NO. 98274-1

SUPREME COURT
OF THE STATE OF WASHINGTON

WEST BEACH CONDOMINIUM, a Washington non-profit corporation,

Respondent,

v.

COMMONWEALTH INSURANCE COMPANY OF AMERICA, a foreign insurance company,

Petitioner.

ANSWER TO PETITION FOR REVIEW

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I. IDENTITY OF RESPONDENT

Respondent ("the Association") is a non-profit corporation made up of homeowners at the West Beach condominium in Seattle.

II. STATEMENT OF THE CASE

Petitioner Commonwealth Insurance Company of America sold the Association two "all risk" property policies that insure the Association's condominium. CP 98-266. In 2016, the Association submitted an insurance claim, which Commonwealth denied. *See* CP 293. Commonwealth took the position in its denial letter that a "suit limitation clause" in the policies barred the Association's "coverage." *See* CP 298. The suit limitation clause states that no lawsuit "for the recovery of any claim under this Policy shall be sustainable in any court of law or equity unless the same be commenced within Twelve (12) months next after discovery by the Insured of the occurrence which gives rise to the claim." CP 264. Commonwealth also stated in its denial letter that the damage to the condominium resulted from (among other things) "faulty construction." *See* CP 299.

The Association filed this lawsuit against Commonwealth for breach of the parties' insurance contract; common law bad faith; violation of RCW 48.30.015, the Insurance Fair Conduct Act ("IFCA"); and violation of RCW 19.86.090, the Consumer Protection Act ("CPA"). *See* CP 1-7; 10-17.

The trial court eventually ruled on summary judgment that Commonwealth's 2010 and 2011 policies do not exclude, and therefore cover, "faulty construction." *See* CP 9. The trial court also ruled that the policies cover damage caused by a combination of excluded and non-excluded perils—*e.g.*, a combination of (excluded) "decay" and (non-excluded) "faulty construction." *Id.*

A few months before trial, Commonwealth moved to dismiss the Association's breach of contract claim on grounds that the one-year deadline in the suit limitation clause had expired before the Association filed its lawsuit (*i.e.*, that the Association discovered the occurrence giving rise to its claim more than a year before it filed suit). The trial court granted that motion and dismissed the Association's breach of contract claim. *See* CP 19.

Commonwealth then filed a motion to dismiss the rest of the Association's case. Commonwealth argued that because the suit limitation clause had run before the Association sued, Commonwealth had necessarily acted reasonably in denying the Association's claim—so the Association could not recover anything under IFCA or the CPA. *See, e.g.*, CP 34. The trial court granted Commonwealth's motion and dismissed the Association's case. *See* CP 74-81.

The Association appealed, and the Court of Appeals reversed. *See* West Beach Condo. v. Commonwealth Ins. Co. of Am., 11 Wn. App. 2d 791, 455 P.3d 1193 (2020). The Court of Appeals reasoned that because a suit limitation clause only affects an insured's *remedies* (*i.e.*, the ability to sue for breach of contract), as opposed to its *rights* (*i.e.*, entitlement to compensation for covered damage), the expiration of the suit limitation clause "did not negate coverage or extinguish Commonwealth's obligations":

> Commonwealth's suit limitation clause says nothing about its underlying coverage obligations. It is thus merely a contractual modification to the statute of limitations otherwise applicable to West Beach's breach of contract claim. This clause does not negate coverage or extinguish Commonwealth's obligations under the all-risk policies.
>
> Because West Beach has an independent statutory claim for failure to provide coverage and because the coverage obligation was not extinguished by the suit limitation clause, the trial court erred in concluding that Commonwealth's denial of coverage was reasonable as a matter of law.

West Beach, 11 Wn. App. 2d at 803-04.

The court further explained that because the suit limitation clause did not affect the Association's *non*-contract claims, the Association could seek to recover what Commonwealth had wrongfully refused to pay under the Association's IFCA and CPA causes of action:

> In this case, West Beach contends the Commonwealth all-risk policies actually cover its claimed losses. Under IFCA, a claimant is entitled to "actual damages sustained, together

> with the costs of the action." An insurer is liable for those damages proximately caused by its IFCA violations. . . . The CPA allows a plaintiff "injured in his or her business or property" by a CPA violation to recover actual damages. And the "deprivation of contracted-for insurance benefits is an injury to 'business or property.'" Thus, recoverable damages under both IFCA and the CPA can include policy benefits that were unreasonably denied, subject to the policy's limits and other applicable terms and conditions. . . .
>
> We conclude the trial court erred by not allowing the jury to decide whether the damage at West Beach's property was caused by covered perils and, if so, whether Commonwealth unreasonably denied coverage and violated IFCA and the CPA by failing to pay for that covered damage.

West Beach, 11 Wn. App. 2d at 805-06 (citations omitted).

III. ARGUMENT

A. THE COURT OF APPEALS' DECISION IS NOT CONTRARY TO PUBLIC POLICY

As the Court of Appeals correctly explained, a suit limitation clause is simply a "contractual modification of the statute of limitations." Simms v. Allstate Ins. Co., 27 Wn. App. 872, 877, 621 P.2d 155 (1980). Thus, the expiration of a contractual limitation period has no effect on the contracting parties' rights or obligations, as opposed to their remedies. *See* Lane v. Dep't of Labor & Indus., 21 Wn.2d 420, 426, 151 P.2d 440 (1944) ("[A]lthough a remedy may become barred [under a statute of limitation], the right or obligation is not extinguished.").

Moreover, because a suit limitation clause has no effect on a plaintiff's *non*-contract claims, *see* Simms, 27 Wn. App. at 878 (suit limitation clause applies to "claims compensable under the contract, not claims arising under an independent statute"), an insured can sue its insurer under extra-contractual theories notwithstanding the expiration of a suit limitation deadline, *see, e.g.*, Keith v. CUNA Mut. Ins. Agency, Inc., 08-01368-RAJ, 2009 WL 1793675, at *6 (W.D. Wash. June 23, 2009). Unpaid policy benefits are recoverable under both the CPA and IFCA. *See, e.g.*, Peoples v. United Services Automobile Ass'n, 194 Wn.2d 771, 779, 452 P.3d 1218 (2019) ("[D]eprivation of contracted-for insurance benefits is an injury to 'business or property.'"); Yancey v. Automobile Ins. Co. of Hartford, C11-1329-RAJ, 2012 WL 12878687, at *9 (W.D. Wash. Oct. 23, 2012) ("actual damages" under IFCA would "include the amount the Policy obligated [the insurer] to pay"). Thus, because the expiration of Commonwealth's limitation period did not mean the Association's claim was no longer "covered," and because the amounts that Commonwealth unreasonably refused to pay are recoverable under the Association's (non-time barred) IFCA and CPA claims, the Court of Appeals correctly determined that the trial court had erroneously dismissed those claims.

Notwithstanding this sound reasoning and its foundation in Washington law, Commonwealth claims this Court should accept review

under RAP 13.4(b)(4) because the Court of Appeals' decision supposedly "violates the public policy of this state, as set forth by the Legislature." *Petition* at 12. This is so, Commonwealth argues, because WAC 284-20-010 supposedly "mandates" a one-year suit limitation clause. *See Petition* at 12-13. But the administrative code was not drafted by the Legislature, so it does not represent a policy "set forth by" that body. More importantly, WAC 284-20-010 does not require insurers to include suit limitation clauses in policies. It states that *if* an insurer includes such a clause, then the clause cannot be "less favorable" than the one in the "standard fire" policy referenced in that regulation (*i.e.*, the period cannot be shorter than a year). *See* WAC 284-20-010(3)(c).

Commonwealth also claims that the Court of Appeals' decision creates an improper "loophole" that makes suit limitation clauses "unenforceable in every case." *Petition* at 1. Yet Commonwealth's clause *was* enforced, and precisely as it is written. It prevented the Association from suing on the parties' contract. If Commonwealth wanted the clause to do more—*e.g.*, to also nullify "coverage," or to absolve Commonwealth of any further obligations—then Commonwealth could have written the clause to say that. *Cf.* Lakewood Shores Homeowners Ass'n v. Continental Cas. Co., C18-1353-MJP, 2018 WL 9439866, at *4 (W.D. Wash. Dec. 14, 2018) (if insurers "wished to eliminate coverage for any claim tendered more than

one year after the inception of damage, they certainly could have done so," but "[t]hey did not").

Contrary to Commonwealth's arguments, the Court of Appeals' decision is wholly consistent with Washington public policy. "[T]he specific purpose of IFCA was to provide insureds with *another* legal resource against their insurer for wrongful denials." Perez-Crisantos v. State Farm Fire & Cas. Co., 187 Wn.2d 669, 679, 389 P.3d 476 (2017) (emphasis added). Likewise, the purpose of the CPA is to protect consumers like the Association from entities like insurers. *See, e.g.*, Miller v. Kenny, 180 Wn. App. 772, 826, 325 P.3d 278 (2014) ("[P]rivate prosecution of Consumer Protection Act violations is backed by public policy. Protecting consumers against the bad faith of insurance companies fulfills the purpose of the statute . . . .").

Commonwealth promised it would pay the Association for covered losses. When the Association submitted a claim for covered damage, Commonwealth refused to pay—because Commonwealth thought the Association couldn't do anything about it. That is precisely the kind of conduct that IFCA and the CPA are intended to remedy. The Court of Appeals' decision is entirely consistent with Washington public policy.

B. THE COURT OF APPEALS' DECISION DOES NOT CONFLICT WITH ANY PUBLISHED COURT OF APPEALS OPINION

Commonwealth next argues that this Court should accept review because the Court of Appeals' decision supposedly conflicts with Hunter v. Regence Blue Shield, 134 Wn. App. 1045 (Aug. 21, 2006), and Schaeffer v. Farmers Ins. Exchange, 111 Wn. App. 1018 (April 22, 2002). *See Petition* at 9. But both of those (pre-2013) cases are unpublished. Thus, not only should Commonwealth not have cited them, *see* GR 14.1, a conflict with those cases would not warrant review. *See* RAP 13.4(b)(2) (review accepted only if decision "is in conflict with a *published* decision of the Court of Appeals) (emphasis added).[1]

The decisions are not in conflict anyway. The issue in Hunter was whether the suit limitation clause was even enforceable—not how such a clause might affect an insured's IFCA and CPA claims. *See* Hunter, 2006 WL 2396643, at *5 ("Hunter . . . argue[s] that the [suit limitation] clause is inconspicuous and should not be enforced."). Likewise in Schaeffer, the policyholder simply argued that the suit limitation clause was inapplicable

[1] The Federal cases that Commonwealth relies upon are similarly unpublished and non-precedential. *See Petition* at 10 n.4 (citing Farnes v. Metro. Grp. Prop. and Cas. Ins. Co., 2:18-CV-1882-BJR, 2019 WL 3501447 (W.D. Wash. Jul. 31, 2019) (unpublished); Hampton v. Allstate Corp., C13-0541-JLR, 2014 WL 1569239 (W.D. Wash. Apr. 18, 2014) (unpublished); Smyth v. State Farm Fire & Cas. Co., C05-838-JLR, 2005 WL 2656993 (W.D. Wash. Oct. 18, 2005) (unpublished).

(because the limitation period had supposedly been tolled). *See* Schaeffer, 2002 WL 662889, at *3 ("The Estate nevertheless argues that its 'appeal tolled the one year contract limitation.'"). In neither case did the insurer refuse to pay a covered loss based on a suit limitation clause, and in neither case did the insured argue that it could recover what the insurer had promised to pay—notwithstanding expiration of a suit limitation clause—under IFCA and the CPA.[2] Thus, the Court of Appeals' decision does not conflict with any published opinion of the Court of Appeals, and is therefore not reviewable under RAP 13.4(b)(2).

C. THE COURT OF APPEALS' DECISION DOES NOT CONFLICT WITH ANY DECISION OF THIS COURT

Nor does the Court of Appeals' decision conflict with any decision of this Court. *See* RAP 13.4(b)(1) (allowing review "[i]f the decision of the Court of Appeals is in conflict with a decision of the Supreme Court"). The case that Commonwealth relies upon, Coventry Assocs. v. Am. States Ins. Co., 136 Wn.2d 269, 961 P.2d 933 (1998), did not even address IFCA (as opposed to *common law* bad faith), and does not even mention suit limitation clauses. As the Court of Appeals correctly observed, Coventry is

[2] To the extent Schaeffer can be read to say that unreasonably-denied insurance benefits are not "injury to business or property" under the CPA, that would improperly contradict this Court's holding in Peoples. *See* Peoples, 194 Wn.2d at 779 ("[T]he deprivation of contracted-for insurance benefits is an injury to 'business or property.'"). As for IFCA, the Legislature had not even enacted it at the time Hunter and Schaffer were decided (IFCA became law in 2007).

irrelevant because the insurance policy in that case did not cover the insured's loss—the policyholder was alleging "bad faith in the investigation of its claim, not bad faith in the denial of coverage." West Beach, 11 Wn. App. 2d at 804-05. Coventry holds that when a property insurance policy does *not* cover a loss, the insured is not entitled to "coverage by estoppel" (as in the liability insurance setting)—so the insured must prove what damages it incurred as a result of the insurer's improper investigation. *See* Coventry, 136 Wn.2d at 284. In other words, Coventry addresses the remedies available when a policy does *not* afford coverage; the case does not address what CPA and IFCA remedies are available when a policy *does* afford coverage—the issue in this case.

Nor does the Court of Appeals' decision conflict with this Court's decisions about what conduct a jury could find "unreasonable." Commonwealth argues that its refusal to pay, even if wrong, was necessarily "reasonable" because no Washington court had yet ruled that Commonwealth could not do what it did. *See Petition* at 14 ("[N]o court had found an insurer to have acted unreasonably solely by not paying a claim that was time-barred under a suit limitation clause."). But as the Court of Appeals pointed out, the suit limitation clause plainly states that the insured is only barred from suing on the contract, not that Commonwealth is absolved of paying covered losses. *See* West Beach, 11 Wn. App. 2d at

803 ("Commonwealth's suit limitation clause says nothing about its underlying coverage obligations."); *see also* Ainsworth v. Progressive Cas. Ins. Co., 180 Wn. App. 52, 80, 322 P.3d 6 (2014) (interpretation that ignores plain text is not "a reasonable interpretation of the policy"). Likewise, Commonwealth's refusal to pay was not based on some new or uncertain law; it has long been the law that the expiration of a limitation period does not affect parties' rights or obligations. *See, e.g.*, West Beach, 11 Wn. App. 2d at 802 (citing the "*settled law* that the expiration of a statutory limitation period does not extinguish legal obligations; 'it simply deprives the plaintiff of a legal remedy'") (emphasis added).[3] Also, the jury in this case might decide that Commonwealth's denial was "unreasonable" for reasons wholly unrelated to the suit limitation clause—*e.g.*, because Commonwealth admitted in its denial letter that the damage was caused by "faulty construction," which the Policies cover. *See* CP 299; CP 9.

Most importantly, this Court has squarely held that an act based upon an "arguable interpretation of existing law" is not in fact good faith/reasonable as a matter of law:

> The Court of Appeals correctly noted that "acts performed in *good faith* under an arguable interpretation of existing law do not constitute unfair conduct violative of the consumer protection law." However, we hold it erroneously implied

[3] *See also* Lane, 21 Wn.2d 420 (1944 case holding that "although a remedy may become barred [under a statute of limitation], the right or obligation is not extinguished").

> that acts under an arguable interpretation of existing law are, as a matter of law, always performed in good faith.

Mulcahy v. Farmers Ins. Co. of Washington, 152 Wn.2d 92, 106, 95 P.3d 313 (2004) (emphasis in original).

IV. CONCLUSION

This Court should deny Commonwealth's Petition for Review. The Court of Appeals' decision was correct, and it does not contradict public policy, a published decision of the Court of Appeals, or a decision of this Court.

DATED this 13th day of April, 2020.

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By: _____

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CERTIFICATE OF SERVICE

The undersigned certifies that on *Monday, April 13, 2020*, I caused a true and correct copy of this document to be delivered in the manner indicated to the following parties:

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DATED this 13th day of April, 2020.

Nicole Johnsen

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