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NO. 95867-0

SUPREME COURT
OF THE STATE OF WASHINGTON

MOUN KEODALAH and AUNG KEODALAH, husband and wife,
Respondents,

v.

ALLSTATE INSURANCE COMPANY, a corporation, and TRACEY
SMITH and JOHN DOE SMITH, husband and wife,
Petitioners.

**BRIEF OF AMICUS CURAE THE COALITION AGAINST
INSURANCE FRAUD IN SUPPORT OF PETITIONERS**

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I. INTEREST OF AMICUS CURIAE

The Coalition Against Insurance Fraud (“Coalition”) respectfully submits this Amicus Curiae Brief in support of the Appellants, Allstate Insurance Company (“Allstate”), Tracey Smith and John Doe Smith (“Smith”).

The Coalition is the only alliance in the country uniting, defending, and empowering the interests of consumers, government agencies, and insurers in combating insurance fraud.¹ The Coalition is a consumer advocacy group representing the interests of consumers in the insurance marketplace. Founded in 1993, the Coalition works to promote public policies that help its constituents combat all forms of insurance fraud across the United States. The ongoing mission of the Coalition includes identifying court cases, such as the instant case, which present opportunities to create environments where insurance fraud can be countered successfully.

This case presents the Washington Supreme Court with a compelling opportunity to correct the holding of the Court of Appeals

¹ As a matter of policy, the Coalition does not oppose appropriate state bad faith schemes. State laws curbing bad faith on the part of insurers are an important public policy interest which compliment, and work alongside of, the public policy interests designed to curb insurance fraud. The Coalition takes no issue with strict and swift penalties for the exact sort of alleged facts in this case.

which created a private cause of action against employees of insurers. *Keodalah v. Allstate Ins. Co.*, 3 Wn. App. 2d 31, 413 P.3d 1059 (Wash. Ct. App. 2018), *review granted*, 191 Wn.2d 1004, 424 P.3d 1214 (2018). This ruling flies in the face of nearly one-hundred years of Washington jurisprudence, does not advance any consumer protections, and the result is at odds with the explicit public policy goals of the Washington Legislature in requiring insurers to investigate and root out fraud. The ruling will expose Washington to increased levels of insurance fraud and harm consumers by driving up premiums.

II. ISSUES PRESENTED

The Coalition Against Insurance Fraud agrees with the Issues Presented as set forth in Petitioners' Petition for Review.

III. STATEMENT OF THE CASE

The Coalition Against Insurance Fraud agrees with the Statement of the Case as set forth in Petitioners' Petition for Review.

IV. STATEMENT OF FACTS

The Coalition Against Insurance Fraud agrees with the Statement of Facts as set forth in Petitioners' Petition for Review.

V. ARGUMENT

A. Summary of Argument.

Amicus cannot support the way in which the underlying claim in this case was handled. However, the holding reached by the Court of Appeals will not provide any additional protection for Washington consumers; instead it will harm consumers through increased premiums and expose Washington to increased levels of insurance fraud. The Legislature has enacted statutes reflecting a strong policy of protecting consumers. RCW 48.01.030; RCW 19.86.090. The Legislature has also created a strong statutory scheme to detect, investigate and prevent insurance fraud. RCW 48.30A.005 *et seq.* The holding below will erode Washington's interest in protecting consumers from insurance fraud while failing to provide any additional consumer protections from bad faith.

The Court of Appeal's reasoning will adversely impact insurers' ability to prevent fraud in a broad array of cases and will do significant and lasting damage to the consumers of Washington State. Adjusters will elect to simply pay fraudulent claims rather than run the risk of being personally sued. Consequently, the Washington Department of Insurance will receive far fewer fraud referrals. Furthermore, this ruling will extend personal liability in ways not anticipated by the Court of Appeals. It will result in significant individual harm to investigators, experts, doctors,

lawyers, and many others who may be only tangentially involved in the handling of an insurance claim. Finally, this ruling will result in increased fraud, in many cases from out of state, drive up insurance premiums for Washington citizens, cause bizarre and contradictory results in future cases, and undermine the legislatively mandated investigative role insurers play in enforcing Washington law.

B. The Court of Appeals Ruling Provides No Additional Consumer Protections.

Washington has long been a leader in enacting statutes with strong public policies aimed at protecting individual consumers. *Hangman Ridge Training Stables, Inc. v. Safeco Title Insurance Co.* 105 Wn.2d 778, 783, 719 P.2d. 531 (1986). This case implicates two realms of statutory pro-consumer public policies which are in delicate balance. First is the interest in curbing bad faith practices in the business of insurance. RCW 48.01.030. Second is the interest of identifying and eradicating insurance fraud. RCW 48.30A.005. While many cases present examples of these two important public policies working in tandem, this case presents a unique situation in which the Court is being asked to sacrifice one without advancing the other. *See e.g. Sharbono v. Universal Underwriters Ins. Co.*, 139 Wn.App. 383, 161 P.3d 406 (2007), *as amended on denial of reconsideration* (Oct. 9, 2007); *Smith v. Safeco Ins. Co.*, 150 Wn.2d 478,

78 P.3d 1274 (2003); *Industrial Indem. Co. of the Nw, Inc. v. Kallevig*, 144 Wn.2d 907, 792 P.2d 520 (1990).

There exists a concrete and explicit requirement that all participants in the insurance marketplace — consumers as well as insurers and their agents — act in good faith. RCW 48.01.030. This requirement is in the public interest. Adherence to good-faith practices helps keep the costs of insurance premiums lower than they would otherwise be and provides an open and honest marketplace. RCW 48.01.030; *and Overton v. Consol. Ins. Co.*, 145 Wn.2d 417, 433-34, 38 P.3d 322 (2002). This policy is so important that the Legislature enshrined a private cause of action for unreasonable denials of claims which allows plaintiffs to recover up to three times the amount of their actual damages as well as attorney's fees. RCW 48.30.015; *see Truck Ins. Exch. v. Vanport Homes, Inc.*, 147 Wn.2d 751, 764, 58 P.3d 276 (2002); *Indus. Indemn. Co.* 144 Wn.2d at 921–22.

The ruling in *Keodalah* fails to advance any new consumer protections. Consumers are the real victims of bad faith and consumers will retain their ability to fully vindicate their rights even if this Court overturns the holding below. Consumers will be entitled to recover their damages from the insurers who possess more than sufficient financial resources to make injured plaintiffs whole.

If this Court returns Washington to a pre-*Keodalah* world plaintiffs will retain access to the statutory cause of action under RCW 48.30.015 with treble damages and attorney fees; they will still have access to the common law cause of action for bad faith as recognized in *St. Paul Fire & Marine Ins. Co v. Onvia, Inc.*, 165 Wn.2d 122, 130, 196 P.3d 664 (2008); they will still have access to consumer protection act claims (“CPA”), which also carry an award of attorney fees. RCW 19.86.020; *St. Paul Fire & Marine Ins. Co.*, 165 Wn.2d at 133-4. Therefore, there is no consumer protection value in the lower court’s ruling. Plaintiffs will be entitled to plead bad faith and CPA violations against insurers, where ultimate financial responsibility lays. The ruling in *Keodalah* adds no additional pockets of recovery for injured consumers.

C. *Keodalah* Will Harm Consumers Through Increased Exposure to Insurance Fraud.

The Legislature found the need to battle against insurance fraud so compelling that they engraved a lengthy and detailed exposition of their purpose into the statutory scheme.

“The Legislature finds that the business of insurance is one affected by the public interest, requiring that all persons be actuated by good faith, abstain from deception, and practice honesty and equity in all insurance matters. The payment of kickbacks, bribes, or rebates for referrals to service providers, as has been occurring with increasing regularity in this state, results in inflated or

fraudulent insurance claims, results in greater insurance costs for all citizens, and is contrary to the public interest. In particular, the process whereby "cappers" buy and sell insurance claims without the controls of professional licensing and discipline creates a fertile ground for illegal activity and has, in this state, resulted in frauds committed against injured claimants, insurance companies, and the public. Operations that engage in this practice have some or all of the following characteristics: Cappers, acting under an agreement or understanding that they will receive a pecuniary benefit, refer claimants with real or imaginary claims, injuries, or property damage to service providers. This sets off a chain of events that corrupts both the provision of services and casualty or property insurance for all citizens. This chain of events includes false claims for services through the use of false estimates of repair; false prescriptions of care or rehabilitative therapy; services that either do not occur or are provided by persons unqualified to provide the services; submission of false claims; submission of and demands for fraudulent costs, lost wages, pain and suffering, and the like; and other devices meant to result in false claims under casualty or property insurance policies or contracts, whether insured or self-insured, and either directly or through subrogation." RCW 48.30A.005.

The Legislature saw that fraud had "been occurring with increasing regularity in this state." *Id.* Specifically they found that the then current law left open significant holes which created "a fertile ground for illegal activity and has, in this state, resulted in frauds committed against injured claimants, insurance companies, and the public." *Id.* To combat the rising tide of fraud, the Legislature created a robust antifraud system in which

insurers play a vital role. This antifraud system was expressly premised on protecting Washington consumers from greater insurance costs. *Id.*

a. Insurers are Legislatively Mandated To Investigate and Report Fraud to the Office of the Insurance Commissioner.

Insurers have a duty to “root out fraud” and are required to create a specific antifraud plan to that end. *Pilgrim v. State Farm Fire & Cas. Ins. Co.*, 89 Wn. App. 712, 719, 950 P.2d 479 (1997). RCW 48.30A.045 requires that insurers “institute and maintain an insurance antifraud plan” and file that plan with the insurance commissioner. Those plans must be kept current and the commissioner must be notified of changes within 30 days. These plans are so important that only insurers with gross premiums of less than one thousand dollars in Washington, during the reporting year, are exempted from this requirement.²

RCW 48.30A.050(1) requires insurers to adopt specific procedures to prevent both internal fraud, and fraud resulting from misrepresentations on claims and applications. Insurers must further adopt procedures to ensure that claims are reviewed for evidence of fraud and to investigate claims where fraud is suspected. RCW 48.30A.050(2). If fraud is

² There are categorical exemptions for health carriers, life insurers, title insurers, and medical malpractice insurers (where the malpractice premiums are over fifty percent of the annual total gross premiums). These categorical exemptions highlight the extreme risk of fraud in the property and casualty insurance marketplace. That risk of fraud will be greatly exacerbated by the Court of Appeals holding below.

suspected, or evidence develops from an internal investigation, insurers are required to report fraud to the appropriate law enforcement agency and cooperate with those agencies. RCW 48.30A.050(3); *Pilgrim*, 89 Wn. App. at 722. Insurers are required to establish specific procedures to “undertake civil actions against persons who have engaged in fraudulent activities.” RCW 48.30A.050(4). Finally, insurers are required to provide training for their employees in the detection and prevention of fraud. RCW 48.30A.050(5). Each of these requirements will be undermined if the Court of Appeals holding is allowed to stand. Faced with potential for life-ruining civil liability, investigators, adjusters, other insurer employees and hired agents will likely allow suspected fraud to slip through the claims process, especially fraud by sophisticated organized criminal rings. Such practice would impair the entire system of fraud detection and prevention.

The Washington Legislature was keenly aware that claims for benefits under personal injury protection and uninsured motorist insurance are ripe for fraudulent activity when it enacted Section 30A to Chapter 48 of the Washington Revised Code. Insurers are required to pay claims unless they are unreasonable, unnecessary, or unrelated. *Truck Ins. Exch.*, 147 Wn.2d at 765. Insurers are also required to investigate and prevent fraud. RCW 48.30A.005 *et seq.* Affirming the ruling below will turn this delicate balance into the horns of an intractable dilemma.

b. *Keodalah* Liability Will Chill Antifraud Investigations

The curious, and illogical, result of the instant case is that it places consumer protection at odds with insurance fraud prevention. Insurers are under a clear statutory duty to investigate and combat insurance fraud. However, the penalties for failing to do so are fixed by statute at no more than \$10,000 per violation. RCW 48.30A.070. This penalty falls on the corporate insurer, not the individual employee. *Id.* On the other hand, the potential exposure to bad faith and CPA suits will be orders of magnitude greater, with treble damages in some cases and attorney fee awards in every case. RCW 19.86.090. This burden will fall disproportionately on the individual adjusters who make the day to day calls in the field, rather than on the corporate insurers.³

In addition to undermining the public policy interest in combatting fraud, *Keodalah* liability erodes several important insurance statutes such as RCW 48.30.210⁴, RCW 48.30.220⁵, RCW 48.30.230⁶. The entirety of

³ Ultimately insurers will absorb the costs for their employees and this will cause premiums to rise for all consumers in the marketplace. The true costs of *Keodalah* will exceed the additional judgments against employees, additional defendants means additional lawyers, discovery and additional imposition on the civil courts.

⁴ Applying criminal penalties to false or misleading statements made to an insurer in relation to an application for insurance.

⁵ Applying criminal penalties to the destruction of insured property with an intent to defraud.

⁶ Applying criminal penalties to persons making false or fraudulent claims.

Chapter 48.30A will be weakened and the important antifraud role played by insurers will go unfulfilled.⁷

Washington insurers have a statutory duty to investigate losses, a duty which has been broadly recognized by the courts of this state. RCW 48.30A.005 *et seq*; *Tran v. State Farm Fire and Cas. Co.*, 136 Wn.2d 214, 231, 961 P.2d 358 (1998) (citing *Pilgrim* 89 Wn. App. at 719); *see also Staples v. Allstate Ins. Co.*, 176 Wn.2d 404, 295 P.3d 201 (2013). This duty will be neutered by the holding in the Court of Appeals. Insureds engaging in fraud will be empowered to preemptively sue the insurer's employees exposing those individuals to personal, and in some cases ruinous, financial liability.

D. The Court of Appeals Unjustly Expanded Individual Liability.

There are many individuals who participate in an insurer's investigation into a fraudulent claim. Adjusters handle the claim file, fire or accident investigators conduct on-the-ground investigations, attorneys take examinations under oath and provide coverage opinions. All these individuals, and every other person who has partial responsibility for the handling of a claim or takes part in the investigation of coverage, will be

⁷ All of these statutes rely on the premise that insurers have a preliminary investigative role in detecting insurance fraud. Fewer investigations means fewer referrals to the Office of the Insurance Commissioner, which in turn means fewer criminal investigations and prosecutions.

subject to litigation. Imputing personal liability, as the Court of Appeals did, will result in a flood of new litigation. The burden will not fall on the insurance adjusters alone. Because of the way the Court of Appeals interpreted “person”, *Keodalah* liability will extend far beyond direct employees of the insurer. Liability will fall on attorneys, fire investigators, and many other professionals who participate in the life-cycle of an insurance claim.

Personal liability will have disastrous results for those swept up in the Court of Appeals decision. Suits and judgments will affect credit ratings, result in denials for home mortgages or refinances. Litigation will show up on background checks and could lead to the loss of a job, prevent an individual from getting hired or cause one to lose a promotion or professional license. For professionals such as investigators, engineers, or attorneys the mere fact of being named as a defendant could result in increased professional insurance premiums or even policy cancellations.

Unscrupulous litigants will quickly learn to file a CPA or common law bad faith suit early in the claim’s life cycle. Adjusters, concerned at the costs and burdens of personal liability, will curtail investigations

without due diligence. Where insurance fraud occurs any meaningful opportunity to develop a factual record will be cut off.⁸

E. The Effects of the Ruling Below Will Negatively Affect the Entire Insurance Marketplace and Harm Consumers.

By upsetting the balance between an insurer's duty to treat claims in good faith and their duty to ferret out fraud, the Court of Appeals has unwittingly given a free pass to fraudsters. This ruling will also have effects beyond the civil courts, with fewer fraud investigations there will be fewer referrals to the Washington Department of Insurance and consequently fewer criminal investigations. Furthermore, the ripple effects of this ruling will result in some truly bizarre outcomes not contemplated by Washington's statutory scheme or case law history.

a. Chilling Fraud Investigations and Reporting Will Unleash the Floodgates of Fraud.

Prior to the enactment of Section 30A to Chapter 48, the Legislature recognized that fraud was becoming a major problem in the business of insurance. RCW 48.30A.005 ("The payment of kickbacks, bribes, or rebates for referrals to service providers, as has been occurring with increasing regularity in this state, results in inflated or fraudulent insurance claims, results in greater insurance costs for all citizens, and is

⁸ Adjusters will be unable to defend themselves by pointing to the fraudulent nature of the underlying claim because no investigation will have been performed.

contrary to the public interest.”). The Court of Appeals holding in this case will return Washington to those days by undermining the motivation of insurers to investigate and prevent fraud. Fewer investigations will be performed, instead claims will be summarily paid. This will invite additional fraud into the state magnifying the effect of the ruling below.⁹

Keodalah argues in his Supplemental Brief of December 7, 2018 that this concern is exaggerated by pointing to the imposition of personal liability in only two states, Montana and West Virginia. *Supplemental Brief of Respondents*, 17; *O’Fallon v. Farmers Ins. Exch.*, 260 Mont. 233, 859 P.2d 1008 (Mont. 1993); *Taylor v. Nationwide Mutual Ins. Co.*, 214 W. Va. 324, 589 S.E.2d 55 (W. Va. 2003). However, neither of these states has the same statutory scheme present in Washington and each of them can be distinguished in important ways.

In *O’Fallon* the Montana Supreme Court based its ruling on an older case, *Klaudt v. Flink*, 202 Mont. 247, 658 P.2d 1065 (Mont. 1983). *O’Fallon*’s holding was a significant extension of the rule from *Klaudt*, which held that a plaintiff has a cause of action under Montana’s Unfair Trade Practices Act against a defendant’s insurer which could be tried simultaneously to the suit against the defendant. *Kaudt*, 202 Mont. at 252;

⁹ Through aggressive litigation, fraudsters will be able to effectively chill fraud investigations and this will beget only more fraud.

Mont. Code Ann. § 33-18-201 (the Unfair Trade Practices section of the Montana Insurance Code). *Klaudt* itself has been mostly overruled except for the narrow holding that the Unfair Trade Practices section of the Montana Code allows third party claimants to sue insurers for bad faith in handling claims based on the acts of their insured. *See O’Fallon*; and *Lorang v. Fortis Ins. Co.*, 345 Mont. 12, 192 P.3d 186 (holding that subsequent statutes superseded *Klaudt*).

The statute that superseded the holding in *Klaudt* created a new cause of action in Montana and placed significant limits on that cause of action.¹⁰ Later Supreme Court holdings have limited the effect of *O’Fallon* and make it clear that the cause of action was specifically statutory and not rooted in the common law. *See e.g. Mark Ibsen, Inc. v. Caring for Montanans, Inc.*, 383 Mont. 346, 371 P.3d 446 (Mont. 2016). Unlike Montana, Washington’s statutory cause of action flows only to the insurer. RCW 48.30.015. Washington now stands on the precipice of a largely unfettered grant of individual liability and the holding in *O’Fallon* should not be extended to Washington.

¹⁰ *O’Fallon* provides a useful discussion of the legislative history and an exploration of the statutory limitations on suits for individual liability. Mont. Code Ann. § 33-18-242, was introduced in the 1987 session in direct response to *Klaudt*. “The bill also limited the types of claims that could be brought based on claim settlement practices, defined with greater particularity the conduct which would form the basis for this statutory claim, required that a third-party complaint not be filed until the underlying claim was resolved, and established a statute of limitations for the newly created statutory claim.” *O’Fallon*, 260 Mont. at 244.

Turning to *Taylor v. Nationwide*, the West Virginia Supreme Court analyzed the West Virginia Unfair Trade Practices Act and the case law of the state and found that an “implied cause of action for a statutory violation is deeply ingrained” in their state’s jurisprudence. *Taylor*, 214 W. Va. at 329, citing *Jenkins v. J.C. Penney Cas. Ins. Co.*, 167 W. Va. 597, 600, 280 S.E.2d 252, 255 (1981), *overruled on other grounds*. The *Taylor* court then held that *Jenkins* required it to extend liability to individuals.

Unlike West Virginia, in Washington there is a statutory cause of action for bad faith insurance practices that is squarely limited to the insurer. Furthermore, the West Virginia Supreme Court noted in *Jenkins* that their jurisprudence concerning implied causes of action was an outlier. *Jenkins*, 167 W. Va. at 600 (stating “[w]e are virtually the only jurisdiction that permits a private cause of action for violation of statutes requiring sidewalks to be in good repair.”). This Court should decline to adopt the West Virginia rule and instead maintain the same prohibition on individual liability for bad faith that every other state in the union has imposed.

b. Investigations by the State and Law Enforcement will Also be Chilled.

The Washington Department of Insurance relies on insurers to do preliminary investigations and refer cases for further investigations and potential criminal charges. RCW 48.30A.50(3). Insurers are on the front lines, and without vigorous investigations the factual record will fail to develop in many, if not most, of these cases. Individual adjusters worried about personal liability will not risk being sued. They will tend to pay claims in lieu of performing a thorough and complete investigation. Word will spread rapidly that there are fewer investigations, fewer referrals and consequently fewer denials of fraudulent claims. Fraudsters and scammers will flock to the state and it will be open season for fraud in the State of Washington.

Reference to a hypothetical claim for a catastrophic loss from fire¹¹ will help elucidate the way that claims are handled and illustrate the damaging effect that the ruling below will have. An insured reports that her residence has been destroyed by fire and that all of the contents of the house are lost. An adjuster goes to the scene of the fire and is told by a public entity fire investigator that the insured was seen taking personal

¹¹ We are using a fire as an example to highlight the breadth of individuals subjected to potential individual liability. Fire investigations involve the greatest number of individuals: cause and origin investigators, engineers, attorneys, adjusters, and public adjusters all will be exposed to *Keodalah* liability.

contents out of the residence the night before the fire and that the home had been on the market and not sold for several months. How should the adjuster proceed; escalate the investigation or process the claim?

In a post *Keodalah* reality, the adjuster, worried about being personally sued, declines to investigate and processes the claim. In a world without *Keodalah* liability, the adjuster contacts his supervisor and escalates the claim to the Special Investigations Unit. The SIU investigator takes more detailed statements, contacts neighbors and other witnesses, evaluates the need for a financial review of the insured's accounts, hires a cause and origin investigator and perhaps hires counsel to take an Examination Under Oath. If that SIU investigator has reasonable belief that fraud has occurred, she has a legal duty to report that to the Office of Insurance Commissioner's Special Investigations Unit.

In a post-*Keodalah* insurance marketplace, claims such as this will be met with hesitation or outright failure to act. In a post-*Keodalah* world the insured in this scenario will be far more likely to get away with arson and insurance fraud. In a world without *Keodalah* liability the insured will be investigated, and this fraudulent claim will be avoided.

c. Chilling Fraud Investigations Will Expose Adjusters to Liability for Failing to Investigate.

By imputing liability to individuals, the holding below will result in seemingly contradictory and bizarre results. Individual adjusters and other agents and employees could be exposed to potential liability for failing to perform those investigations. The Court of Appeals extended a private cause of action to individuals looking only at their participation in alleged bad faith denials of claims. However, in the broader universe of insurance activities, this holding will result in unfettered liability that insurers and their employees will be unable to escape.¹²

VI. CONCLUSION

For decades there has existed a balance in Washington between insurer's duties to their insured and their duties to the public. Every other state, but two, that has examined this issue has concluded that liability for unfair practices and bad faith is limited to the insurers and cannot be extended to their agents and employees. Insurers play a vital statutory role

¹² A literal reading of the relevant statutes reveals a potentially bizarre outcome of *Keodalah* liability. An adjuster who fails to investigate a claim for fraud could be liable for violating their duty under RCW 48.30A.005 *et seq.* An insurance consumer who faces a rate increase as a result of increased fraud will be able to satisfy the five-step test for violations of the CPA. First, failure to properly investigate fraud is manifestly unfair to those who do not engage in insurance fraud. Second, such activities are in commerce. Third, RCW 48.30A.005 provides the required finding of public interest. Fourth, the injury to the consumer is the upward spiral of rate increases. Finally, there is a causal link between the failure to conduct fraud investigations and the specific injury that results.

in combating insurance fraud. This role will be severely undermined by an expansion of liability. Extending personal liability will result in a broad chilling of antifraud investigation by employees of insurers. Individual employees, more worried of exposure to bad faith and CPA suits than they are of failing to properly investigate claims, will allow insurance fraud to go uninvestigated and unreported.

Keodalah does not realistically provide any additional consumer protections nor does it afford any new mechanism for financial recovery by injured persons. It merely creates a situation where employees in the course and scope of their jobs will be subjected to being personally named in lawsuits. In the absence of a statutory grant of a cause of action against individual persons employed by insurer and in recognition of the important role insurers play in investigating and combatting fraud, this Court should overturn the ruling of the Court below and find for the Petitioners.

RESPECTFULLY SUBMITTED this 10th day of January, 2018.

THENELL LAW GROUP P.C..

By:

/s/ Daniel E. Thenell

Daniel E. Thenell, WSBA #37297
Attorney for Amicus Curiae Coalition
Against Insurance Fraud, Inc.

CERTIFICATE OF SERVICE

The undersigned hereby certifies under the penalty of perjury under the laws of the State of Washington that on this date I caused to be served in the manner below a true and correct copy of the foregoing *Brief of Amicus Curiae The Coalition Against Insurance Fraud in Support of Petitioner* on the facilities and to the parties mentioned below as indicated:

ELECTRONIC ORIGINAL TO:

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Supreme Court Clerk	<input type="checkbox"/> Via Messenger Service
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SIGNED at Portland, Oregon this 10th day of January, 2018.



Emerson Lenon

NO. 95867-0

SUPREME COURT
OF THE STATE OF WASHINGTON

MOUN KEODALAH and AUNG KEODALAH, husband and wife,
Respondents,

v.

ALLSTATE INSURANCE COMPANY, a corporation, and TRACEY
SMITH and JOHN DOE SMITH, husband and wife,
Petitioners.

**APPENDIX TO BRIEF OF AMICUS CURAE THE COALITION
AGAINST INSURANCE FRAUD IN SUPPORT OF PETITIONERS**

RCW 19.86.020.....	001
RCW 19.86.090.....	002-003
RCW 48.01.030.....	004
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RCW 48.30A.050.....012
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MCA 33-18-201.....014-015

West's Revised Code of Washington Annotated
Title 19. Business Regulations--Miscellaneous (Refs & Annos)
Chapter 19.86. Unfair Business Practices--Consumer Protection (Refs & Annos)

West's RCWA 19.86.020

19.86.020. Unfair competition, practices, declared unlawful

Currentness

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

Credits

[1961 c 216 § 2.]

West's RCWA 19.86.020, WA ST 19.86.020

The statutes and Constitution are current with all legislation from the 2018 Regular Session of the Washington Legislature.

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West's Revised Code of Washington Annotated

Title 19. Business Regulations--Miscellaneous (Refs & Annos)

Chapter 19.86. Unfair Business Practices--Consumer Protection (Refs & Annos)

West's RCWA 19.86.090

19.86.090. Civil action for damages--Treble damages authorized--Action by governmental entities

Effective: July 26, 2009

Currentness

Any person who is injured in his or her business or property by a violation of RCW 19.86.020, 19.86.030, 19.86.040, 19.86.050, or 19.86.060, or any person so injured because he or she refuses to accede to a proposal for an arrangement which, if consummated, would be in violation of RCW 19.86.030, 19.86.040, 19.86.050, or 19.86.060, may bring a civil action in superior court to enjoin further violations, to recover the actual damages sustained by him or her, or both, together with the costs of the suit, including a reasonable attorney's fee. In addition, the court may, in its discretion, increase the award of damages up to an amount not to exceed three times the actual damages sustained: **PROVIDED**, That such increased damage award for violation of RCW 19.86.020 may not exceed twenty-five thousand dollars: **PROVIDED FURTHER**, That such person may bring a civil action in the district court to recover his or her actual damages, except for damages which exceed the amount specified in RCW 3.66.020, and the costs of the suit, including reasonable attorney's fees. The district court may, in its discretion, increase the award of damages to an amount not more than three times the actual damages sustained, but such increased damage award shall not exceed twenty-five thousand dollars. For the purpose of this section, "person" includes the counties, municipalities, and all political subdivisions of this state.

Whenever the state of Washington is injured, directly or indirectly, by reason of a violation of RCW 19.86.030, 19.86.040, 19.86.050, or 19.86.060, it may sue therefor in superior court to recover the actual damages sustained by it, whether direct or indirect, and to recover the costs of the suit including a reasonable attorney's fee.

Credits

[2009 c 371 § 1, eff. July 26, 2009; 2007 c 66 § 2, eff. April 17, 2007; 1987 c 202 § 187; 1983 c 288 § 3; 1970 ex.s. c 26 § 2; 1961 c 216 § 9.]

OFFICIAL NOTES

Application--2009 c 371: "This act applies to all causes of action that accrue on or after July 26, 2009." [2009 c 371 § 3.]

Effective date--2007 c 66: See note following RCW 19.86.080.

Intent--1987 c 202: See note following RCW 2.04.190.

Short title--Purposes--1983 c 288: "This act may be cited as the antitrust/consumer protection improvements act. Its purposes are to strengthen public and private enforcement of the unfair business practices-consumer protection act, chapter 19.86 RCW, and to repeal the unfair practices act, chapter 19.90 RCW, in order to eliminate a statute which is unnecessary in light of the provisions and remedies of chapter 19.86 RCW. In repealing chapter 19.90 RCW, it is the

intent of the legislature that chapter 19.86 RCW should continue to provide appropriate remedies for predatory pricing and other pricing practices which constitute violations of federal antitrust law.” [1983 c 288 § 1.]

West's RCWA 19.86.090, WA ST 19.86.090

The statutes and Constitution are current with all legislation from the 2018 Regular Session of the Washington Legislature.

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West's Revised Code of Washington Annotated
Title 48. Insurance (Refs & Annos)
Chapter 48.01. Initial Provisions (Refs & Annos)

West's RCWA 48.01.030

48.01.030. Public interest

Currentness

The business of insurance is one affected by the public interest, requiring that all persons be actuated by good faith, abstain from deception, and practice honesty and equity in all insurance matters. Upon the insurer, the insured, their providers, and their representatives rests the duty of preserving inviolate the integrity of insurance.

Credits

[1995 c 285 § 16; 1947 c 79 § .01.03; Rem. Supp. 1947 § 45.01.03.]

OFFICIAL NOTES

Effective date--1995 c 285: See RCW 48.30A.900.

West's RCWA 48.01.030, WA ST 48.01.030

The statutes and Constitution are current with all legislation from the 2018 Regular Session of the Washington Legislature.

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West's Revised Code of Washington Annotated
Title 48. Insurance (Refs & Annos)
Chapter 48.30. Unfair Practices and Frauds (Refs & Annos)

West's RCWA 48.30.015

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

Effective: December 6, 2007

Currentness

(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.

Credits

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

OFFICIAL NOTES

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

West's RCWA 48.30.015, WA ST 48.30.015

The statutes and Constitution are current with all legislation from the 2018 Regular Session of the Washington Legislature.

West's Revised Code of Washington Annotated
Title 48. Insurance (Refs & Annos)
Chapter 48.30. Unfair Practices and Frauds (Refs & Annos)

West's RCWA 48.30.210

48.30.210. Misrepresentation in application for insurance

Currentness

A person who knowingly makes a false or misleading statement or impersonation, or who willfully fails to reveal a material fact, in or relative to an application for insurance to an insurer, is guilty of a gross misdemeanor, and the license of any such person may be revoked.

Credits

[1995 c 285 § 18; 1990 1st ex.s. c 3 § 10; 1947 c 79 § .30.21; Rem. Supp. 1947 § 45.30.21.]

OFFICIAL NOTES

Effective date--1995 c 285: See RCW 48.30A.900.

West's RCWA 48.30.210, WA ST 48.30.210

The statutes and Constitution are current with all legislation from the 2018 Regular Session of the Washington Legislature.

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West's Revised Code of Washington Annotated
Title 48. Insurance (Refs & Annos)
Chapter 48.30. Unfair Practices and Frauds (Refs & Annos)

West's RCWA 48.30.220

48.30.220. Destruction, injury, secretion, etc., of property

Currentness

Any person, who, with intent to defraud or prejudice the insurer thereof, burns or in any manner injures, destroys, secretes, abandons, or disposes of any property which is insured at the time against loss or damage by fire, theft, embezzlement, or any other casualty, whether the same be the property of or in the possession of such person or any other person, under circumstances not making the offense arson in the first degree, is guilty of a class C felony.

Credits

[1995 c 285 § 19; 1965 ex.s. c 70 § 25; 1947 c 79 § .30.22; Rem. Supp. 1947 § 45.30.22.]

OFFICIAL NOTES

Effective date--1995 c 285: See RCW 48.30A.900.

West's RCWA 48.30.220, WA ST 48.30.220

The statutes and Constitution are current with all legislation from the 2018 Regular Session of the Washington Legislature.

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West's Revised Code of Washington Annotated
Title 48. Insurance (Refs & Annos)
Chapter 48.30. Unfair Practices and Frauds (Refs & Annos)

West's RCWA 48.30.230

48.30.230. False claims or proof--Penalty

Currentness

(1) It is unlawful for any person, knowing it to be such, to:

(a) Present, or cause to be presented, a false or fraudulent claim, or any proof in support of such a claim, for the payment of a loss under a contract of insurance; or

(b) Prepare, make, or subscribe any false or fraudulent account, certificate, affidavit, or proof of loss, or other document or writing, with intent that it be presented or used in support of such a claim.

(2)(a) Except as provided in (b) of this subsection, a violation of this section is a gross misdemeanor.

(b) If the claim is in excess of one thousand five hundred dollars, the violation is a class C felony punishable according to chapter 9A.20 RCW.

Credits

[2003 c 53 § 270, eff. July 1, 2004; 1990 1st ex.s. c 3 § 11; 1947 c 79 § .30.23; Rem. Supp. 1947 § 45.30.23.]

OFFICIAL NOTES

Intent--Effective date--2003 c 53: See notes following RCW 2.48.180.

West's RCWA 48.30.230, WA ST 48.30.230

The statutes and Constitution are current with all legislation from the 2018 Regular Session of the Washington Legislature.

West's Revised Code of Washington Annotated
Title 48. Insurance (Refs & Annos)
Chapter 48.30A. Insurance Fraud

West's RCWA 48.30A.005

48.30A.005. Findings--Intent

Currentness

The legislature finds that the business of insurance is one affected by the public interest, requiring that all persons be actuated by good faith, abstain from deception, and practice honesty and equity in all insurance matters. The payment of kickbacks, bribes, or rebates for referrals to service providers, as has been occurring with increasing regularity in this state, results in inflated or fraudulent insurance claims, results in greater insurance costs for all citizens, and is contrary to the public interest. In particular, the process whereby “cappers” buy and sell insurance claims without the controls of professional licensing and discipline creates a fertile ground for illegal activity and has, in this state, resulted in frauds committed against injured claimants, insurance companies, and the public. Operations that engage in this practice have some or all of the following characteristics: Cappers, acting under an agreement or understanding that they will receive a pecuniary benefit, refer claimants with real or imaginary claims, injuries, or property damage to service providers. This sets off a chain of events that corrupts both the provision of services and casualty or property insurance for all citizens. This chain of events includes false claims for services through the use of false estimates of repair; false prescriptions of care or rehabilitative therapy; services that either do not occur or are provided by persons unqualified to provide the services; submission of false claims; submission of and demands for fraudulent costs, lost wages, pain and suffering, and the like; and other devices meant to result in false claims under casualty or property insurance policies or contracts, whether insured or self-insured, and either directly or through subrogation.

The legislature finds that combatting these practices requires laws carefully fashioned to identify practices that mimic customary business practices. The legislature does not intend this law to be used against medical and other business referral practices that are otherwise legal, customary, and unrelated to the furtherance of some or all of the corrupt practices identified in this chapter.

Credits

[1995 c 285 § 1.]

West's RCWA 48.30A.005, WA ST 48.30A.005

The statutes and Constitution are current with all legislation from the 2018 Regular Session of the Washington Legislature.

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West's Revised Code of Washington Annotated
Title 48. Insurance (Refs & Annos)
Chapter 48.30A. Insurance Fraud

West's RCWA 48.30A.045

48.30A.045. Insurance antifraud plan--File plan and changes with commissioner--Exemptions

Currentness

(1) Each insurer licensed to write direct insurance in this state, except those exempted in subsection (2) of this section, shall institute and maintain an insurance antifraud plan. An insurer licensed after July 1, 1995, shall file its antifraud plan within six months of licensure. An insurer shall file any change to the antifraud plan with the insurance commissioner within thirty days after the plan has been modified.

(2) This section does not apply to:

(a) Health carriers, as defined in RCW 48.43.005;

(b) Life insurers;

(c) Title insurers;

(d) Property or casualty insurers with annual gross written medical malpractice insurance premiums in this state that exceed fifty percent of their total annual gross written premiums in this state;

(e) Credit-related insurance written in connection with a credit transaction in which the creditor is named as a beneficiary or loss payee under the policy, except vendor single-interest or collateral protection coverage as defined in RCW 48.22.110(4); or

(f) Insurers with gross written premiums of less than one thousand dollars in Washington during the reporting year.

Credits

[2005 c 223 § 20, eff. July 24, 2005; 1997 c 92 § 1; 1995 c 285 § 9.]

West's RCWA 48.30A.045, WA ST 48.30A.045

The statutes and Constitution are current with all legislation from the 2018 Regular Session of the Washington Legislature.

West's Revised Code of Washington Annotated
Title 48. Insurance (Refs & Annos)
Chapter 48.30A. Insurance Fraud

West's RCWA 48.30A.050

48.30A.050. Insurance antifraud plan--Specific procedures

Currentness

An insurer's antifraud plan must establish specific procedures to:

- (1) Prevent insurance fraud, including internal fraud involving employees or company representatives, fraud resulting from misrepresentation on applications for insurance coverage, and claims fraud;
- (2) Review claims in order to detect evidence of possible insurance fraud and to investigate claims where fraud is suspected;
- (3) Report fraud to appropriate law enforcement agencies and cooperate with those agencies in their prosecution of fraud cases;
- (4) Undertake civil actions against persons who have engaged in fraudulent activities;
- (5) Train company employees and agents in the detection and prevention of fraud.

Credits

[1995 c 285 § 10.]

West's RCWA 48.30A.050, WA ST 48.30A.050

The statutes and Constitution are current with all legislation from the 2018 Regular Session of the Washington Legislature.

West's Revised Code of Washington Annotated
Title 48. Insurance (Refs & Annos)
Chapter 48.30A. Insurance Fraud

West's RCWA 48.30A.070

48.30A.070. Duty to investigate, enforce, and prosecute violations

Currentness

It is the duty of all peace officers, law enforcement officers, and law enforcement agencies within this state to investigate, enforce, and prosecute all violations of this chapter.

Credits

[1995 c 285 § 14.]

West's RCWA 48.30A.070, WA ST 48.30A.070

The statutes and Constitution are current with all legislation from the 2018 Regular Session of the Washington Legislature.

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West's Montana Code Annotated
Title 33. Insurance and Insurance Companies (Refs & Annos)
Chapter 18. Unfair Trade Practices (Refs & Annos)
Part 2. Insurer's Relations with Insured and Claimant

MCA 33-18-201

33-18-201. Unfair claim settlement practices prohibited

Currentness

A person may not, with such frequency as to indicate a general business practice, do any of the following:

- (1) misrepresent pertinent facts or insurance policy provisions relating to coverages at issue;
- (2) fail to acknowledge and act reasonably promptly upon communications with respect to claims arising under insurance policies;
- (3) fail to adopt and implement reasonable standards for the prompt investigation of claims arising under insurance policies;
- (4) refuse to pay claims without conducting a reasonable investigation based upon all available information;
- (5) fail to affirm or deny coverage of claims within a reasonable time after proof of loss statements have been completed;
- (6) neglect to attempt in good faith to effectuate prompt, fair, and equitable settlements of claims in which liability has become reasonably clear;
- (7) compel insureds to institute litigation to recover amounts due under an insurance policy by offering substantially less than the amounts ultimately recovered in actions brought by the insureds;
- (8) attempt to settle a claim for less than the amount to which a reasonable person would have believed the person was entitled by reference to written or printed advertising material accompanying or made part of an application;
- (9) attempt to settle claims on the basis of an application that was altered without notice to or knowledge or consent of the insured;
- (10) make claims payments to insureds or beneficiaries not accompanied by statements setting forth the coverage under which the payments are being made;

(11) make known to insureds or claimants a policy of appealing from arbitration awards in favor of insureds or claimants for the purpose of compelling them to accept settlements or compromises less than the amount awarded in arbitration;

(12) delay the investigation or payment of claims by requiring an insured, claimant, or physician of either to submit a preliminary claim report and then requiring the subsequent submission of formal proof of loss forms, both of which submissions contain substantially the same information;

(13) fail to promptly settle claims, if 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; or

(14) fail 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.

Credits

Enacted 40-3502.1 by Laws 1977, ch. 320, § 1; Revised Code of Montana 1947, 40-3502.1. Amended by Laws 2009, ch. 56, § 1206, eff. Oct. 1, 2009.

MCA 33-18-201, MT ST 33-18-201

Current through chapters effective, Oct. 1, 2017 session. Statutory changes are subject to classification and revision by the Code Commissioner. Court Rules in the Code are current with amendments received through May 1, 2017.

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