislature in creating an independent cause of action or per se violation under IFCA for a WAC violation. This is further supported by the development of the IFCA Washington Pattern Jury Instruction by the Washington State Supreme Court Committee on Jury Instructions.

c. Washington Pattern Jury Instruction

While not authoritative, in 2013, the Washington State Supreme Court Committee on Jury Instructions provided the following jury instruction on IFCA, which is noted below (in pertinent part):

WPI 320.06.01 Insurance Fair Conduct Act

(Name of plaintiff) claims that (name of insurer) has violated the Washington Insurance Fair Conduct Act. To

prove this claim, (name of plaintiff) has the burden of proving each of the following propositions:

(1) That (name of insurer) [unreasonably denied a claim for coverage][unreasonably denied payment of benefits] **or [violated a statute or regulation governing the business of insurance claims handling];**

(2) That (name of plaintiff) was [injured] [damaged]; and

(3) That (name of insurer's) act or practice was a proximate cause of (name of plaintiff's) [injury] [damage].

6A Wash. Prac. WPI 320.06.01 (2013)
(Emphasis Added).

The Washington Supreme Court appoints committee members from nominees submitted by the Superior Court Judges' Association, the District and Municipal Court Judges' Association, the Washington State Bar Association, the Washington Association of Prosecuting Attorneys, the Washington Defender Association, the Washington Association of Criminal Defense Lawyers, the Washington State Association for Justice, the Washington Defense Trial Lawyers, the University of Washington, Seattle University, and Gonzaga law schools, as well as the Administrative Office of the Courts in studying and drafting pattern jury instructions to guide the courts on the current state of the law to instruct Washington juries.

Appellant submits that IFCA provides an independent cause of action for a violation of WAC 284-30-330(7).

**STATE FARM'S VIOLATION
OF WAC 284-30-330(7) AND IFCA**

In this case, on February 14, 2012, State Farm failed to conduct a reasonable UIM claim evaluation and made a \$0 offer of UIM benefits to Appellant Perez as a result. Appellant was forced to litigate and recovered substantially more than the \$0 UIM benefits offer through mandatory arbitration approximately fifteen (15) months later, in September 2013. State Farm violated WAC 284-30-330(7) and IFCA.

To evaluate the UIM claim, State Farm was provided with the pertinent medical records back on January 13, 2012. At the same time, it was also authorized to utilize any other State Farm files, including State Farm's own PIP file, to evaluate the UIM claim. Despite this, the State Farm UIM team ignored or discounted medical records that supported Appellant's accident related shoulder injury and did not even utilize the PIP file, under which State Farm had already evaluated and paid shoulder injury automobile insurance benefits as reasonable and necessary under the policy. On the cross motions for summary judgment, State Farm did not present any evidence to support how its actions above were reasonable in light of this information.

State Farm's UIM evaluation was completed on February 14, 2012, and noted that the records did not show a complaint of a shoulder injury

until February 7, 2011, about three (3) months after the November 26, 2010, automobile collision. CP 232. However, the medical records provided to the UIM adjuster did show potential evidence of a right shoulder injury as early as December 2, 2010, six (6) days after the collision. CP 340-341. The December 9, 2010, medical record provided to the UIM adjuster also noted right shoulder symptoms and injury. CP 342. Another record from December 13, 2010, available to the UIM adjuster noted right shoulder symptoms and injury as well. CP 343. Again, State Farm did not provide any evidence to show how its actions could be determined to be reasonable in light of this evidence before the superior court.

On February 16, 2012, Appellant Perez communicated to State Farm that it's evaluation was not fair or reasonable as it was flip flopping on the its prior PIP payments as reasonable and necessary accident related benefits. CP 272. He also expressed his concerns about State Farm not utilizing anything from a medical provider for determination of whether the right shoulder injury/SLAP tear was accident related and the appropriate amount of chiropractic care. *Id.* Appellant then filed his IFCA notice with the Insurance Commissioner on or around February 21, 2012 in this regard.

State Farm did not resolve the issues within the twenty day requirement of RCW 48.30.015(8)(b), allowing Appellant the right to bring

his cause of action under IFCA. At the superior court, State Farm took the position that its self-serving record review submitted by Scot Youngblood, M.D. approximately three (3) months later, around May 31, 2012, satisfied Appellant's complaint in this regard and made its UIM evaluation reasonable. The superior court incorrectly agreed without addressing the fact that the May 31, 2012, was not provided within the twenty (20) day period to resolve the IFCA violations of February 21, 2012. VRP 24. The lawsuit was already in the making and was filed with the court on June 4, 2012.

Appellant Perez also sought to determine through further discovery why on February 14, 2012, the UIM adjuster, without any medical basis and in light of medical records to the contrary, concluded against its insured and contrary to the PIP team's payment of shoulder related automobile insurance benefits. Subsequent written discovery produced evidence of salary and incentive programs that influence claims handling, which would have applied to Appellant's UIM claim. Evidence in this regard was provided to the superior court through the declaration of insurance industry expert, Stephen L. Strzelec, who testified that State Farm's salary and incentive program did influence claims handling, including that of Appellant Perez. However, he informed the court that

specific information from the State Farm personnel files was necessary to determine the full extent of such influence.

The evidence before the superior court showed that State Farm ignored or discounted the medical evidence on the UIM claim; flip flopped from the PIP first party payment of benefits of the shoulder injury being accident related; and failed to timely obtain a medical basis for its UIM evaluation. Appellant submits that this alone provided support for a finding by the superior court of an unreasonable denial of payment of UIM benefits and partial summary judgment in his favor.

More so, this substandard evaluation led to a \$0 offer on the UIM claim. Plaintiff was forced into litigation and recovered substantially more than the amount offered. Under IFCA and the violation of WAC 284-30-330(7), Appellant submits that the superior court should have granted him partial summary judgment, leaving only a determination of actual damages, treble damages, and a calculation of attorneys' fees, actual costs and statutory litigation costs, including expert witness fees.

However, this does not end the evidence available to the superior court. It also had evidence from insurance industry expert Strzelec that the salary and incentive pay available to the State Farm employees, including those involved in Appellant's UIM claim, was influenced by the incentive and pay programs available. The court repeatedly did not allow Appellant

to obtain the specific information needed from the pertinent State Farm personnel files to further prove his claims in this regard.

One of the incentive programs Mr. Strzelec's declaration explains is the State Farm Enterprise Auto Growth Incentive Plan, which applies both to employees and management. CP 210-212. This is a profit sharing incentive pay program. *Id.* In its most simplistic terms, this means helping the company take in more money than it pays out earns the employee and management incentive pay. UIM adjusters and supervisor are not able to assist the company in taking in money. However, their involvement in what it pays out on claims can affect the company's bottom line, which will help them earn incentive pay. Again, the superior court continually denied Appellant the evidence needed from the pertinent State Farm personnel files, and then granted summary judgment in favor of State Farm, even though there were still seven (7) months left in the discovery process.

The evidence before the court was that State Farm violated WAC 284-30-330(7) and IFCA. This included State Farm's UIM claim evaluation ignoring or discounting medical records that supported Appellant's claim; not even looking into its own previous PIP payments and thus flip flopping on the shoulder injury; and not having a medical basis for its evaluation. This evidence, at a minimum, viewed in the light to the non-moving party, left issues of material fact as to whether State Farm UIM claims handling

violated IFCA. Finally, the court should have allowed Appellant the opportunity to finalize his discovery into the incentive pay programs before making a final ruling disposing of the case.

C. State Farm Violated a Regulation Governing the Business of Insurance Claims Handling, Which Provides Appellant an Cause of Action Under the CPA.

An insurer who acts in bad faith or violates an insurance statute or regulation may also be liable under the CPA, RCW 19.86 et. seq. An insurer that violates the common law duty of good faith commits an “unfair or deceptive act” under the CPA. The CPA provides that unfair or deceptive acts in the conduct of trade or commerce are unlawful. RCW 19.86.020.

To prevail on a CPA claim, a claimant need only show evidence of: (1) an unfair or deceptive act or practice in trade or commerce that impacts public interest, and (2) resulting injury to the claimant. *James E. Torina Fine Homes, Inc. v. Mut. Of Enumclaw Ins. Co.*, 118 Wn.App. 12, 20, 74 P.3d 648 (2003), *review denied*, 151 Wn.2d 1010 (2004). Any act that qualifies as an unfair claims settlement practice in WAC 284-30-330 constitutes a per se unfair trade practice impacting public interest. *Id.* at 20-21 (citing *Kallevig*, 114 Wn.2d at 923).

As noted in the previous IFCA Argument/Analysis, the facts show

State Farm's unreasonable handling of Appellant's UIM claim, resulting in a violation of WAC 284-30-330(7). Such is a per se unfair/deceptive trade practice which resulted in monetary injury to Plaintiff, who had to pay increased litigation attorney fees and costs as a result. Again, the only issue remaining under this theory will be the full amount of damages owed by State Farm to be determined at a later date once discovery is completed.

As such, the superior court should have granted Appellant Perez' motion for partial summary judgment and denied State Farm's motion for full summary judgment. Alternatively, given State Farm's substandard evaluation and violation of WAC 284-30-330(7) and the CPA, it would have been prudent for the trial court to allow Appellant to utilize the remaining seven (7) months of discovery remaining to complete his discovery into State Farm's incentive program, including production of the personnel files of the pertinent State Farm employees.

D. The Superior Court Should Have Denied State Farm's Motion for Summary Judgment as There was Evidence of State Farm's Bad Faith Conduct Before the Superior Court and Additional Evidence Necessary Through Discovery Before Coming to a Final Conclusion.

Insurers have a fiduciary relationship with its insured. *Coventry Associates v. American States Ins. Co.*, 136 Wn.2d 269, 961 P.2d 933, (1998) citing *Tank v. State Farm Fire & Cas. Co.*, 105 Wn. 2d 381, 751

P.2d 1133 (1986). In light of the fiduciary relationship, an insurer has an obligation to give the rights of the insured the same consideration that it gives to its own monetary interests. *Truck Ins. Exchange v. Vanport Homes, Inc.*, 147 Wn.2d 757, 58 P.3d 276 (2002). The duty of good faith requires insurers to give equal consideration in all matters to the policy holders interests as well as its own. *American States Ins. Co. v. Symes of Silverdale, Inc.*, 150 Wn.2d 462, 78 P.3d 1266 (2003). An insurer acts in bad faith when it overemphasizes its own interests. *Anderson v. State Farm Mut. Ins. Co.*, 101 Wn.App. 523, 2 P.3d 1028 (2000), *review denied*, 142 Wn.2d 1017 (2001). This duty is broad and an insurer may breach it by conduct short of intentional bad faith or fraud. *Ind. Indem. Co. of the NW, Inc. v. Kallevig*, 114 Wn.2d 907, 792 P.2d 520 (1990).

An insured establishes bad faith when it shows an insurer's act was "unreasonable, frivolous, or unfounded." *Kirk v. Mt. Airy Ins. Co.*, 134 Wn.2d 558 951 P.2d 1124 (1998). Whether an insurer acted in bad faith is a question of fact. *Smith v. Safeco Ins. Co.*, 150 Wn.2d 478 (2003). The existence of some theoretical reasonable basis for its action by an insurance company does not avail itself entitlement to summary judgment as the insured may present evidence that the insurer's alleged reasonable basis was not the actual basis for its action. *Smith, Id.* at 486. An insured making a UIM claim, even though it creates a form of an adversarial

relationship, is still entitled to a duty of good faith and fair dealing from his insurer and has a reasonable expectation that he will be dealt with fairly and in good faith. *Ellwein v. Hartford Accident & Indem. Co.*, 142 Wn.2d 766, 780 (2001) overruled on other grounds (summary judgment standard); *Smith v. Safeco Ins. Co.*, 150 Wn.2d 478 (2003).

In *Safeco Ins. v. Butler*, 118 Wn.2d 383, 823 P.2d 499 (1992), the Court stated that the bad faith action “sounds in tort”. The tort is largely premised upon the fiduciary relationship that exists between the insurer and insured. *Id.*, and also see *Smith v. Safeco Ins. Co.*, 150 Wn.2d 478, 484, 78 P.3d 1274 (2003). “The tort of bad faith has been defined as a breach of the obligation to deal fairly with an insured, giving equal consideration to the insured’s interest.” *Anderson v. State Farm Mut. Ins. Co.*, 101 Wn.App. 323, 329, 2 P.3d 1029 (2000). Because bad faith is a tort, in the context of liability insurance, an insured “is entitled to a trial to prove the amount of damages, both financial and emotional caused by [the insurer’s] bad faith . . . “ *Id.* at 333. “Unlike the injury in the CPA claim, the injury alleged [in a bad faith claim] need not be economic and may include emotional distress or personal injury.” *American Manufacturers Mut. Ins. Co. v. Osborn*, 104 Wn.App. 686, 698, 17 P.3d 1229 (2001).

Long before IFCA, RCW 48.30 et. seq. prohibited insurance

companies from using unfair or deceptive acts in the conduct of such business. The statute authorizes the insurance commissioner to promulgate regulations that define minimum standards for insurance practices. See RCW 48.30.010(2), WAC 284-30-300. The Washington Administrative Code, WAC 284-30-300 through WAC 284-30-800 provide these standards and further provide that a violation of the standards constitutes a breach of the insurer's duty of good faith. *Am. Mfrs. Ins. Co. v. Osborn*, 104 Wn.App. 686, 697, 17 P.3d 1229 (2001). See also, *Anderson v. State Farm Mut. Ins. Co.*, 101 Wn.App. 523, 2 P.3d 1028 (2000), *review denied*, 142 Wn.2d 1017 (2001)(a violation of WAC 284-30-350 also constitutes a per se violation under the CPA).

In this case, Appellant submitted evidence to the superior court that State Farm previously determined through its PIP process that its insured's shoulder injury/surgery was reasonable and necessary accident related care for which first party benefits were due to Appellant Perez. For reasons to yet be determined through discovery, in its UIM claim evaluation State Farm did not utilize the authority provided by Appellant to use the PIP file, even though the State Farm PIP team had already made a determination that the shoulder injury/surgery was accident related and entitled Appellant to first party benefits. This alone provides an issues of material facts in which a jury would question the real motivations of the

State Farm UIM adjuster in flip flopping and coming to the February 14, 2012, determination that the shoulder injury/surgery was not accident related, entitling Appellant to his UIM benefits for which he paid premiums.

Additionally, specific chiropractic records were also presented to the court that were available to the UIM adjuster showing that State Farm failed to take into account evidence of a shoulder injury early after the accident, rather than State Farm's UIM evaluation of February 14, 2012, in which they noted that no shoulder symptoms were present until three (3) months after the motor vehicle accident. State Farm either somehow ignored or discounted these records, without any type of further medical evaluation, and made a decision that favored itself. In light of State Farm's flip-flopping in the PIP and UIM first party claims files and records contrary to its UIM evaluation, a jury could clearly conclude that State Farm put its own interest above that of its insured in the handling of his UIM claim. A jury could also find the culmination of the above resulted in the violation of WAC 284-30-330(7), and thus State Farm acted in bad faith.

Again, discovery was ongoing into State Farm's incentive plan that provided the UIM team with incentive pay when they helped the company

obtain its goals, including taking in more money than it pays out. In reducing claims payouts, the UIM team helps State Farm become more profitable. Despite the expert declaration from insurance expert Stephen Stzelec, the court did not allow Appellant to obtain information necessary in discovery to prove that this was part of the true basis for State Farm's decision on the UIM claim. Appellant submits he should have been able to complete his necessary discovery before the court dismissed his entire case. For this reason, State Farm's motion for summary judgment should have been denied on the bad faith claims.

**E. Issues of Fact Exist as to Whether State Farm was
Negligent in the handling of Appellant's UIM Claim**

The elements of a negligence action are duty, breach, proximate cause, and damages. *Mathis v. Ammons*, 84 Wn.App. 411 (1996). Additionally, "a statute may impose a duty that is additional to, and different from, the duty to exercise ordinary care." *Id.* at 416. "A statute has this effect when it meets a four-part test drawn from the RESTATEMENT (SECOND) OF TORTS: The statute's purposes, exclusively or in part, must be (1) to protect a class of persons that includes the person whose interest is invaded; (2) to protect the particular interest invaded; (3) to protect that interest against the kind of harm that resulted; and (4) to protect that interest against the particular hazard from

which the harm resulted.” *Id.* “When a statute meets this four-part test, a negligence action will involve not just a common law duty to exercise ordinary care, but also a statutory duty to comply with whatever the pertinent statute says.” *Id.* at 417.

As previously noted, Appellant Perez set forth facts that State Farm violated WAC 284-30-330(7) and was within the class of those intended to be protected by the insurance claims settlement practices therein as a first party insured. He also previously noted being proximately caused to incur increased attorneys fees and legal costs as he was forced to litigate to obtain his UIM benefits. Whether the violation of WAC 284-30-330 along with any other duties breached by the UIM claims team in the evaluation of his UIM claim is an issue of fact for the jury (i.e. properly evaluating the records, utilizing the PIP file or a timely review by a medical professional).

F. Breach of Contract Claim

Appellant waives his right of appeal on the breach of contract claim.

G. Request For Costs and Attorney Fees on Appeal Under IFCA

Appellant Perez respectfully requests all litigation costs and expenses incurred through this appeal pursuant to RAP 18.1. Under IFCA and the CPA, Appellants also request an award of reasonable attorneys fees and

actual and statutory litigation costs from State Farm pursuant to RCW 48.30.015(3) and RCW 19.86.090.

VII. CONCLUSION AND RELIEF REQUESTED

In this case, State Farm violated WAC 284-30-330(7) by compelling its insured to submit to litigation to recover his UIM benefits after offering substantially less than the amount ultimately recovered through litigation. This WAC is one of the Insurance Commissioner's minimum standards of unfair claims settlement practices. WAC 284-30-330 is one of five (5) enumerated WAC provision of IFCA that automatically trigger an award of attorneys' fees, actual and statutory litigation costs, including expert witness fees. A violation also allows a superior court discretion to award treble damages. The language of IFCA and legislative history show that it was intended to provide a first party insured an independent cause of action for a violation of one of the enumerated WAC violations in RCW 48.15.030(5).

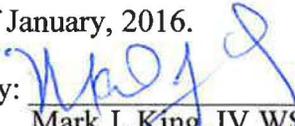
After an offer of \$0 in UIM benefits, it took over a year of litigation and increased legal fees and costs to finally obtain the proceeds of his UIM benefits for which he paid premiums for in a time of need. Despite medical records supporting his right shoulder injury/surgery as accident related, the State Farm UIM adjuster either ignored or discounted those records without explanation. Additionally, despite being given specific

authorization to utilize the first party PIP file, in which State Farm had already made a determination and paid first party benefits on the right shoulder injury/surgery as accident related, and without explanation, the State Farm UIM unit decided not to utilize this. The State Farm adjuster then, without the benefit of any medical guidance for causation on a SLAP tear, decided that the shoulder injury/surgery was not accident related and denied the insured any payment of his UIM benefits. State Farm's claim that its records review three (3) months later did not cure its IFCA violation, in which it had thirty (30) days to resolve the issue.

Moreover, discovery in litigation revealed an incentive plan available to the UIM adjuster and supervisor that he believes provides the true reasons for the substandard UIM evaluation. However, the superior court would not allow Appellant access to the necessary personnel files to prove this as part of his case. This is also a basis to set aside summary judgment in favor of State Farm as there was still another seven (7) months of discovery to allow Appellant the ability to obtain evidence to prove his claims.

Appellant requests the appeals court reverse the superior court's granting of summary judgment in favor of State Farm and grant partial summary judgment in favor of Appellant Perez for the per se violations of IFCA and the CPA.

Respectfully submitted this 15th day of January, 2016.

By: 

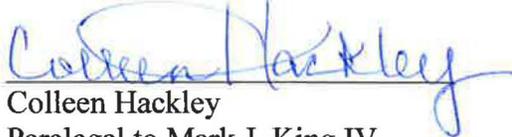
Mark J. King, IV WSBA 29764
Attorney for Appellant Isidoro
Perez-Crisantos

CERTIFICATE/DECLARATION OF SERVICE

I hereby certify that on the 15th day of January, 2016, I caused to be served the a true and correct copy of Appellant's Brief, by the method(s) indicated below (if by mail, postage prepaid):

Emmelyn Hart
Lewis Brisbois
Bisgaard & Smith
1111 Third Ave, Ste. 2700
Seattle, WA 98101

U.S. MAIL
 HAND DELIVERED
 ELECTRONIC DELIVERY
Emmelyn.Hart@lewisbrisbois.com


Colleen Hackley
Paralegal to Mark J. King IV

FINAL BILL REPORT

ESSB 5726

C 498 L 07

Synopsis as Enacted

Brief Description: Creating the insurance fair conduct act.

Sponsors: Senate Committee on Consumer Protection & Housing (originally sponsored by Senators Weinstein, Kline and Franklin).

Senate Committee on Consumer Protection & Housing

House Committee on Insurance, Financial Services & Consumer Protection

Background: Insurance claims are governed by general principles of contract and tort law, statute, and regulations promulgated by the Insurance Commissioner. If an insurer denies a valid claim, the insured may sue to enforce the insurance contract and force the insurer to pay according to the policy.

An insured may also bring an action against an insurer for acting in bad faith. To succeed on a claim of bad faith, the insured must demonstrate that the insurer's denial of the claim was unreasonable, frivolous, or unfounded. Additionally, an insured may bring a claim under the Consumer Protection Act if the insurer's denial of a claim amounts to an unfair or deceptive trade practice.

By statute, the Insurance Commissioner has the authority to promulgate rules prohibiting unfair and deceptive business practices by the insurance industry. Current insurance regulations require an insurer to attempt in good faith to make a fair, prompt, and equitable settlement of a claim when liability is relatively clear and to generally observe standards of reasonableness in all aspects of its claim settlement practices. The Commissioner may fine an insurer for failure to comply with these regulations.

Summary: Insurers may not unreasonably deny insurance coverage of payment of benefits. First party claimants to an insurance policy may sue insurers for unreasonable denials of coverage or payments of benefits.

First party claimant is defined as an individual, corporation, association, partnership or any other legal entity who asserts the right to payment as a covered person under the insurance policy at issue.

Damages are available to plaintiffs upon a finding that the insurer unreasonably denied coverage or payment. A plaintiff may also recover damages upon a finding that the insurer violated one of five rules adopted by the Office of the Insurance Commissioner (OIC) and codified in chapter 284-30 of the Washington Administrative Code (WAC) or any additional rules that the OIC adopts that are intended to implement this act. The five WAC rules regulate insurers' actions in the following areas: (1) specific unfair claims practices; (2) misrepresentation of policy provisions; (3) failure to acknowledge pertinent communications;

(4) standards for prompt investigation; and (5) standards for prompt fair, and equitable settlements.

Upon finding a violation of the act, the court must award: (1) the actual damages sustained; (2) reasonable attorney's fees; and (3) actual and statutory litigation costs, including expert witness fees. The court has the discretion to also increase the total award of damages to an amount that does not exceed three times the actual damages suffered by the plaintiff. A court's ability to make any other determination regarding unfair or deceptive practices or to provide any other available remedy is not limited.

Health plans offered by health carriers are exempt from this bill.

A claimant must provide 20 days written notice to both the insurer and the OIC before filing suit under this section. The notice must provide for the basis of the cause of action. If the insurer does not resolve the claim during that 20-day period, the claimant may then bring suit without any further notice to the insurer.

Votes on Final Passage:

Senate	30	17	
House	59	38	(House amended)
Senate	31	18	(Senate concurred)

Effective: July 22, 2007

Referendum Measure 67
Passed by the Legislature and Ordered Referred by Petition

AN ACT Relating to creating the insurance fair conduct act; amending RCW 48.30.010; adding a new section to chapter 48.30 RCW; creating a new section; and prescribing penalties.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF WASHINGTON:

NEW SECTION. **Sec. 1.** This act may be known and cited as the insurance fair conduct act.

Sec. 2. RCW 48.30.010 and 1997 c 409 s 107 are each amended to read as follows:

(1) No person engaged in the business of insurance shall engage in unfair methods of competition or in unfair or deceptive acts or practices in the conduct of such business as such methods, acts, or practices are defined pursuant to subsection (2) of this section.

(2) In addition to such unfair methods and unfair or deceptive acts or practices as are expressly defined and prohibited by this code, the commissioner may from time to time by regulation promulgated pursuant to chapter 34.05 RCW, define other methods of competition and other acts and practices in the conduct of such business reasonably found by the commissioner to be unfair or deceptive after a review of all comments received during the notice and comment rule-making period.

(3)(a) In defining other methods of competition and other acts and practices in the conduct of such business to be unfair or deceptive, and after reviewing all comments and documents received during the notice and comment rule-making period, the commissioner shall identify his or her reasons for defining the method of competition or other act or practice in the conduct of insurance to be unfair or deceptive and shall include a statement outlining these reasons as part of the adopted rule.

(b) The commissioner shall include a detailed description of facts upon which he or she relied and of facts upon which he or she failed to rely, in defining the method of competition or other act or practice in the conduct of insurance to be unfair or deceptive, in the concise explanatory statement prepared under RCW 34.05.325(6).

(c) Upon appeal the superior court shall review the findings of fact upon which the regulation is based de novo on the record.

(4) No such regulation shall be made effective prior to the expiration of thirty days after the date of the order by which it is promulgated.

(5) If the commissioner has cause to believe that any person is violating any such regulation, the commissioner may order such person to cease and desist therefrom. The commissioner shall deliver such order to such person direct or mail it to the person by registered mail with return receipt requested. If the person violates the order after expiration of ten days after the cease and desist order has been received by him or her, he or she may be fined by the commissioner a sum not to exceed two hundred and fifty dollars for each violation committed thereafter.

(6) If any such regulation is violated, the commissioner may take such other or additional action as is permitted under the insurance code for violation of a regulation.

(7) An insurer engaged in the business of insurance may not unreasonably deny a claim for coverage or payment of benefits to any first party claimant. "First party claimant" has the same meaning as in section 3 of this act.

NEW SECTION. **Sec. 3.** A new section is added to chapter 48.30 RCW to read as follows:

(1) Any first party claimant to a policy of insurance who is unreasonably denied a claim for coverage or payment of benefits by an insurer may bring an action in the superior court of this state to recover the actual damages sustained, together with the costs of the action, including reasonable attorneys' fees and litigation costs, as set forth in subsection (3) of this section.

(2) The superior court may, after finding that an insurer has acted unreasonably in denying a claim for coverage or payment of benefits or has violated a rule in subsection (5) of this section, increase the total award of damages to an amount not to exceed three times the actual damages.

(3) The superior court shall, after a finding of unreasonable denial of a claim for coverage or payment of benefits, or after a finding of a violation of a rule in subsection (5) of this section, award reasonable attorneys' fees and actual and statutory litigation costs, including expert witness fees, to the first party claimant of an insurance contract who is the prevailing party in such an action.

(4) "First party claimant" means 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.

(5) A violation of any of the following is a violation for the purposes of subsections (2) and (3) of this section:

(a) WAC 284-30-330, captioned "specific unfair claims settlement practices defined";
(b) WAC 284-30-350, captioned "misrepresentation of policy provisions";
(c) WAC 284-30-360, captioned "failure to acknowledge pertinent communications";
(d) WAC 284-30-370, captioned "standards for prompt investigation of claims";
(e) WAC 284-30-380, captioned "standards for prompt, fair and equitable settlements applicable to all insurers"; or
(f) An unfair claims settlement practice rule adopted under RCW 48.30.010 by the insurance commissioner intending to implement this section. The rule must be codified in chapter 284-30 of the Washington Administrative Code.

(6) This section does not limit a court's existing ability to make any other determination regarding an action for an unfair or deceptive practice of an insurer or provide for any other remedy that is available at law.

(7) This section does not apply to a health plan offered by a health carrier. "Health plan" has the same meaning as in RCW 48.43.005. "Health carrier" has the same meaning as in RCW 48.43.005.

(8)(a) Twenty days prior to filing an action based on this section, a first party claimant must provide written notice of the basis for the cause of action to the insurer and office of the insurance commissioner. Notice may be provided by regular mail, registered mail, or certified mail with return receipt requested. Proof of notice by mail may be made in the same manner as prescribed by court rule or statute for proof of service by mail. The insurer and insurance commissioner are deemed to have received notice three business days after the notice is mailed.

(b) If the insurer fails to resolve the basis for the action within the twenty-day period after the written notice by the first party claimant, the first party claimant may bring the action without any further notice.

(c) The first party claimant may bring an action after the required period of time in (a) of this subsection has elapsed.

(d) If a written notice of claim is served under (a) of this subsection within the time prescribed for the filing of an action under this section, the statute of limitations for the action is tolled during the twenty-day period of time in (a) of this subsection.

RCW 48.30.015**Unreasonable denial of a claim for coverage or payment of benefits.**

(1) Any first party claimant to a policy of insurance who is unreasonably denied a claim for coverage or payment of benefits by an insurer may bring an action in the superior court of this state to recover the actual damages sustained, together with the costs of the action, including reasonable attorneys' fees and litigation costs, as set forth in subsection (3) of this section.

(2) The superior court may, after finding that an insurer has acted unreasonably in denying a claim for coverage or payment of benefits or has violated a rule in subsection (5) of this section, increase the total award of damages to an amount not to exceed three times the actual damages.

(3) The superior court shall, after a finding of unreasonable denial of a claim for coverage or payment of benefits, or after a finding of a violation of a rule in subsection (5) of this section, award reasonable attorneys' fees and actual and statutory litigation costs, including expert witness fees, to the first party claimant of an insurance contract who is the prevailing party in such an action.

(4) "First party claimant" means 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.

(5) A violation of any of the following is a violation for the purposes of subsections (2) and (3) of this section:

(a) WAC 284-30-330, captioned "specific unfair claims settlement practices defined";

(b) WAC 284-30-350, captioned "misrepresentation of policy provisions";

(c) WAC 284-30-360, captioned "failure to acknowledge pertinent communications";

(d) WAC 284-30-370, captioned "standards for prompt investigation of claims";

(e) WAC 284-30-380, captioned "standards for prompt, fair and equitable settlements applicable to all insurers"; or

(f) An unfair claims settlement practice rule adopted under RCW 48.30.010 by the insurance commissioner intending to implement this section. The rule must be codified in chapter 284-30 of the Washington Administrative Code.

(6) This section does not limit a court's existing ability to make any other determination regarding an action for an unfair or deceptive practice of an insurer or provide for any other remedy that is available at law.

(7) This section does not apply to a health plan offered by a health carrier. "Health plan" has the same meaning as in RCW 48.43.005. "Health carrier" has the same meaning as in RCW 48.43.005.

(8)(a) Twenty days prior to filing an action based on this section, a first party claimant must provide written notice of the basis for the cause of action to the insurer and office of the insurance commissioner. Notice may be provided by regular mail, registered mail, or certified mail with return receipt requested. Proof of notice by mail may be made in the same manner as prescribed by court rule or statute for proof of service by mail. The insurer and insurance commissioner are deemed to have received notice three business days after the notice is mailed.

(b) If the insurer fails to resolve the basis for the action within the twenty-day period after the written notice by the first party claimant, the first party claimant may bring the action without any further notice.

(c) The first party claimant may bring an action after the required period of time in (a) of this subsection has elapsed.

(d) If a written notice of claim is served under (a) of this subsection within the time prescribed for the filing of an action under this section, the statute of limitations for the action is tolled during the

1/9/2016

RCW 48.30.015: Unreasonable denial of a claim for coverage or payment of benefits.

twenty-day period of time in (a) of this subsection.

[2007 c 498 § 3 (Referendum Measure No. 67, approved November 6, 2007).]

NOTES:

Short title—2007 c 498: "This act may be known and cited as the insurance fair conduct act." [2007 c 498 § 1.]

