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IN THE SUPREME COURT OF THE STATE OF WASHINGTON

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ISIDORO PEREZ-CRISANTOS,

Plaintiff/Appellant,

vs.

STATE FARM FIRE & CASUALTY COMPANY,

Defendant/Respondent.

FILED E  
AUG 23 2016  
WASHINGTON STATE  
SUPREME COURT

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BRIEF OF AMICUS CURIAE  
WASHINGTON STATE ASSOCIATION FOR JUSTICE FOUNDATION

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## I. IDENTITY AND INTEREST OF AMICUS CURIAE

The Washington State Association for Justice Foundation (WSAJ Foundation) is a not-for-profit corporation organized under Washington law, and a supporting organization to Washington State Association for Justice. WSAJ Foundation operates an amicus curiae program and has an interest in the rights of persons seeking redress under the civil justice system, including an interest in the proper interpretation and application of Laws of 2007, Ch. 498 (Referendum Measure 67, approved November 6, 2007), known as the Insurance Fair Conduct Act (IFCA).<sup>1</sup>

## II. INTRODUCTION AND STATEMENT OF THE CASE

This appeal provides the Court with an opportunity to interpret IFCA and determine whether the violation of a Washington Administrative Code (WAC) regulation enumerated in RCW 48.30.015 may serve as an independent basis for imposing liability under this statute.

This action was brought by Isidoro Perez-Crisantos (Perez) against his insurer, State Farm Fire & Casualty Company (State Farm), for the alleged mishandling of his underinsured motorist (UIM) claim.<sup>2</sup> The underlying facts are drawn from the briefing of the parties. See Perez Br. at 1-2, 5-15; State Farm Br. at 1-2, 3-8. For purposes of this brief, the following

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<sup>1</sup> IFCA is codified in RCW 48.30.010(7) and RCW 48.30.015. The texts of Laws of 2007, Ch. 498 and RCW 48.30.010-.015 are reproduced in the Appendix to this brief. Because RCW 48.30.015 sets forth the substance of this law, it is also referred to as "IFCA" in this brief.

<sup>2</sup> Mr. Perez-Crisantos refers to himself as "Perez" in his briefing, and WSAJ Foundation does the same. See Perez Br. at 1.

facts are relevant: Perez was involved in a motor vehicle accident in November of 2010 and sustained personal injuries. Apparently, responsibility for the accident was not disputed and the tortfeasor's liability insurer paid Perez the policy limits. Perez sought Personal Injury Protection (PIP) coverage from State Farm, and it provided these benefits for medical expenses and wage loss. Perez also made a claim with State Farm for UIM benefits, urging that the damages he sustained in the accident exceeded the tortfeasor's liability limit and PIP benefits paid by State Farm. State Farm rejected Perez' UIM claim and Perez initiated this action seeking UIM benefits and damages against State Farm for mishandling the UIM claim. Perez alleged State Farm is liable for breach of contract, violation of IFCA, violation of the Consumer Protection Act, Ch. 19.86 RCW (CPA), insurance bad faith and negligence.

In superior court, the parties agreed to bifurcate the action and proceed to arbitration on the UIM claim, resulting in an award in Perez' favor in excess of the liability limits and PIP benefits already received. State Farm paid the award in full. Thereafter, Perez moved successfully to amend his complaint to specifically allege that in handling Perez' claim State Farm violated WAC 284-30-330(7), thereby subjecting it to liability on this basis under both IFCA and the CPA. See Perez Br. at 9, 14. Under WAC 284-30-330(7), it is an unfair act or practice for an insurer to compel an insured in Perez' position "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.” Id.<sup>3</sup>

State Farm moved for summary judgment of dismissal of all of Perez' claims, contending no genuine issue of material fact exists regarding any theory of liability. State Farm further urged that the dispute between the parties was merely one over the value of the UIM claim, which was fully resolved by the arbitration award. Perez opposed State Farm's motion and moved for a partial summary judgment that State Farm had violated WAC 284-30-330(7), rendering it liable under both IFCA and the CPA as a matter of law.

The superior court denied Perez' motion for partial summary judgment and granted State Farm's motion for summary judgment of dismissal of all of Perez' claims, finding no genuine issue of material fact on any theory of recovery.

Perez appealed directly to this Court the superior court's dismissal of all of his claims except the breach of contract claim, and the denial of his motion for partial summary judgment on the IFCA and CPA claims. This Court accepted direct review.

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<sup>3</sup> The full text of the current version of WAC 284-30-330 is reproduced in the Appendix to this brief.

### III. ISSUE PRESENTED

Does an insured have a cause of action under IFCA for the violation of an Insurance Commissioner's administrative regulation enumerated in RCW 48.30.015(5)?

See Perez Br. at 4 (Issue 1).<sup>4</sup>

### IV. SUMMARY OF ARGUMENT

Reading the provisions of RCW 48.30.015 together, the subsection (1) unreasonable denial standard is not the only basis for imposing IFCA liability. Violation of a regulation enumerated in subsection (5) of RCW 48.30.015 is also actionable in its own right, whether the text of the statute is viewed as clear or ambiguous.

Under the "plain meaning" rule of statutory construction, when RCW 48.30.015(1) is considered in the context of the entire statute, a violation of a regulation enumerated in subsection (5) is actionable under IFCA, and should be viewed as an independent basis for liability. While subsection (1) of RCW 48.30.015 does not expressly reference subsection (5), or state that a violation of a listed administrative regulation is itself actionable, this is implicit in a fair reading of the statute as a whole, particularly because of the alternative ways an insured may qualify for the remedies provided for in subsections (2) and (3) of the statute. Otherwise, if violation of subsection (1) is the only way liability can be estab-

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<sup>4</sup> While Perez raises other issues on review, see Perez Br. at 4-5, this brief only addresses whether a violation of a regulation enumerated in RCW 48.30.015(5) is independently actionable under the statute.

lished, then the relief provided for in subsections (2) and (3) will *always* be available, and the reference in those subsections to violation of a WAC in subsection (5) is meaningless.

If the foregoing “plain meaning” contextual analysis of RCW 48.30.015 is not determinative, at the very least it demonstrates the statute is ambiguous as to whether a violation of a regulation enumerated in subsection (5) is independently actionable. This ambiguity allows the Court to consider the legislative history of IFCA, in which event the Referendum Measure 67 Voters' Pamphlet clearly sets forth a legislative intent that such violations are actionable in their own right.

## V. ARGUMENT

### A.) Overview Of Remedies Available To Insureds For An Insurer's Wrongful Conduct, Separate And Distinct From IFCA.

In 2007, the Washington Legislature enacted IFCA, subject to referendum, and the voters subsequently approved this law as Referendum Measure 67. See Appendix. At the time IFCA became law, there was a fairly broad range of remedies available to insureds for wrongful conduct of an insurer. These other remedies are preserved by IFCA. See RCW 48.30.015(6) (providing that “[t]his 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”). These remedies, all of which remain available to this day, are surveyed briefly below:

***Re: Breach of Contract***

The insurer-insured relationship arises from the insurance contract. Recovery for breach of contract is typically limited to amounts due under the contract plus interest. See Kirk v. Mt. Airy Ins. Co., 134 Wn.2d 558, 560, 951 P.2d 1124 (1998). Generally, there is no recovery for general or punitive damages, or attorney fees and costs.

***Re: Equitable Attorney Fees***

Given the disparity of bargaining power between insurer and insured, concern that litigation costs erode contracted-for benefits, and a public policy that favors prompt payment of claims, a first party insured who prevails in litigation with the insurer regarding a coverage issue is entitled to recover attorney fees and costs. See Olympic S.S. Co. Inc. v. Centennial Ins. Co., 117 Wn.2d 37, 811 P.2d 673 (1991); McGreevy v. Oregon Mut. Ins. Co., 128 Wn.2d 26, 904 P.2d 731(1995). This one-way fee shifting is not available if the dispute is over the value of a claim. See Dayton v. Farmers Ins. Group, 124 Wn.2d 277, 280-81, 876 P.2d 896 (1994).

***Re: Common Law Tort Of Insurance Bad Faith***

Independent of contract, insurer and insured have a duty to act in good faith, which is based upon public interest and the quasi-fiduciary nature of the insurer's obligations to its insured. See RCW 48.01.030 (declaring

public interest in insurance and duty of good faith); Tank v. State Farm Fire & Cas. Co., 105 Wn.2d 381, 386, 715 P.2d 1133 (1986) (recognizing insurer's enhanced duty of good faith requiring that "an insurer must deal fairly with an insured, giving equal consideration *in all matters* to the insured's interests"); Safeco Insurance v. Butler, 118 Wn.2d 383, 389-90, 823 P.2d 499 (1992) (clarifying quasi-fiduciary nature of insurer-insured relationship under equal consideration rule). An insurer's duty of good faith in the UIM context is slightly different, given that the insurer "stands in the shoes" of the tortfeasor. See Ellwein v. Hartford Co., 142 Wn.2d 766, 780, 15 P.3d 640 (2001), *overruled on other grounds*, Smith v. Safeco Ins. Co., 150 Wn.2d 478, 78 P.3d 1274 (2003). In the UIM context, the insurer must deal fairly and in good faith with its insured, notwithstanding the adversarial aspects of the relationship. See Ellwein, 142 Wn.2d at 780-81.

Liability for common law insurance bad faith sounds in tort, and is based on a finding that conduct is unreasonable, frivolous or unfounded. See Am. Best Food, Inc. v. Alca London, Ltd., 168 Wn.2d 398, 412, 229 P.3d 693 (2010) (recognizing that unreasonable conduct is actionable); see also WPI 320.02 (pattern instruction defining insurer's failure to act in good faith to include unreasonable, frivolous or unfounded conduct).

Recovery for bad faith conduct may include "consequential damages" and "general tort damages." Coventry Assocs. v. American States

Ins. Co., 136 Wn.2d 269, 284-85, 961 P.2d 933 (1998); see also St. Paul Ins. Co. v. Onvia, Inc., 165 Wn.2d 122, 129-33, 196 P.3d 664 (2008).<sup>5</sup>

Punitive damages and attorney fees are not available.<sup>6</sup>

***Re: Common Law Negligence***

While there is admittedly some conceptual overlap between common law insurance bad faith and common law negligence, Washington case law and commentary have recognized a separate theory of recovery against an insurer based on negligence. See First State Ins. Co. v. Kemper Nat'l Ins. Co., 94 Wn. App. 602, 612-13, 971 P.2d 953 (1999) (indicating negligence and bad faith are distinct theories of recovery); Murray v. Mossman, 56 Wn.2d 909, 911, 355 P.2d 985 (1960) (similar); see also Thomas V. Harris, Washington Insurance Law, §§7.02-.04 (3<sup>rd</sup> ed. 2010).<sup>7</sup> Negligence may be

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<sup>5</sup> Coventry, 136 Wn.2d at 284-85, equates "consequential damages" with damages incurred "as a result of the insurer's breach of its contractual and statutory obligations" and "amounts [the insured] has incurred as a result of the bad faith." Accord Onvia, 165 Wn.2d at 133. The Court of Appeals has interpreted "general tort damages" as including damages for mental or emotional distress. See Am. Mfrs. Mut. Ins. Co. v. Osborn, 104 Wn. App. 686, 698, 17 P.3d 1229 (citing Coventry), *review denied*, 144 Wn.2d 1005 (2001); Anderson v. State Farm Mut. Ins. Co., 101 Wn. App. 323, 333, 2 P.3d 1029 (2000) (citing Coventry), *review denied*, 142 Wn.2d 1017 (2001); Werlinger v. Clarendon Nat'l Ins. Co., 129 Wn.App. 804, 809, 120 P.3d 593 (2005) (citing Anderson), *review denied*, 157 Wn.2d 1004 (2006); Miller v. Kenny, 180 Wn. App. 772, 802, 325 P.3d 278 (2014) (citing Anderson); but cf. Schmidt v. Coogan, 181 Wn.2d 661, 676-77, 335 P.3d 424 (2014) (3-Justice lead opinion by Wiggins, J., noting that the availability of emotional distress damages for insurance bad faith has not been definitively addressed by the Supreme Court); id., 181 Wn.2d at 689-90 (Stephens, J., dissenting, indicating these damages recoverable).

<sup>6</sup> Under some circumstances a liability insurer may be liable in tort for damages awarded against its insured in excess of the policy limits. See Murray v. Aetna Cas. & Sur. Co., 61 Wn.2d 618, 620-21, 379 P.2d 731 (1963). Similarly, in cases involving a liability insurer's failure to defend, an insured (or assignee) may be awarded "coverage by estoppel" as a result of the insurer's wrongful conduct. See Truck Ins. Exch. v. VanPort Homes, Inc., 147 Wn.2d 751, 764-66, 58 P.3d 276 (2002).

<sup>7</sup> State Farm overlooks this precedent, relying on federal district court opinions in describing insurance bad faith and negligence claims as indistinguishable. See State Farm Br. at 37-39.

found when the insurer fails to exercise ordinary care in discharging its duty to its insured. See Kemper, 94 Wn. App. at 612. Damages recoverable under a theory of negligence should be similar to those available under a claim for insurance bad faith. See WPI 30.02.01, 30.04 & 30.06 (and Comments) (pattern instructions on tort damages).

***Re: CPA***

Because the business of insurance implicates the public interest, an insured may also sue an insurer for violations of the CPA. See RCW 48.01.030 (declaring public interest in insurance); see also RCW 19.86.090 (enabling private CPA actions). Violations of the Insurance Code, Title 48 RCW, and certain Insurance Commissioner regulations (including WAC 284-30-330), are deemed a per se unfair trade practice in private CPA actions. See Industrial Indem. Co. v. Kallevig, 114 Wn.2d 907, 920-25, 792 P.2d 520 (1990); Coventry, 136 Wn.2d at 276-81; Onvia, 165 Wn.2d at 133-34; see also RCW 19.86.170 (describing relationship between Insurance Code and its regulations and the CPA). In determining whether an insurer's conduct gives rise to CPA liability based upon the regulations governing claims-handling practices (see Ch. 284-30 WAC), courts have required proof that the insurer acted unreasonably under the circumstances. See Am. Mfrs. Mut. Ins. v. Osborn, 104 Wn. App. 686, 699, 17 P.3d 1229 (requiring proof of unreasonable conduct under several subsections of WAC 284-30-330 as a basis for proving insurance bad faith

or CPA liability), *review denied*, 144 Wn.2d 1005 (2001); Anderson v. State Farm Mut. Ins. Co., 101 Wn. App. 323, 335, 2 P.3d 1029 (2000) (determining that violation of WAC 284-30-330(7) requires unreasonable conduct by insurer to support insurance bad faith or CPA liability), *review denied*, 142 Wn.2d 1017 (2001).

Under the CPA, an insured may recover "actual damages" for injury to business or property, attorney fees and costs, and injunctive relief for an insurer's wrongful conduct. See RCW 19.86.090. Damages for mental and emotional distress are not recoverable because they do not arise from injury to business or property. See Washington State Physicians Ins. Exch. & Ass'n v. Fisons Corp., 122 Wn.2d 299, 317-18, 858 P.2d 1054 (1993). Under the CPA, a court has discretion to treble the actual damages amount, but only up to a maximum of \$25,000. See RCW 19.86.090.

**B.) Background Regarding IFCA, And Its Enhanced Remedies For First Party Claimants That Are Subjected To Unreasonable Conduct By Insurers.**

When the Legislature enacted and the people of Washington approved IFCA, they did not alter existing civil remedies for insurer misconduct. See RCW 48.30.015(6). Instead, they provided for an additional remedy with several key features, some of which overlap with existing law and some of which are new.

- IFCA requires a twenty-day notice of claim before filing suit, providing an opportunity for the insurer "to resolve the basis for the action within the twenty-day period." RCW 48.30.015(8)(b).
- IFCA expressly creates a cause of action for unreasonable denial of a claim for coverage or the payment of benefits by an insurer.

RCW 48.30.015(1) provides:

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.

This provision supplements the torts of insurance bad faith and negligence, and non-per se violations of the CPA. The relationship of this subsection to subsection (5) is discussed in further detail in § C, infra.

- IFCA allows a first party claimant to recover "actual damages" sustained as a result of the insurer's violation of the act. See RCW 48.30.015(1)-(2). This provision may supplement tort damages recoverable for insurance bad faith and/or negligence, and consequential damages for injury to business or property recoverable under the CPA. The meaning of the undefined phrase "actual damages" is not before the Court in this case.
- IFCA incorporates specified Insurance Commissioner regulations. See RCW 48.30.015(2)-(3) & (5). Subsections (2) and (3) address the availability of additional remedies for either a violation of subsection (1) or

violation of a regulation listed in subsection (5). The extent to which a violation of one of the enumerated regulations is itself actionable under IFCA is addressed in §C, infra.

- IFCA provides for recovery of expenses incurred by an insured who prevails in an IFCA action, including attorney fees, expert witness fees, and costs. See RCW 48.30.015(1), (3) & (5). This supplements attorney fees and costs that may be recoverable under Olympic S.S. and/or the CPA.
- IFCA provides that a court may "increase the total award of damages to an amount not to exceed three times the actual damages." RCW 48.30.015(2). This eclipses treble damages available under the CPA, which are limited to damages arising from injury to business or property, and are subject to a \$25,000 maximum. See RCW 19.86.090. This broad punitive damages provision is perhaps the centerpiece of IFCA, in that the prospect of these damages serves as an additional deterrent against wrongful conduct by an insurer.

**C.) A Violation Of An Insurance Commissioner Regulation Referenced In Subsections (2) And (3) And Enumerated In Subsection (5) Of RCW 48.30.015 Should Be Independently Actionable Under This Statute, Based On Either A "Plain Meaning" Rule Contextual Analysis Or Because The Statute Is Ambiguous And Legislative Intent Requires This Result.**

State Farm argues that under the plain language of RCW 48.30.015, a cause of action is only provided for under subsection (1) when an insured "is unreasonably denied a claim for coverage or payment of benefits by an insurer." See State Farm Br. at 14-17. It further contends that under subsections (2), (3) and (5), a violation of a regulation enumerated in (5) is relevant only in determining whether to award attorney fees or to enhance actual damages. See id.<sup>8</sup> In making this argument, it relies on a line of federal decisions interpreting the statute in this manner. See id. at 17-20 (relying principally on Workland v. Wither-  
spoon, 141 F.Supp.3d 1148, 1155 (E.D. Wash. 2015), rejecting implied cause of action for WAC violation under a "plain reading" of subsection (5)).

On the other hand, Perez argues that RCW 48.30.015 is ambiguous and that, as a result, legislative intent is determinative here because both the "Explanatory Statement" for Referendum Measure 67 and the Washington Legislature Final Bill Report indicate that violation of a specified regulation is independently actionable under IFCA. See Perez Reply Br. at

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<sup>8</sup> State Farm does acknowledge that noncompliance with an enumerated WAC provision may "highlight" when a denial is unreasonable under subsection (1). See State Farm Br. at 8, 13.

1, 4-6; Perez Br. at Appendix (reproducing SSB 5726 Final Bill Report). Perez also points to conflicting authority in federal district court opinions, relying upon Langley v. GEICO Gen. Ins. Co., 89 F.Supp.3d 1083 (E.D. Wash. 2015) (surveying conflicting authority and concluding that an implied cause of action exists for a WAC violation), an analysis that is rejected in Workland. See Perez Reply Br. at 2-3.<sup>9</sup>

This is an issue of first impression for the Court.<sup>10</sup> Under the "plain meaning" rule set forth in Dep't of Ecology v. Campbell & Gwynn, LLC, 146 Wn.2d 1, 9, 93 P.3d 4 (2002), the "fundamental objective is to ascertain and carry out the Legislature's intent...." A Court derives that intent "by construing the language as a whole, *giving effect to every provision.*" Cent. Puget Sound Reg'l Transit Auth. v. Airport Inv. Co., \_\_\_ Wn.2d \_\_\_, 2016 WL 4155004, at \* 5 (August 4, 2016) (emphasis added). Under this rule, no single term or phrase is evaluated in isolation; rather, it is considered in the context of the entire statute and any closely related statutory provisions. See Dep't of Ecology 146 Wn.2d at 10-11. This approach also

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<sup>9</sup> In reaching its conclusion, Workland acknowledges the "vexing relationship between subsections (2) and (3) and subsection (5)," see 141 F.Supp.3d at 1155, and concedes that its reading of the statute fails to "perfectly harmonize the various IFCA subsections," *id.* at 1156. Nonetheless, the court focuses its analysis on the "unreasonably denied" phrase in subsection (1). Under Washington law, the plain meaning rule requires that statutory provisions be interpreted in context. See main text. A federal court sitting in diversity construing a state statute is required to apply the state's rules of statutory construction. See Western States Wholesale Natural Gas Antitrust Litigation v. Oneok, 715 F.3d 716, 746 (9th Cir. 2013). To the extent Workland or any other federal district court case fails to interpret IFCA in accordance with the plain meaning rule discussed above, its analysis is unhelpful.

<sup>10</sup> In Ainsworth v. Progressive Ins. Co., 180 Wn. App. 52, 322 P.2d 6 (2014), a case relied upon by State Farm, see State Farm Br. at 15, 20-23, the Court of Appeals did not reach the issue of whether violation of a WAC enumerated in subsection (5) is independently actionable.

allows for consideration of background facts of which judicial notice can be taken. See id. at 11. If, under this analysis, "the statute remains susceptible to more than one reasonable meaning, the statute is ambiguous and it is appropriate to resort to aids to construction, including legislative history." Id. at 12 (citations omitted).

RCW 48.30.015 should be read as authorizing a cause of action based upon a violation of a regulation enumerated in subsection (5). This result follows under either a "plain meaning" contextual analysis, on the basis that this is implicit in a fair reading of the entire statute, or, if this analysis is rejected, then based upon ambiguity in the statute on this point coupled with a clear legislative history indicating that such violations are actionable in their own right. Each of these analyses is discussed below.

***Re: "Plain Meaning" Contextual Analysis***

Subsections (2) and (3) of RCW 48.30.015 provide:

(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.

(Emphasis added). Subsection (5) references a number of regulations adopted by the Insurance Commissioner, including WAC 284-30-330(7), the subsection relied upon by Perez. See Perez Br. at 4, 14-15.<sup>11</sup> Under WAC 284-30-330(7), an insurer commits an unfair or deceptive act or practice by "[c]ompelling 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." As indicated in §A, supra, proof of a violation of this subsection requires a showing of unreasonableness on the part of the insurer.

Admittedly, this is not a model statute. Nonetheless, subsections (2), (3) and (5) should be read together as indicating a legislative intent that a violation of a regulation enumerated in subsection (5) is actionable, even though the regulations are not expressly referenced in subsection (1) as a basis for liability. The regulations are identified as a basis for possible award of treble damages in subsection (2) and mandatory attorney fees and litigation costs in subsection (3). Notably, both subsection (2) and subsection (3) use the disjunctive "or" in referring to unreasonable denial on the one hand or violation of a WAC on the other, indicating that viola-

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<sup>11</sup> As indicated, WAC 284-30-330 is reproduced in the Appendix to this brief. The current versions of the remaining WACs enumerated in subsection (5) — WAC 284-30-350, 360, 370 and 380 — are also reproduced in the Appendix for the convenience of the Court.

tion of one of these regulations is the *equivalent* of the unreasonable conduct deemed actionable in subsection (1).<sup>12</sup>

Nonetheless, State Farm insists that the plain language of subsection (1) is determinative, and is the sole basis provided by the Legislature for imposing liability. See State Farm Br. at 14-16. The key problem with this argument is that it does not consider subsection (1) in the context of the entire statute. See Dept of Ecology, 146 Wn.2d at 10-11. Under State Farm's reading, the disjunctive language in subsections (2) and (3) — allowing for additional relief on the alternative ground of violation of a rule (regulation) listed in subsection (5) — is rendered superfluous because violation of subsection (1) will *always* be enough to establish the basis for additional relief under subsections (2) and (3), as it is the only purported basis for imposing liability. There would be no need for the Legislature to set forth an alternative means for establishing entitlement to additional relief unless it was also intended to form an independent basis for imposing liability. See State ex. rel. Evergreen v. WEA, 140 Wn.2d 615, 639-40, 992 P.2d 602 (2000) (requiring where possible statutory provisions be harmonized so no part of the statutory scheme is rendered superfluous); City of Seattle v. Winebrenner, 167 Wn.2d 451, 464, 219 P.3d 686 (2009)

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<sup>12</sup> This is unsurprising because the gravamen of a number of these regulations is unreasonable conduct by the insurer. See § A, supra at 9-10. These WACs reflect certain recurring themes that would presumably also support a finding of unreasonable conduct by an insurer, including requirements bearing on promptness (see e.g. WAC 284-30-330(2), (3), (5), (6), (7) & (12); 284-30-370), thoroughness (see e.g. WAC 284-30-330(3), (4) & (9)), and honesty (see e.g. WAC 284-30-330(1) & (2); 284-30-350).

(rejecting an interpretation rendering statutory language superfluous; Madsen, J., concurring). Under State Farm's view, a trier of fact would not reach the issue of violation of a regulation under subsection (5).

On the other hand, the text of subsections (2) and (3) suggests that RCW 48.30.015, taken as a whole, contemplates that proof of a violation of a regulation enumerated in subsection (5) is independently actionable. The Court should recognize the equivalency between the unreasonable conduct generally proscribed in subsection (1) and the unreasonable conduct specifically prohibited in the various regulations listed in subsection (5). This interpretation harmonizes the various subsections and avoids rendering the use of the disjunctive in subsections (2) and (3) meaningless.

Of course, as with unreasonable denial under subsection (1), a regulatory violation under subsection (5) is not actionable unless the insured sustains actual damages.

***Re: Ambiguity Analysis***

If the above contextual analysis is not found to be determinative, then at least it should serve to establish that RCW 48.30.015 is ambiguous as to whether violation of a regulation enumerated in subsection (5) is independently actionable. In this event, the Court may consider legislative history, which should be determinative here. See Dep't of Ecology at 12.

The Referendum Measure 67 Voters' Pamphlet, reproduced in the Appendix, sets forth the Official Ballot Title, which states in relevant part

“[t]his bill would make it unlawful for insurers to unreasonably deny certain coverage claims, and permit treble damages plus attorney fees for that and other violations.” More importantly, the Voters' Pamphlet "Explanatory Statement" describes the pre-IFCA state of the law as allowing the Insurance Commissioner to take action against insurers who violate its regulations, explaining that the effect of IFCA would be to:

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.

(Emphasis added). This statement is relevant in ascertaining “the collective intent of the voters who, acting in their legislative capacity, enacted the measure.” Amalgamated Transit v. State, 142 Wn.2d 183, 205, 11 P.3d 762 (2000) (involving initiative measure); Lynch v. Dept of Labor and Industries, 19 Wn.2d 802, 812-13, 145 P.2d 265 (1944) (similar; involving referendum). The statements for and against Referendum Measure 67 do not take issue with this description of IFCA. See Voters' Pamphlet; Evergreen, 140 Wn.2d at 637 (in determining the intent of a statute based on an initiative, the court may consider arguments for and against the initiative in the Voters' Pamphlet); Lynch, 19 Wn.2d at 812-13 (indicating court may review published arguments in discerning voters' intent).

In light of the above-quoted statement in the Voters' Pamphlet, interpreting IFCA to preclude actions based on violation of Insurance Commissioner regulations enumerated in RCW 48.30.015(5) would frustrate the expectations of the voters who approved this law.

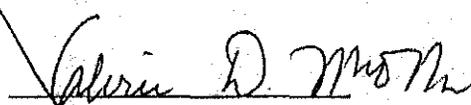
Under RCW 48.30.015, a violation of a regulation enumerated in subsection (5) is actionable in its own right, whether the statute is viewed as clear or ambiguous.

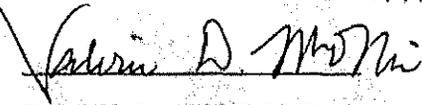
## VI. CONCLUSION

The Court should adopt the argument advanced in this brief and resolve this appeal accordingly.

DATED this 19th day of August, 2016.

  
FOR BRYAN P. HARNETIAUX,  
WITH AUTHORITY

  
VALERIE D. McOMIE

  
FOR DANIEL E. HUNTINGTON,  
WITH AUTHORITY

On behalf of WSAJ Foundation

# Appendix

WASHINGTON 2007 LEGISLATIVE SERVICE  
60th Legislature, 2007 Regular Session

Additions are indicated by Text; deletions by  
~~Text~~. Changes in tables are made but not highlighted.  
Vetoed provisions within tabular material are not displayed.

CHAPTER 498  
S.S.B. No. 5726  
INSURANCE—BOARDS AND COMMISSIONS—RULES AND REGULATIONS

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:

<< WA ST 48.30.010 >>

(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:

<< WA ST 48.30 >>

(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.

Approved May 15, 2007.

Effective July 22, 2007.

WA LEGIS 498 (2007)



## RCW 48.30.010

### Unfair practices in general—Remedies and penalties.

(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 RCW **48.30.015**.

[2007 c 498 § 2 (Referendum Measure No. 67, approved November 6, 2007); 1997 c 409 § 107; 1985 c 264 § 13; 1973 1st ex.s. c 152 § 6; 1965 ex.s. c 70 § 24; 1947 c 79 § .30.01; Rem. Supp. 1947 § 45.30.01.]

**NOTES:**

**Short title—2007 c 498:** See note following RCW 48.30.015.

**Part headings—Severability—1997 c 409:** See notes following RCW 43.22.051.

**Severability—1973 1st ex.s. c 152:** See note following RCW 48.05.140.



## 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 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.]



## WAC 284-30-330

### Specific unfair claims settlement practices defined.

The following are hereby defined as unfair methods of competition and unfair or deceptive acts or practices of the insurer in the business of insurance, specifically applicable to the settlement of claims:

- (1) Misrepresenting pertinent facts or insurance policy provisions.
- (2) Failing to acknowledge and act reasonably promptly upon communications with respect to claims arising under insurance policies.
- (3) Failing to adopt and implement reasonable standards for the prompt investigation of claims arising under insurance policies.
- (4) Refusing to pay claims without conducting a reasonable investigation.
- (5) Failing to affirm or deny coverage of claims within a reasonable time after fully completed proof of loss documentation has been submitted.
- (6) Not attempting in good faith to effectuate prompt, fair and equitable settlements of claims in which liability has become reasonably clear. In particular, this includes an obligation to promptly pay property damage claims to innocent third parties in clear liability situations. If two or more insurers share liability, they should arrange to make appropriate payment, leaving to themselves the burden of apportioning liability.
- (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.
- (8) Attempting to settle a claim for less than the amount to which a reasonable person would have believed he or she was entitled by reference to written or printed advertising material accompanying or made part of an application.
- (9) Making a claim payment to a first party claimant or beneficiary not accompanied by a statement setting forth the coverage under which the payment is made.
- (10) Asserting to a first party claimant a policy of appealing arbitration awards in favor of insureds or first party claimants for the purpose of compelling them to accept settlements or compromises less than the amount awarded in arbitration.
- (11) Delaying the investigation or payment of claims by requiring a first party claimant or his or her physician to submit a preliminary claim report and then requiring subsequent submissions which contain substantially the same information.
- (12) Failing to promptly settle claims, where liability has become reasonably clear, under one portion of the insurance policy coverage in order to influence settlements under other portions of the insurance policy coverage.
- (13) Failing to promptly provide a reasonable explanation of the basis in the insurance policy in relation to the facts or applicable law for denial of a claim or for the offer of a compromise settlement.
- (14) Unfairly discriminating against claimants because they are represented by a public adjuster.

(15) Failing to expeditiously honor drafts given in settlement of claims. A failure to honor a draft within three working days after notice of receipt by the payor bank will constitute a violation of this provision. Dishonor of a draft for valid reasons related to the settlement of the claim will not constitute a violation of this provision.

(16) Failing to adopt and implement reasonable standards for the processing and payment of claims after the obligation to pay has been established. Except as to those instances where the time for payment is governed by statute or rule or is set forth in an applicable contract, procedures which are not designed to deliver a check or draft to the payee in payment of a settled claim within fifteen business days after receipt by the insurer or its attorney of properly executed releases or other settlement documents are not acceptable. Where the insurer is obligated to furnish an appropriate release or settlement document to a claimant, it must do so within twenty working days after a settlement has been reached.

(17) Delaying appraisals or adding to their cost under insurance policy appraisal provisions through the use of appraisers from outside of the loss area. The use of appraisers from outside the loss area is appropriate only where the unique nature of the loss or a lack of competent local appraisers make the use of out-of-area appraisers necessary.

(18) Failing to make a good faith effort to settle a claim before exercising a contract right to an appraisal.

(19) Negotiating or settling a claim directly with any claimant known to be represented by an attorney without the attorney's knowledge and consent. This does not prohibit routine inquiries to a first party claimant to identify the claimant or to obtain details concerning the claim.

[Statutory Authority: RCW **48.02.060** and **48.30.010**. WSR 09-11-129 (Matter No. R 2007-08), § 284-30-330, filed 5/20/09, effective 8/21/09. Statutory Authority: RCW **48.02.060**, **48.44.050** and **48.46.200**. WSR 87-09-071 (Order R 87-5), § 284-30-330, filed 4/21/87. Statutory Authority: RCW **48.02.060** and **48.30.010**. WSR 78-08-082 (Order R 78-3), § 284-30-330, filed 7/27/78, effective 9/1/78.]



## WAC 284-30-350

### Misrepresentation of policy provisions.

(1) No insurer shall fail to fully disclose to first party claimants all pertinent benefits, coverages or other provisions of an insurance policy or insurance contract under which a claim is presented.

(2) No insurance producer or title insurance agent shall conceal from first party claimants benefits, coverages or other provisions of any insurance policy or insurance contract when such benefits, coverages or other provisions are pertinent to a claim.

(3) No insurer shall deny a claim for failure to exhibit the property without proof of demand and unfounded refusal by a claimant to do so.

(4) No insurer shall, except where there is a time limit specified in the policy, make statements, written or otherwise, requiring a claimant to give written notice of loss or proof of loss within a specified time limit and which seek to relieve the company of its obligations if such a time limit is not complied with unless the failure to comply with such time limit prejudices the insurer's rights.

(5) No insurer shall request a first party claimant to sign a release that extends beyond the subject matter that gave rise to the claim payment.

(6) No insurer shall issue checks or drafts in partial settlement of a loss or claim under a specific coverage which contain language which release the insurer or its insured from its total liability.

(7) No insurer shall make a payment of benefits without clearly advising the payee, in writing, that it may require reimbursement, when such is the case.

[Statutory Authority: RCW **48.02.060** (3)(a) and **48.17.010**(5). WSR 11-01-159 (Matter No. R 2010-09), § 284-30-350, filed 12/22/10, effective 1/22/11. Statutory Authority: RCW **48.02.060**, **48.44.050** and **48.46.200**. WSR 87-09-071 (Order R 87-5), § 284-30-350, filed 4/21/87. Statutory Authority: RCW **48.02.060** and **48.30.010**. WSR 78-08-082 (Order R 78-3), § 284-30-350, filed 7/27/78, effective 9/1/78.]



## WAC 284-30-360

### Standards for the insurer to acknowledge pertinent communications.

(1) Within ten working days after receiving notification of a claim under an individual insurance policy, or within fifteen working days with respect to claims arising under group insurance contracts, the insurer must acknowledge its receipt of the notice of claim.

(a) If payment is made within that period of time, acknowledgment by payment constitutes a satisfactory response.

(b) If an acknowledgment is made by means other than writing, an appropriate notation of the acknowledgment must be made in the claim file of the insurer describing how, when, and to whom the notice was made.

(c) Notification given to an agent of the insurer is notification to the insurer.

(2) Upon receipt of any inquiry from the commissioner concerning a complaint, every insurer must furnish the commissioner with an adequate response to the inquiry within fifteen working days after receipt of the commissioner's inquiry using the commissioner's electronic company complaint system.

(3) For all other pertinent communications from a claimant reasonably suggesting that a response is expected, an appropriate reply must be provided within ten working days for individual insurance policies, or fifteen working days with respect to communications arising under group insurance contracts.

(4) Upon receiving notification of a claim, every insurer must promptly provide necessary claim forms, instructions, and reasonable assistance so that first party claimants can comply with the policy conditions and the insurer's reasonable requirements. Compliance with this paragraph within the time limits specified in subsection (1) of this section constitutes compliance with that subsection.

[Statutory Authority: RCW 48.02.060, 48.44.050, 48.46.200, and 48.30.010. WSR 13-12-079 (Matter No. R 2013-05), § 284-30-360, filed 6/5/13, effective 1/1/14. Statutory Authority: RCW 48.02.060 and 48.30.010. WSR 09-11-129 (Matter No. R 2007-08), § 284-30-360, filed 5/20/09, effective 8/21/09; WSR 78-08-082 (Order R 78-3), § 284-30-360, filed 7/27/78, effective 9/1/78.]



## WAC 284-30-370

### Standards for prompt investigation of a claim.

Every insurer must complete its investigation of a claim within thirty days after notification of claim, unless the investigation cannot reasonably be completed within that time. All persons involved in the investigation of a claim must provide reasonable assistance to the insurer in order to facilitate compliance with this provision.

[Statutory Authority: RCW **48.02.060** and **48.30.010**. WSR 09-11-129 (Matter No. R 2007-08), § 284-30-370, filed 5/20/09, effective 8/21/09; WSR 78-08-082 (Order R 78-3), § 284-30-370, filed 7/27/78, effective 9/1/78.]



## WAC 284-30-380

### Settlement standards applicable to all insurers.

(1) Within fifteen working days after receipt by the insurer of fully completed and executed proofs of loss, the insurer must notify the first party claimant whether the claim has been accepted or denied. The insurer must not deny a claim on the grounds of a specific policy provision, condition, or exclusion unless reference to the specific provision, condition, or exclusion is included in the denial. The denial must be given to the claimant in writing and the claim file of the insurer must contain a copy of the denial.

(2) If a claim is denied for reasons other than those described in subsection (1) and is made by any other means than in writing, an appropriate notation must be made in the claim file of the insurer describing how, when, and to whom the notice was made.

(3) If the insurer needs more time to determine whether a first party claim should be accepted or denied, it must notify the first party claimant within fifteen working days after receipt of the proofs of loss giving the reasons more time is needed. If after that time the investigation remains incomplete, the insurer must notify the first party claimant in writing stating the reason or reasons additional time is needed for investigation. This notification must be sent within forty-five days after the date of the initial notification and, if needed, additional notice must be provided every thirty days after that date explaining why the claim remains unresolved.

(4) Insurers must not fail to settle first party claims on the basis that responsibility for payment should be assumed by others except as may otherwise be provided by policy provisions.

(5) Insurers must not continue negotiations for settlement of a claim directly with a claimant who is neither an attorney nor represented by an attorney until the claimant's rights may be affected by a statute of limitations or a policy or contract time limit, without giving the claimant written notice that the time limit may be expiring and may affect the claimant's rights. This notice must be given to first party claimants thirty days and to third party claimants sixty days before the date on which any time limit may expire.

(6) The insurer must not make statements which indicate that the rights of a third party claimant may be impaired if a form or release is not completed within a specified period of time unless the statement is given for the purpose of notifying the third party claimant of the provision of a statute of limitations.

(7) Insurers are responsible for the accuracy of evaluations to determine actual cash value.

[Statutory Authority: RCW 48.02.060 and 48.30.010. WSR 09-11-129 (Matter No. R 2007-08), § 284-30-380, filed 5/20/09, effective 8/21/09; WSR 78-08-082 (Order R 78-3), § 284-30-380, filed 7/27/78, effective 9/1/78.]



# REFERENDUM MEASURE 67

Passed by the Legislature and Ordered Referred by Petition

## Official Ballot Title:

The legislature passed Engrossed Substitute Senate Bill 5726 (ESSB 5726) concerning insurance fair conduct related to claims for coverage or benefits and voters have filed a sufficient referendum petition on this bill.

This bill would make it unlawful for insurers to unreasonably deny certain coverage claims, and permit treble damages plus attorney fees for that and other violations. Some health insurance carriers would be exempt.

Should this bill be:

Approved [ ] Rejected [ ]

### Votes cast by the 2007 Legislature on final passage:

Senate: Yeas, 31; Nays, 18; Absent, 0; Excused, 0.

House: Yeas, 59; Nays, 38; Absent, 0; Excused, 1.

Note: The Official Ballot Title was written by the court. The Explanatory Statement was written by the Attorney General as required by law and revised by the court. The Fiscal Impact Statement was written by the Office of Financial Management. For more in-depth fiscal analysis, visit [www.ofm.wa.gov/initiatives](http://www.ofm.wa.gov/initiatives). The complete text of Referendum Measure 67 begins on page 29.



## Fiscal Impact Statement

### Fiscal Impact Statement for Referendum 67

Referendum 67 is a referendum on ESSB 5726, a bill that would prohibit insurers from unreasonably denying certain insurance claims, permitting recovery up to triple damages plus attorney fees and litigation costs. This may increase frequency and amounts of insurance claims recovered by state and local government, the number of insurance-related suits filed in state courts, and increase state and local government insurance-premiums. Research offers no clear guidance for estimating the magnitude of these potential increases. Notice of insurance-related suits must be provided to the Office of the Insurance Commissioner prior to court filing, costing an estimated \$50,000 per year.

### Assumptions for Fiscal Analysis of R-67

- There would likely be an increase in the number of cases filed in Superior Court related to the denial of insurance claims, but there is no data available to provide an accurate estimate of that fiscal impact. It is assumed that the impact to the operations of Washington courts would be greater than \$50,000 per year.
- Premiums for state and local governments that purchase auto, property, liability or other insurance may increase due to a potential increase in insurance companies' litigation costs and the amounts awarded to claimants.
- When the state or local government is a claimant, the referendum could increase the likelihood of recovering on the claim, and the amount recovered.
- Various studies have been conducted to determine how changes in law affecting insurance can affect costs for courts, insurance premiums, and claimant recovery. However, individual study results vary widely. Due to the conflicting research, there is no clear guidance for estimating the magnitude of the fiscal impact of potential increases in court costs, insurance premiums, or recovered claims.
- It is estimated that 300 notices per year of insurance-related lawsuits would be filed with the Office of the Insurance Commissioner, resulting in a minimum cost of less than \$50,000 per year increased cost to the agency.





## REFERENDUM MEASURE 67

### *Explanatory Statement*

#### **The law as it presently exists:**

The state insurance code prohibits any person engaged in the insurance business from engaging in unfair methods of competition or in unfair or deceptive acts or practices in the conduct of their business. Some of these practices are set forth in state statute. The insurance commissioner has the authority to adopt rules defining unfair practices beyond those specified in statute. The commissioner has the authority to order any violators to cease and desist from their unfair practices, and to take action under the insurance code against violators for violation of statutes and regulations. Depending on the facts, the insurance commissioner could impose fines, seek injunctive relief, or take action to revoke an insurer's authority to conduct insurance business in this state.

Under existing law, an unfair denial of a claim against an insurance policy could give the claimant a legal action against the insurance company under one or more of several legal theories. These could include violation of the insurance code, violation of the consumer protection laws, personal injuries or property losses caused by the insurer's acts, or breach of contract. Depending on the facts and the legal basis for recovery, a claimant could recover money damages for the losses shown to have been caused by the defendant's behavior. Additional remedies might be available, depending on the legal basis for the claim.

Plaintiffs in Washington are not generally entitled to recover their attorney fees or litigation costs (except for small amounts set by state law) unless there is a specific statute, a contract provision, or recognized ground in case law providing for such recovery. Disputes over insurance coverage have been recognized in case law as permitting awards of attorney fees and costs. Likewise, plaintiffs in Washington are not generally entitled to collect punitive damages or damages in excess of their actual loss (such as double or triple the amount of actual loss), unless a statute or contract specifically provides for such payment.

#### **The effect of the proposed measure, if approved:**

This measure is a referral to the people of a bill (ESSB 5726) passed by the 2007 session of the legislature. The term "this bill" refers here to the bill as passed by the legislature. **A vote to "approve" this bill is a vote to approve ESSB 5726 as passed by the legislature. A vote to "reject" this bill is a vote to reject ESSB 5726 as passed by the legislature.**

ESSB 5726 would amend the laws concerning unfair or deceptive insurance practices by providing that 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." The term "first party claimant" is defined in the bill to mean 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.

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. A successful plaintiff could recover the actual damages sustained, together with reasonable attorney fees and litigation costs as determined by the court. The court could also increase the total award of damages to an amount not exceeding three times the actual damages, if the court finds that an insurer has acted unreasonably in denying a claim or has violated certain rules adopted by the insurance commissioner. The new law would not limit a court's existing ability to provide other remedies available at law. The claimant would be required to give written notice to the insurer and to the insurance commissioner's office at least twenty days before filing the lawsuit.

ESSB 5726 would not apply to a health plan offered by a health carrier as defined in the insurance code. The term "health carrier" includes a disability insurer, a health care service contractor, or a health maintenance organization as those terms are defined in the insurance code. The term "health plan" means any policy, contract, or agreement offered by a health carrier to provide or pay for health care services, with certain exceptions set forth in the insurance code. These exceptions include, among other things, certain supplemental coverage, disability income, workers' compensation coverage, "accident only" coverage, "dental only" and "vision only" coverage, and plans which have a short-term limited purpose or duration. Because these types of coverage fall outside the definition of "health plan," ESSB 5726's provision would apply to these exceptions to "health plans."



## **Statement For Referendum Measure 67**

### **APPROVE 67 – MAKE THE INSURANCE INDUSTRY TREAT ALL CONSUMERS FAIRLY.**

Referendum 67 simply requires the Insurance Industry to be fair and pay legitimate claims in a reasonable and timely manner. Without R-67, there is no penalty when insurers delay or deny valid claims. R-67 would help make the Insurance Industry honor its commitments by making it against the law to unreasonably delay or deny legitimate claims.

### **APPROVE 67 – RIGHT NOW, THERE IS NO PENALTY FOR DELAYING OR DENYING YOUR VALID CLAIM.**

R-67 encourages the Insurance Industry to treat legitimate insurance claims fairly. R-67 allows the court to assess penalties if an insurance company illegally delays or denies payment of a legitimate claim.

### **APPROVE 67 – YOU PAY FOR INSURANCE. THEY SHOULD KEEP THEIR PROMISES.**

When you pay your premiums on time, the Insurance Industry is supposed to pay your legitimate claims. Unfortunately, the Insurance Industry sometimes puts profits ahead of people and intentionally delays or denies valid claims. R-67 makes the Insurance Industry keep its promises and pay legitimate claims on time. That is why the Insurance Industry is spending millions of dollars to defeat it.

### **APPROVE 67 – JOIN BIPARTISAN OFFICIALS AND CONSUMER GROUPS SUPPORTING FAIR TREATMENT BY THE INSURANCE INDUSTRY.**

Insurance Commissioner Mike Kriedler, former Insurance Commissioners, seniors, workers, and consumer groups urge you to approve R-67. Supporters include the Puget Sound Alliance of Senior Citizens, former Republican Party State Chair Dale Foreman, the Labor Council, and the Fraternal Order of Police.

### **APPROVE 67 – R-67 SIMPLY MAKES SURE CLAIMS ARE HANDLED FAIRLY.**

If the Insurance Industry honors its commitments, R-67 does not impose any new requirements – other than making sure all claims are handled fairly. R-67 would have an impact only on those bad apples that unreasonably delay or deny valid insurance claims.

For more information, visit [www.approve67.org](http://www.approve67.org).

### **Rebuttal of Statement Against**

Washington is one of only 5 states with no penalty when the Insurance Industry intentionally denies a valid claim. That is why the Insurance Industry is spending millions to defeat R67. Referendum 67 is only on the ballot because the Insurance Industry used its special-interest influence to block it from becoming law. Now you can vote to *approve* R67 to make fair treatment by the Insurance Industry the law. Approve R67 for Insurance Fairness.

#### **Voters' Pamphlet Argument Prepared by:**

STEVE KIRBY, Chair, House Insurance, Financial Services, Consumer Protection Committee; TOM CAMPBELL, Chair, House Environmental Health Committee; DIANE SOSNE, RN, President SEIU 1199; SKIP DREPS, Government Relations Director Northwest Paralyzed Veterans; KELLY FOX, President, Washington State Council of Firefighters; STEVE DZIELAK, Director, Alliance for Retired Americans.

## **Statement Against Referendum Measure 67**

### **REJECT FRIVOLOUS LAWSUITS. REJECT HIGHER INSURANCE RATES. REJECT R-67.**

As if there weren't enough frivolous lawsuits jacking up insurance rates, Washington's trial lawyers have invented yet another way to file more lawsuits to fatten their pocketbooks. They wrote and pushed a law through the Legislature that permits trial lawyers to threaten insurance companies with *triple damages* to force unreasonable settlements that will *increase insurance rates for all consumers*. The trial lawyers also included a provision that *guarantees payment of attorneys' fees*, sweetening the incentive to file frivolous lawsuits. There's no limit on the fees they can charge. What does this mean for consumers? You guessed it: *higher insurance rates*.

### **TRIAL LAWYERS WIN. CONSUMERS LOSE.**

R-67 is a *windfall for trial lawyers* at the expense of consumers. Trial lawyers backed a similar law in California, but the resulting explosion of fraudulent claims and frivolous lawsuits caused auto insurance prices to increase 48% more than the national average (according to a national actuarial study) and *it was later repealed*.

### **CURRENT LAW PROTECTS CONSUMERS.**

Insurance companies have a legal responsibility to treat people fairly, and *consumers can sue insurance companies under current law* if they believe their claim was handled improperly. The Insurance Commissioner can—and does—levy stiff fines, or even ban an insurance company from the state, if the company mistreats consumers.

### **R-67 IS BAD NEWS FOR CONSUMERS. REJECT R-67.**

Not only does R-67 raise auto and homeowners insurance rates, it applies to small businesses and doctors as well. That means *higher medical bills and higher prices for goods and services*.

Laws should reduce frivolous lawsuits, not create more. Reject R-67!

See for yourself. Visit [www.REJECT67.org](http://www.REJECT67.org).

### **Rebuttal of Statement For**

Don't be fooled.

Trial lawyers didn't push this law through the legislature to protect your rights. They want this law because it gives them new opportunities to file *frivolous lawsuits* and collect *fat lawyers' fees*.

Trial lawyers don't care if frivolous lawsuits jack up our insurance rates. *Consumers, doctors and small businesses will pay more* so trial lawyers can file more lawsuits and collect larger fees.

Reject frivolous lawsuits and excessive lawyers' fees. Reject 67.

#### **Voters' Pamphlet Argument Prepared by:**

W. HUGH MALONEY, M.D., President, Washington State Medical Association; DON BRUNELL, President, Association of Washington Business; RICHARD BIGGS, President, Professional Insurance Agents of Washington; DANA CHILDERS, Executive Director, Liability Reform Coalition; TROY NICHOLS, Washington State Director, National Federation of Independent Business; BILL GARRITY, President, Washington Construction Industry Council.

## OFFICE RECEPTIONIST, CLERK

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**From:** OFFICE RECEPTIONIST, CLERK  
**Sent:** Friday, August 19, 2016 1:26 PM  
**To:** 'Valerie McOmie'  
**Cc:** Mark King; Emmelyn Hart; Julie.Johnson@lewisbrisbois.com; Stewart A. Estes; Bryan Harnetiaux; Dan Huntington'; WSAJ Foundation Amicus Program  
**Subject:** RE: Perez-Crisantos v. State Farm Fire & Casualty Co., Inc. (S.C. # 92267-5)

Rec'd 8/19/16

Supreme Court Clerk's Office

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**From:** Valerie McOmie [mailto:valeriemcomie@gmail.com]  
**Sent:** Friday, August 19, 2016 1:24 PM  
**To:** OFFICE RECEPTIONIST, CLERK <SUPREME@COURTS.WA.GOV>  
**Cc:** Mark King <mark.king@craigswapp.com>; Emmelyn Hart <emmelyn.hart@lewisbrisbois.com>; Julie.Johnson@lewisbrisbois.com; Stewart A. Estes <sestes@kbmlawyers.com>; Bryan Harnetiaux <bryanpharnetiauxwsba@gmail.com>; Dan Huntington' <danhuntington@richter-wimberley.com>; WSAJ Foundation Amicus Program <amicuswsajf@wsajf.org>  
**Subject:** Perez-Crisantos v. State Farm Fire & Casualty Co., Inc. (S.C. # 92267-5)

Dear Ms. Carlson:

On behalf of the WSAJ Foundation, below please find a letter request to file an Amicus Curiae Brief and accompanying Amicus Curiae Brief (with separate Appendix to be attached). Counsel for the parties and other Amicus Curiae are being served simultaneously by copy of this email, per prior arrangement.

Respectfully submitted,

Valerie McOmie

Amicus Co-Coordinator  
Washington State Association for Justice Foundation  
(360) 852-3332  
[valeriemcomie@gmail.com](mailto:valeriemcomie@gmail.com)

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