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DIVISION III
STATE OF WASHINGTON
By _____

NO. 339297

COURT OF APPEALS, DIVISION III
STATE OF WASHINGTON

WILLIAM MERRIMAN AND COLLEEN MERRIMAN,
husband and wife

Appellants,

vs.

AMERICAN GUARANTEE & LIABILITY INSURANCE COMPANY;
YORK RISK SERVICES GROUP, INC.; PARTNERS CLAIM
SERVICES, INC.; BERND MOVING SYSTEMS, INC., a Washington
corporation; DOUGLAS A. BERND and JANE DOE BERND, and John
Does 1-5,

Respondents.

**RESPONSE BRIEF OF
YORK RISK SERVICES GROUP, INC.**

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I. INTRODUCTION

Bernd Moving Systems, Inc. (“Bernd”) owned warehouse space in Yakima, Washington where numerous customers stored items of personal property. One such customer was Bill and Colleen Merriman (the “Merrimans”).

On August 5, 2012 there was a fire at the Bernd warehouse that damaged and/or destroyed the facility together with the items of personal property that Bernd was storing there on behalf of its customers. Fortunately, Bernd had purchased insurance coverage related to the business. That coverage was purchased through American Guarantee Ins. Co. (“American Guarantee”).

American Guarantee had an independent contract with York Risk Services Group, Inc. (“York”) to adjust insurance claims. American Guarantee notified York of the Bernd loss. York then employed another independent contractor, Partners Claim Service (“Partners”), to be the “boots on the ground” and interact and communicate with the various customers making claims and assist them in the process. It is undisputed that neither York nor Partners had any contractual relation with either Bernd or the customers of Bernd. American Guarantee contracted with York. York contracted with Partners. It is undisputed that neither York nor

Partners provides any sort of insurance coverage to anyone. They are not “insurers.” American Guarantee provided the insurance.

The Merrimans were provided a copy of the Bernd/American Guarantee insurance policy. In reviewing the policy, they decided that they were provided “first party coverage” for their loss. The Merrimans then instituted this suit against American Guarantee and York to this effect. Partners was later added to the lawsuit and the claim was then certified as a class action with the class being all customers storing property at the Bernd warehouse.

At a first summary judgment, all “insurance related” claims by the class against York were dismissed. The court ruled, in essence, that York was not an insurer so the insurance regulations, per-se CPA and bad faith causes of action could not stand. It did allow the claims for negligent misrepresentation, constructive fraud, and non-per se CPA to proceed.

Based on the trial court’s ruling, York moved to decertify the class as to York since the three remaining claims were “individualized” and not amenable to a class action. The trial court agreed and decertified the class as to York. York then moved for summary judgment of the remaining three claims as to the Merrimans (the only remaining plaintiff as to York) and that motion was granted since the Merrimans produced no evidence supporting any of the causes of action.

The trial court's decisions to dismiss all claims against York and to decertify the class as against York should be affirmed. This court's resolution of one legal issue will largely resolve all others: was York— an independent, third party adjuster hired by an insurance company – under any obligation to disclose American Guarantee insurance coverage to the Merrimans? Since there is no such obligation, all of the trial court's rulings in dismissing claims and decertifying the class as to York were correct.

York simply was not obligated by the insurance contract, Washington statutes, the Washington Administrative Code, or common law principles to disclose insurance coverages to people who stored property at the Bernd facility. For those reasons, and as further explained herein, the trial court's decision should be affirmed.

II. RESTATEMENT OF ISSUES

1. Was the trial court correct in dismissing the claims against York in holding that York had no duty to disclose coverage to the Merrimans?
2. Was the trial court correct in decertifying the class as to the York claims, based on a finding that York had no common duty to the class members?

III. STATEMENT OF THE CASE

In their brief, the Merrimans have outlined many facts, most of which are irrelevant to this appeal. This appeal presents a legal question: does an independent insurance adjuster owe a duty to people like the Merrimans to adjust in accordance to WAC regulations? Therefore, the important facts relate to the Merrimans' status vis a vis the insurance contract. That status determines what duties, if any, York owed the Merrimans. If York did not have a duty that ran to the Merrimans, no amount of alleged poor adjusting can create liability for York under any theory.

A. Factual History

On August 5, 2012, there was a catastrophic fire at a storage facility owned by Bernd. CP 65. The Merrimans were customers of Bernd, and stored items of personal property at the Bernd facility which were damaged or destroyed in the fire. *Id.*

Bernd had in place insurance coverage for its storage facility and operations, which it had purchased from one of the defendants below, American Guarantee. CP 179. Bernd's insurance policy contained first party insurance coverage for Bernd's building and business personal property, which by policy definition may have included customer property. CP 196-266; CP 198 (business personal property defined to include

“[p]ersonal property of others in your care, custody, and control”). Bernd’s insurance policy also contained liability coverage protecting Bernd from third party claims, including potential claims from its storage customers. CP 274-391. Following the fire, Bernd tendered the claim, which implicated both first party and liability coverages, to American Guarantee under the policy of insurance.

York provided “claims administrator” services to assist in adjusting the claim made by Bernd, which were subject to a pre-existing contract between American Guarantee and York. CP 117-150 (hereafter the “TPA Agreement”). Soon after the fire loss, York arranged for Partners to provide subcontracted adjusting services on a limited assignment basis to assist in adjusting the liability portion of the claim. CP 152-153. Partners was tasked with obtaining information from Bernd’s storage customers about their claims; evaluating certain storage documents, including bills of lading, that may have limited Bernd’s liability for customer claims; and reporting that information to York and/or American Guarantee. *Id.* Partners had no authority to discuss coverages or settle any claims. *Id.*

Following the fire loss, it is undisputed that York never had any communication with the Merrimans. *Brief of Appellants*, 6; CP 2653. In fact, Mr. Merriman was specifically instructed by Partners *not* to contact York, and his one attempt to do so was met with an immediate instruction

from Partners to communicate only with the Partners adjuster. CP 2654. The Merrimans only point of contact, then, was with Partners. Partners adjuster Elizabeth Bowers was assigned the Merrimans' file, and made first contact with them 12 days after the fire on August 17, 2012. CP 2660-2662.

In his deposition, Mr. Merriman outlined all of the communications the Merrimans had with Partners. Mr. Merriman agrees that he was contacted “[a] week or two after the fire” by Ms. Bowers. CP 2654. At one point, Mr. Merriman had a conversation with Ms. Bowers about coverage.

Q. How about any discussion with Ms. Bower [sic] about available insurance for Mr. Bernd?

A. We asked about our coverage and she was very vague about it, to the point of confused [sic] herself.

CP 2654.

In the same or another conversation, Mr. Merriman states that “It was not until later in the discussion with Partners that I was asked to go to any insurance company. So it – we picked up the discussion from there.” CP 2655. Lastly, “Partners just wasn’t able to answer my questions about coverage, wasn’t able – didn’t get back to me and just said go to your insurance company and they’ll take care of it.” CP 2656. That was the extent of the conversations Mr. Merriman had with Partners.

About a month later, Partners’ notes indicate that the Merrimans had tendered their claim to their own homeowners insurer, Farmers Insurance,

and Partners provided subrogation information – ostensibly assuming that all further claim activity would be through the homeowners insurer. CP 2660-2662. After September 13, 2012, Partners had no further contact with the Merrimans. *Id.* Later, the Merrimans sued Bernd for negligence, and then sued American Guarantee, York, and Partners in the underlying lawsuit.

B. Procedural History.

Though the Merrimans correctly set forth some procedural history in their brief, they left out some important information. After York was dismissed, the Merrimans, as class members, settled with the insurer for far more than the value of their claims. Combined, the Merrimans received a total of \$757,814.31 for their lost property, even though the value of their lost property was only \$316,125.14.¹ In addition, all of the Merrimans’ attorneys’ fees were paid, and the Merrimans received an additional \$20,000.00 for their roles as class representatives. CP 3359-3377; CP 3357.

¹ The Appellants attached the November 6, 2015 Order Granting (1) Final Approval of Settlement; and (2) and [sic] Representative Plaintiff Awards; and [sic] (3) Reserving Award of Attorneys Fees/Costs to their Notice of Appeal (CP 03354-03357), but inexplicably failed to attach the exhibits to that final order. York has filed a Supplemental Designation of Clerk’s Papers designating the entire order with exhibits, and has also attached it hereto as Appendix “A.”

IV. ARGUMENT

A. **York Is Not An Insurer, and Cannot Be Liable For Insurance Bad Faith.**

The Merrimans' allegation that York, an insurance adjuster with no legal relationship with the Merrimans, can be liable for insurance bad faith is absurd and should be rejected. *See* Brief of Appellants, p. 20-32. York is not an insurer, was not a party to the insurance contract between American Guarantee and Bernd, and owed the Merrimans no contractual or regulatory duties. York is not an insurer as that term is defined under Washington law. Under WAC 284-30-320:

(8) "Insurer" means any individual, corporation, association, partnership, reciprocal exchange, interinsurer, Lloyds insurer, fraternal mutual insurer, fraternal mutual life insurer, and any other legal entity engaged in the business of insurance, authorized or licensed to issue or who issues any insurance policy or insurance contract in this state. . . .

See also RCW 48.01.050 (defining insurer).

It is undisputed that York does not meet this definition of insurer. York is not authorized or licensed to issue and does not issue insurance policies or contracts in the state of Washington – thus York is not an insurer. Instead, York is an independent adjuster operating under separate definitions and regulations in Washington law.

"Adjuster" means any person who, for compensation as an independent contractor or as

an employee of an independent contractor, or for fee or commission, investigates or reports to the adjuster's principal relative to claims arising under insurance contracts, on behalf solely of either the insurer or the insured.

RCW 48.17.010(1) (emphasis added).

Thus, by statutory definition, York worked solely for the insurer. *See* RCW 48.17.010(1)(a) (defining “independent adjuster” as an adjuster representing the interests of the insurer). However, in asserting that York is liable for insurance bad faith, the Merrimans seek to extend existing duties – owed by insurers to their own insureds – and create new duties owed by independent adjusters to claimants to an insurance contract. However, these duties are not owed as a matter of Washington law.

In Washington, the source of the duty of good faith is centered upon

the fiduciary relationship existing between the insurer and the insured. Such a relationship exists not only as a result of the contract between insurer and insured, but because of the high stakes involved for both parties to an insurance contract and the elevated level of trust underlying insureds' dependence on their insurers.

Tank v. State Farm Fire and Cas. Co., 105 Wash.2d 381, 385 (1986).

It is undisputed that there was no contract in existence between York and the Merrimans. The insurance contract in this case was between Bernd and American Guarantee. There was never a fiduciary relationship between York and Merrimans. York's sole role was to adjust claims on behalf of

American Guarantee, which role was subject to a separate agreement that had nothing to do with the Merrimans. There is nothing in Washington law that creates a duty of good faith between an independent adjuster and third party (or even first party) claimants to an insurance policy. The Merrimans have failed to find a single controlling case where a Washington court has found such a duty, because such a duty does not exist. There are no disputed material facts as to York's status, so any claim based on fiduciary duties existing between an insurance company and its insured must fail as against York since it is not an insurer and Merrimans are not its insureds.

The Washington insurance statutes and regulations support this conclusion. RCW 48.30 defines certain statutory unfair practices within the insurance industry. The Merrimans allege violations of those practices that the insurance commissioner has adopted by rule pursuant to RCW 48.30.010(2). However, Merrimans allegations fail since those regulations apply only to insurers. WAC 284-30-310 (“[t]his regulations applies to all insurers . . .”). York is not an insurer, and cannot be liable for insurance bad faith.

B. The Merrimans Were Not First Party Claimants to Bernd's Property Insurance Policy, and the Trial Court Decisions at Issue Can Be Affirmed on That Basis Alone.

The Merrimans were only third party claimants to the insurance contract between American Guarantee and Bernd. As a result they cannot

maintain an action against York. The law is clear in Washington that third party claimants cannot sue insurance companies (and by extension, adjusters hired by the insurance company) “on the contract,” even if they stand to benefit from coverages in the policy. *Tank*, 105 Wash.2d at 394-95. After a comprehensive analysis of the policy and principles of insurance contract interpretation in Washington, this court should hold that the Merrimans are only third party claimants and all claims against York were properly dismissed at the trial court.

WAC 284-30 creates two categories of claimants to an insurance policy.

(6) “First party claimant” means an individual . . . asserting a right as a covered person to payment under an insurance policy or insurance contract arising out of the occurrence of the contingency or loss covered by a policy or contract.

(14) “Third party claimant” means any individual . . . asserting a claim against any individual, corporation, association, partnership, or other legal entity insured under an insurance policy or insurance contract of the insurer.

The two regulatory categories in the WAC provisions track two broad categories of insurance: first party property coverage and third party liability coverage. In the first party property context, “[t]he contract commonly agrees to indemnify another in whole or in part up to a specified amount for loss or damage to designated property” 1 Couch on Ins. §

1:37 (citing *Davis v. Oregon Mut. Ins. Co.*, 71 Wn.2d 579, 580 (1967)). On the other hand,

[l]iability insurance is third-party coverage and provides policyholders with two main benefits: payment and defense. That is, insurance companies generally owe their insureds a duty to pay and a duty to defend. *Mut. of Enumclaw Ins. Co. v. Dan Paulson Constr., Inc.*, 161 Wash.2d 903, 914, 169 P.3d 1 (2007). Related to the two main benefits of an insurance contract, liability insurers owe a duty to settle claims against their insureds. *See Besel v. Viking Ins. Co. of Wis.*, 146 Wash.2d 730, 735–36, 49 P.3d 887 (2002).

St. Paul Fire & Marine Ins. Co. v. Onvia, Inc., 165 Wn.2d 122, 129, 196 P.3d 664, 667 (2008).

The insurance contract between Bernd and American Guarantee was a comprehensive policy containing both first party property coverage and liability coverage. At the trial court and in this appeal, the Merrimans have alleged multiple first party coverages which they contend were available directly to the Merrimans because of their status as storers of property at the Bernd warehouse. First party coverage was alleged even though the Merrimans were not named insureds in the policy, were not named as an additional insured or loss payee, were not a party to the insurance contract, and never paid any premiums required by the policy. CP 79, CP 115. When viewed in light of Washington's standards of insurance contract construction, the Merrimans are third party claimants.

1. Standards for insurance contract interpretation and construction.

Washington courts apply two steps when determining the legal effect of an insurance policy – interpretation and construction. *International Marine Underwriters v. ABCD Marine, LLC*, 179 Wn.2d 274, 281-82 (2013). Courts “use the same interpretive techniques employed on other commercial contracts.” *McDonald Indus., Inc. v. Rollins Leasing Corp.*, 95 Wn.2d 909 (1981). “During interpretation, a court’s primary goal is to ascertain the parties’ intent at the time they executed the contract.” *Id.* at 282 (quoting *Berg v. Hudesman*, 115 Wn.2d 657, 663 (1990)). “Extrinsic evidence is admissible as an aid in ascertaining the parties’ intent.” *Berg*, 115 Wn.2d at 667.

For example, a court may look to the structure of the policy as an important objective source of meaning and intent. A court will also consider whether there was another type of insurance that would have covered the loss.

Int’l Marine, 179 Wn.2d at 282-83 (internal quotations and citations omitted).

After the court interprets the insurance policy according to the analysis above, “the court must construe it, i.e. determine its legal effect.”

Int’l Marine, 179 Wn.2d at 288.

If a court is unable to resolve an ambiguity through interpretation, it must construe the

ambiguity in favor of the insured. . . . A court, however, is not at liberty to revise a contract under the theory of construing it.

Id. (internal quotations and citations omitted)(emphasis added).

Applying the interpretation principles outlined above, it is clear that neither Bernd nor American Guarantee ever intended the insurance policy to provide first party rights to anyone other than the named insured, Bernd.

The structure of the policy and the inter-related policy provisions indicate that American Guarantee and Bernd did not intend for storage customers to have any first party rights. The “Commercial Insurance Policy” issued by American Guarantee was a comprehensive policy which insured Bernd against several kinds of business risks, including those risks inherent in a moving and storage business. The policy consisted of property, general liability, crime and fidelity, inland marine (including moving and storage liability coverage), and business automobile coverage. CP 179. Bernd is the only named insured. *Id.* The two broad policies within the overall insurance contract at issue in the trial court litigation were the commercial property coverage (hereinafter the “Property Policy”), CP 374-391, and the inland marine policy including moving and storage liability coverage (the “Liability Policy”), CP 374-391.

Through its insurance policy, Bernd insured its “brick and mortar” business which included a warehouse, vehicles, and equipment necessary to

carry on business as a moving and storage company. At the same time, Bernd was in the business of transporting and storing customer property in the course of business. There are risks inherent in both activities – the risk of property loss as an owner of property, and the risk of liability for damage to customer property that occurs in the course of administering a moving and storage business. The Property Policy and Liability Policy reflect these distinct risks.

The Property Policy had a limit of insurance of \$775,500, inclusive of Bernd's building and the replacement cost of Bernd's business personal property. CP 196. This limit of insurance was ostensibly the replacement cost of Bernd's building and the business personal property used to carry on the moving and storage business. This was also the approximate amount paid to Bernd (after certain limits increased provided by the policy). CP 1858.

Rather than covering customer property *directly*, Bernd also purchased a specialty form of insurance for moving and storage companies. The Liability Policy contains a "Moving and Storage Coverage Form" which covered Bernd's liability as a carrier and liability as a warehouse operator. CP 374-391. Again, Bernd was the only named insured. CP 388. The Merrimans were not named as additional insureds. *Id.* The Moving and Storage Coverage form operated as a liability policy:

1. Coverage A – Liability as a Carrier

We will pay those sums *that you become legally obligated to pay as damages* because of accidental loss or damage to “shipper’s” goods . . . described in the “shipping document”, bills of lading or “advice of coverage” and while in your custody and control in the ordinary course of transit, or while being moved within or between the “shipper’s” location(s).

2. Coverage B – Liability as a Warehouse Operator

We will pay those sums *that you become legally obligated to pay as damages* because of accidental loss of or damage to “customer’s” goods that you have accepted . . . for storage, repositioning, packing, crating, or similar service

CP 374. (emphasis added).

The structure of the various policy forms indicates that Bernd intended to insure itself against distinct business risks. The Property Policy ensured that, in the event of a covered loss, Bernd would be able to rebuild its business. As Bernd noted through its CR 30(b)(6) designee, this occurred – Bernd was paid for its building and business personal property and was able to rebuild its business. CP 1858. The Liability Policy ensured that, in the event Bernd became legally obligated to pay one of its customers due to loss or damage to their goods, Bernd would be insured for that claim.

2. The Merrimans' interpretation of the policy creates absurd results.

At the trial court, the Merrimans argued that Bernd protected itself from claims based on loss or damage to customer property through the Liability Policy, and then *also* covered the customer directly as a first party claimant under the Property Policy. Such an interpretation does not comport with the structure and logic of the insurance policy for two reasons: 1) in the event of a loss involving both Bernd's and customer property, the insurance proceeds would be insufficient to allow Bernd to rebuild its business and 2) the policy would elevate Bernd's customers to the same status as Bernd, creating impossible and conflicting duties of good faith in the event of a loss.

First, if American Guarantee had adopted the Merriman's interpretation when it first received the claim, the loss involving both Bernd's property and customer property would have resulted in Bernd's inability to rebuild its warehouse or re-purchase equipment, because direct claims by the storage customers would reduce the insurance proceeds available to Bernd. The facts in the case below show the absurdity of such a result. The actual cash value of the damaged property stored by Bernd's customers at the warehouse was eventually agreed to be \$1,414,854.25. *See* Appendix "A." If all of the customers were insureds and able to make a claim directly to American Guarantee for their loss, the insurance proceeds

available to Bernd under a pro rata allocation would have been less than half of the property limits – an amount clearly insufficient to repair or replace Bernd’s business and personal property. This would defeat the purpose of building and business personal property coverage. Such an interpretation cannot prevail because it does not comport with the structure and purpose of the policy.

Second, if the Merrimans and other customers were first party insureds under Bernd’s Property Policy, American Guarantee would have owed conflicting duties to its named insured Bernd and the other alleged first party claimants to the Property Policy. Bernd purchased an insurance policy covering its building and business personal property, and soon after the fire submitted a claim for the damages. An interpretation finding that the Merrimans and other customers were also first party claimants would have required American Guarantee to delay payment to its named insured, Bernd, while investigating the claims of third parties. The Merrimans’ interpretation would essentially require American Guarantee to act in bad faith to its own insured (Bernd) by delaying payment, and the eventual payment to the named insured would be a fraction of the limits – an amount insufficient to cover the named insured’s losses.

3. None of the policy provisions cited by the Merrimans established first party rights for anyone other than Bernd.

- a. The provision in the Property Policy covering personal property in Bernd's care, custody and control does not establish the Merrimans' first-party status.

In the Property Policy, Bernd had coverage for Bernd's business personal property, which included "personal property of others in your care, custody and control." CP 198. The language and structure of the policy requires an interpretation that customer property was not covered in such a fashion as to make the Merrimans first party claimants. Instead, it covered only Bernd's liability to his customer's for lost property, and did not cover customers directly. The "Loss Payment" portion of the Building and Personal Property Coverage Form states:

e. We may adjust losses with the owners of lost or damaged property if other than you. ***If we pay the owners, such payments will satisfy your claims against us for the owner's property. . .***

f. We may elect to defend you against suits arising from claims of owners of property. We will do this at our expense.

CP 233. (emphasis added).

Both of the above provisions indicate that, if the owner of property covered under the Property Policy was someone other than Bernd, American Guarantee could choose to defend Bernd from suits arising from

claims. If American Guarantee did pay owners directly, it was to satisfy claims by customers against Bernd, and was not an obligation owed to customers directly.

Similarly, American Guarantee's option to defend Bernd does not comport with an interpretation providing the Merrimans with first party rights under the policy. If the Merrimans were indeed first party claimants, American Guarantee's option to defend Bernd would be superfluous, as the Merrimans would have been entitled to make their own first party claim against the policy.

In this case, American Guarantee chose to defend its insured for the loss of the Merrimans' property – yet the Merrimans' interpretation would hold that American Guarantee's election of that option is in bad faith to another first party claimant. The only workable interpretation is that the Property Policy covered Bernd's interest in its building and business personal property, which might include property of others. Pursuant to the Property Policy, Bernd could make a claim for his covered property, which happened in this case. If the claim made by Bernd was for property *not owned by Bernd*, American Guarantee had the option to pay the owner directly or defend Bernd in a suit by the owner, either of which would fulfill its contractual obligation to protect Bernd from third party claims. The provision does not show that Bernd and American Guarantee agreed to

elevate the Merrimans to the same status of its insured, Bernd, in the case of loss. Thus, the personal property of others provision did not create first party status for the Merrimans.

- b. Bernd's coverages for fine arts, valuable papers and records, and personal effects under the Property Policy did not create first party status for the Merrimans.

The Merrimans claim that Bernd's fine arts coverage created the Merrimans' first party status must fail because the fine arts coverage, like the "personal property of others" coverage, operated as liability coverage for Bernd. The same "Loss Payment" provision referenced above also applies to any fine arts owned by persons other than Bernd. Therefore, coverage was only for Bernd's liability and did not cover customers directly. Further, Bernd was required to "report such [fine arts] within 30 days from the date acquired and pay additional premium that is due." CP 197. The Merrimans presented no evidence to the trial court that any fine arts were reported to American Guarantee or that additional premium was paid. Similarly, Bernd's valuable papers and records coverage, to the extent that it applied to Merrimans' property, covered Bernd's liability for such property because it was not owned by Bernd.

- c. The coverages alleged under the Liability Policy did not create first party status.

The Liability Policy provided Bernd with certain liability coverages, additional coverages, and limited additional coverages. Inventory Cost was an additional coverage, but was available only to Bernd so could not be the basis for Merrimans' first party status. "We will pay your cost of appraisal, adjustment, or inventory . . . necessary in connection with any claim of \$5,000 or more which is covered under this Coverage Form." CP 375. In the Liability Policy, "you" and "your" are defined as Bernd, and "we" is defined as American Guarantee. CP 374. The "Coverage Form" referenced is the Moving and Storage Coverage Form, so a claim covered "under this Coverage Form" would be a liability claim stemming from Bernd's activities as a mover or storer of customer property. The coverage is available only to Bernd by its terms, and cannot be the basis for first party rights in any other party.

Other coverages under the Liability Policy are "Limited Additional Coverages" including valuable papers and fine arts. CP 379-380. However, the Limited Additional Coverages are subject to the same limits of liability as the other liability coverages under the Moving and Storage Coverage Form. CP 379 ("The limit . . . is included in, and not in addition to, the Limit of Liability shown in the Declarations."). Those limits are for

“Liability as a Carrier” and “Liability as a Warehouse Operator.” CP 390. Thus, the Limited Additional Coverages cannot be the basis for first party rights because they are included in Bernd’s liability coverage.

In summary, the Merrimans were not “first party claimants” under the insurance policy. American Guarantee’s obligations (and by extension, York’s) ran to Bernd, its customer.

4. As third party claimants, the Merrimans’ causes of action against York and American Guarantee should have been dismissed as a matter of law.

The ability of strangers to sue on the insurance contract is not an issue of first impression in Washington. Just because a person stands to possibly benefit from someone else’s coverage does not mean they are first party claimants. *See Postlewait Constr. v. Great American Ins.*, 106 Wn.2d 96, 101 (1986). The fact that the Merrimans may have incidentally benefited from some terms in the policy is simply not enough to allow them to make a claim directly under the policy of insurance. While Bernd may have known that the Merrimans existed, there is no evidence that American Guarantee had any clue that Merriman was intended to benefit from the contract of insurance. Merriman is not left without a remedy. It is simply not a remedy against American Guarantee:

In sum, there has been no showing in this case that the insurer intended to assume a direct obligation to

the lessor. Rather, the lessor is attempting to directly collect proceeds it claims are owing under an insurance policy on which it was not named as an insured, a loss payee or otherwise. Although the lessor has a remedy, this is not it. Obviously, the lessor can sue the lessee, then if judgment is obtained against the lessee, the lessee's insurer can, if necessary, be garnished.

Postlewait, 106 Wn.2d at 101 (emphasis added).

The same should have been true at the trial court in this case. The Merrimans were neither a named insured nor a loss payee under the policy of insurance. The fact that their property may have been incidentally benefited under the policy of insurance of Bernd should not have given the Merrimans a direct cause of action.

Having no direct cause of action against the insurer, the Merrimans should not have been able to avail themselves of claims against York for alleged violations of the insurance regulations, Consumer Protection Act and bad faith claims, as there is no duty owed by insurers (or their adjusters) to third party claimants in Washington. Insurers do not owe a duty of good faith to third party claimants. *Tank*, 105 Wash.2d at 391-394. To assert insurance statute or regulation violations a plaintiff must be an insured of the insurance company. *Id.* at 393-4. Washington's unfair claim settlement practices regulations, set forth in WAC 284-30-300 through -600, do not create a cause of action against insurers (or their adjusters) for third party

claimants. *Id.* at 393. Nothing in the language of the regulations gives third party claimants the right to enforce the rules or indicates an intent by the Insurance Commissioner to create such right. *Id.* 393. The enforcement of these rules on behalf of third parties should be the province of the Insurance Commissioner, not individual third party claimants. Third party claimants are not intended beneficiaries of liability policies and are owed no direct contractual obligation by insurers. *Id.* 394-395. Because the Merrimans were not an insured of American Guarantee, they cannot rely on the insurance regulations as a basis for relief.

Tank itself discussed two cases involving third party suits against auto liability insurers for alleged bad faith violations of the CPA. In one, the claimant was injured in a traffic-oriented altercation and obtained a judgment against the insured, which the insurer refused to pay. In the other, the claimant sustained injuries in an accident with an insured, but the insurer questioned the extent and cause of the injuries, and refused to advance medical expenses. The *Tank* court carefully weighed and considered alternative holdings but held that nothing in the language of WAC 284-30-300 et seq. specifically gives third party claimants the right to enforce this regulation:

In ruling that a third party claimant has no right of action against an insurance company for breach of duty of good faith, we are not unmindful that a

handful of other jurisdictions recognize such a cause of action.... We do not, however, choose to follow those few.

Tank, 105 Wash.2d at 393.

As outlined above, the Merrimans should have had no direct cause of action against the insurer. The Merrimans were not insureds. The Merrimans were not loss payees. The Merrimans were, instead, third party claimants. As such, the Merrimans had no direct cause of action against the insurer and could not maintain any claim for violation of the insurance regulations, bad faith or the Consumer Protection Act. By extension, the Merrimans had no cause of action against York, American Guarantee's independent adjuster. If this court so rules, all of the trial court rulings on appeal can be affirmed on that alternative basis.

C. The Superior Court Properly Granted Summary Judgment Because There Were No Genuine Issues of Material Fact And York Was Entitled To Summary Dismissal of All Claims as a Matter of Law.

The trial court properly dismissed the claims against York on the basis that York owed no duty to the Merrimans or Bernd's other customers. This question of legal duty was resolvable on summary judgment, as York's status is a question of law, and was based on undisputed facts. As is further explained below, Washington's "independent duty" rule does not directly apply to this situation, as it is undisputed that there is no contract between

York and the Merrimans. However, the existence of contractual relationships between the insurer, American Guarantee, the insured, Bernd, and the Merrimans as Bernd's customers bear directly upon the ultimate lack of a duty from York to the Merrimans.

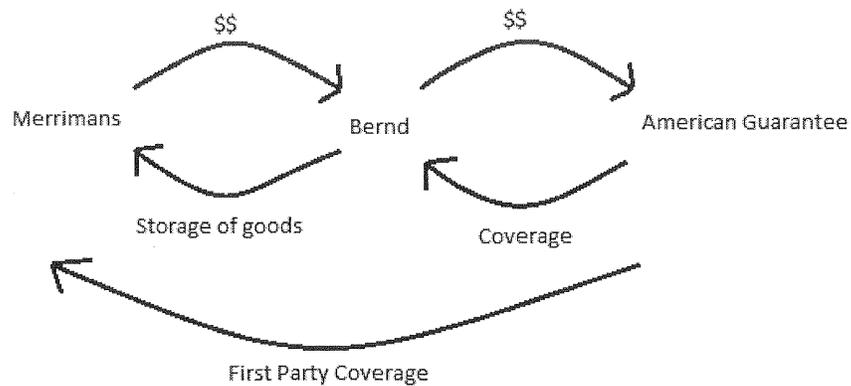
1. York had no contractual relationship with the Merrimans.

Before the fire, the contracts and relationships between the parties were relatively simple. As explained above, Bernd had a contract with its insurance company, American Guarantee. In exchange for payment of the premium, American Guarantee provided coverage under the policy. CP 179. Bernd also had an unrelated contractual relationship with the Merrimans. In exchange for payment of storage fees paid by the Merrimans, Bernd promised to store their household goods.

However, the contractual relationships became slightly more complicated after the trial court held that the Merrimans were intended third party beneficiaries of the American Guarantee/Bernd contract. *See* CP 617. Analytically, this status must have attached *pre-fire*, upon contract formation. *See Del Guzzi Const. Co., Inc. v. Global Northwest, Ltd., Inc.*, 105 Wn.2d 878, 886 (1986) (“Creation of a third-party beneficiary contract requires that the parties intend that the promisor assume a direct obligation to the intended beneficiary *at the time they enter into the contract.*”)

(citations omitted). Thus, the pre-fire relationships, as determined by the trial court, were actually as shown on Figure 1 below.

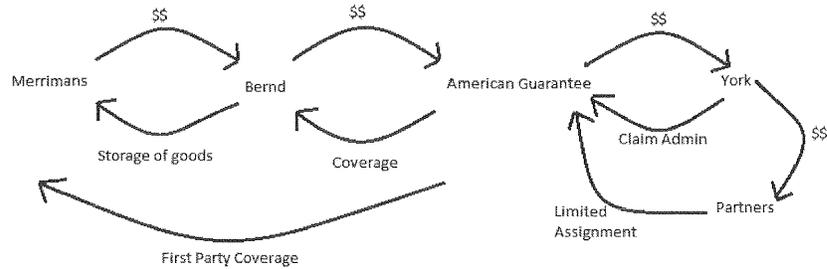
Figure 1: Pre-Fire Relationships as Determined by the Trial Court



CP 2922.

However, no one could know this relationship “pre-fire” because the trial court had yet to determine it. After the fire, American Guarantee assigned York the task of adjusting Bernd’s claim, which assignment was governed by the existing TPA Agreement between York and American Guarantee. York then made a limited assignment of certain claims related tasks to Partners. Therefore, after the fire, the relationships were as shown in Figure 2, below:

Figure 2: Post-Fire Relationships



CP 2922.

At the trial court, the Merrimans argued that the purported third party beneficiary relationship that pre-existed the fire carried with it the responsibilities and duties, including those found in Washington Administrative Code sections governing insurers. Based on an allegation that American Guarantee did not treat them as “first party claimants” as defined in WAC 284-30-320, the Merrimans sued American Guarantee for theories based on breach of the insurance contract and related extra-contractual theories. Those legal theories were not available against York, as York was neither an insurer nor a party to the insurance contract.

The Merrimans agreed that York never had a direct relationship with them. *Brief of Appellants*, 6; CP 2653. Therefore, the Merrimans’ sole alleged basis for York’s liability is that York, by its failure to properly instruct Partners, failed to disclose relevant coverages to the Merrimans. As

York did not have a legal obligation (i.e. a duty) to do so, York cannot be held liable for that conduct (or lack thereof).

2. York did not owe any duty to the Merrimans.

All of the Merrimans claims against York depend on an alleged duty owed by York to the Merrimans. In the absence of such a duty, their claims were properly dismissed by the trial court. “[A] duty of care is defined as an obligation, to which the law will give recognition and effect, to conform to a particular standard of conduct toward another.” *Affiliated FM Ins. Co. v. LTK Consulting Services, Inc.* 170 Wn.2d 442, 449 (2010). York does not dispute that it had certain contractual duties to American Guarantee by way of the TPA Agreement between the companies. No facts were presented, however, which would extend that contractual duty to the Merrimans. Further, neither Washington’s insurance statutes nor common law theories support the existence of a duty. Because no duty was owed at all, the trial court properly dismissed the claims against York.

- a. In Washington, independent insurance adjusters, like York, do not owe duties to purported third party beneficiaries to insurance policies, like the Merrimans.

As an insurance adjuster working solely on behalf of American Guarantee, York owed no duty of care to Bernd’s storage customers. The Restatement of the Law – Agency, announces the general rule:

An agent's breach of a duty owed to the principal is not an independent basis for the agent's tort liability to a third party. An agent is subject to tort liability to a third party harmed by the agent's conduct only when the agent's conduct breaches a duty that the agent owes to the third party.

Restatement (Third) Of Agency § 7.02 (2006).

Though the existence of a contractual relationship is not an absolute bar to recovery in tort, the basis for recovery must come from a duty that arises separately from a contract. If the Merrimans were actually third party beneficiaries to the insurance policy, they may have been entitled to contract remedies *against American Guarantee* for their insurance-based losses. However, as it relates to York, the question is whether the Merrimans have cognizable claims in tort that arise independently of contract claims against American Guarantee. They do not, and the trial court properly dismissed those claims.

In 2010, in two decisions, the Washington Supreme Court clarified the boundary line between contract and tort remedies.

An injury is remediable in tort if it traces back to the breach of a tort duty arising independently of the terms of the contract. The court determines whether there is an independent tort duty of care, and the existence of a duty is a question of law and depends on mixed considerations of logic, common sense, policy, and precedent. . . . When no independent tort duty exists, tort does not provide a remedy.

Eastwood v. Horse Harbor Foundation, Inc., 170 Wn.2d 380, 389 (2010) (internal citations and quotations omitted).

In *Affiliated FM*, decided on the same date as *Eastwood*, the court evaluated the duty of an engineering firm, LTK, to the City of Seattle’s monorail concessionaire, SMS. *Affiliated FM*, 170 Wn.2d at 444. LTK and SMS were not in contractual privity, but based on an allegedly negligently designed ground system, LTK caused economic damage to SMS’s business operations. *Id.* at 446-47. LTK’s liability turned on whether or not it owed a duty of care to SMS. According to the court:

[T]he duty question breaks down into three inquiries: Does an obligation exist? What is the measure of care required? To whom and with respect to what risks is the obligation owed? . . . To decide if the law imposes a duty of care, and to determine the duty’s measure and scope, we weigh “considerations of ‘logic, common sense, justice, policy, and precedent.’ (Hereinafter, we will call these considerations “the duty considerations.”) “The concept of duty is a reflection of all those considerations of public policy which lead the law to conclude that a ‘plaintiff’s interests are entitled to legal protection against the defendant’s conduct.” Using our judgment, we balance the interests at stake.

Id. at 449-450 (internal citations and quotations omitted).

In concluding that the engineering firm *did* have an independent duty to SMS, the court engaged in extended analysis of the “duty

considerations.” One of the primary considerations was the balance between protecting private ordering through contract and protecting people from physical damage or harm. The court noted that, “[i]n the context of complex multiparty transactions, at least, the preference for private ordering suggests that an engineer does not operate under extracontractual tort obligations.” *Id.* However, the court ultimately held that engineers owed a duty outside of their contracts when “[t]he interest in safety is significant.”

Turning to the scope of the duty, the court framed the question as “whether an engineer’s duty of care extends to safety risks of physical damage to the property on which the engineer works.” *Id.* at 456. In answering that it does, the Court’s entire focus was on the potential for physical harm resulting from an engineer’s actions:

As we have already observed, the harm in this case exemplifies the safety-insurance concerns that are the foundation of tort law. A fire broke out suddenly on the Seattle Monorail’s blue train, endangering people and causing extensive physical damage to property. Given the safety interest that justifies imposing a duty of care on engineers, LTK was obligated to act as a reasonably prudent engineer would *with respect to safety risks of physical damage*.

Id. (emphasis added).

York’s role was different. York was an insurance adjuster, working on behalf of its insurance company client, and was engaged in an

investigatory role. York became involved *after* the fire. The safety risks of physical damage were not present in this case to support an independent duty of York to protect the Merrimans from physical harm. The Merrimans never alleged any harm to their property that was caused by York. Instead, they sought recovery for American Guarantee's failure to provide coverage, a contract claim. York had no obligation to protect the Merrimans from that type of harm – they were already protected by their deemed status under the insurance policy.

- b. Considerations of logic, common sense, justice, policy, and precedent dictate that there is no independent duty of due care owed from an independent adjuster to a third party beneficiary of an insurance policy.

The Merrimans have failed to provide a single controlling case which holds that a third party beneficiary to an insurance policy was owed a duty by an independent adjuster hired by an insurer. Such a duty would defy logic, common sense, justice, policy, and precedent.

First, York's statutory role and its relationship with American Guarantee cannot be the source of a duty to the Merrimans. York's role in this case is defined (and limited) by statute and the TPA Agreement.

Under RCW 48.17.010:

- (1) "Adjuster" means any person who, for compensation as an independent contractor or as an employee of an independent contractor, or for fee or commission, investigates or reports to the

adjuster's principal relative to claims arising under insurance contracts, on behalf solely of either the insurer or the insured. An attorney-at-law who adjusts insurance losses from time to time incidental to the practice of his or her profession or an adjuster of marine losses is not deemed to be an "adjuster" for the purpose of this chapter. A salaried employee of an insurer or of a managing general agent is not deemed to be an "adjuster" for the purpose of this chapter, except when acting as a crop adjuster.

(a) "Independent adjuster" means an adjuster representing the interests of the insurer.

(b) "Public Adjuster" means an adjuster employed by and representing solely the financial interests of the insured named in the policy.

Under this definition, York was and did act as an "Independent Adjuster". York was hired by American Guarantee and was not employed by the Merrimans. The statutory definition is important, if not dispositive, because it outlines 1) York's role in the claims process, and 2) the relationship between an insurance company principal, an adjuster, and third parties. As an adjuster, York's role is primarily investigative – York "investigate[d] or report[ed] to [American Guarantee] relative to claims arising under insurance contracts." York worked "on behalf solely of . . . the insurer" and "represent[s] the interests of the insurer." The Merrimans have attempted to impose upon York a relationship between an independent adjuster and the claimant that the statute forbids.

More importantly, under RCW 48.17.410, York cannot and, in fact, is forbidden from, representing both the insurer and the insured in the same transaction.

An adjuster shall have authority under an adjuster's license only to investigate or report to the adjuster's principal upon claims as limited under RCW 48.17.010(1) on behalf only of the insurers if licensed as an independent adjuster, or on behalf only of insureds if licenses as a public adjuster. **An adjuster licensed concurrently as both an independent and a public adjuster shall not represent both the insurer and the insured in the same transaction.**

RCW 48.17.410 (emphasis added).

York's only statutory role was to "investigate or report to the adjuster's principal upon claims . . . on behalf **only** of the insurer[] if licensed as an independent adjuster." (emphasis added). In fact, the statute specifically precludes an adjuster from representing both the insurer and the insured in the same transaction. The statute forbids the exact conduct that the Merrimans allege York should have engaged in in this case.

As a representative only of the insurer, a new duty running to the Merrimans would have created an unresolvable conflict. It would also have created a duty in violation of Washington statute. Under the Merrimans' theory, an independent adjuster would be in constant danger of breaching a duty of care to a claimant if it sided with its insurance company client

regarding a coverage issue. Policy considerations disfavor finding a duty to a third party when it would create a risk of divided loyalties because of a conflicting interest. *See Trask v. Butler*, 123 Wn.2d 835, 1085 (1994); *see also Dewar v. Smith*, 185 Wn.App 544, 558-59 (2015) (applying *Trask* analysis to professionals other than attorneys). There is nothing within Washington statutory law that creates a duty of York to third party beneficiaries of an insurance policy.

Instead, York's contractual duties to the insurer are defined within the TPA Agreement. That agreement does not create any duties to anyone other than American Guarantee – any duties owed to third parties would necessarily conflict with York's statutory role as a representative only of American Guarantee. Furthermore, the TPA agreement specifically excepts certain behaviors from York's "Claim Administration Services": "Nothing in this agreement is intended to require [York] to engage in the practice of law or assume the obligations of an insurer . . ." CP 119.

Under the TPA Agreement, "[American Guarantee] has the ultimate and complete authority for all Claims related decisions and directives . . ." York promised to keep all claims information confidential. CP 125. There is no mention in the TPA agreement of the Merrimans or similarly situated persons. There is no non-frivolous argument that that the parties to the TPA Agreement had the Merrimans in mind as third party beneficiaries of York's

contractual duties. Washington statutes governing adjusters and the TPA Agreement define contractual duties that York owed only to American Guarantee. There was no duty owed to Merriman. Accordingly, summary judgment was appropriate, and the trial court decision should be affirmed.

c. There was no common law duty of care owed by York to the Merrimans.

Without a duty arising from statute, the only remaining possible duty would arise from a general duty of care. The majority rule throughout the United States is that insurance adjusters owe no independent duty of care to claimants such as the Merrimans. *See, e.g. Charleston Dry Cleaners & Laundry, Inc. v. Zurich Am. Ins. Co.*, 355 S.C. 614, 619, 586 S.E.2d 586, 588-89 (2003) (“We decline to recognize a general duty of due care from an independent insurance adjuster or insurance adjusting company to the insured, and thereby align South Carolina with the majority rule on this issue.”). There has been no indication that the Washington Supreme Court would diverge from the majority rule – the only appellate decision discussing the issue expressly held that adjusters are not liable in negligence or for Consumer Protection Act claims in the absence of a contractual relationship. *International Ultimate v. St. Paul Fire & Marine Ins. Co.*, 122 Wn.App 736, 758 (2004).

Furthermore, from a logical and practical standpoint, there is no public policy reason to extend York's duties to the Merrimans. If the Merrimans were indeed first party claimants to the insurance policy, they had direct remedies either in contract or arising directly out of the contract (breach of contract, Insurance Fair Conduct Act, insurance bad faith, and *per se* Consumer Protection Act claims) directly against American Guarantee. Under the TPA Agreement, York is directly liable to American Guarantee if it exposes American Guarantee to certain losses. CP 128-129. Under the insurance statutes and the TPA Agreement, American Guarantee is ultimately responsible for all coverage determinations and the handling of claims. CP 122. The existing contractual and regulatory relationships were sufficient to address all of the Merrimans harm without creating a new duty.

In addition, Washington's "duty considerations" do not support the creation of a new "adjuster liability" law in Washington. The creation of a new "adjuster liability law" is contrary to the statutory framework established for insurance adjusters, RCW 48.17 *et seq.* The Merrimans are protected whether or not York is liable, and adjusters are appropriately incentivized to act properly by indemnity provisions in their agreements with insurers. From a policy and precedent perspective, the Washington legislature has already defined the adjuster's role without creating a

statutory duty, and no controlling court decision creates a duty. The duty does not exist, and this Court should not create it.

- d. The general rule nationwide is that there is no duty owed by adjusters to claimants.

Other states conclude that independent adjusters do not owe duties to insureds. For example, *Meineke v. GAB Bus. Servs., Inc.* is an Arizona case announcing that Arizona conforms to the majority rule, that independent adjusters owe no independent duties to policy claimants:

We conclude that the relationship between adjuster and insured is sufficiently attenuated by the insurer's control over the adjuster to be an important factor that militates against imposing a further duty on the adjuster to the insured.

More important . . . imposing a duty on the adjuster in these circumstances would work a fundamental change in the law. The law of agency requires a duty of absolute loyalty of the adjuster to its employer, the insurer. See Restatement (Second) of Agency (“Restatement”) § 387 (1958). The independent adjuster's obligation is measured by the contract between the adjuster and the insurer. The adjuster that contracts to perform a \$200 investigation is not obligated to expend the same effort that might be reasonable for a fee of \$2000, nor is it obligated to continue when the insurer advises it to stop. **Creating a separate duty from the adjuster to the insured would thrust the adjuster into what could be an irreconcilable conflict between such duty and the adjuster’s contractual duty to follow the instructions of its client, the insurer.**

The relationship between insurer and insured is defined by the terms of the policy and the implied covenant of good faith and fair dealing. . . .

We see no reason to apply a different rule when the insurer's agent, the adjuster, mishandles a claim. In that circumstance, the adjuster's actions are imputed to the insurer. See Restatement § 140. If the adjuster mishandles the claim, the insurer has the same liability to the insured as if an employee of the insurer had mishandled the claim.

The trial court correctly concluded that defendants owed no legal duty to appellants. Therefore, we affirm the court's summary judgment in favor of defendants on appellants' negligence claim.

Meineke v. GAB Bus. Servs., Inc., 195 Ariz. 564, 567-68, 991 P.2d 267, 270-71 (Ct. App. 1999)(citations omitted)(emphasis added). Based on similar considerations to Washington's "duty considerations" the Supreme Court of Oklahoma similarly held in *Trinity Baptist Church v. Brotherhood Mut. Ins. Services, LLC*, 341 P.3d 75 (Okla. 2014) that independent adjusters owe no duty of care to insureds.

The (vast) majority rule in America is that there is no independent duty of due care owed by independent insurance adjusters to claimants to an insurance policy. See *Sanchez v. Linsey Morden Claims Services, Inc.*, 72 Cal.App.4th 249 (1990); *Dear v. Scottsdale Ins. Co.*, 947 S.W.2d 908, 917 (Tex. App. 1997) *disapproved of on unrelated issue by Apex Towing*

Co. v. Tolin, 41 S.W.3d 118 (Tex. 2001) (“We also conclude that H & G, an independent adjusting firm hired exclusively by Scottsdale, had no relationship with, and therefore owed no duty to, Dear. Absent such a relationship and concomitant duty, H & G could not be liable to Dear for improper investigation and settlement advice, regardless of whether Dear phrased his allegations as negligence, bad faith, breach of contract, tortious interference, or DTPA claims.”); *King v. Nat’l Sec. Fire & Cas. Co.*, 656 So.2d 1338, 1339 (Fla. Dist. Ct. App. 1995) (“In Florida, an independent insurance adjuster owes a duty to the insurance company arising out of the contract between the insurance company and the independent adjuster, and does not owe a duty to the insured unless the insured is suing for an intentional tort”); *Velastequi v. Exch. Ins. Co.*, 132 Misc.2d 896, 897, 505 N.Y.S.2d 779 (N.Y. Civ. Ct. 1986) (holding that the adjuster’s duty was owed to the insurer and based in contract, so insured could not sue adjuster for negligence in investigating the claim); *Troxell v. Am. States Ins. Co.*, 596 N.E.2d 921, 925 (Ind. Ct. App. 1992) (recognizing that adjuster’s duty was owed to the insurer, and had no direct relationship with insureds, therefore owed no duty); *Charleston Dry Cleaners & Laundry, Inc. v. Zurich Am. Ins. Co.*, 355 S.C. 614, 619, 586 S.E.2d 586, 588-89 (2003) (“We decline to recognize a general duty of due care from an independent

insurance adjuster or insurance adjusting company to the insured, and thereby align South Carolina with the majority rule on this issue.

e. Washington law holds that there is no adjuster liability.

The one controlling case in Washington is *International Ultimate*, and it conforms to the majority rule: “we conclude that the CPA is not a vehicle for insureds to sue adjusters in their individual capacity.” *International Ultimate*, 122 Wash.App. at 779. The court resolved the issue based on the unique CPA claim that arises out of the insurance contract:

To be liable under the CPA, there must be a contractual relationship between the parties. Here, the contractual relationship was between IUI and its insurance providers. We dismiss the [insureds] claim against [the adjuster] because the CPA does not contemplated suits against employees of insurers.

Id. at 758.

International Ultimate controls the outcome of this case.

3. The cases cited by the Merrimans are inapposite.

The Merrimans rely primarily on *Lease Crutcher Lewis, WA, LLC v. Nat'l Union Fire Ins. Co.*, No. C08-1862RSL, 2009 WL 3444762 (W.D. Wash. Oct. 2009) to support their position, a federal trial court decision that does not bind Washington courts. The court in *Lease Crutcher* engaged in flimsy analysis with regard to the issue of duty, commenting that “[n]o distinct body of legal principles governs the liability of adjusters to insureds for their

acts or omissions while handling a claim.” But, as noted above, Washington law *does* contain a distinct body of legal principles governing the liability of anyone: liability can only lie upon a duty independent of American Guarantee’s contractual duties to the class.

In addition to its flawed legal analysis, *Lease Crutcher* is also factually distinct. The adjuster in *Lease Crutcher*, AIG Domestic Claims, LLC was a “sister company” of the insurer, and ostensibly part of the same corporate group. The case involved an action by the named insured against its own insurance company, and the “bad” behavior was affirmative conduct. *See Lease Crutcher Lewis, LLC v. National Union Fire Ins. Co. of Pittsburg, PA*, No. C08-1862RSL, 2010 WL 4272453 (W.D. Wash. Oct. 2010). The plaintiff, Lease Crutcher, alleged that the insurance company (and its related-entity adjuster) actively sought to secure, for themselves, contribution from a joint tortfeasor before making the named insured whole. *Id.* at 3. The instant case instead involves a claim, not by the insured Bernd, but by a purported third party beneficiary to an insurance policy. The Merrimans’ claims were not based on affirmative malfeasance like in *Lease Crutcher*, but for failing to properly adjust a claim, essentially negligence. *Lease Crutcher* is too factually distinct to offer this court any guidance regarding a general duty of an adjuster to properly adjust a claim.

Aldrich & Hedman, Inc. v. Blakely, 31 Wn.App. 16 (1982), also cited by the Merrimans, is also so factually distinct as to be useless in the analysis of the instant case. In *Aldrich*, the “sole question presented [was] whether [an attorneys fee] award was a proper exercise of the court’s inherent equitable powers.” *Id.* at 16. The availability of claims against an adjuster was not an issue. Further, the facts of *Aldrich* show a situation that the trial court may have envisioned when it allowed non-insurance related claims to continue against York following York’s first summary judgment motion. The adjuster in *Aldrich* made affirmative representations to the insured about the qualifications of a construction contractor, who was clearly unqualified and unable to properly complete the work. *Id.* The adjuster was directly involved in all of the negotiations between various contractors to resolve the insured’s issues, and an affirmative action of the adjuster directly led to a lawsuit and lien filed against the insured. *Id.* at 19. Notably, the issue of duty was not discussed *at all*; apparently the adjuster either admitted the duty or chose not to appeal the trial court’s determination. *Aldrich* does not stand for the Merrimans’ proposition that adjusters owe an independent duty of due care to third party beneficiaries of an insurance policy.

4. CPA liability cannot rest upon negligent claim handling.

Throughout the trial court litigation and this appeal, the Merrimans sought to pin Consumer Protection Act liability on York for negligent claims handling. The Merrimans argue that a unique CPA claim, available only against insurance companies, can apply against an insurance adjuster with no relationship to the claimant. *See International Ultimate*, 122 Wn.App at 756 (an insured may maintain a CPA action against its insurer for breach of insurer's duty of good faith); *see also Industrial Indem. Co. of the Northwest, Inc. v. Kallevig*, 114 Wn.2d 907, 922 (first party insured may bring action for violation of CPA based on violations of WAC 284-30-330). No case law supports this extension of liability to an adjuster.

That insurance-specific CPA claim is not available against independent adjusters. First, as already discussed herein, there can be no "unfair or deceptive act or practice" sufficient for a CPA claim because York owed no duty to comply with the WAC provisions. That is an obligation of the insurer to first party claimants, not one an insurance adjuster owes to an insurance company's clients. More importantly, a CPA action is unavailable against an adjuster for negligent claims handling. Holding adjusters liable for simple negligence "would be contrary to the purpose of the CPA." *Harrison v. Whitt*, 40 Wn.App 175, 180 (1985).

The purpose of the Consumer Protection [A]ct is 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. The term “trade” as used by the CPA only includes the entrepreneurial or commercial aspects of professional services, not the substantive quality of services provided. Entrepreneurial aspects include how the cost of services is determined, billed, and collected and the way a professional obtains, retains, and dismisses clients. *Claims directed at the competence of and strategies employed by a professional amount to allegations of negligence and are exempt from the Consumer Protection Act.*

Ramos v. Arnold, 141 Wn.App. 11, 20 (2007) (dismissing CPA claim based on negligent appraisal) (emphasis added).

The Merrimans never alleged that York engaged in an unfair or deceptive act arising from the “entrepreneurial or commercial aspects” of its professional services. Instead, Merrimans seek to hold York liable for its competence and strategies employed in its professional capacity. That is *not* a CPA claim, but a negligence claim. No matter if a duty exists, there is not a CPA claim in Washington available for negligent adjusting of claims.

The *Panag* case cited by the Merrimans is inapposite. That case did not involve adjusting of claims at all; it involved deceptive debt collection notices, an activity clearly within the purview of the Consumer Protection

Act. *Panag v. Farmers Ins. Co. of Washington*, 166 Wash.2d 27, 49 (2009). *Panag* dealt with a debt collector that was retained by insurers to recover subrogation claims. *Id.* at 35 – 36. In doing so, the debt collector issued notices based on insurance liability claims that were designed to look like debt collection notices. *Id.* The *Panag* court held that the insurance notices could potentially deceive a substantial portion of the public because they “may induce people to remand payment in the mistaken belief they have a legal obligation to do so when in fact the notices represent nothing more than an adjudicated claim for tort damages”. *Id.* at 47-48. Adjuster liability was never an issue, and the question presented was not whether negligence in the adjusting of claims can trigger liability under the Consumer Protection Act. *Panag* is simply inapplicable to this case. The trial court properly dismissed the Merriman’s Consumer Protection Act claims.

D. The Trial Court Properly Decertified the Class as to the Claims Against York, as the Claims Depended on a Common Duty York Owed to the Class.

The trial court properly decertified the class as to the claims against York on the basis that York did not owe a common duty to the Merrimans and similarly situated storage customers. Trial court class certification decisions are reviewed for an abuse of discretion. *Weston v. Emerald City Pizza LLC*, 137 Wash.App. 164, 167 (2007). “A trial court abuses its discretion when its decision is ‘manifestly unreasonable, or exercised on

untenable grounds, or for untenable reasons.”” *Id.* (quoting *Mayer v. Sto Indus., Inc.*, 156 Wash.2d 677, 684 (2006)). The trial court’s decision to decertify the claims against York was reasonable, as there was no class wide duty to the class members to disclose coverage, as set forth above. The non-insurance claims were originally certified by trial court under CR 23(b)(3), which required the court to find that questions of law or fact common to the members of the class predominated over questions affecting only individual members. CP 2298-2200. After the insurance-related claims were dismissed as to York on summary judgment, no common questions remained. Without a common duty, each class member was left to individually establish facts that would tend to prove, on an individual basis, duty, causation, and damage – each class member was essentially a class of one. Therefore, the trial court properly decertified the class as to the remaining claims against York.

V. CONCLUSION

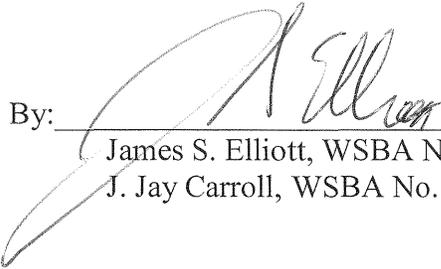
For the reasons set forth herein, York respectfully requests that the trial court decisions be affirmed.

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DATED this 23rd day of May, 2016.

HALVERSON | NORTHWEST Law Group P.C.
Attorneys for Respondent York Risk Services Group

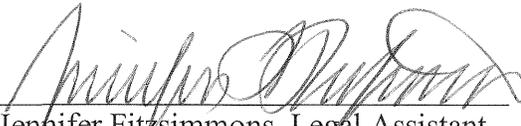
By:  _____
James S. Elliott, WSBA No. 28420
J. Jay Carroll, WSBA No. 17424

CERTIFICATE OF SERVICE

I certify that on the 23rd day of May, 2016, I caused a true and correct copy of the above to be served on the following in the manner indicated below:

Court of Appeals Division III 500 N. Cedar Street Spokane, WA 99201	<input checked="" type="checkbox"/> US Mail
William C. Smart / Kathryn Knudsen Ian Birk Law Offices of Keller Rohrback, LLP 1201 Third Avenue, Suite 3200 Seattle, WA 98101 wsmart@kellerrohrback.com kknudsen@kellerrohrback.com ibirk@kellerrohrback.com	<input checked="" type="checkbox"/> Email by Agreement
Jeffrey I. Tilden Gordon Tilden Thomas & Cordell, LLP 1001 Fourth Avenue, Suite 4000 Seattle, WA 98154 jtilden@gordontilden.com	<input checked="" type="checkbox"/> Email by Agreement

DATED at Yakima, Washington, this 23rd day of May, 2016.


Jennifer Fitzsimmons, Legal Assistant

HALVERSON | NORTHWEST Law Group P.C.

10

FILED
COUNTY CLERK

The Honorable Douglas L. Federspiel

'15 NOV -6 P4:06

SUPERIOR COURT
YAKIMA CO. WA

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SUPERIOR COURT OF WASHINGTON IN AND FOR YAKIMA COUNTY

WILLIAM MERRIMAN and COLLEEN
MERRIMAN, husband and wife, each on their
own and on behalf of all similarly situated
individuals,

Plaintiffs,

v.

AMERICAN GUARANTEE & LIABILITY
INSURANCE COMPANY; YORK RISK
SERVICES GROUP, INC.; PARTNERS
CLAIM SERVICE; BERND MOVING
SYSTEMS, INC., a Washington corporation;
DOUGLAS A. BERND and JANE DOE
BERND; JOHN DOES 1-5,

Defendants.

No. 13-2-01732-5

~~THE COURT~~ ORDER GRANTING (1)
FINAL APPROVAL OF SETTLEMENT;
AND (2) ~~AWARD OF ATTORNEY
FEES, COST REIMBURSEMENT,~~ AND
REPRESENTATIVE PLAINTIFF
AWARDS; AND (3) *RESERVING
AWARD OF ATTORNEY'S FEES/COSTS*
CLERK'S ACTION REQUIRED

THIS MATTER came before the Court upon the joint Motion for Approval of Final
Settlement and plaintiffs' Motion for Attorney Fees, Reimbursement of Expenses, and
Representative Plaintiff Award Payments. The Court has considered the motions, the records
and files herein, and the argument of counsel and finds as follows:

OK The plaintiff ^{UNDER THIS CAUSE #} class consists of "all persons, other than Bernd Moving Systems,
^{ARE 2 DIFFERENT} Inc. and any member of the Bernd family, who stored property that was damaged in the August

~~THE COURT~~ ORDER GRANTING (1) FINAL APPROVAL OF
SETTLEMENT; AND (2) ~~AWARD OF ATTORNEY FEES, COST
REIMBURSEMENT,~~ AND REPRESENTATIVE PLAINTIFF
AWARDS - 1

KELLER ROHRBACK L.L.P.
1201 Third Avenue, Suite 3200
Seattle, Washington 98101-3052
TELEPHONE: (206) 623-1000
FACSIMILE: (206) 623-3384

OK

1 5, 2012 fire at the Bernd warehouse in Yakima, Washington, and any homeowners' insurer that
2 has paid proceeds to such persons." Order Granting Class Certification, Doc. 363.

3 2. Pursuant to the Court's Order Granting Preliminary Approval, Doc. 587, class
4 counsel caused the notice to be posted and mailed or emailed to the class. The notice to the class
5 was practicable under the circumstances of the case and fully satisfied CR 23, the requirements
6 of due process, and any other applicable law.

7 **I. SETTLEMENT APPROVAL**

8 3. The Court GRANTS approval of the proposed class settlement between the
9 Plaintiffs and American Guarantee; attached hereto as Exhibit A, as fair, reasonable, and
10 adequate. The terms and provisions of the settlement are the product of lengthy, arms-length
11 negotiation. Approval of the settlement will result in substantial savings of time, money, and
12 effort to the Court and the Parties, and will further the interests of justice.

13 4. The settlement is given final approval as full and final resolution of all claims
14 alleged in the above-titled action, other than class members' claims against York. The Court has
15 considered numerous factors, including the opinions of experienced counsel; the procedural
16 history of the case, including the litigation status at the time of settlement; the risk, expense,
17 complexity, and likely duration of further litigation; the lack of written objections by class
18 members; and the terms of the settlement. The court hereby approves the terms of the settlement
19 as fair, reasonable, adequate, and in the best interests of the parties.

20 5. The absence of written objections to the proposed settlement raises a strong
21 presumption that the terms of the settlement are favorable to the class.

22 6. The plan of allocation approved attached hereto as Exhibit B, is also approved as
23 fair, reasonable, and adequate. The total proceeds subject to the settlement consist of
24
25
26

TOTALING
\$5,034,383.80

AND OTHER THAN GABERMAN'S EXTRA-CONTRACTUAL
CLAIMS UNDER CR 23 (EX) HAVING OPTED OUT
DUBI
THUS NO LONGER A CLASS MEMBER

INITIALLY HOLDBACK
1 \$5,054,383.80. The net settlement funds to be distributed among the class (after a ~~reduction~~ for
2 attorney fees, costs, and representative plaintiff award, see §II below) is \$3,391,684.67. The net
3 settlement funds shall be allocated to the class members by class counsel according to the
4 percentages reflected in Exhibit B.
5

6 7. The Court retains jurisdiction over the administration and effectuation of the
7 settlement.

8 8. This settlement does not include class members' claims against York. It is
9 recognized that Plaintiffs intend to appeal the prior dismissal and decertification of the claims
10 against York. This Order represents the final order of the Court. Timely appeal by Plaintiffs of
11 the York dismissal and decertification orders following entry of this Order shall not be
12 construed as an appeal of or challenge to the settlement herein, which shall compromise and
13 discharge all class members' and subrogating insurers' claims against American Guarantee
14 and/or Bernd.

NOR THE GABENMANS' EXTRA-CONTRACTUAL
CLAIMS UNDER OR AS (b)(3) HAVING
DATED OUT,
AND NO LONGER A
CLASS
MEMBER.
FOR PURPOSES OF THAT APPEAL.

15 **II. ATTORNEY FEES AND REPRESENTATIVE PLAINTIFF AWARDS**

16 (RESERVED)
17 9. The Court recognizes that 20 to 30 percent is the usual common fund award in a
18 class action lawsuit under *Bowles v. Washington Dep't of Ret. Sys.*, 121 Wn2d 52, 72, 847 P.2d
19 440 (1993) and finds that a 30% award is appropriate here. In making this determination, the
20 Court took into account the results achieved for the class, the significant risk undertaken by
21 class counsel in pursuing these claims, the skill and quality of work, the contingent nature of the
22 fee and financial burden carried by plaintiffs for over two years, awards in similar cases, and a
23 lodestar comparison.

ALLEGED IN THESE CONSOLIDATED
SUITS.

24 10. Class counsel have proactively prosecuted this case for years, diligently
25 conducted a thorough investigation of all relevant facts, engaged in significant discovery, and
26

[REDACTED] ORDER GRANTING (1) FINAL APPROVAL OF
SETTLEMENT; AND (2) AWARD OF ATTORNEY FEES, COST
REIMBURSEMENT, AND REPRESENTATIVE PLAINTIFF
AWARDS- 3

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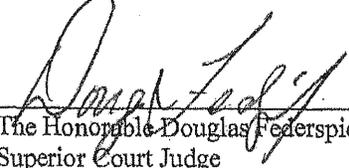
1 participated in numerous hearings before the Court. At the time class counsel filed their motion
2 for attorney fees, they had expended 4,165 hours on prosecuting the claims of 39 class members
3 on a contingent basis. In addition, plaintiffs have incurred over \$120,000 in costs to assist the
4 class in pursuing this settlement. Since preliminary approval, that number has only increased.

5 11. The Court therefore awards the following amounts to be paid to class counsel
6 from the common fund:

7	Attorney fees (30% of common fund):	\$1,516,315.14
8		
9	Costs:	\$126,383.99

10 12. Furthermore, in recognition of the work, time, and expenses incurred on behalf
11 of the class and the value of the settlement, the named plaintiffs, Bill and Colleen Merriman, are
12 entitled to receive from the common fund a representative plaintiff award in the amount of
13 \$10,000 each (for a total of \$20,000).

14
15 DONE IN OPEN COURT this 6 day of November, 2015.

16
17
18 
19 The Honorable Douglas Federspiel
20 Superior Court Judge

21
22
23
24
25
26
[REDACTED] ORDER GRANTING (1) FINAL APPROVAL OF
SETTLEMENT; AND (2) AWARD OF ATTORNEY FEES, COST
REIMBURSEMENT, AND REPRESENTATIVE PLAINTIFF
AWARDS- 4

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Exhibit A

DLF

CR 2A Agreement
Merriman v. American Guarantee, et al.

Plaintiffs and American Guarantee agree to settle their case, subject to approval by the court, as follows:

1. Payment by American Guarantee in the sum of \$4,850,000.00 (*four million, eight hundred and fifty thousand dollars*). This amount includes the money already on deposit with the Court.
2. American Guarantee will not oppose class counsel's fee petition for reimbursement of fees, costs, and representative plaintiff awards out of the common fund settlement amount so long as the amount does not exceed 35% of the gross recovery.
3. The parties contemplate one class settlement subject to approval by the Court. The settlement shall include the complete dismissal with prejudice of any and all claims against American Guarantee by class claimants and their insurers as well as complete dismissal with prejudice of any and all claims by class claimants and their insurers against Bernd Moving Systems, Inc., and all individual Bernd defendants that were or could have been joined in any action. This dismissal includes any appellate rights against Bernd in the coverage action and also includes but is not limited to providing separate releases and dismissals by all individual claimants that have filed suit against Bernd and are represented by class counsel in those actions.
4. To the extent a complete release of a threshold percentage of the ACV property damage numbers as determined by Roger Howson cannot be secured as part of the class settlement due to opt outs or otherwise, American Guarantee will have the opportunity to review and assess the effect of such opt outs and either renegotiate or void the settlement. The "threshold percentage" means that percentage agreed upon between plaintiffs and American Guarantee regarding class participation in settlement.
5. A mutual release of the parties will be drafted to formalize all final settlement terms. This agreement is contingent upon completing and executing a full and final release and settlement with more specific terms. The release shall include all claims presented in all actions, including but not limited to all contractual and extra contractual claims and all claims for attorneys' fees and costs.
6. The release does not include any claims class claimants have or may have against York Risk Services Group, Inc. All such claims against York are specifically reserved to the class claimants.
7. American Guarantee will provide reasonable assistance to the class with regard to having the settlement approved in both the coverage and underlying actions.

DLF

8. Class claimants shall include any subrogating insurers in the approval and settlement process for the class action. Class claimants through their counsel shall be responsible for resolving, negotiating, or otherwise handling any subrogating insurers' liens and claims and securing releases of said claims and shall through their counsel hold harmless and indemnify Bernd and American Guarantee from all such liens and claims. The parties shall jointly ask the Court to authorize, as part of settlement approval and to facilitate the hold harmless of this paragraph, that class counsel may hold in trust an amount equal to the total payment made by any subrogating insurer on behalf of an individual claimant in the event of dispute as to the amount properly payable to that subrogating insurer. While class claimants through their counsel will make best efforts to secure releases from the subrogating insurers, the failure to secure such releases shall not be construed to mean the class claimants have breached a condition of settlement so long as class claimants through their counsel otherwise resolve the subrogating insurers' claims and uphold their hold harmless obligations to Bernd and American Guarantee.
9. The funds currently deposited in the court registry shall be released upon the court's final approval of the settlement and the expiration of any appeal period to the trust account of Keller Rohrback L.L.P. Release of the funds deposited with the Court shall be specifically conditioned upon an order granting final approval of the settlement and the expiration of any appeal period and providing that the claims of the class claimants and subrogating insurers against Bernd are released in full, with prejudice, or have otherwise been compromised and resolved.
10. Payment of the remaining settlement funds shall be contingent upon the court's final approval of the settlement and the expiration of any appeal period and shall be made within one week after the expiration of any appeal period. Interest shall accrue thereafter on any unpaid sums at the rate of 12% per annum, compounded continuously.
11. Class claimants' counsel shall be responsible for the class notice, although American Guarantee shall assist as reasonable and necessary and shall have an opportunity to review the class notice and provide comment. The class notice will contain a proposed distribution method of the settlement funds and may also contain notice that as of now class claimants' claims against York have been dismissed.
12. American Guarantee will cease paying storage fees for the property that remains at ServPro and/or Rainbow from the date of the court's final approval of the class settlement. From that date forward, the class claimants shall be individually responsible for picking up their items, paying additional storage fees, and/or obtaining cleaning with ServPro if desired. The class notice will provide notice to the class claimants to make arrangements with ServPro directly to pick up their items within 14 days of the final class settlement approval hearing.
13. American Guarantee will no longer be responsible for fees and costs incurred by Roger Howson or any experts on his behalf under the Property Inventory Agreement from the date of the court's final approval of the class settlement. The

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Property Inventory Agreement is terminated as of the date of the court's final approval of the class settlement.

14. Nothing in the agreement constitutes an admission of liability by Bernd or American Guarantee.



Exhibit B

23

Exhibit B

				<u>Estimated</u>	<u>Estimated</u>
				<u>Total</u>	<u>Minimum</u>
<u>Name</u>	<u>ACV</u>	<u>%</u>	<u>Pro Rata</u>	<u>Subrogation</u>	<u>Recovery</u>
			<u>Allocation</u>	<u>Claim</u>	
1 Baldwin	\$ 19,442.43	1.37%	\$ 46,607.34	\$ (19,114.27)	\$ 27,493.07
2 Bourcier	\$ 194,812.74	13.77%	\$ 467,004.56	\$ (150,069.01)	\$ 316,935.55
3 Brown	\$ 80,588.04	5.70%	\$ 193,185.43	\$ (77,226.81)	\$ 115,958.62
4 Burns	\$ 3,398.85	0.24%	\$ 8,147.71		\$ 8,147.71
5 Burrows	\$ 10,757.79	0.76%	\$ 25,788.54		\$ 25,788.54
6 Campbell	\$ 2,698.55	0.19%	\$ 6,468.96		\$ 6,468.96
7 Clark	\$ 9,564.26	0.68%	\$ 22,927.42		\$ 22,927.42
8 Cole	\$ 21,596.59	1.53%	\$ 51,771.29		\$ 51,771.29
9 Cornellison	\$ 3,735.36	0.26%	\$ 8,954.39		\$ 8,954.39
10 Cross	\$ 160,797.88	11.36%	\$ 385,464.23	\$ (165,756.92)	\$ 219,707.31
11 Delorie	\$ 48,839.26	3.45%	\$ 117,077.34	\$ (54,603.93)	\$ 62,473.41
12 Doherty	\$ 9,015.02	0.64%	\$ 21,610.78		\$ 21,610.78
13 Dreisbach	\$ 13,166.03	0.93%	\$ 31,561.57	\$ (9,163.36)	\$ 22,398.21
14 Eaton	\$ 27,826.38	1.97%	\$ 66,705.32		\$ 66,705.32
15 Flower	\$ 10,492.06	0.74%	\$ 25,151.54	\$ (5,250.00)	\$ 19,901.54
16 Freitag	\$ 8,764.20	0.62%	\$ 21,009.52		\$ 21,009.52
17 Gibbons	\$ 31,613.87	2.23%	\$ 75,784.68	\$ (31,613.87)	\$ 44,170.81
18 Herring	\$ 24,148.96	1.71%	\$ 57,889.82		\$ 57,889.82
19 Hubbard	\$ 7,687.32	0.54%	\$ 18,428.02	\$ (7,500.00)	\$ 10,928.02
20 Johnson	\$ 118,710.95	8.39%	\$ 284,573.56	\$ (180,069.57)	\$ 104,503.99
21 Kennedy	\$ 10,254.31	0.72%	\$ 24,581.60	\$ (8,274.80)	\$ 16,306.80
22 Leingang	\$ 5,000.00	0.35%	\$ 11,985.99	\$ (4,000.00)	\$ 7,985.99
23 Mercado	\$ 9,754.89	0.69%	\$ 23,384.40		\$ 23,384.40
24 Merriman	\$ 316,125.14	22.34%	\$ 757,814.31	\$ (15,000.00)	\$ 742,814.31
25 Monson	\$ 1,605.33	0.11%	\$ 3,848.29	\$ (605.33)	\$ 3,242.96
26 Moore	\$ 2,620.60	0.19%	\$ 6,282.10	\$ (2,620.60)	\$ 3,661.50
27 Nuzum	\$ 4,951.67	0.35%	\$ 11,870.13	\$ (4,951.67)	\$ 6,918.46
28 Osborne	\$ 40,216.32	2.84%	\$ 96,406.45	\$ (23,676.47)	\$ 72,729.98
29 Patterson	\$ 92,311.66	6.52%	\$ 221,289.25	\$ (92,311.66)	\$ 128,977.59
30 Peters	\$ 29,542.50	2.09%	\$ 70,819.20	\$ (45,450.00)	\$ 25,369.20
31 Sears	\$ 22,357.54	1.58%	\$ 53,595.43	\$ (22,032.85)	\$ 31,562.58
32 Slobodova	\$ 11,801.85	0.83%	\$ 28,291.36	\$ (11,183.33)	\$ 17,108.03
33 Syverson	\$ 8,995.56	0.64%	\$ 21,564.13	\$ (3,995.63)	\$ 17,568.50
34 Wade	\$ 15,242.49	1.08%	\$ 36,539.25		\$ 36,539.25
White					
35 /Cavender	\$ 21,078.16	1.49%	\$ 50,528.51		\$ 50,528.51
36 Yeverino	\$ 9,723.57	0.69%	\$ 23,309.31		\$ 23,309.31
37 Zavala	\$ 5,616.12	0.40%	\$ 13,462.95		\$ 13,462.95
Totals:	\$ 1,414,854.25	100%	\$ 3,391,684.67		

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