NO. 958670

SUPREME COURT
OF THE STATE OF WASHINGTON

No. 75731-8-I
COURT OF APPEALS, DIVISION ONE
OF THE STATE OF WASHINGTON

MOUN KEODALAH and AUNG KEODALAH, husband and wife,

Respondents,

v.

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

Appellants.

AMICUS CURIAE MEMORANDUM OF AMERICAN INSURANCE ASSOCIATION, NATIONAL ASSOCIATION OF MUTUAL INSURANCE COMPANIES AND PROPERTY CASUALTY INSURERS ASSOCIATION OF AMERICA IN SUPPORT OF PETITION FOR REVIEW

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I. IDENTITY AND INTERESTS OF AMICUS

The American Insurance Association and the National Association of Mutual Insurance Companies, and Property Casualty Insurers Association of America (collectively "Amici") are leading national trade associations representing property and casualty insurance companies writing business in Washington, nationally, and globally. Amici's members range in size from small companies to the largest insurers with global operations. Amici advocate sound and progressive public policies on behalf of their members in legislative and regulatory forums nationwide. Amici also file amicus curiae briefs in significant cases before federal and state courts, including this Court, on issues of importance to the insurance industry and marketplace. This allows Amici to share their broad national perspectives with the judiciary on matters that shape and develop the law. Amici's interests are in the clear, consistent and reasoned development of law that affects their members and the policyholders they insure. Although Amici have no interest in the specific outcome of the present case, Amici and their member insurers have a direct interest in preserving predictability and consistency in insurance law.

II. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

A. Summary of Argument

Amici do not condone the handling of any claim in the manner described in the Court of Appeals' opinion. However, despite the conduct alleged, the Court of Appeals misapplied Washington law and ignored significant public policy concerns in issuing an opinion that has potentially broad negative consequences for the employees and representatives of insurers as well as for the industry as a whole. By imposing personal bad faith liability for the bad judgment of an adjuster acting within the scope of employment, the opinion would create a punitive remedy not grounded in state law and inconsistent with important public policy considerations. This severe outcome, which would impact all stakeholders to insurance transactions, is not offset by any significant benefit to plaintiff insureds. The Court of Appeals decision also has troubling implications for Washington's insurance code. The Court of Appeals imposed bad faith liability based solely on the broad language of 48.01.030, which does not expressly create a private cause of action, but imposes broad general duties on "all persons." The Court of Appeals did not examine whether the legislature actually intended to create such a broad private cause of action and failed to conduct a *Bennett* analysis, which is a prerequisite to determining whether a cause of action should be implied from a statute.

The exposure of individual adjusters to insurance enterprise risk arising within the course of their employment would significantly distance Washington from other states on this important issue and this Court should reject such an outcome.

B. Personal Liability for Adjusters is Not Necessary to Advance the Legitimate Interests of Insureds in Litigation

Extra-contractual remedies such as bad faith exist so that an insured who suffers damages (other than policy benefits) for unreasonable denials, delays or underpayments of claims has a right to be compensated.

Insurers are accountable for their claim decisions and, in those instances where an insurer's conduct (which is necessarily the conduct performed for the insurer by its adjusters/employees/agents) is determined to constitute bad faith, the insurer is subject to bad faith damages. The measure of those damages is not broadened by the inclusion of a private right of action against the individual adjuster who engaged in the conduct forming the basis of the insurer's liability. If the insurer lacks the financial resources to pay a judgment, it is highly unlikely that the individual adjuster would be able to step in and pay the judgment. According to government data, the 2017 median annual wage for

insurance adjuster was $64,900.[1] This negates any economic justification for suing an individual adjuster. Absent such justification, public policy counsels against allowing a private right of action against individual adjusters.

Claimants counsel may seek a strategic advantage by bringing a claim directly against an adjuster. Such a strategy may increase settlement value by holding the insurer's employee hostage to the collateral consequences of being a defendant in a civil suit for damages (increasing complexity, contentiousness, and cost of litigation). Claimant's counsel may also use a private action against an individual adjuster as a tactic to defeat diversity of citizenship jurisdiction where a plaintiff insured wishes to keep a case in state court. A suit brought against an in-state adjuster may prevent a foreign insurer from removing the case to federal court. Each of these tactics is inconsistent with this State's public policy interests. The latter is a means of forum shopping while the former encourages litigation against individual adjusters that would create significant disincentives likely to drive individuals away from these important jobs.

[1] Available at https://www.bls.gov/ooh/business-and-financial/claims-adjusters-appraisers-examiners-and-investigators.htm

C. Personal Liability for Adjusters Is an Excessive Means of Regulating Insurer Conduct, and Encourages Litigation

The idea that bad faith conduct should be "deterred" through the imposition of individual adjuster liability ignores the nature of the bad faith tort standards in Washington. As Justice Madsen recently noted, in the liability insurance context, this Court has found bad faith as a matter of law because an insurer merely failed to "anticipate whether and how the law might change," resulting in liability for a $2 million judgment. *Xia v. ProBuilders Specialty Ins. Co.*, 188 Wn.2d 171, 196, 400 P.3d 1234 (2017) (Madsen, J. Dissenting). This sets a very high standard for insurer conduct and a fairly low bar for claimants to state a claim for bad faith. Most other states define bad faith as an intentional tort and require not just that the insurer's conduct be unreasonable, but also require a showing of intentional, knowing, or reckless disregard for the lack of a reasonable basis for the insurer's position.[2]

It is arguably possible for insurers to manage the level of exposure under Washington's bad faith tort law, but it is absurd to expect individuals of ordinary means working for insurers to do so.

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[2] *E.g., White v. Unigard Mut. Ins. Co.*, 730 P.2d 1014 (Idaho 1986); *Freidline v. Shelby Ins. Co.*, 774 N.E.2d 37 (Ind. 2002); *Pickett v. Lloyds*, 621 A.2d 445 (N.J. 1993).

The effects of holding adjusters personally liable for the business enterprise risk of insurers will reverberate across a broad spectrum of individuals and entities with a stake in the proper handling of insurance claims and allocation of the attendant risks. Since the prospect of personal bankruptcy for individual adjusters is not far-fetched, they will understandably be hesitant to even handle Washington matters, and overly cautious in doing so even when willing. This will drastically slow the claims handling process on even routine claims, since otherwise trivial disputes could result in a proliferation of bad faith suits that will unduly burden the courts, and the potentially significant increase in insured losses likely to result from this type of "defensive" claims handling would adversely impact not only insurers, but also their policyholders and other claimants.

Appropriate deterrents already exist for adjusters who make genuinely unreasonable claims decisions. When blameworthy conduct by an individual adjuster results in bad faith liability for the adjuster's employer, adverse employment consequences for the adjuster are likely. Moreover, the insurance code and regulation provides for the discipline of adjusters. But a liability regime in which an adjuster with a five-figure salary has difficulty securing home loans because she is currently a defendant in a multi-million dollar civil suit is both untenable and unfair.

D. The Court of Appeals' Reasoning Extends Sweepingly to "All Persons"

Because the Court of Appeals holds that RCW 48.01.030 identifies the persons owing a good faith tort duty, it necessarily holds that "all persons" including "insureds" and their "representatives" and "providers" have such a tort duty. The Court of Appeals acknowledged this, stating "the legislature has expressly imposed an obligation of good faith on those who represent insurers and insureds," and that "Washington courts have expressly stated that the statute does impose a duty of good faith on both the insureds and the insurer." *Keodalah v. Allstate Ins. Co.*, 413 P.3d 1059, 1062 (Wash. Ct. App. 2018). This is a remarkable proposition when one considers that bad faith in Washington consists of taking any "unreasonable" position on a claim. Under this reasoning, the insured who, without engaging in fraud or deceit, stubbornly insists that a very minor injury is worth the policy limits could now be sued for "bad faith" for unreasonably forcing his or her insurer to litigate the value of the claim in court instead of settling. And since the statute's reach encompasses "representatives," an insured's public adjuster and attorneys would also be subject to liability. Liability for bad faith, where appropriate, should remain at the institutional level, i.e., restricted to insurers, who alone are in a position to absorb the consequences of mistakes, whether innocent or

intentional, and to prevent or correct those mistakes, e.g., through supervision, claims handling procedures and other safeguards.

The statute extends even further to "providers" working on behalf of either insurers or insureds. Thus, a building contractor providing an estimate to an insured for insurance repairs would also owe a duty of good faith to the insurer. It is unlikely that the legislature's sweeping language was the result of a considered public policy decision to create tort duties running in every direction to every person or firm involved in an insurance-related transaction.

E. The Court of Appeals Implied a Statutory Cause of Action without the Analysis Required by this Court

As Allstate's Petition explains, adjuster liability finds no support in either common law agency principles or in the nature of the common law bad faith tort. The overriding question then is whether RCW 48.01.030 creates a private cause of action against insurance adjusters for bad faith. The statute reads:

> **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.

When a statute creates a duty, but does not expressly create a cause of action, this Court applies what is known as the *Bennett* test to decide whether a cause of action should be implied. The three prongs of the test are "first, whether the plaintiff is within the class for whose 'especial' benefit the statute was enacted; second, whether legislative intent, explicitly or implicitly, supports creating or denying a remedy; and third, whether implying a remedy is consistent with the underlying purpose of the legislation." *Swank v. Valley Christian Sch.*, 188 Wn.2d 663, 675, 398 P.3d 1108 (2017) (citing *Bennett v. Hardy*, 113 Wn.2d 912, 784 P.2d 1258 (1990)).

The statute at issue fails the first prong because it is not for the benefit of a class of individual persons. Instead, the beneficiary is "the business of insurance" and "the integrity of insurance." With respect to the second and third factors, the legislative intent is easily discerned from the statute's highly general language and its place within the code. It is the first substantive statement about insurance in the first chapter of Title 48, preceded only by the sections stating the short title and scope of the code. It is simply an expression of the general public policy animating the remainder of Title 48. The specifics of how the legislature intends to advance those policies are found in the remainder of Title 48.

The above analysis is confirmed when one considers the specified enforcement mechanisms in Title 48. The remainder of Title 48 specifies potential misdemeanor criminal sanctions for violating the code when no other consequence of a violation is specified. RCW 48.01.080. It further specifies powers of the Insurance Commissioner to revoke or suspend an insurer's authority to transact business as a consequence of code violations or to levy fines for violations. RCW 48.05.140; RCW 48.05.185. These potential penalties are mirrored in the case of adjusters. RCW 48.17.520-525 (license suspension or revocation); RCW 48.17.560 (fines). While it is doubtful that fines or criminal sanctions would be forthcoming for failing to uphold the nebulous mandate in RCW 48.01.030 to "preser[ve] inviolate the integrity of insurance," the specified enforcement mechanisms are inconsistent with a legislative intent to create civil causes of action.

III. CONCLUSION

For the above reasons, the Court should accept review of the decision of Court of Appeals.

RESPECTFULLY SUBMITTED this 20th day of July, 2018.

BETTS, PATTERSON & MINES, P.S.

By: _____

Daniel L. Syhre, WSBA #34158
Attorney for Amici Curiae American Insurance Association, National Association of Mutual Insurance Companies and Property Casualty Insurers Association of America

CERTIFICATE OF SERVICE

I, Valerie D. Marsh, declare as follows:

1) I am a citizen of the United States and a resident of the State of Washington. I am over the age of 18 years and not a party to the within entitled cause. I am employed by the law firm of Betts Patterson & Mines, One Convention Place, Suite 1400, 701 Pike Street, Seattle, Washington 98101-3927.

2) By the end of the business day on July 20, 2018, I caused to be served upon counsel of record at the addresses and in the manner described below, the following documents:

- **Amicus Curiae Memorandum Of American Insurance Association, National Association Of Mutual Insurance Companies And Property Casualty Insurers Association Of America In Support Of Petition For Review; and**
- **Certificate of Service.**

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I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 20th day of July, 2018.

Valerie D Marsh

Valerie D. Marsh

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