

No. 95867-0

No. 75731-8-I

COURT OF APPEALS, DIVISION ONE,
OF THE STATE OF WASHINGTON

MOUN KEODALAH and AUNG KEODALAH, husband and wife,

Appellants,

v.

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

Respondents.

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Division I
State of Washington

BRIEF OF APPELLANTS

Scott David Smith, WSBA # 48108
C. Steven Fury, WSBA # 8896
Fury Duarte, PS
1606 148th Avenue SE
Bellevue, Washington 98007
425.643.1606
scott@furyduarte.com
steve@furyduarte.com
Attorneys for Appellants

Vonda M. Sargent, WSBA # 24552
Law Office of Vonda M. Sargent
119 First Avenue South, Suite 500
Seattle, Washington 98104
206.838.4970
sisterlaw@me.com
Attorney for Appellants

TABLE OF CONTENTS

I. INTRODUCTION 1

II. ASSIGNMENTS OF ERROR 2

 A. Assignments of Error 2

 B. Issues Pertaining to Assignments of Error 2

III. STATEMENT OF THE CASE 3

IV. SUMMARY OF THE ARGUMENT 7

V. ARGUMENT 8

 A. Moun Keodalah states a cognizable bad-faith claim against individual, employee insurance adjuster Tracey Smith 9

 1. Title 48 imposes a good-faith duty on individual, employee adjusters, and insureds may pursue bad-faith claims against such adjusters for violating that duty 9

 a. RCW 48.01.030’s plain language unambiguously imposes a good-faith duty upon individual, employee adjusters 11

 b. Other state courts have held that individual, employee adjusters may be personally liable based on similar language 17

 c. Only one case in an intra-Western District of Washington split of authority properly applies Washington law, and it, like Division III, held bad-faith actions exist against independent corporate adjusters 21

 2. Keodalah’s factual allegations justify recovery for bad faith and exceed CR 12(b)(6)’s requirements 26

 B. Keodalah states a cognizable CPA claim against Smith 29

1.	Insureds can pursue CPA claims against individual, employee adjusters in Washington	30
2.	Keodalah’s factual allegations justify recovery for Smith’s CPA violations and exceed CR 12(b)(6)’s requirements.....	35
	a. Smith engaged in unfair or deceptive acts or practices, in trade or commerce, that affect the public interest, and satisfy first three prongs.....	35
	b. Smith’s bad faith and unfair and/or deceptive practices caused Keodalah injury	38
VI.	<u>CONCLUSION</u>	39
VII.	<u>APPENDIX</u>	

TABLE OF AUTHORITIES

Washington State Cases

<u>Avnet, Inc. v. Dep’t of Rev.,</u> 187 Wn. App. 427, 348 P.3d 1273 (2015).....	24
<u>Becker v. Cmty. Health Sys., Inc.,</u> 184 Wn.2d 252, 359 P.3d 746 (2015).....	8
<u>Budget Rent-A-Car v. Dep’t of Rev.,</u> 81 Wn.2d 171, 500 P.2d 764 (1972).....	24
<u>Chandler v. Office of the Ins. Comm’r,</u> 141 Wn. App. 639, 173 P.3d 275 (2007).....	14
<u>Deegan v. Windermere Real Estate/Center-Isle, Inc.,</u> 197 Wn. App. 875, __ P.3d __, (2017).....	3 n.2, 9, 29
<u>Eastwood v. Horse Harbor Found., Inc.,</u> 170 Wn.2d 380, 241 P.3d 1256 (2010).....	24
<u>Ellwein v. Hartford Accident & Indem. Co.,</u> 142 Wn.2d 766, 15 P.3d 640 (2001).....	10, 26
<u>Forston-Kemmerer v. Allstate Ins. Co.,</u> 2017 Wash. App. LEXIS 739 (2017).....	7 n.3
<u>FutureSelect Portfolio Mgmt., Inc. v. Tremont Grp. Hold., Inc.,</u> 180 Wn.2d 954, 331 P.3d 29 (2014).....	9, 9 n.4, 29 n.14, 39
<u>Gould v. Mut. Life Ins. Co.,</u> 37 Wn. App. 756, 683 P.2d 207 (1984).....	19, 20, 20 n.9, 34
<u>Guillen v. Pearson,</u> 195 Wn. App. 464, 381 P.3d 149 (2016).....	11, 12
<u>Haberman v. Wash. Pub. Power Supply Sys.,</u> 109 Wn.2d 107, 744 P.2d 1032 (1987).....	20 n.9

<u>Hangman Ridge Training Stables v. Safeco Title Ins. Co.,</u> 105 Wn.2d 778, 719 P.2d 531 (1986).....	30, 35, 38
<u>Indus. Indem. Co. v. Kallevig,</u> 114 Wn.2d 907, 792 P.2d 520 (1990).....	36, 37
<u>In re Parental Rights of KJB,</u> 187 Wn.2d 592, 387 P.3d 1072 (2017).....	9 n.4, 11, 12, 29 n.14, 31
<u>Int’l Ultimate v. St. Paul Fire & Marine,</u> 122 Wn. App. 736, 87 P.3d 774 (2004).....	20 n.9, 33, 34 n.15
<u>Kirk v. Mount Airy Ins. Co.,</u> 134 Wn.2d 558, 951 P.2d 1124 (1998).....	26
<u>Ledcor Indus., Inc. v. Mut. of Enumclaw Ins. Co.,</u> 150 Wn. App. 1, 206 P.3d 1255 (2009).....	35, 36
<u>Manteufel v. Safeco Ins. Co. of Am.,</u> 117 Wn. App. 168, 68 P.3d 1093 (2003).....	20 n.9
<u>Merriman v. York Risk Servs. Grp.,</u> 2017 Wash. App. LEXIS 854 (2017).....	passim
<u>Panag v. Farmers,</u> 166 Wn.2d 27, 204 P.3d 885 (2009).....	13, 30, 33, 34 n.15, 35, 38
<u>Perez-Crisantos v. State Farm Fire & Cas. Co.,</u> 187 Wn.2d 669, __ P.3d __ (2017).....	2 n.2, 11 n.5
<u>Pub. Employees Mut. Ins. Co. v. Kelly,</u> 60 Wn. App. 610, 805 P.2d 822 (1991).....	25
<u>Short v. Demopolis,</u> 103 Wn.2d 52, 691 P.2d 163 (1984).....	31
<u>St. Paul Fire & Mar. Ins. Co. v. Onvia, Inc.,</u> 165 Wn.2d 122, 196 P.3d 664 (2008).....	26
<u>State v. Ervin,</u> 169 Wn.2d 815, 239 P.3d 354 (2010).....	11

<u>State v. Roggenkamp,</u> 153 Wn.2d 614, 106 P.3d 196 (2005).....	23, 31
<u>State v. Willis,</u> 151 Wn.2d 255, 87 P.3d 1164 (2004).....	9 n.4, 29 n.14
<u>Tank v. State Farm Fire & Cas. Co.,</u> 105 Wn.2d 381, 715 P.3d 1133 (1986).....	26, 27
<u>Trujillo v. Nw. Tr. Servs., Inc.,</u> 183 Wn.2d 820, 355 P.3d 1100 (2015).....	9, 38
<u>Vogel v. Alaska S.S. Co.,</u> 69 Wn.2d 497, 419 P.2d 141 (1966).....	27, 37
<u>Wash. State Phys. Ins. Exch. & Ass'n v. Fisons Corp.,</u> 122 Wn.2d 299, 858 P.2d 1054 (1993).....	33, 34 n.15, 35

Federal Cases

<u>Collins v. Quintana,</u> 2016 U.S. Dist. LEXIS 11000 (W.D. Wash. Jan. 28, 2016)..	24 n.10
<u>Garoutte v. Am. Fam. Mut. Ins. Co.,</u> 2013 U.S. Dist. LEXIS 8559 (W.D. Wash. Jan. 22, 2013)....	passim
<u>Lease Crutcher Lewis WA, LLC v. Nat'l Union Fire Ins. Co. of Pitt.,</u> 2009 U.S. Dist. LEXIS 97899 (WD Wash. Oct. 20, 2009) ...	passim
<u>Rice v. State Farm Mut. Auto. Ins. Co.,</u> 2005 WL 2487975 (W.D. Wash. Oct. 7, 2005)	passim

Other State Cases

<u>O'Fallon v. Farmers Ins. Exch.,</u> 260 Mont. 233, 859 P.2d 1008 (Mont. 1993)	passim
<u>Taylor v. Nationwide Mutual Insurance Co.,</u> 214 W. Va. 324, 589 S.E.2d 55 (W. Va. 2003)	passim

Washington Statutes

RCW 19.86.010	31
RCW 19.86.020	30, 31
RCW 19.86.090	30
RCW 19.86.093	38
RCW 19.86.170	36
RCW 19.86.920	30
RCW 48.01.020	10, 13, 17
RCW 48.01.030	passim
RCW 48.01.070	10, 13, 36
RCW 48.03.030	16 n.7
RCW 48.05.140	16 n.7
RCW 48.12.475	16 n.7
RCW 48.18.180	15
RCW 48.18.210	16 n.7
RCW 48.29.210	16
RCW 48.30.010	36
RCW 48.30.015	2 n.1
RCW 48.30A.050.....	16 n.7
RCW 48.36A.310.....	16 n.7
RCW 48.44.160	16 n.7

RCW 48.90.020	16 n.7
RCW 48.94.020	16
RCW 48.94.030	16
RCW 48.130.040	16 n.7

Other State Statutes

Mont. Code Ann. § 33-1-202.....	17
Mont. Code Ann. § 33-18-201	17, 18, 32
W. Va. Code § 33-11-1	18

Washington Regulations

WAC 284-30-300.....	27
WAC 284-30-330.....	27, 37

Washington State Rules

CR 12(b)(6).....	passim
CR 30(b)(6).....	5, 28
RAP 2.3(b)(4)	2, 7 n.3

Federal Rules

Fed. R. Civ. P. 12(b)(6).....	6
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Additional Authority

<u>The American Heritage Dictionary</u> (2d Coll. Ed. 1985).....	14
<u>The Claims Environment</u> (James Markham et al., eds., 1st ed. 1993)	15

Webster's Collegiate Dictionary (7th New Coll. Ed. 1970)14

Webster's New Collegiate Dictionary (1981).....14

I. INTRODUCTION

Moun Keodalah, an Allstate insured, suffered injuries in a serious traffic crash an uninsured motorcyclist caused in Seattle on April 2, 2007. Keodalah made an underinsured-motorist (“UIM”) claim with Allstate and requested that it pay his \$25,000 limits. Though Allstate knew the Seattle Police Department had determined the motorcyclist was at fault, Allstate’s witness interviews revealed that the motorcyclist was driving recklessly and well over the speed limit, and Allstate’s own accident-reconstruction expert found that the motorcyclist caused the crash, Allstate told Keodalah he was 70 percent at fault, refused to explain its reasoning, and offered only \$1,600.

Keodalah was ultimately forced to file a UIM action against Allstate in King County District Court to obtain benefits. Allstate’s adjuster, Tracey Smith, participated in answering discovery and testified at deposition and trial. Throughout the process, she misrepresented facts, made assertions that contradicted her and Allstate’s investigation, refused to settle Keodalah’s claim despite the fact liability was reasonably clear, and otherwise failed to deal with Keodalah in a state of mind that indicated honesty and lawfulness of purpose. The jury awarded Keodalah \$108,868.20.

Keodalah sued Allstate and Smith in King County Superior Court on August 4, 2015. Pertinent here, he alleged both insurance bad faith (“bad faith”) and Consumer Protection Act (“CPA”) claims against Smith. Smith

moved to dismiss the claims under CR 12(b)(6), arguing that Washington law does not permit bad-faith or CPA claims against individual, employee insurance adjusters. In an August 1, 2016 CR 12(b)(6) order, the trial court granted her motion. It then certified its order under RAP 2.3(b)(4), and this Court granted discretionary review.¹ That part of the CR 12(b)(6) order that dismissed the bad-faith and CPA claims against Smith should be reversed.

II. ASSIGNMENTS OF ERROR

A. Assignments of Error.

1. The trial court erred in its August 1, 2016 CR 12(b)(6) Order when it dismissed Keodalah's bad-faith claim against Smith.

2. The trial court erred in its August 1, 2016 CR 12(b)(6) Order when it dismissed Keodalah's CPA claim against Smith.

B. Issues Pertaining to Assignments of Error.

1. Did the trial court err in interpreting RCW 48.01.030 when it concluded that Washington law does not permit bad-faith claims against individual, employee insurance adjusters? (Assignment of Error 1).

2. Did the trial court err in interpreting the CPA when it held Washington law does not permit CPA claims against individual, employee insurance adjusters? (Assignment of Error 2).

¹ Keodalah also alleged an IFCA claim against Allstate. CP 14-15. Allstate moved to dismiss based on the statute of limitations. CP 57-60. Keodalah opposed, arguing that each IFCA-enumerated WAC violation, *see* RCW 48.30.015(2)-(3), (5), creates an IFCA claim with its own statute of limitations. CP 126-29. The trial court granted Allstate's motion, and this Court granted review of that issue as well. The Washington Supreme Court has since decided *Perez-Crisantos v. State Farm Fire & Cas. Co.*, 187 Wn.2d 669, ___ P.3d ___ (2017), which held IFCA-enumerated WAC violations alone do not create an IFCA claim, rendering the IFCA part of Keodalah's appeal moot. Thus, he does not pursue that part.

III. STATEMENT OF THE CASE

Moun Keodalah was involved in a serious motor-vehicle crash on April 2, 2007. CP 2.² He had come to a complete stop at a stop sign and had just begun across the cross street when a motorcyclist crashed into the side of his truck. CP 2. Keodalah was injured; the cyclist was killed. CP 2. The Seattle Police Department (“SPD”) concluded the cyclist was traveling 70 to 74 miles per hour in a 30-mile-per-hour zone and that his excessive speed caused the crash. CP 3. It also found Keodalah had not been on a cell phone and had fully stopped at the stop sign. CP 3. SPD issued no citation. CP 3.

Keodalah’s UIM insurance carrier, Allstate, investigated the crash, and its employee, Celia Hart, interviewed witnesses. CP 3-4. On May 31, 2007, she noted that the witnesses believed the cyclist was driving between 75 to 80 miles per hour and caused the crash. CP 3-4. Allstate employee Scott McFarland then again reviewed the file around June 25, 2007. CP 4-5. He noted that Witness 03 stated the cyclist “cheated” at the intersection to get to the front of the line and exceeded 70 miles per hour. CP 4-5.

McFarland suggested that Allstate hire an accident reconstructionist to assist with determining liability. CP 5. It hired Traffic Collision Analysis (“TCA”). CP 5. On August 17, 2007, TCA provided its report; it concluded

² “Because this is an appeal from a trial court order dismissing claims under CR 12(b)(6), [the Court] focus[es] on the facts as alleged in the complaint.” Deegan v. Windermere Real Estate/Center-Isle, Inc., 197 Wn. App. 875, 880 n.1, __ P.3d __ (2017).

that Keodalah stopped at the stop sign, the cyclist was traveling 60 miles per hour minimum, and that excessive speed caused the crash. CP 5-6.

Because the cyclist was uninsured, CP 3, on April 8, 2008, Keodalah requested that Allstate pay his \$25,000 UIM policy limits. CP 6. On July 11, 2008, Allstate responded by stating Keodalah was 70 percent at fault and offering \$1,600. CP 6. Despite Keodalah's demands, through an August 11, 2008 letter, Allstate refused to provide Keodalah TCA's report. CP 6. Moreover, despite repeated requests, Allstate also refused to explain why it found that Keodalah was 70 percent at fault. CP 6-7.

On June 28, 2012, Keodalah initiated a UIM action against Allstate in King County District Court to obtain his benefits. CP 7. Allstate answered by denying liability and asserting comparative fault. CP 7. It also requested that the trial court dismiss the action with prejudice and award Allstate costs and attorneys' fees for having to defend. CP 7.

Keodalah served discovery on Allstate on October 19, 2012. CP 7. Allstate, through attorney Jodi Held and its adjuster, Tracey Smith, asserted that Keodalah failed to stop at the stop sign and was at fault. CP 7. Yet, Allstate and Smith acknowledged they possessed the SPD report, which found the cyclist was at fault, CP 3, 7, and TCA's report, which found that Keodalah had stopped and the cyclist was at fault. CP 5-6, 8.

On February 28, 2013, Allstate designated Smith as its CR 30(b)(6) representative. CP 8. She testified that she did not know when Allstate made its liability decision or when it determined the value of Keodalah's claim. CP 8. She further testified that Keodalah ran the stop sign and was thus at fault, but she later admitted that Keodalah had not failed to stop. CP 8. She additionally testified that Keodalah had been on his cell phone, but again later admitted he had not been on his phone. CP 8.

In March 2013, Allstate offered to settle Keodalah's UIM claim for \$15,000—substantially less than the \$25,000 policy limits. CP 8. Then, in October 2013, Keodalah offered to settle for policy limits; Allstate refused. CP 8-9. Smith directed and/or participated in the acts throughout the course of the UIM claim.

Trial began on March 10, 2014. CP 9. Smith again testified at trial that Keodalah was 70 percent at fault. CP 9. However, she also testified that she and Allstate had relied on the eyewitness statements, SPD report, and TCA report—all of which found or demonstrated that the cyclist was in fact at fault—to reach that conclusion. CP 9. Indeed, she later conceded during her testimony that Allstate's own expert, TCA, did not support that at-fault finding, CP 10, and that Allstate refused to alter its liability position after it learned the cyclist's speed caused the crash. CP 10. She further testified that when she and Allstate alleged that Keodalah failed to stop, they knew the

statement was false, CP 9-10, and that Allstate changed its position from failure to stop to failure to yield because another attorney looked at the case. However, she also stated that there was no evidence Keodalah failed to yield other than the fact a crash occurred. CP 10. She also again testified that she and Allstate had argued Keodalah was on his cell phone, and that Allstate refused to change its liability position after learning he was not. CP 10. On March 12, 2014, the jury found the cyclist 100 percent at fault and awarded \$108,868.20. CP 11.

Keodalah filed the current action against Allstate and Smith in King County Superior Court on August 4, 2015. CP 1-16. He alleged bad-faith and CPA claims against Smith and Allstate and an Insurance Fair Conduct Act (“IFCA”) claim against Allstate. CP 1-16. Allstate and Smith removed the action to the US District Court for the Western District of Washington, CP 17-28, and moved to dismiss under Rule 12(b)(6). *See* CP 32. Keodalah moved to remand, and the federal court granted Keodalah’s remand motion on the basis that Allstate and Smith had failed to demonstrate more than \$75,000 was in controversy, eliminating diversity jurisdiction. CP 35-44.

Allstate and Smith then moved the trial court below to dismiss under CR 12(b)(6). CP 46. Pertinent here, Smith asked that the trial court dismiss Keodalah’s claims against Smith on the basis that Washington law does not permit bad-faith or CPA claims against individual, employee adjusters. CP

61-67. The trial court heard argument on July 22, 2016. CP 154. It entered its written CR 12(b)(6) order in which it dismissed Keodalah’s bad faith and CPA claims against Smith on August 1, 2016. CP 154-55.³

IV. SUMMARY OF THE ARGUMENT

The trial court misinterpreted RCW 48.01.030 and, thus, dismissed Keodalah’s bad-faith claim against Smith in error. The Legislature has long recognized the insurance industry is a matter of public interest. To protect the industry’s integrity and public, it enacted Title 48 to comprehensively regulate the industry and *all persons* engaged therein. As a keystone of its statutory scheme, it imposed, through RCW 48.01.030, a good-faith duty on *all persons* engaged in the industry, including insurers, insureds, and their representatives. The courts have long held that bad-faith actions may lie for acts that breach that statutory duty.

Individual, employee adjusters are clearly “persons” engaged in the insurance industry. Further, Title 48’s scheme and RCW 48.01.030’s plain, unambiguous language demonstrate that the Legislature intended to impose on such adjusters a good-faith duty as insurer “representatives”. Thus, such

³ Allstate and Smith also moved to dismiss the claims against them by arguing that, because Keodalah had already litigated the UIM claim, *res judicata* barred his current action. CP 51-57. The trial court denied Allstate and Smith’s motion in that regard and certified that issue under RAP 2.3(b)(4). CP 155. Allstate and Smith did not seek review. Division III has since held that *res judicata* does not bar claims in cases like that present here. Forston-Kemmerer v. Allstate Ins. Co., 2017 Wash. App. LEXIS 739 (2017). The trial court also denied Allstate and Smith’s motion to the extent they argued that acts taken post-UIM-complaint cannot be actionable. CP 155. They did not seek review of that ruling.

adjusters owe an independent good-faith duty, and a bad-faith claim may lie upon breach. Keodalah's bad-faith claim against Smith was proper.

The trial court also misinterpreted RCW 19.86 and, thus, dismissed Keodalah's CPA claim against Smith in error. By enacting the CPA, the Legislature intended to broadly prohibit *any person* from engaging in unfair or deceptive acts in trade or commerce; this included the insurance industry. The Legislature also created a private right of action to enforce the CPA. This private right of action does not require a contractual relationship.

The CPA defines "person" to include a natural person. Individual, employee adjusters clearly fall within that definition. Thus, the CPA applies to individual, employee adjusters by its plain, unambiguous terms, and a CPA claim may lie against such adjusters. Further, because Smith acted in bad-faith, engaged in acts that the WACs define to be unfair practices, and the insurance industry is legislatively declared to be in the public interest, a *per se* CPA action exists. Keodalah's CPA claim against Smith was proper.

V. ARGUMENT

A court must deny a CR 12(b)(6) motion unless it appears beyond doubt the plaintiff can prove no set of facts consistent with the complaint that would entitle him or her to relief. Becker v. Cmty. Health Sys., Inc., 184 Wn.2d 252, 257-58, 359 P.3d 746 (2015). It must take all facts alleged in a complaint as true, draw all reasonable inferences in the plaintiff's favor,

and consider hypothetical facts that support the claim. Trujillo v. Nw. Tr. Servs., Inc., 183 Wn.2d 820, 830, 355 P.3d 1100 (2015). Any hypothetical situation a complaint conceivably raises will defeat a CR 12(b)(6) motion if legally sufficient to support plaintiff's claim. Deegan v. Windermere Real Estate/ Center-Isle, 197 Wn. App. 875, 884, ___ P.3d ___ (2017). “[A] complaint survives a CR 12(b)(6) motion if *any* set of facts could exist that would justify recovery.” FutureSelect Portfolio Mgmt., Inc. v. Tremont Grp. Hold., Inc., 180 Wn.2d 954, 962-63, 331 P.3d 29 (2014) (quoting Hoffer v. State, 110 Wn.2d 415, 420, 755 P.2d 781 (1988)).

A. Keodalah states a cognizable bad-faith claim against Smith.⁴

The trial court dismissed Keodalah's bad-faith claim against Smith, holding that Washington law does not allow an insured to pursue bad-faith claims against individual, employee adjusters. CP 148-49. This was error.

1. Title 48 imposes a good-faith duty on individual employee adjusters, and insureds may pursue bad-faith claims against such adjusters for violating that duty.

Our Legislature long-ago made clear that the insurance industry is a matter that affects the public interest, and that it intended to establish broad, comprehensive insurance-industry regulation in Title 48: “All insurance and

⁴ CR 12(b)(6) dismissals are reviewed *de novo*. FutureSelect, 180 Wn.2d at 962. Statutory interpretation matters are likewise reviewed *de novo*. In re Parental Rights to KJB, 187 Wn.2d 592, 596, 387 P.3d 1072 (2017). Case law interpretation is also a question of law subject to *de novo* review. State v. Willis, 151 Wn.2d 255, 261, 87 P.3d 1164 (2004).

insurance transactions in this state, or affecting subjects located wholly or in part or to be performed within this state, and *all persons* having to do therewith are governed by [Title 48].” RCW 48.01.020 (emphasis added); Laws of 1947, ch. 79, §.01.02. To protect the industry’s integrity and the public, it included in Title 48 a blanket, statutory good-faith duty owed by *all persons*, including both insurers *and their representatives*:

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.

RCW 48.01.030 (emphasis added). It broadly defined the term “person” in Title 48 to include an individual. *Id.* 48.01.070.

Washington’s state courts have also long recognized that, if an entity that owes RCW 48.01.030’s statutory good-faith duty breaches that duty, it may be subject to a common-law tort action for bad faith. See *Ellwein v. Hartford Accident & Indem. Co.*, 142 Wn.2d 766, 775, 15 P.3d 640 (2001), overruled on other grounds by *Smith v. Safeco Ins. Co.*, 150 Wn.2d 478, 78 P.3d 1274 (2003). Indeed, while Washington’s state courts have not had an opportunity to consider the precise issue of whether individual, employee adjusters owe an RCW 48.01.030 good-faith duty that can subject them to

a bad-faith claim,⁵ Division III recently held, using reasoning that applies equally here, that corporate adjusters “unambiguously” owe such a duty and are subject to a bad-faith claim. Merriman v. York Risk Servs. Grp., 2017 Wash. App. LEXIS 854, at 14-17 (2017) (“RCW 48.01.030 unambiguously applies to insurance adjusters.”). Its reasoning, as well as long-established statutory interpretation rules, make clear that RCW 48.01.030 imposes an actionable, good-faith duty on individual, employee adjusters. Thus, a bad-faith tort action for a breach of that duty is available.

- a. *RCW 48.01.030’s plain language unambiguously imposes a good-faith duty on individual, employee adjusters.*

The chief goal in statutory interpretation is to discern and implement the Legislature’s intent. In re Parental Rights to KJB, 187 Wn.2d 592, 596, 387 P.3d 1072 (2017). To determine the intent, a court must first look to the statute’s plain language, considering the provision’s text, statute’s context, related provisions, and statutory scheme as a whole. Guillen v. Pearson, 195 Wn. App. 464, 471, 381 P.3d 149 (2016), cert. denied, 187 Wn.2d 1005, 386 P.3d 1093 (2017). A court must give an undefined term its plain and ordinary meaning unless a contrary legislative intent is indicated, State v. Ervin, 169 Wn.2d 815, 820, 239 P.3d 354 (2010), and may use a dictionary to determine a term’s plain meaning. Guillen, 195 Wn. App. at 471. If the

⁵ As first occurred here, insurers remove many of these extra-contractual actions to federal court based on diversity jurisdiction. See Perez-Crisantos, 187 Wn.2d at 669.

statute's meaning is plain on its face, a court must give effect to the plain meaning as an expression of legislative intent and not consider other sources of such intent. Id. Plain, unambiguous language requires no construction. KJB, 387 P.3d at 597. A statute is unambiguous if its language is susceptible to only one reasonable interpretation. Guillen, 195 Wn. App. at 471.

Since this Court granted discretionary review here, Division III in Merriman, 2017 Wash. App. LEXIS 854, held that corporate adjusters owe a statutory, good-faith duty, and insureds can assert bad-faith actions against such adjusters. Id. at *14-17. There, insureds lost \$300,000 in personal property in a warehouse fire. Id. at *2. The warehouse's insurer retained a corporate adjuster to assist in handling claims. Id. at *3. That adjuster failed to disclose that coverage existed for persons that stored belongings at the warehouse. Id. at *4-5. After learning through discovery in a negligence action against the warehouse owner that insurance coverage did in fact exist, the insureds joined the adjuster and asserted a bad-faith and CPA claim. Id. at *5-6. The trial court dismissed the claims. Id. at *6.

Reversing the trial court as to the bad-faith claim, Division III first noted that the issue presented "a question of statutory interpretation." Id. at *15. Applying the principles set forth above, Division III stated that "RCW 48.01.030 unambiguously applies to 'the business of insurance,' imposing requirements on 'all persons,' and rests the duty of preserving inviolate the

integrity of insurance upon, among others, ‘[the] representatives’ of the insurer.” Id. Noting that Title 48 defined person to include companies, the court held the adjuster “was, at all relevant times, a ‘person’ engaged in ‘the business of insurance’ and a representative of” the insurer. Id. at *15-16. Indeed, it broadly held that “RCW 48.01.030 unambiguously applies to insurance adjusters.” Id. at *17. The same applies here.

RCW 48.01.030’s broad, plain language is unambiguous and clearly includes individual, employee adjusters. Through Title 48, the Legislature intended to protect both the public and the insurance industry’s integrity by comprehensively regulating the entire industry “and ***all persons*** having to do therewith”. RCW 48.01.020 (emphasis added); Panag v. Farmers Ins. Co. of Wash., 166 Wn.2d 27, 43, 204 P.3d 885 (2009) (“A primary purpose of the intensive regulation of [the insurance industry] is to create public confidence in the honesty and reliability of those who engage in the business of insurance”). To further its protective goal, the Legislature mandated that ***all persons*** “be actuated by good faith, abstain from deception, and practice honesty and equity in all insurance matters.” Id. 48.01.030. It then specifically defined “persons” to include “individuals”. Id. 48.01.070. This definition clearly encompasses individual, employee adjusters. Thus, based on the Legislature’s distinct intent to comprehensively regulate all persons in the industry, it is evident that RCW 48.01.030’s use of the term person

was intended to encompass and impose upon all persons, including persons such as individual, employee adjusters, a good-faith duty. Cf. Chandler v. Office of the Ins. Comm’r, 141 Wn. App. 639, 659-60, 173 P.3d 275 (2007) (applying RCW 48.01.030’s good-faith duty to insurance agents).

Moreover, it imposed on “the insurer, the insured, their providers, and *their representatives*” a duty to preserve “inviolate the integrity of insurance.” RCW 48.01.030 (emphasis added). And, while Title 48 does not specifically define the term “representative”, it is again evident that the Legislature intended that the term would include persons such as individual, employee adjusters.

Representative is defined as “one that represents another as *agent*, deputy, substitute, or delegate”, Webster’s Collegiate Dictionary 728 (7th New Coll. Ed. 1970) (emphasis added), “[o]ne that serves as a delegate or *agent* for another”, The American Heritage Dictionary 1049 (2d Coll. Ed. 1985) (emphasis added), or one “that represents another as *agent*, deputy, substitute, or delegate”. Webster’s New Collegiate Dictionary 974 (1981) (emphasis added). Individual, employee adjusters clearly fall within these definitions. Indeed, in an influential industry text, both the American Institute for Chartered Property Casualty Underwriters and the Insurance Institute of America state that the claims representative—*i.e.*, the person that “investigate[s] the facts of specific claims to determine coverage, legal

liability, damages, and reserves”—is the person and employee “responsible for fulfilling the insurance company’s promise” to its insured. The Claims Environment vii (James J. Markham et al. eds., 1st ed. 1993). In other words, the adjuster is the insurer’s agent—or representative—for handling claims. RCW 48.01.030 thus includes individual, employee adjusters in its duty. Nothing in the provision removes such adjusters from its broad reach.

Moreover, several of the Legislature’s other uses of “representative” in Title 48 provide further evidence that it considered employees to fall in the term. For example, in requiring that a premium stated in a policy include all fees, charges, and premiums, the Legislature stated, in pertinent part:

(2) No insurer or its officer, *employee*, appointed insurance producer, *or other representative* shall charge or receive any fee, compensation, or consideration for insurance which is not included in the premium specified in the policy.

RCW 48.18.180(2) (emphasis added).⁶ Likewise, in prohibiting various title insurer practices, it provided:

(1) A title insurer, title insurance agent, or *employee, agent, or other representative* of a title insurer or title insurance agent shall not, directly or indirectly, give any fee, kickback, or other thing of value to any person as an inducement, payment, or reward for placing business, referring business, or causing title insurance business to be given to either the title insurer, or title insurance agent, or both.

(2) A title insurer, title insurance agent, or *employee, agent, or other representative* of a title insurer or title insurance agent shall not, directly or indirectly, give anything of value to any person in a

⁶ The Legislature included both this provision and the provision codified at RCW 48.01.030 in the 1947 Insurance Code. Laws of 1947, ch. 79, §.18.18.

position to refer or influence the referral of title insurance business to either the title insurance company or title insurance agent, or both, except as permitted under rules adopted by the commissioner.

RCW 48.29.210 (emphasis added). It also specifically removed employees from “representative” in other Title 48 parts. For example, in requiring that reinsurance intermediary-brokers maintain certain records, it stated:

(1) For at least ten years after expiration of each contract of reinsurance transacted by the reinsurance intermediary-broker, the reinsurance intermediary-broker shall keep a complete record for each transaction showing:

....

(k) When the reinsurance intermediary-broker procures a reinsurance contract on behalf of a licensed ceding insurer:

....

(ii) If placed through a *representative* of the assuming reinsurer, *other than an employee*, written evidence that the reinsurer has delegated binding authority to the representative.

RCW 48.94.020(1)(k) (emphasis added); RCW 48.94.030(4)(k) (similar).⁷

Like the term “person”, “representative” is plain and unambiguous.

RCW 48.01.030’s text establishes the Legislature intended the provision to carry a broad, all-encompassing scope, RCW 48.01.030’s related provisions

⁷ The Legislature has also used employees and representatives as distinct terms in various Title 48 provisions as well. Largely it has done so when trying to make clear that every person involved with an entity that is subject to Title 48 must cooperate with the insurance commissioner, see, e.g., RCW 48.03.030, 48.05.140, 48.12.475, 48.36A.310, 48.44.160, but also in other contexts. See RCW 48.130.040, 48.18.210, 48.30A.050, 48.90.020. Nevertheless, several Title 48 provisions demonstrate the Legislature clearly contemplated that the term representative would include employees, and including employees comports with both Title 48 and, specifically, RCW 48.01.030’s unambiguously broad reach.

demonstrate the Legislature intended a comprehensive statutory coverage, see RCW 48.01.020, and the statute’s context—recognizing the business of insurance affects the public interest—makes clear the Legislature’s intent to closely regulate all persons involved. RCW 48.01.030’s language and duties are subject to only one reasonable interpretation—the Legislature intended to broadly impose a duty of good faith on all persons engaged in the insurance industry. This includes individual, employee adjusters. No further analysis is required. They are thus subject to a tort action for bad faith if they violate the duty.

- b. *Other state courts have held individual, employee adjusters may be personally liable based on similar language.*

Two other state courts have held that individual, employee adjusters can be held personally liable for bad faith and consumer protection statute violations based on similar language. In 1993, the Montana Supreme Court in O’Fallon v. Farmers Ins. Exch., 260 Mont. 233, 859 P.2d 1008 (Mont. 1993), decided that individual, employee adjusters could be held personally liable for violating Mont. Code Ann. § 33-18-201, which prohibits unfair claim settlement practices. In so holding, the O’Fallon court first noted that 33-18-201 stated “no person” can engage in the statute’s forbidden conduct. O’Fallon, 260 Mont. at 243. It then noted that the same Act defined person to include an individual. Id. (quoting § 33-1-202(3)). Finally, it recognized

it had previously held that a claimant could maintain a civil action for an entity's violating a 33-18-201 duty. Id. (citing Klaudt v. Flink, 202 Mont. 247, 658 P.2d 1065 (Mont. 1983)). Based on those recognitions, it held that the statute's language made clear that individual, employee adjusters were within the statute's coverage, that they owed a statutory duty, and that, per Klaudt, insureds can pursue common-law bad-faith suits against individual, employee adjuster for breaching a 33-18-201 duty. Id. at 243-45.

Likewise, in Taylor v. Nationwide Mutual Insurance Co., 214 W. Va. 324, 589 S.E.2d 55 (W. Va. 2003)—an insured's action against his UIM carrier—the West Virginia Supreme Court of Appeals held “that a cause of action exists in West Virginia to hold a claims adjuster employed by an insurance company personally liable for violations of the West Virginia Unfair Trade Practices Act”. Id. at 326. The *Taylor* court first noted that Unfair Trade Practice Act's purpose was “to regulate trade practices in the business of insurance” by defining and prohibiting unfair or deceptive acts. Id. at 328 (quoting W. Va. Code § 33-11-1). It then noted the Act achieved its goal by prohibiting any “person” from engaging in a trade practice the Act defined to be a deceptive act or practice in the business of insurance. Id. And, like O'Fallon, it recognized it had previously held that a private cause of action exists against entities that violate the act. Id. at 328-29.

Because a private right of action existed, the Taylor court concluded that the issue of whether an insured can hold individual, employee adjusters liable for violating the Act presented “a straightforward case of statutory interpretation”—the court needed only decide if such an adjuster fell within the Act’s express terms. Id. at 328-29. The Taylor court then noted again that the Act prohibits any person from engaging in deceptive acts in the business of insurance, and that the term “person” was defined to include an individual. Id. 329-30. It then easily concluded:

This Court finds that this definition of “person” is clear and unambiguous and plainly expresses the legislative intent to include “any individual” within the scope of the term “person” for purposes of the Act. Further, it is undisputed that a claims adjuster is an individual. We conclude, therefore, that individual claims adjusters fall within the Act’s scope. Accordingly, we hold that a cause of action exists in West Virginia to hold a claims adjuster employed by an insurance company personally liable for violations of the West Virginia Unfair Trade Practices Act

Id. at 330. The same analysis—indeed the same analysis Division III applied in Merriman—holds true here.

In fact, in a substantially similar context, the Washington Court of Appeals, without citing to RCW 48.01.030, has previously held that insurer agents who are responsible for adjusting a claim can be held liable. In Gould v. Mut. Life Ins., 37 Wn. App. 756, 683 P.2d 207 (1984), a life-insurance beneficiary that had her claim denied alleged that the insurer and two of its attorneys had acted in bad faith and violated the CPA. Id. at 757-58.

Specifically, she alleged “[t]hat the actions of [the two attorneys] were not limited to rendering services as attorneys of the [insurer], but included participation in an managing the wrongful and bad faith conduct as agents of the insurer” Id. at 757-58.

In concluding that liability existed, the court noted that “[t]he law is clear that corporate officers and agents can incur personal liability under the [CPA]”. Id. at 759. It then held that if the claims were true, “[the attorneys] acted as de facto corporate officers⁸ and in that capacity engaged in conduct for which personal liability can be imposed. . . . It follows that the fact that [the attorneys] are attorneys at law would not protect them from liability imposed on proof of the allegations of the complaint.” Id. at 760.⁹

⁸ The court was not clear in what it meant when saying the two attorneys had become *de facto* corporate officers. There was no allegation that the attorneys exercised any type of company or personnel management. Nevertheless, the opinion states that both officers and agents can incur personal liability. Moreover, even if the attorneys were *de facto* officers, the opinion demonstrates that it is not simply insurers that may be held liable.

⁹ Two cases, Manteufel v. Safeco Ins. Co. of Am., 117 Wn. App. 168, 68 P.3d 1093 (2003), and Int’l Ultimate v. St. Paul Fire & Marine, 122 Wn. App. 736, 87 P.3d 774 (2004), have held that the Washington Supreme Court overruled Gould sub silentio in Haberman v. Wash. Pub. Power Supply Sys., 109 Wn.2d 107, 744 P.2d 1032 (1987). To the extent that Haberman held that CPA claims are not viable against attorneys unless the claims involve the entrepreneurial or commercial aspects of the practice of law, Haberman, 109 Wn.2d at 169, Manteufel and Ultimate may in part be correct. But as Manteufel recognizes, Gould did not permit a claim against attorneys; it permitted a claim against persons who had become adjusters on the claim. 117 Wn. App. at 174. Moreover, even if Manteufel and Ultimate are correct that Gould has been partially overruled, Haberman did not overrule Gould to the extent Gould held that corporate officers and agents can incur personal liability for bad faith and CPA violations. This is certainly true where agents owe their own independent duty—a duty RCW 48.01.030 imposes upon individual, employee adjusters. Indeed, as Merriman notes as to Ultimate: “The court’s discussion affirming dismissal of negligence claims against an insurer’s employee-adjuster in [Ultimate] is so fleeting as to be inscrutable. To read it as suggesting that the tort liability of an agent is limited to conversion situation involving corporate officers cannot be correct. ‘Under Washington

RCW 48.01.030 unambiguously imposes on individual, employee adjusters an independent good-faith duty. If they violate that duty, they are subject to a common-law tort action. Both Montana and West Virginia have reached the same conclusion on a similar analysis—the same analysis that Merriman recently use to hold that corporate adjusters can be liable.

- c. *Only one case in an intra-Western District of Washington split of authority properly applies Washington law, and it, like Division III, held that bad-faith actions exist against independent corporate adjusters.*

The US District Court for the Western District of Washington has also considered the question and reached opposing conclusions within the district. Compare Lease Crutcher Lewis WA, LLC v. Nat’l Union Fire Ins. Co. of Pitt., No. C08-1862, 2009 U.S. Dist. LEXIS 97899 (W.D. Wash. Oct. 20, 2009), with Rice v. State Farm Mut. Auto. Ins. Co., No. C05-5595, 2005 WL 2487975 (W.D. Wash. Oct. 7, 2005), and Garoutte v. Am. Fam. Mut. Ins. Co., No. C12-1787, 2013 U.S. Dist. LEXIS 8559 (W.D. Wash. Jan. 22, 2013). Only Lease properly applies Washington law. See Merriman, 2017 Wash. App. LEXIS 854, at *16 (citing Lease with approval).

In Lease, Judge Robert Lasnik, like Merriman, correctly concluded that a bad-faith claim existed against an independent, corporate adjuster.

law . . . [a]n employee or agent is personally liable to a third party injured by his or her tortious conduct, even if that conduct occurs within the scope of employment or agency.” Merriman, 2017 Wash. App. LEXIS 854, at *23 n.8 (internal citations omitted) (quoting Annechino v. Worthy, 175 Wn.2d 630, 638, 290 P.3d 126 (2012)).

2009 U.S. Dist. LEXIS 97899. His reasoning properly applies Washington law, including statutory-interpretation law, tracks Merriman, O’Fallon, and Taylor’s reasoning, and applies equally to individual, employee adjusters.

Judge Lasnik first recognized that Title 48 “applies to ‘all insurance transactions . . . and all persons having to do therewith’”. Lease, 2009 U.S. Dist. LEXIS 97899, at *5 (quoting RCW 48.01.020). And, just as person is defined to include an individual, he noted the term person also included a corporation. He then noted that, through RCW 48.01.030, Washington’s Legislature “expressly imposed an obligation of good faith on those who represent insurers and insureds.” Lease, 2009 U.S. Dist. LEXIS 97899, at *5-6, 7. Finding the insurer delegated one of its basic insurer functions—claim handling and adjustment—to its representative, as occurred here, he held that RCW 48.01.030’s language encompassed the adjuster. Id. at *6; see also Merriman, 2017 Wash. App. LEXIS 854, at *17.

Conversely, in Rice, 2005 WL 2487975, Judge Robert J. Bryan held that no cause of action exists against an individual, employee adjuster. But, the opinion misapplies Washington law. First, Rice contains no statutory-interpretation analysis. Rather, it states only that the plaintiff had provided no authority for the assertion that RCW 48.01.030’s language—“and their representatives”—imposed a good-faith duty on individual, employee adjusters. 2005 WL 2487975, at *3. Yet that statement fails to account for

the fact the statute’s plain, unambiguous language states that an insurer’s representatives owe a duty of good faith, and ignores the broad context of the statute, which states *all persons* shall “be actuated by good faith, abstain from deception, and practice honesty and equity in all insurance matters.” RCW 48.01.030. Judge Bryan’s interpretation improperly reads the term “their representatives” out of the statute, State v. Roggenkamp, 153 Wn.2d 614, 624, 106 P.3d 196 (2005), and is in error.

Judge Bryan additionally held that RCW 48.01.030 “cannot be read in isolation”, and because it is “administratively implemented” through the WACs, the bad-faith claim must be read in conjunction with the WACs. Id. at *4. He concluded that the WACs applied only to “insurers”, and that the individual, employee adjuster did not fall within the regulatory definition.

Id. However, as Judge Lasnik properly stated in addressing that conclusion:

[Courts] should not defer to an agency’s interpretation of a statute if that interpretation conflicts with the statutory mandate. In this case, the statute is unambiguous: both the insurer and its representative must act in good faith toward the insured. . . . In addition, the regulations are not exclusive: “acts performed, whether or not specified herein, may also be deemed to be violations of specific provisions of the insurance code or other regulations.”

Id. at *6-8, 3 n.1. Division III echoed that conclusion in Merriman. 2017 Wash. App. LEXIS 854 at *16 (“As for the claims handling regulations, the insurance commissioner is powerless to narrow the plainly broad language of RCW 48.01.030. In choosing to focus regulation on insurers, the

commissioner did not purport to narrow the statutory duty of good faith.”). Rice was incorrect in trying to graft a regulatory definition into the statute to change is unambiguous language. Avnet, Inc. v. Dep’t of Rev., 187 Wn. App. 427, 440, 348 P.3d 1273 (2015) (“The Department cannot contradict a substantive legislative enactment by administrative regulation.”), aff’d, 184 Wn.2d 1026, 364 P.3d 120 (2016); Budget Rent-A-Car v. Dep’t of Rev., 81 Wn.2d 171, 176, 500 P.2d 764 (1972).

Judge Marsha Pechman also concluded that no bad-faith cause of action exists against an individual, employee adjuster in Garoutte. 2013 U.S. Dist. LEXIS 8559. As with Rice, Garoutte misapplies Washington law. First, the opinion posits that individual, employee adjusters cannot be liable for bad-faith when acting within the scope of their employment. Id. at *5-6. But Garoutte relied solely on a Ninth Circuit case interpreting California law for that proposition. Id. at *5-6 (citing Mercado v. Allstate Ins. Co., 340 F.3d 824, 826 (9th Cir. 2003)).¹⁰ Washington law is clear that employees acting within the scope of their employment are liable for their own torts. E.g., Eastwood v. Horse Harbor Found., Inc., 170 Wn.2d 380, 400, 241 P.3d 1256 (2010); see also Lease, 2009 U.S. Dist. LEXIS 97899, at *3 (citing

¹⁰ Defendant also cites to Collins v. Quintana, No. C15-1619, 2016 U.S. Dist. LEXIS 11000, at *10-11 (W.D. Wash. Jan. 28, 2016), for the same proposition. First, that case relies on the same cases as Garoutte, including Garoutte, and suffers from the same legal defects. Second, it involved a *pro se* plaintiff who failed to respond to the substantive arguments contained in a motion to dismiss, id. at *4, and was a third-party claimant who would have no bad-faith claim against the insurer or its adjuster in any event.

Dodson v. Econ. Equip. Co., Inc., 188 Wash. 340, 343, 62 P.2d 708 (1936); Deep Water Brewing, LLC v. Fairview Res. Ltd., 152 Wn. App. 229, 215 P.3d 990, 1009-12 (2009)) This is clearly true when the individual owes its own independent duty. Adjusters owe an independent good-faith duty.¹¹

Garoutte then held that RCW 48.01.030 cannot mean an adjuster—the insurer’s representative—is subject to liability for bad faith, as it would also mean the insured is subject to liability for bad faith under the statute. Id. at *6 (noting the statute provides “[u]pon the insurer, the insured, . . . and their representatives rests the duty . . .”). However, Washington law does hold that insureds are subject to the statutory duty of good faith. E.g., Pub. Employees Mut. Ins. Co v. Kelly, 60 Wn. App. 610, 619, 805 P.2d 822 (1991) (noting the duty “is clearly a reciprocal duty borne by insureds as well, as reflected in RCW 48.01.030.”).¹² Merriman also implicitly rejected this argument in holding a corporate adjuster can be held liable.

Judge Lasnik’s Lease decision properly applies Washington law, including statutory-interpretation law, tracks the same analysis set forth in Merriman, O’Fallon, and Taylor, gives effect to all the statute’s language,

¹¹ As Division III notes in Merriman: “‘Under Washington law . . . [a]n employee or agent is personally liable to a third party injured by his or her tortious conduct, even if that conduct occurs within the scope of employment or agency.’” Merriman, 2017 Wash. App. LEXIS 854, at *23 n.8 (internal citations omitted) (quoting Annechino, 175 Wn.2d at 638).

¹² Garoutte distinguishes Lease by simply stating Lease involved an independent corporate adjuster and not an individual, employee adjuster. Lease, 2009 U.S. Dist. LEXIS 97899, at *6-7. But it provides no discussion of Judge Lasnik’s analysis or conclusions and does not state why his analysis would not apply equally to individual adjusters.

and through the statute's plain language, applies the clear legislative intent. Though Lease dealt with a corporate adjuster, like Merriman, its reasoning applies equally to individual, employee adjusters.

2. Keodalah's factual allegations would justify recovery for bad faith and exceed CR 12(b)(6)'s requirements.

Bad faith sounds in tort. St. Paul Fire & Mar. Ins. Co. v. Onvia, Inc., 165 Wn.2d 122, 130, 196 P.3d 664 (2008). Like any other tort, it requires breach of a duty that proximately causes damage. Id. As the Washington Supreme Court noted in Tank v. State Farm Fire & Cas. Co., 105 Wn.2d 381, 715 P.2d 1133 (1986), a duty of good faith requires the entity bearing the duty to, at a minimum, deal with “an insured in a state of mind indicating honesty and lawfulness of purpose.” Id. at 385. This standard holds true in the UIM context. Ellwein, 142 Wn.2d at 779-80. Therefore, at a minimum, Smith's RCW 48.01.030 good-faith duty requires that she must deal with Keodalah “in a state of mind indicating honesty and lawfulness of purpose.” Tank, 105 Wn.2d at 385.¹³ Unreasonable, frivolous, or unfounded acts violate the duty. See Kirk v. Mount Airy Ins. Co., 134 Wn.2d 558, 560, 951 P.2d 1124 (1998).

¹³ Smith argued below that Washington courts cast bad-faith claims in terms of an insurer's duty to an insured with an intent to limit claims to only insurer defendants. CP 64. Keodalah argued that the courts had framed the issue with insurers in mind because the courts had only been asked to address insurers in bad-faith claims; the courts' wording of the cause of action did not eliminate causes of action against the adjuster, but rather reflected the issues the courts were, in fact, deciding. CP 119 n.4. Division III has since agreed with Keodalah. Merriman, 2017 Wash. App. LEXIS 854, at *16; see also Taylor, 214 W. Va. at 328 n.9.

Together with failing to deal with an insured in good faith generally, an entity may also breach its duty of good faith through actions that violate the Unfair Claims Settlement Practices Regulation, WAC 284-30; Tank, 105 Wn.2d at 386. Regulatory breaches non-exclusively include compelling claimants to initiate litigation by offering substantially less than the amount recovered, misrepresenting relevant facts, and failing to conduct reasonable investigations, effect settlement when liability becomes reasonably clear, or promptly explain the legal/factual basis for denying a claim. WAC 284-30-330. And, though WAC 284-30 applies to only insurers by its terms, the regulation merely establishes “minimum standards” of fairness. WAC 284-30-300. Thus, the regulation still provides evidence of conduct that violates Smith’s duty. See Vogel v. Alaska S.S. Co, 69 Wn.2d 497, 498-03, 419 P.2d 141 (1966) (“The [ship]owner’s duty does not stem from the [longshoremen employer safety regulation], but the regulation may be shown just like other evidence to indicate that a certain practice is safe or unsafe. While such evidence is not conclusive, it is relevant.”).

Keodalah has alleged more than sufficient facts under CR 12(b)(6) to show Smith failed to deal with her “in a state of mind indicating honesty and lawfulness of purpose.” Smith consistently took a position and made statements that misrepresented facts and were contrary to her and Allstate’s investigation. She also failed to explain why she or Allstate found Keodalah

was 70 percent at fault, and she offered far less than that to which Keodalah was entitled, especially since her and Allstate's investigation and expert demonstrated liability was reasonably clear. The following provide a few of the examples Keodalah sets forth in his complaint.

In responding to discovery requests, Smith stated that Keodalah failed to stop at the stop sign, despite the fact she had the SPD report, which found the motorcyclist at fault, and TCA report, which found Keodalah had stopped and the motorcyclist was at fault. CP 7-8. She later then testified, as a CR 30(b)(6) representative, that Keodalah ran the stop sign, but then admitted he had not. CP 8. She then later testified at trial that when Allstate first stated Keodalah failed to stop, she knew that statement was not true. CP 9-10. Moreover, despite the fact she testified there was no evidence that Keodalah failed to yield other than the fact a collision occurred, she held to that position. CP 10.

Smith also testified at the deposition that Keodalah had been on his cell phone, but then she admitted he was not. CP 8. She again testified at trial that Keodalah was on his cell phone at the time of the collision, and refused to change her position regarding liability after learning he was not on his cell phone. CP 10.

She testified at trial that Keodalah was 70 percent at fault, despite the fact she also testified that Allstate relied upon the eyewitness statements,

SPD report, which did not find fault, and TCA report, which did not find fault, to reach that conclusion. CP 9-11. She further testified that Allstate refused to change its position regarding liability after it learned that, but for the cyclist's speed, the collision would not have occurred, and she conceded that the TCA report did not support her or Allstate's finding of fault. CP 10.

Smith failed to deal fairly with Keodalah. She took a self-serving factual view, disregarded Keodalah's interests, and ignored Allstate's own investigation to reach a liability decision she could not explain. All these unreasonable, frivolous acts demonstrate that Smith failed to treat Keodalah fairly or act in a state of mind indicating honesty or lawfulness of purpose. Moreover, as Keodalah alleged, Smith's breach caused him damages. CP 13. Based on these allegations—including any number of other hypothetical allegations—Deegan, 197 Wn. App. at 884 (providing that any hypothetical situation conceivably raised by a complaint defeats CR 12(b)(6) motion), Smith violated her good-faith duty and is liable.

B. Keodalah states a cognizable CPA claim against Smith.¹⁴

The trial court also dismissed Keodalah's CPA claim against Smith based on its conclusion that insureds may not maintain such a claim against individual, employee adjusters in Washington. CP 148-50. It was incorrect.

¹⁴ CR 12(b)(6) dismissals are reviewed *de novo*. FutureSelect, 180 Wn.2d at 962. Statutory and case-law interpretation matters are likewise reviewed *de novo*. KJB, 187 Wn.2d at 596; Willis, 151 Wn.2d at 261.

1. An insured can pursue a CPA claim against an individual, employee adjuster in Washington.

Washington's consumer-protection history is long and effective. See Hangman Ridge Training Stables v. Safeco Title Ins., 105 Wn.2d 778, 783, 719 P.2d 531 (1986). The Legislature first enacted the CPA "to complement the body of federal law governing restraints of trade, unfair competition and unfair, deceptive, and fraudulent acts or practices in order to protect the public and foster fair and honest competition." RCW 19.86.920. It aimed to achieve this goal by declaring "[u]nfair methods of competition and unfair or deceptive acts . . . in the conduct of any trade or commerce" unlawful. Id. 19.86.020. It also provided a private right of action. Id. 19.86.090. The CPA is to be "liberally construed so that its beneficial purpose may be served." Panag, 166 Wn.2d at 37.

Because a statutory CPA right of action exists against an entity that engages in "unfair or deceptive acts or practices in the conduct of any trade or commerce", RCW 19.86.090, 020, the question is whether an individual, employee adjuster is an entity against which the Legislature intended that a CPA action may exist. Like bad faith, this is a statutory-interpretation issue, and the same principles detailed above apply. A court must discern and implement the Legislature's intent, give effect to the statute's facially plain meaning, accord meaning to all statutory language, and rely solely on the

statutory language if no ambiguity exists. KJB, 187 Wn.2d at 596-97; Roggenkamp, 153 Wn.2d at 621, 624.

RCW 19.86.020 provides in full:

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

Id. The Section does not delineate those entities that may not engage in the unlawful behavior. However, the CPA's definition section provides, in part:

As used in this chapter:

- (1) "Person" shall include, where applicable, natural persons, corporations, trusts, unincorporated associations and partnerships.

RCW 19.86.010. Read together in context, RCW 19.86.010 and .020 clearly establish the Legislature's intent to broadly state that no person, specifically including a natural person, may engage in "[u]nfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce". Indeed, in concluding that attorneys are not exempt from the CPA, the Washington Supreme Court stated:

[W]e hold that certain entrepreneurial aspects of the practice of law may fall within the "trade or commerce" definition of the CPA. . . . The CPA, on its face, shows a carefully drafted attempt to bring within its reaches *every* person who conducts unfair or deceptive acts or practices in *any* trade or commerce. RCW 19.86.010(1) and (2); RCW 19.86.020.

Short v. Demopolis, 103 Wn.2d 52, 60-61, 691 P.2d 163 (1984). Thus, the CPA unambiguously includes individual, employee adjusters in its scope.

They are, therefore, subject to the statutory CPA cause of action if they violate the CPA.

Since this Court granted discretionary review, Division III has held that corporate adjusters are subject to, and thus liable for violating, the CPA. Merriman, 2017 Wash. App. LEXIS 854, at *33-36. Moreover, as detailed above, Montana's and West Virginia's supreme courts have held individual, employee adjusters may be liable for consumer-protection violations based on a similar language and analysis. See discussion supra Part V.A.1.b.

Briefly restated here, in O'Fallon, 260 Mont. 233, the Montana Supreme Court noted that Mont. Code Ann. § 33-18-201 provides that “no person” can engage in the statute’s prohibited conduct, that the Act defined “person” to include an individual, and that the court had previously held that a claimant could maintain a common-law claim against an entity that violates a § 33-18-201 duty. Id. Applying statutory interpretation principles, it then held that the statute’s language made clear that individual, employee adjusters were included within the statute, owed a statutory duty, and were subject to a cause of action for breaching a 33-18-201 duty. Id.

Similarly, in Taylor, 214 W. Va. 324, the West Virginia Supreme Court of Appeals recognized that the legislature intended its unfair practices act “to regulate trade practices in the business of insurance”, aimed to achieve its goal by prohibiting any “person” from engaging in a practice

that is unlawful under the Act, and recognized that the court had previously held that a private cause of action exists against entities that violate the Act. Id. at 328-29. Considering the issue “a straightforward case of statutory interpretation, id., the court held that the term “person” unambiguously included “any individual” in the Act, a claims adjuster is an individual, the adjuster was thus within the Act’s scope, and a cause of action therefore existed. Id. at 330. The same holds true here.

The only Washington Court of Appeals decision to directly address the issue is Int’l Ultimate v. St. Paul Fire & Marine, 122 Wn. App. 736, 87 P.3d 774 (2004), which held “the CPA does not contemplate suits against employees of insurers.” Id. at 758. But it based its holding on a flawed legal conclusion, stating in part: “[t]o be liable under the CPA, there must be a contractual relationship between the parties.” Id. The decision cited no authority for its proposition, and Washington Supreme Court precedent both pre- and post-Ultimate holds that the CPA does not require a contractual relationship. Panag, 166 Wn.2d at 41-44, 45 (“We hold that a private CPA action may be brought by one who is not in a consumer or other business relationship with the actor against whom the suit is brought.”); Wash. State Phys. Ins. Exch. & Ass’n v. Fisons, 122 Wn.2d 299, 312-13, 858 P.2d 1054 (1993). Indeed, as Merriman notes:

The [Ultimate] court provided no authority for that statement; it conflicts with our Supreme Court’s identification of the five elements of a CPA claim in [Hangman Ridge], and later cases; and it cannot survive the Supreme Court’s holding in Panag that a CPA claim need not arise from a consensual business transaction or a business relationship.

Merriman, 2017 Wash. App. LEXIS 854, at *33 n.11 (internal citations omitted). Ultimate’s holding fails.¹⁵ Moreover, as detailed above, the Court of Appeals, in a similar context, has held that persons who are responsible for adjusting a claim may be held liable for violating the CPA. Gould, 37 Wn. App. 756;¹⁶ see also discussion supra Part V.A.1.b.

The Legislature intended to prohibit any person—including natural persons—from engaging in unfair or deceptive acts in trade or commerce. RCW 19.86.010, .020; Short, 103 Wn.2d at 60-61. It also intended that a private citizen be permitted to assert a cause of action against any entity that violates the CPA, regardless of whether a contractual relationship exists,

¹⁵ Below, Smith again relied on the Rice, 2005 WL 2487975, and Garoutte, 2013 U.S. Dist. LEXIS 8559, holdings. Both tersely and with little analysis held that “the CPA does not contemplate suits against employees of insurers.” Rice, 2005 WL 2487975, at *5; Garoutte, 2013 U.S. Dist. LEXIS 8559, at *8. However, both cited solely to Ultimate. And, although Garoutte acknowledges the plaintiffs cited Panag and Fisons, the court, providing no discussion, analysis, or reasoning, states that the plaintiffs cited no cases holding contrary to Ultimate. 2013 U.S. Dist. LEXIS 8559, at *8. As both Panag and Fisons hold precisely the opposite, Garoutte’s statement is incorrect.

¹⁶ Moreover, as Merriman states: “The court’s discussion affirming dismissal of negligence claims against an insurer’s employee-adjuster in [Ultimate] is so fleeting as to be inscrutable. To read it as suggesting that the tort liability of an agent is limited to conversion situation involving corporate officers cannot be correct. ‘Under Washington law . . . [a]n employee or agent is personally liable to a third party injured by his or her tortious conduct, even if that conduct occurs within the scope of employment or agency.’” 2017 Wash. App. LEXIS 854, at *23 n.8 (internal citations omitted) (quoting Annechino, 175 Wn.2d at 638).

Panag, 166 Wn.2d at 41-44, 45; Fisons, 122 Wn.2d at 312-13, if the CPA’s elements are otherwise met. Individual, employee adjusters fall within the CPA’s intended scope, and Keodalah can assert a CPA claim against Smith.

2. Keodalah’s factual allegations would justify recovery for Smith’s CPA violations and exceed CR 12(b)(6)’s requirements.

The CPA is to be “liberally construed so that its beneficial purpose may be served.” Panag, 166 Wn.2d at 37. To prevail in a CPA claim, “the plaintiff must prove (1) an unfair or deceptive act or practice, (2) occurring in trade or commerce, (3) that affects the public interest, (4) injury to a person’s business or property, and (5) causation.” Id. at 37. The first two elements may be established—*i.e.*, a “*per se* unfair trade practice” exists—when a statute which has been declared by the Legislature to constitute an unfair or deceptive act in trade or commerce has been violated. Hangman Ridge, 105 Wn.2d at 785-86. Further, violations of any statutes that contain specific legislative declarations of public interest impact satisfy the public interest prong *per se*. Id. at 791; RCW 19.86.093. Moreover, “bad faith constitutes a *per se* violation of the CPA.” Ledcor Indus., Inc. v. Mut. of Enumclaw Ins. Co., 150 Wn. App. 1, 12-13, 206 P.3d 1255 (2009).

- a. *Smith engaged in unfair or deceptive acts or practices, in trade or commerce, that affect the public interest, satisfying the first three prongs.*

The CPA provides that all “actions and transactions prohibited or regulated under the laws administered by the insurance commissioner[, *i.e.*,

Title 48,] shall be subject to the provisions of RCW 19.86.020” RCW 19.86.170; Indus. Indem. Co. v. Kallevig, 114 Wn.2d 907, 922-23, 792 P.2d 520 (1990). Thus, Keodalah may assert CPA claims for Title 48 violations.

Smith engaged in *per se* unfair trade practices satisfying the first two CPA prongs. As detailed above, an individual, employee adjuster may be held personally liable for bad faith, see discussion supra Part IV.A.1, and Keodalah stated a viable bad-faith action against Smith. Because bad faith is a *per se* unfair trade practice, Keodalah has satisfied the first two prongs on that basis alone. Ledcor, 150 Wn. App. at 12-13.

Moreover, RCW 48.30.010, unfair insurance practices in general, is also subject to the CPA. See RCW 19.86.170. It provides in part:

(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.

RCW 48.30.010(1)-(2) (emphasis added). The Legislature defined “person” to include an individual. RCW 48.01.070. A single RCW 48.30.010-related

violation is a *per se* unfair trade practice that satisfies the CPA's first two prongs. See Kallevig, 114 Wn.2d at 922.

Through WAC 284-30, Washington's Insurance Commissioner has enacted a detailed regulation setting "minimum standards" that, if violated, constitute "unfair claims settlement practices". These include compelling claimants to initiate litigation by offering substantially less than the amount recovered, misrepresenting relevant facts, and failing to conduct reasonable investigations, effect settlement when liability becomes reasonably clear, or promptly explain the legal/factual basis for denying a claim. WAC 284-30-330. And, though WAC 284-30 applies to only insurers by its terms, it still provides evidence of conduct where Smith engaged in unfair or deceptive insurance practices. See Vogel, 69 Wn.2d at 498-503.

As detailed above, see discussion supra Part V.A.2., and by way of example, Smith on multiple occasions, under oath, misrepresented relevant facts. She stated that Keodalah allegedly failed to stop at a stop sign, failed to yield, and was using a cell phone, despite the fact the SPD report found the motorcyclist at fault, and despite the fact Allstate's own expert accident reconstructionist concluded that the motorcyclist was at fault. Id.; CP 7-10. She refused to consider the SPD and expert reports or eyewitness accounts in assessing fault, CP 9-11, and failed to explain why she asserted Keodalah was 70 percent at fault. CP 9-11. She also failed to effect settlement for the

policy limits when liability was clear. These allegations—along with any number of hypothetical facts—more than satisfy CR 12(b)(6), would justify recovery, and *per se* establish the CPA’s first two prongs. Hangman, 105 Wn.2d at 785-86.

Finally, because Title 48, under which Keodalah asserts his claims, contains a specific legislative declaration of a public interest impact, RCW 48.01.030, Keodalah satisfies the CPA’s third-prong *per se* as well. Id. at 791; RCW 19.86.093.

b. *Smith’s bad faith and unfair or deceptive practices caused Keodalah injury.*

The CPA’s “injury requirement is met upon proof the plaintiff’s ‘property interest or money is diminished because of the unlawful conduct even if the expenses caused by the statutory violation are minimal.’” Panag, 166 Wn.2d at 57-58. Moreover, “[m]onetary damages need not be proved; unquantifiable damages may suffice.” Id. at 58.

Keodalah alleged Smith’s CPA violations “directly and proximately caused Keodalah to suffer injuries and damages in an amount to be proven at trial.” CP 14. Given Washington’s notice pleading standards, the fact that a Court must consider even hypothetical facts on a CR 12(b)(6) motion, and that a CR 12(b)(6) motion must be denied if any set of facts consistent with a plaintiff’s complaint would justify recovery, Trujillo, 183 Wn.2d at 830;

FutureSelect, 180 Wn.2d at 962-63, this allegation more than satisfies the CPA's last two prongs for CR 12(b)(6) purposes.

VI. CONCLUSION

For the foregoing reasons, this Court should reverse the trial court's CR 12(b)(6) order dismissing Keodalah's bad-faith and CPA claims against Smith and remand the action back to the trial court for further proceedings. Keodalah should be awarded costs on appeal.

Respectfully submitted this 26th day of April, 2017.

/s/ Scott David Smith
Scott David Smith, WSBA # 48108
C. Steven Fury, WSBA # 8896
Attorneys for Appellants

/s/ Vonda M. Sargent
Vonda M. Sargent, WSBA # 24552
Attorney for Appellants

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 noted below a true and correct copy of the foregoing *Brief of Appellants* on the facilities and to the parties mentioned below as indicted:

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Suite 4500	[X] Via Electronic Service
Seattle, Washington 98154	

SIGNED at Seattle, Washington this 26th day of April, 2017.



Tonya Arico

No. 75731-8-I

COURT OF APPEALS, DIVISION ONE,
OF THE STATE OF WASHINGTON

MOUN KEODALAH and AUNG KEODALAH, husband and wife,

Appellants,

v.

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

Respondents.

APPENDIX TO BRIEF OF APPELLANTS

RCW 48.01.020	01
RCW 48.01.030	02
RCW 48.01.070	03
RCW 48.30.010	04-05
RCW 19.86.010	06
RCW 19.86.020	07
RCW 19.86.090	08
RCW 19.86.093	09
RCW 19.86.170	10

[Rev. Code Wash. \(ARCW\) § 48.01.020](#)

Statutes current through 2017 Regular Session c 7)

[Annotated Revised Code of Washington](#) > [Title 48 Insurance](#) > [Chapter 48.01 Initial Provisions](#)

48.01.020. Scope of code.

All insurance and insurance transactions in this state, or affecting subjects located wholly or in part or to be performed within this state, and all persons having to do therewith are governed by this code.

History

1947 c 79 § .01.02; Rem. Supp. 1947 § 45.01.02.

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[Rev. Code Wash. \(ARCW\) § 48.01.030](#)

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[Annotated Revised Code of Washington](#) > [Title 48 Insurance](#) > [Chapter 48.01 Initial Provisions](#)

48.01.030. Public interest.

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.

History

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

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[Annotated Revised Code of Washington](#) > [Title 48 Insurance](#) > [Chapter 48.01 Initial Provisions](#)

48.01.070. “Person” defined.

“Person” means any individual, company, insurer, association, organization, reciprocal or interinsurance exchange, partnership, business trust, or corporation.

History

1947 c 79 § .01.07; Rem. Supp. 1947 § 45.01.07.

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[Rev. Code Wash. \(ARCW\) § 48.30.010](#)

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[Annotated Revised Code of Washington](#) > [Title 48 Insurance](#) > [Chapter 48.30 Unfair Practices and Frauds](#)

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](#).

History

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.

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[Rev. Code Wash. \(ARCW\) § 19.86.010](#)

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[Annotated Revised Code of Washington](#) > [Title 19 Business Regulations — Miscellaneous](#) > [Chapter 19.86 Unfair Business Practices — Consumer Protection](#)

19.86.010. Definitions.

As used in this chapter:

- (1) “Person” shall include, where applicable, natural persons, corporations, trusts, unincorporated associations and partnerships.
- (2) “Trade” and “commerce” shall include the sale of assets or services, and any commerce directly or indirectly affecting the people of the state of Washington.
- (3) “Assets” shall include any property, tangible or intangible, real, personal, or mixed, and wherever situate, and any other thing of value.

History

1961 c 216 § 1.

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Rev. Code Wash. (ARCW) § 19.86.020

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Annotated Revised Code of Washington > Title 19 Business Regulations — Miscellaneous > Chapter 19.86 Unfair Business Practices — Consumer Protection

19.86.020. Unfair competition, practices, declared unlawful.

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

History

1961 c 216 § 2.

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[Rev. Code Wash. \(ARCW\) § 19.86.090](#)

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[Annotated Revised Code of Washington](#) > [Title 19 Business Regulations — Miscellaneous](#) > [Chapter 19.86 Unfair Business Practices — Consumer Protection](#)

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

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.

History

2009 c 371 § [1](#); 2007 c 66 § [2](#); 1987 c 202 § 187; 1983 c 288 § 3; 1970 ex.s. c 26 § 2; 1961 c 216 § 9.

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[Rev. Code Wash. \(ARCW\) § 19.86.093](#)

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[Annotated Revised Code of Washington](#) > [Title 19 Business Regulations — Miscellaneous](#) > [Chapter 19.86 Unfair Business Practices — Consumer Protection](#)

19.86.093. Civil action — Unfair or deceptive act or practice — Claim elements.

In a private action in which an unfair or deceptive act or practice is alleged under [RCW 19.86.020](#), a claimant may establish that the act or practice is injurious to the public interest because it:

- (1) Violates a statute that incorporates this chapter;
- (2) Violates a statute that contains a specific legislative declaration of public interest impact; or
- (3)
 - (a) Injured other persons; (b) had the capacity to injure other persons; or (c) has the capacity to injure other persons.

History

2009 c 371 § [2](#).

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[Rev. Code Wash. \(ARCW\) § 19.86.170](#)

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[Annotated Revised Code of Washington](#) > [Title 19 Business Regulations — Miscellaneous](#) > [Chapter 19.86 Unfair Business Practices — Consumer Protection](#)

19.86.170. Exempted actions or transactions — Stipulated penalties and remedies are exclusive.

Nothing in this chapter shall apply to actions or transactions otherwise permitted, prohibited or regulated under laws administered by the insurance commissioner of this state, the Washington utilities and transportation commission, the federal power commission or actions or transactions permitted by any other regulatory body or officer acting under statutory authority of this state or the United States: PROVIDED, HOWEVER, That actions and transactions prohibited or regulated under the laws administered by the insurance commissioner shall be subject to the provisions of [RCW 19.86.020](#) and all sections of chapter 216, Laws of 1961 and chapter 19.86 RCW which provide for the implementation and enforcement of [RCW 19.86.020](#) except that nothing required or permitted to be done pursuant to Title 48 RCW shall be construed to be a violation of [RCW 19.86.020](#): PROVIDED, FURTHER, That actions or transactions specifically permitted within the statutory authority granted to any regulatory board or commission established within Title 18 RCW shall not be construed to be a violation of chapter 19.86 RCW: PROVIDED, FURTHER, That this chapter shall apply to actions and transactions in connection with the disposition of human remains.

[RCW 9A.20.010\(2\)](#) shall not be applicable to the terms of this chapter and no penalty or remedy shall result from a violation of this chapter except as expressly provided herein.

History

1977 c 49 § 1; 1974 ex.s. c 158 § 1; 1967 c 147 § 1; 1961 c 216 § 17.

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