

67126-0

67126-0

No. 67126-0

---

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

---

EMILY JOHNSON,

Appellant,

v.

STATE FARM AUTOMOBILE INSURANCE COMPANY,

Respondent.

---

APPELLANT'S REPLY BRIEF

---

William C. Smart, WSBA #8192  
Isaac Ruiz, WSBA #35237  
Attorneys for Appellant  
Emily Johnson

**KELLER ROHRBACK L.L.P.**  
1201 Third Avenue, Suite 3200  
Seattle, Washington 98101-3052  
Telephone: (206) 623-1900  
Facsimile No.: (206) 623-3384

FILED  
COURT OF APPEALS DIV I  
STATE OF WASHINGTON  
2011 SEP 28 AM 10:43

ORIGINAL

**Table of Contents**

A. *Hockley v. Hargitt*, 82 Wn.2d 337, 510 P.2d 1123 (1973), supplies the rule of decision. .... 1

B. The superior court’s subject-matter jurisdiction is unaffected by standing. .... 2

C. Ms. Johnson easily satisfies the CPA’s requirements for bringing an injunction claim. .... 6

D. Based on the manner in which State Farm handled Ms. Johnson’s UIM claim, she is well situated to pursue a CPA injunction against State Farm. .... 10

E. State Farm seeks a premature adjudication of Ms. Johnson’s CPA injunction claim..... 13

F. Conclusion ..... 21

## Table of Authorities

### Cases

<i>Adams v. City of Walla Walla</i> , 196 Wash. 268, 82 P.2d 584 (1938).....	6
<i>Ajax v. Gregory</i> , 177 Wash. 465, 32 P.2d 560 (1934).....	6
<i>Am. Red Cross v. Palm Beach Blood Bank, Inc.</i> , 143 F.3d 1407 (11th Cir. 1998) .....	15
<i>Anderson v. State Farm Mutual Automobile Insurance Co.</i> , 101 Wn. App. 323, 2 P.3d 1029 (2000).....	12
<i>Baker v. Teachers Insurance &amp; Annuities Association College Retirement Equity Funds</i> , 91 Wn.2d 482, 588 P.2d 1164 (1979).....	3
<i>Birmingham v. Cheetham</i> , 19 Wash. 657, 54 P. 37 (1898).....	6
<i>Bravo v Dolsen Cos.</i> , 125 Wn.2d 745, 888 P.2d 147 (1995).....	15
<i>Burton v. City of Belle Glade</i> , 178 F.3d 1175 (11th Cir. 1999) .....	15
<i>Daniels v. Woodbury County</i> , 742 F.2d 1128 (8th Cir. 1984) .....	15
<i>Doe v. Puget Sound Blood Center</i> , 117 Wn.2d 772, 819 P.2d 370 (1991).....	17
<i>Ex parte McCardle</i> , 74 U.S. (7 Wall.) 506, 19 L. Ed. 264 (1868) .....	4
<i>Federal Way School District No. 210 v. State</i> , 167 Wn.2d 514, 219 P.3d 941 (2009).....	6
<i>Fleck &amp; Assocs., Inc. v. City of Phoenix</i> , 471 F.3d 1100 (9th Cir. 2006) .....	4

<i>Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co.</i> , 105 Wn.2d 778, 719 P.2d 531 (1986).....	7, 10, 11, 12
<i>Hockley v. Hargitt</i> , 82 Wn.2d 337, 510 P.2d 1123 (1973).....	passim
<i>Hughey v. JMS Dev. Corp.</i> , 78 F.3d 1523 (11th Cir. 1996) .....	15
<i>In re Xerox Corp. ERISA Litigation</i> , 483 F. Supp. 2d 206 (D. Conn. 2007).....	15
<i>Industrial Indemnity Co. v. Kallevig</i> , 114 Wn.2d 907, 792 P.2d 520 (1990).....	12
<i>International Association of Firefighters, Local 1789 v. Spokane Airports</i> , 103 Wn. App. 764, 14 P.3d 193 (2000).....	3, 4
<i>Krieschel v. Board of County Commissioners of Snohomish County</i> , 12 Wash. 428, 41 P. 186 (1895).....	4
<i>Panag v. Farmers Insurance Co.</i> , 166 Wn.2d 27, 204 P.3d 885 (2009).....	9, 10
<i>Putman v. Wenatchee Valley Medical Center, P.S.</i> , 166 Wn.2d 974, 216 P.3d 374 (2009).....	17
<i>San Juan County v. No New Gas Tax</i> , 160 Wn.2d 141, 157 P.3d 831 (2007).....	14, 15, 21
<i>Sanders v. Air Line Pilots Ass'n</i> , 473 F.2d 244 (2d Cir. 1972).....	15
<i>Schmidt v. Lessard</i> , 414 U.S. 473, 94 S. Ct. 713 (1974).....	15
<i>State v. Dennison</i> , 115 Wn.2d 609, 801 P.2d 193 (1990).....	19
<i>Steel Co. v. Citizens for a Better Evn't</i> , 523 U.S. 83, 118 S. Ct. 1003, 140 L.Ed.2d 210 (1998).....	4

<i>To-Ro Trade Shows v. Collins</i> , 100 Wn. App. 483, 997 P.2d 960 (2000), <i>aff'd</i> , 144 Wash. 2d 403, 27 P.3d 1149 (2001).....	5, 6
<i>Tyler Pipe Industries, Inc. v. State Department of Revenue</i> , 105 Wn.2d 318, 715 P.2d 123 (1986), <i>vacated on other grounds</i> , 483 U.S. 232, 107 S. Ct. 2810 (1987).....	3, 4
<i>Ullery v. Fulleton</i> , 256 P.3d 406 (Wash. Ct. App. 2011).....	4, 5
<i>United States v. Georgia Power Co.</i> , 301 F. Supp. 538 (N.D. Ga. 1969).....	16
<i>Warth v. Seldin</i> , 422 U.S. 490, 95 S. Ct. 2197, 45 L.Ed.2d 343 (1975).....	5
<b><u>Constitutional Provisions and Statutes</u></b>	
Article III, Section 2 of the United States Constitution.....	5
Article IV, section 6 of the Washington Constitution.....	4
Article I, section 10 of the Washington Constitution .....	17
RCW 19.86 .....	8
RCW 19.86.020 .....	6, 12
RCW 19.86.030 .....	6
RCW 19.86.040 .....	6
RCW 19.86.040 .....	6
RCW 19.86.050 .....	6
RCW 19.86.080 .....	16
RCW 19.86.090 .....	1, 2, 6, 8
RCW 48.30.010 .....	12
RCW 7.24.010 to 7.24.190 .....	5

RCW 7.24.020 ..... 6

**Rules**

Civil Rule 8 ..... 20

Civil Rule 8(a)..... 20

Civil Rule 9 ..... 20, 21

Civil Rule 9(a)–(k)..... 21

Civil Rule 12(b)(6)..... 14, 15, 16, 21

Civil Rule 54(c)..... 14

Civil Rule 55(b)(2)..... 14

Civil Rule 65(d) ..... 13, 14, 16, 21

Fed. R. Civ. P. 65(d) ..... 16

Washington Administrative Code 284-30-310 ..... 12

Washington Administrative Code 284-30-330(1) ..... 20

Washington Administrative Code 284-30-330(2) ..... 12

Washington Administrative Code 284-30-330(3) ..... 12, 20

Washington Administrative Code 284-30-330(4) ..... 13

Washington Administrative Code 284-30-330(6) ..... 13

Washington Administrative Code 284-30-330(7) ..... 13

Washington Administrative Code 284-30-330(13) ..... 13, 20

Washington Administrative Code 284-30-370 ..... 13

**Other Authorities**

Consent Order Levying a Fine, *In re State Farm Mutual  
Automobile Insurance Co.*, Order No. 10-0092,  
<http://www.insurance.wa.gov/oicfiles/orders/2010orders/10-0092.pdf> (accessed September 27, 2011) ..... 20

Michelle L. Evans, *Who is a 'Consumer' Entitled to Protection of  
State Deceptive Trade Practice and Consumer Protection Acts*,  
63 A.L.R.5th 1 (1998)..... 9

Philip A. Talmadge, *Understanding the Limits of Power: Judicial  
Restraint in General Jurisdiction Court Systems*,  
22 Seattle U.L. Rev. 695 (1999) ..... 4, 5

A. ***Hockley v. Hargitt*, 82 Wn.2d 337, 510 P.2d 1123 (1973), supplies the rule of decision.**

State Farm makes two broad arguments. **1st**, State Farm argues that Ms. Johnson lacks standing to bring a CPA injunction claim. That argument was not made to the superior court. **2nd**, State Farm argues that Ms. Johnson does not satisfy the requirements for issuance of a CPA injunction. Ms. Johnson addresses those arguments in later sections of this brief. The present section is devoted to an argument that State Farm does not make—namely, the argument apparently adopted by the superior court, *sua sponte*, that a claimant who has a CPA claim for damages may not pursue a claim for injunctive relief. *See* CP 217–18.

The *Hockley* case contains several pertinent holdings, beginning with its holding that a plaintiff has standing to enjoin further violations of the CPA even when the plaintiff could be made whole by a money judgment. 82 Wn.2d at 349–50. This result was clear from the text of the CPA, which provides that “[a]ny person who is injured in his or her business or property” by a CPA violation “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.” RCW 19.86.090 (emphasis added). State Farm concedes that Ms. Johnson pleads facts sufficient to

establish injury from a CPA violation, *see* Resp.'s Br. at 6. Therefore, the CPA authorizes Ms. Johnson to bring a civil action to recover actual damages, to enjoin further violations, or both. The superior court's apparent analysis is foreclosed by RCW 19.86.090 and *Hockley*.

**B. The superior court's subject-matter jurisdiction is unaffected by standing.**

Ms. Johnson originally filed a single action against State Farm in which she asserted both her damages and injunction claims. State Farm then removed the action to federal court. The federal court concluded that Ms. Johnson lacked federal Article III standing with respect to the CPA injunction claim, meaning that the federal court lacked subject-matter jurisdiction over that claim. CP 159. The federal court therefore dismissed the claim without prejudice to refile in state superior court, *id.*, which Ms. Johnson promptly did. The federal-court damages claims and the state-court injunction claim are part of the same dispute. It is only because of federal jurisdictional limits and State Farm's decision to remove that the claims are proceeding on concurrent tracks in federal and state courts. Now, despite admitting that Article III does not apply to state courts of general jurisdiction, *see* Resp.'s Br. at 5, State Farm wishes to transpose the federal standing ruling to bar Ms. Johnson's claim in state court.

Because State Farm did not raise standing at the superior-court level, the issue is foreclosed on appeal. RAP 2.5(a). State Farm contends otherwise, arguing that standing pertains to the subject-matter jurisdiction of the superior court. The supreme court has held otherwise. In *Baker v. Teachers Insurance & Annuities Association College Retirement Equity Funds*, 91 Wn.2d 482, 484, 588 P.2d 1164 (1979), the supreme court found that “the issue of standing was not submitted to the trial court, hence, it may not be considered on appeal.” Similarly, in *Tyler Pipe Industries, Inc. v. State Department of Revenue*, 105 Wn.2d 318, 327, 715 P.2d 123 (1986), *vacated on other grounds*, 483 U.S. 232, 107 S. Ct. 2810 (1987), the supreme court held, “If the issue of standing is not submitted to the trial court, it may not be considered on appeal.”

State Farm points to a court of appeals case, *International Association of Firefighters, Local 1789 v. Spokane Airports*, 103 Wn. App. 764, 768, 14 P.3d 193 (2000), which considered a standing argument made for the first time on appeal because, the court said, “standing is a jurisdictional issue.” That case is unavailing because it is contrary to controlling supreme court rulings. What is more, the court of appeals took it as a given that standing is jurisdictional without actually analyzing the question. Cases that have examined the issue—including a case that

predates *International Association of Firefighters*—hold that standing does not go to the superior court’s subject-matter jurisdiction.

In *Ullery v. Fulleton*, 256 P.3d 406 (Wash. Ct. App. 2011), the court of appeals held that federal standing requirements do not limit a state superior court’s subject-matter jurisdiction. Said the court of appeals:

In some courts—those, such as the federal courts, whose authority is limited to deciding cases and controversies—a plaintiff’s lack of standing deprives a court of subject matter jurisdiction, making it impossible to enter a judgment on the merits. *Fleck & Assocs., Inc. v. City of Phoenix*, 471 F.3d 1100, 1102 (9th Cir. 2006) (recognizing that when a plaintiff lacks standing, the district court lacked subject matter jurisdiction to address the merits of the claim and should have dismissed it without prejudice on that ground alone); *cf. Steel Co. v. Citizens for a Better Env’t*, 523 U.S. 83, 94, 118 S. Ct. 1003, 140 L. Ed. 2d 210 (1998) (“Without jurisdiction the court cannot proceed at all in any cause. Jurisdiction is power to declare the law, and when it ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the cause,” (quoting *Ex parte McCardle*, 74 U.S. (7 Wall.) 506, 514, 19 L. Ed. 264 (1868))). But article IV, section 6 of the Washington Constitution does not exclude any sort of causes from the jurisdiction of its superior courts, leaving Washington courts, by contrast with federal courts, with few constraints on their jurisdiction. *Krieschel v. Bd. of County Comm’rs of Snohomish County*, 12 Wash. 428, 439, 41 P. 186 (1895); Philip A. Talmadge, *Understanding the Limits of Power: Judicial Restraint in General Jurisdiction Court Systems*, 22 Seattle U.L. Rev. 695, 708–09 (1999). Accordingly, if a defendant waives the defense that a plaintiff lacks standing, a Washington court can reach the merits. Talmadge, *supra*, at 718–19 (citing *Tyler Pipe Indus., Inc. v. Dep’t of Revenue*, 105 Wash. 2d 318, 327, 715 P.2d 123 (1986), *vacated on other grounds*, 483 U.S. 232, 107 S. Ct. 2810, 97 L. Ed. 2d 199 (1987)).

*Id.* at 411.

In *To-Ro Trade Shows v. Collins*, 100 Wn. App. 483, 488, 997 P.2d 960 (2000), *aff'd*, 144 Wn.2d 403, 27 P.3d 1149 (2001), the issue was whether a plaintiff had standing under the Uniform Declaratory Judgments Act, RCW 7.24.010 to 7.24.190. The court of appeals distinguished a federal case regarding standing as follows:

The standing requirement in federal courts is based primarily on the “case or controversy” requirement of Article III, Section 2 of the United States Constitution. *Warth v. Seldin*, 422 U.S. 490, 498, 95 S. Ct. 2197, 45 L. Ed. 2d 343 (1975); Philip A. Talmadge, *Understanding the Limits of Power: Judicial Restraint in General Jurisdiction Court Systems*, 22 Seattle U.L. Rev. 695, 705–07 (1999). In addition to the constitutional constraint of subject matter jurisdiction on federal court jurisdiction, the federal courts have imposed prudential constraints flowing from the case and controversy requirement. *Warth*, 422 U.S. at 499–501, 95 S. Ct. 2197; Talmadge, *supra* at 706. Thus, the “federal courts will generally not hear cases that are moot, lack ripeness, require advisory opinions, or in which the plaintiff lacks standing.” Talmadge, *supra* at 706–07 (footnotes omitted). In contrast, the Washington State superior courts are courts of general jurisdiction and are not constrained by subject matter jurisdiction under Article III, Section 2. *See* Talmadge, *supra* at 708–11. Thus, we first review the standing issue under Washington’s Declaratory Judgments Act, RCW Ch. 7.24, and the cases interpreting it.

100 Wn. App. at 489. *To-Ro* thus directs superior courts conducting standing analyses to examine the statute authorizing the relief sought. In *To-Ro*, that was the Uniform Declaratory Judgments Act.<sup>1</sup> In Ms. Johnson's case, it is the CPA.

**C. Ms. Johnson easily satisfies the CPA's requirements for bringing an injunction claim.**

RCW 19.86.090 provides:

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.

---

<sup>1</sup> State Farm relies on standing cases involving the Uniform Declaratory Judgments Act or challenging the constitutionality of a statute. *Adams v. City of Walla Walla*, 196 Wash. 268, 82 P.2d 584 (1938); *Ajax v. Gregory*, 177 Wash. 465, 32 P.2d 560 (1934); *Birmingham v. Cheetham*, 19 Wash. 657, 54 P. 37 (1898). Washington courts have construed RCW 7.24.020 of the Uniform Declaratory Judgments Act to impose a standing requirement in cases in which the plaintiff seeks a declaratory judgment. "The Uniform Declaratory Judgments Act grants standing to persons 'whose rights ... are affected by statute.' This is consistent with the general rule that a party must be directly affected by a statute to challenge its constitutionality." *Federal Way School District No. 210 v. State*, 167 Wn.2d 514, 528, 219 P.3d 941 (2009) (quoting RCW 7.24.020). Ms. Johnson does not seek declaratory relief in this case, nor does she challenge the constitutionality of any statute. The CPA contains its own requirements for plaintiffs bringing suit, which Ms. Johnson easily satisfies.

A private CPA claim requires the claimant to prove the five *Hangman Ridge* elements: (1) an unfair or deceptive act or practice; (2) occurring in trade or commerce; (3) public interest impact; (4) injury to plaintiff in his or her business or property; and (5) causation. *Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co.*, 105 Wn.2d 778, 780, 719 P.2d 531 (1986). State Farm concedes that the facts alleged in Ms. Johnson's complaint support a damages claim under the CPA, Resp.'s Br. at 6, which means she alleges the five *Hangman Ridge* elements, including injury to Ms. Johnson's business or property from a CPA violation. Therefore, Ms. Johnson "may bring a civil action in superior court to enjoin further violations, to recover the actual damages sustained by him or her, or both." *Id.* Put another way, Ms. Johnson has standing to bring a CPA injunction claim.

Once again, *Hockley* supplies the rule of decision. After rejecting defendants' argument that the availability of a monetary remedy foreclosed a claim for an injunction, the supreme court turned to defendants' argument that the plaintiff lacked standing to enjoin future violations for the benefit of the public. *Hockley*, 82 Wn.2d at 350 ("However, defendants further argue that plaintiff may enjoin future violations only as to himself, thus protecting his own interests, but that he may not protect the public interest as well."). The supreme court rejected

that argument, too. “Such a constriction of the scope of injunctive relief provided to the individual by RCW 19.86.090 is inconsistent with both the language of that section and the spirit and purpose of the consumer protection act.” *Id.* “RCW 19.86.090 authorizes an injured person to recover only the ‘actual damages sustained by him’ but imposes no such limitation upon injunctive relief. Had the legislature desired to so limit the injunction they could have easily done so, as they did with damages.” *Id.*

**“The broad public policy [behind the CPA] is best served by permitting an injured individual to enjoin future violations of RCW 19.86, even if such violations would not directly affect the individual’s own private rights.”** *Id.* (emphasis added). Contrary to State Farm’s suggestion that an injunction will lure the judiciary into a quagmire of enforcement proceedings, the supreme court in *Hockley* concluded that allowing individuals to enjoin future violations of the CPA—even if such violations would not directly affect that individual’s private rights—would **reduce** the multiplicity of litigation:

If each consumer victim were limited to injunctive relief tailored to his own individual interest, the fraudulent practices might well continue unchecked while a multiplicity of suits developed. **On the other hand, if a single litigant is allowed to represent the public and consumer fraud is proven, the multiplicity of suits is avoided and the illegal scheme brought to a halt.** Both results are in the public interest and consistent with the liberal construction of our consumer protection act.

*Id.* at 350–51 (emphasis added). The supreme court then underscored the point that a claimant, who has been damaged by the challenged practice, is authorized to pursue a claim for injunctive relief even if that injunctive relief would not do that individual claimant any good. It said: “Indeed, in many private consumer protection cases the damage has already been done to the particular individual plaintiff at the time the lawsuit is filed, making ineffectual an injunction limited solely to the protection of the individual plaintiff.” *Id.* at 351.

State Farm would have this court inject a standing test beyond the requirements of the statute. The supreme court rejected just such a proposal in *Panag v. Farmers Insurance Co.*, 166 Wn.2d 27, 204 P.3d 885 (2009). The issue in *Panag* was whether the CPA applied to a collection agency’s allegedly deceptive efforts to collect on an insurance company’s subrogation claim against an underinsured motorist. The plaintiff had no contractual relationship with either the insurers or collection agencies. Nonetheless, the Supreme Court held that the CPA applied. The Court reasoned:

**[T]he *Hangman Ridge*-test incorporates the issue of standing, particularly the elements of public interest impact and injury.** See Michelle L. Evans, *Who is a ‘Consumer’ Entitled to Protection of State Deceptive Trade Practice and Consumer Protection Acts*, 63 A.L.R.5th 1 (1998) (annotating cases that limit standing based on a consumer relationship, public interest impact, or both). As

this court stated in *Hangman Ridge*, a “successful plaintiff” is “one who establishes all five elements of a private CPA action.” *Hangman Ridge*, 105 Wash.2d at 795, 719 P.2d 531. **We will not adopt a sixth element, requiring proof of a consumer transaction between the parties, under the guise of a separate standing inquiry.**

*Id.* at 38 (emphases added). The Court thus rejected an argument that a CPA claim must arise from a consensual consumer or business transaction. *Panag*, like *Hockley*, establishes that there is no standing requirement beyond the terms of the statute.

Ms. Johnson has standing.

**D. Based on the manner in which State Farm handled Ms. Johnson’s UIM claim, she is well situated to pursue a CPA injunction against State Farm.**

This is not a case of a mere disagreement over the value of a claim. Ms. Johnson’s car accident occurred on December 15, 2007, CP 90, 95, and State Farm then failed to make any offer on her UIM claim for almost two and a half years. It took State Farm more than two years to even refer the matter to an outside lawyer for a valuation analysis. State Farm did not communicate any dollar amount for Ms. Johnson’s claim until after she told State Farm that she intended to sue to obtain the benefit of the insurance she purchased. CP 97. During the claims process, State Farm told Ms. Johnson that other claims, in which insureds had attorneys, were in line ahead of hers. CP 96. After Ms. Johnson filed this case, she learned that the adjuster on the UIM claim evaluated the claim at the policy-limits

amount of \$1 million, but adjuster's supervisors instructed him to offer just 20% of that without any factual justification, which is exactly what he did, to Ms. Johnson's detriment. CP 223.

It is interesting that State Farm attempts to distinguish the supreme court's clear holdings in *Hockley* because, says State Farm, the merits "were not fully developed." Resp.'s Br. at 8. That is precisely the problem with the superior court's dismissal of Ms. Johnson's case without permitting discovery or elaboration of the parties' factual and legal arguments. A hint of what discovery is likely to reveal can be gleaned from the arguments of State Farm's counsel before the federal district court. At oral argument, State Farm claimed that the Washington claims-handling regulations do not apply to UIM insurance, going so far as to call the requirements "bizarre" in the UIM setting. CP 75, 194. The district judge posed this question to State Farm's counsel: "Your client, she makes a claim, as she did while she is a resident here. Could your client have done nothing, just put the letter in a file and done nothing, without violating the Washington Administrative Code regulations regarding the duties of an insurance company?" CP 75, 197. State Farm's answer was, "Probably so, your Honor." *Id.* The district judge followed up: "Do you know of any cases that have dealt with this area?" *Id.* State Farm's answer:

“There are none, your Honor.” *Id.* A little later, counsel for State Farm compared State Farm’s UIM claims-handling philosophy to

a dance that the plaintiff and the defendant go through. The first step in the dance is the plaintiff says, I demand X dollars. The defendant says, I agree with that, I will settle with you for the X dollars, or the defendant says, we don’t think it is worth that. And guess what happens? You go to suit just like the contract says.

CP 75, 199–200.

The suggestion that the CPA and the claims-handling regulations do not apply to UIM insurance is easily put to rest by the authorities cited in Ms. Johnson’s opening brief. *See* Appellant’s Br. at 13–15 (discussing RCW 19.86.020, RCW 48.30.010, WAC 284-30-310 *et seq.*, *Industrial Indemnity Co. v. Kallevig*, 114 Wn.2d 907, 792 P.2d 520 (1990), and *Anderson v. State Farm Mutual Automobile Insurance Co.*, 101 Wn. App. 323, 2 P.3d 1029 (2000)). A single violation of the claims-handling regulations is a per se unfair trade practice under the CPA. *See Industrial Indemnity*, 114 Wn.2d at 925. In Ms. Johnson’s case, the allegations establish clear violations of at least the following regulations (and, therefore, the CPA): WAC 284-30-330(2) (requiring that insurers acknowledge and act reasonably and promptly upon communications with respect to claims); WAC 284-30-330(3) (requiring that insurers adopt and implement reasonable standards for the prompt investigation of claims

arising under insurance policies); WAC 284-30-330(4) (requiring that insurance companies conduct a reasonable investigation before refusing to pay claims); WAC 284-30-330(6) (requiring that insurance companies attempt in good faith to effectuate prompt, fair, and reasonable settlements of claims in which liability has become reasonably clear); WAC 284-30-330(7) (prohibiting insurance companies from compelling insureds to institute or submit to litigation to recover amounts due under an insurance policy by offering substantially less than the amounts ultimately recovered in such actions or proceedings); WAC 284-30-330(13) (requiring that insurers promptly provide a reasonable explanation of the basis in the insurance policy in relation to the facts or applicable law for the denial of the claims or for the offer of a compromise settlement); and WAC 284-30-370 (requiring that every insurer complete its investigation into a claim within 30 days of the notice of the claim).

**E. State Farm seeks a premature adjudication of Ms. Johnson's CPA injunction claim.**

Rule 65(d) requires that an order granting an injunction "shall set forth the reasons for its issuance; shall be specific in terms; [and] shall describe in reasonable detail, and not by reference to the complaint or other document, the act or acts sought to be restrained." CR 65(d). State

Farm concedes that CR 65(d) does not apply at the pleadings stage.<sup>2</sup>

Resp.'s Br. at 17. The standard that does apply is well known and extremely deferential to the plaintiff. Dismissal under CR 12(b)(6) requires that it appear **beyond doubt** that the plaintiff can prove **no set of facts** consistent with the complaint that would justify recovery. *San Juan County v. No New Gas Tax*, 160 Wn.2d 141, 164, 157 P.3d 831 (2007).

Rule 12(b)(6) motions are granted **sparingly** and only in the **unusual** case in which the allegations on the face of the complaint show an **insuperable**

---

<sup>2</sup> State Farm makes a peculiar argument starting on page 19 of its brief. State Farm says that, upon a default, the superior court could, at most, issue an injunction with the terms contained in the complaint. According to State Farm, in Ms. Johnson's case such an injunction would fail under CR 65(d). State Farm's argument fails for five reasons.

**1st**, such an argument is just a convoluted way of saying that CR 65(d) applies at the pleadings stage, which State Farm concedes is not true. *See* Resp.'s Br. at 17.

**2nd**, the CR 12(b)(6) standard requires consideration of hypothetical facts consistent with the complaint, meaning that the superior court's analysis on a CR 12(b)(6) motion is not limited to the text of the complaint.

**3rd**, CR 65(d) itself says that an injunction cannot just refer to the complaint.

**4th**, CR 54(c) only requires that a default judgment be the same "in kind" to what is pleaded, not that it be verbatim. When a defendant defaults, the superior court conducts a hearing to determine the relief, if any, it will award. *See* CR 55(b)(2).

**5th**, State Farm did not default, and so the issue is not presented in Ms. Johnson's case.

**bar to relief.** *Id.* The plaintiff is allowed to present **hypothetical facts** “to assist the court in establishing the conceptual backdrop against which the challenge to the legal sufficiency of the claim is considered.” *Bravo v. Dolsen Cos.*, 125 Wn.2d 745, 750, 888 P.2d 147 (1995) (quotations and brackets omitted). State Farm cannot meet the heavy burden for obtaining a Rule 12(b)(6) dismissal.

State Farm cites the following cases for the proposition that an injunction may not simply demand that the defendant obey the law, or some variation on that theme: *Schmidt v. Lessard*, 414 U.S. 473, 473, 94 S. Ct. 713 (1974); *Am. Red Cross v. Palm Beach Blood Bank, Inc.*, 143 F.3d 1407, 1408–09 (11th Cir. 1998); *Hughey v. JMS Dev. Corp.*, 78 F.3d 1523, 1524 (11th Cir. 1996), *Daniels v. Woodbury County*, 742 F.2d 1128, 1130 (8th Cir. 1984); *Burton v. City of Belle Glade*, 178 F.3d 1175, 1183 (11th Cir. 1999); *Sanders v. Air Line Pilots Association*, 473 F.2d 244, 245 (2d Cir. 1972). As discussed in Ms. Johnson’s opening brief, none of these cases involves a Rule 12(b)(6) motion. Appellant’s Br. at 11. *Schmidt*, *American Red Cross*, *Hughey*, and *Daniels* were appeals from injunction orders. *Burton* was an appeal from summary judgment after extensive pretrial proceedings. And *Sanders* was an appeal from the denial of an injunction. State Farm also cites *In re Xerox Corp. ERISA Litigation*, 483 F. Supp. 2d 206, 221 (D. Conn. 2007), a case that summarily applied

Fed. R. Civ. P. 65(d) on a Rule 12(b)(6) motion. But *Xerox* is contrary to the great weight of authority, see *United States v. Georgia Power Co.*, 301 F. Supp. 538, 543 (N.D. Ga. 1969); 11A Charles Alan Wright *et al.*, *Federal Practice and Procedure* § 2955, at 328–29 (2d ed. 1995), not to mention State Farm’s concession that CR 65(d) does not apply at the pleadings stage.

Were this Court to accept State Farm’s argument that Ms. Johnson will not, under any hypothetical facts, ever be able to satisfy CR 65(d) at the conclusion of trial, it will mean that that no claimant would ever be able to obtain a CPA injunction against an insurer regardless of how egregious, abusive, or systematic the insurer’s violations of claims-handling regulations are shown to be. See Resp.’s Br. at 19 (“The defects in plaintiff’s complaint are incapable of cure through amendment because they are **inherent in the nature of her claim.**” (emphasis added)). Because CR 65(d) applies to all civil actions in superior courts, it would also mean that the attorney general would not be able to bring a suit seeking a CPA injunction against an insurer either. RCW 19.86.080 (authorizing the attorney general to bring an action to restrain CPA violations). A holding of this magnitude should not occur at the pleadings stage before discovery relating to specific claims-handling practices at State Farm that violate the regulations and before expert testimony

regarding the specific terms of an injunction to remedy State Farm's wrongdoing. As Ms. Johnson argued in her opening brief, the superior court violated Ms. Johnson's right to access to the courts to the extent its order rests on the erroneous premise that a plaintiff must plead—in her complaint—the contents of the injunction she will seek at the conclusion of trial. *See* Const. art. 1, § 10; *Putman v. Wenatchee Valley Medical Center, P.S.*, 166 Wn.2d 974, 979, 216 P.3d 374 (2009); *Doe v. Puget Sound Blood Center*, 117 Wn.2d 772, 780, 819 P.2d 370 (1991); Appellant's Br. at 22–24.

State Farm erects several straw men in an attempt to portray Ms. Johnson's claim as absurd. Ms. Johnson never argued that it would be appropriate for the superior court to enter an injunction that merely stated that State Farm must obey the Insurance Code and the claims-handling regulations. Nor has Ms. Johnson ever proposed an injunction that State Farm must agree to whatever amount a UIM claimant seeks. Ms. Johnson provided the superior court with examples of the kinds of provisions that an injunction against State Farm could contain. For example, the injunction could prohibit the following acts:

- instruction to UIM claims handlers that the claims-handling regulations do not apply in UIM claims;
- company policies that encourage claims handlers to compel UIM insureds into litigation by extending low offers; and

- instruction on tolerance for discrimination (in the form of delay or low offers) against claims in which the insured does not have an attorney.

Other examples can be found on pages 15 and 16 of Ms. Johnson's opening brief.

None of the examples incorporates a reasonableness requirement that would make it difficult to enforce. For example, if State Farm instructed its UIM claims handlers that the claims-handling regulations do not apply to UIM claims, State Farm would be in violation of the injunction. If State Farm did not so instruct its UIM claims handlers, it would be in compliance. Similarly, if discovery reveals that State Farm has written procedures that encourage handlers to compel UIM insureds into litigation by extending offers that are far below that amount that State Farm itself evaluates the claim, the injunction could require State Farm to rescind those procedures. If State Farm refused to rescind the procedures, it would be in violation of the injunction. If State Farm rescinded the procedures, it would be in compliance.

On pages 26 to 29 of its brief, State Farm criticizes each of the possible injunctions. But, in doing so, State Farm mischaracterizes Ms. Johnson's hypotheticals. For example, discussing an injunction against instruction for tolerance for discrimination against claims in which the insured does not have an attorney, State Farm suggests that it would be

subject to contempt proceedings if claims by pro se claimants were ever delayed. Resp.'s Br. at 27. In fact, a violation would only occur if State Farm **instructed** its adjusters to discriminate against such claims. A court would never be called upon to determine whether a given amount of delay was reasonable or unreasonable. If a violation of the injunction is ever alleged, the court might be called upon to decide whether State Farm had written policies instructing claims handlers to discriminate against pro se claims, but that would be a simple "yes" or "no" question.

In another example, State Farm argues that an injunction prohibiting "instruction to UIM claims handlers that claims-handling regulations do not apply to UIM claims" would constitute a prior restraint on the expression of a legal or political viewpoint. As with State Farm's other criticisms of the hypothetical injunctions, State Farm cites no authority for its position. This court need not consider arguments that are not developed in the briefs and for which a party has not cited authority. *State v. Dennison*, 115 Wn.2d 609, 629, 801 P.2d 193 (1990). In any event, an injunction requiring State Farm to stop instructing its claims handlers to violate the CPA is no more an unlawful restraint of speech than the injunction in *Hockley*, which restrained the defendants from solicitation and advertising activity. 82 Wn.2d at 340. State Farm's argument would render the claims-handling regulations themselves

unconstitutional on free-speech grounds because they require insurers to adopt and implement reasonable standards for prompt investigation of claims arising under insurance policies, *see* WAC 284-30-330(3), because they require insurers to communicate certain information to the insured, *see, e.g.*, WAC 284-30-330(13), and because they forbid insurance companies from misrepresenting pertinent facts or insurance policy provisions, *see, e.g.*, WAC 284-30-330(1). Indeed, perusal of the Office of the Insurance Commissioner's website reveals disciplinary actions that have required State Farm to provide "specific" training to its producers of insurance. *See, e.g.*, Consent Order Levying a Fine, *In re State Farm Mutual Automobile Insurance Co.*, Order No. 10-0092, <http://www.insurance.wa.gov/oicfiles/orders/2010orders/10-0092.pdf> (accessed September 27, 2011). This argument, like the others that State Farm makes, cries out for a full airing of relevant facts and legal authorities, not the summary dismissal that occurred here.

Ultimately, it is not up to Ms. Johnson's complaint to chart out all of the different provisions of an injunction that may be issued at the conclusion of trial. Civil Rule 8 states that a complaint need only include "(1) a short and plain statement of the claim showing that the pleader is entitled to relief and (2) a demand for judgment for the relief to which he deems himself entitled." CR 8(a). Civil Rule 9 creates exceptions for items

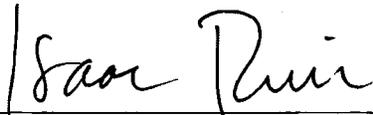
that a plaintiff must plead with particularity, but none of the exceptions involve injunctions. *See* CR 9(a)–(k). It is State Farm’s burden on a CR 12(b)(6) motion to prove that there is “**no set of facts**, consistent with the complaint, which would justify recovery.” *San Juan County*, 160 Wn.2d at 164 (emphasis added). State Farm failed to meet its burden. At the time of trial, the superior court will serve as gatekeeper to ensure that whatever injunction is entered satisfies CR 65(d)’s requirements. To discharge its gatekeeping duties, the superior court will need to have before it evidence regarding State Farm’s practices and the opinions of experts regarding measures that will both address State Farm’s shortcomings and provide State Farm with sufficient detail so that State Farm may determine what it must do or refrain from doing. None of this information is currently available to the superior court on a CR 12(b)(6) motion, when State Farm has not even answered the complaint.

**F. Conclusion**

Ms. Johnson respectfully requests that this court reverse and remand.

RESPECTFULLY SUBMITTED this 28th day of September,  
2011.

KELLER ROHRBACK L.L.P.

By   
\_\_\_\_\_  
William C. Smart, WSBA #8192  
Isaac Ruiz, WSBA #35237  
Attorneys for Plaintiff  
Emily Johnson

**CERTIFICATE OF SERVICE**

The undersigned certifies that on the 28th day of September, 2011,

I caused to be served the within document to:

**Via Hand Delivery**

Joseph D. Hampton  
Karen Bamberger  
Vasudev N. Addanki,  
Betts Patterson & Mines  
701 Pike Street, Suite 1400  
Seattle, WA 98101-3927

Mr. Rob McKenna  
Attorney General  
Office of the Attorney General  
800 Fifth Avenue, Suite 2000  
Seattle, WA 98104

I declare under penalty of perjury under the laws of the State of  
Washington, this 28th day of September, 2011.



\_\_\_\_\_  
Shannon K. McKeon