

RECEIVED
SUPREME COURT
STATE OF WASHINGTON
Sep 20, 2013, 3:25 pm
BY RONALD R. CARPENTER
CLERK

No. 88706-3

RECEIVED BY E-MAIL

SUPREME COURT OF
THE STATE OF WASHINGTON

CERTIFICATION FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON IN:

ENZO MORELLA,

Plaintiff,

v.

SAFECO INSURANCE COMPANY OF ILLINOIS,

Defendant.

FILED
SUPREME COURT
STATE OF WASHINGTON
2013 SEP 30 P 3:25
BY RONALD R. CARPENTER
CLERK

BRIEF OF AMICI CURIAE
AMERICAN INSURANCE ASSOCIATION,
NATIONAL ASSOCIATION OF MUTUAL INSURANCE COMPANIES,
AND PROPERTY CASUALTY INSURERS ASSOCIATION
OF AMERICA

Michael B. King, WSBA No. 14405
Jason W. Anderson, WSBA No. 30512
Attorneys for Amici Curiae

CARNEY BADLEY SPELLMAN, P.S.
701 Fifth Ave., Suite 3600
Seattle, WA 98104-7010
(206) 622-8020

TABLE OF CONTENTS

	<u>Page</u>
TABLE OF CONTENTS.....	i
TABLE OF AUTHORITIES	ii
I. INTRODUCTION	1
II. STATEMENT OF INTEREST.....	2
III. ARGUMENT.....	3
A. This Court Should Answer the Certified Question By Holding that “Actual Damages” under IFCA Do Not Include the Amount of the Denied Benefits.	3
1. A Plain Meaning Analysis Establishes that “Actual Damages” Does Not Include the Amount of the Denied Benefits.	3
2. Statutory Construction Confirms that “Actual Damages” Does Not Include the Amount of the Denied Benefits.	8
B. This Court Should Limit Its Analysis to the Certified Question and Expressly Decline to Address Certain Collateral Issues.	13
1. This Court Should Expressly Decline to Address Whether Delay Alone May Constitute an “Unreasonable Denial of Coverage or Benefits.”	13
2. This Court Should Expressly Decline to Address Whether Notice Provided after the Basis for the Complaint Is Fully Resolved Complies with IFCA’s 20-Day Notice Requirement.....	15
IV. CONCLUSION.....	16

TABLE OF AUTHORITIES

	<u>Page</u>
<u>Washington State Cases</u>	
<i>Bain v. Metro. Mortgage Grp., Inc.</i> , 175 Wn.2d 83, 285 P.3d 34 (2012)	13
<i>Barr v. Interbay Citizens Bank of Tampa, Fla.</i> , 96 Wn.2d 692, 635 P.2d 441 (1981)	8
<i>Bird-Johnson Corp. v. Dana Corp.</i> , 119 Wn.2d 423, 833 P.2d 375 (1992)	13
<i>Broughton Lumber Co. v. BNSF Ry. Co.</i> , 174 Wn.2d 619, 278 P.3d 173 (2012)	8
<i>Carlsen v. Global Client Solutions, LLC</i> , 171 Wn.2d 486, 256 P.3d 321 (2011)	13
<i>City of Spokane ex rel. Wastewater Mgmt. Dept. v. Wash. State Dept. of Revenue</i> , 145 Wn.2d 445, 38 P.3d 1010 (2002)	3
<i>City of Tacoma v. Taxpayers of Tacoma</i> , 108 Wn.2d 679, 743 P.2d 793 (1987)	3
<i>Coventry Assocs. v. Am. States Ins. Co.</i> , 136 Wn.2d 269, 961 P.2d 911 (1998)	<i>passim</i>
<i>Dayton v. Farmers Insurance Group</i> , 124 Wn.2d 277, 876 P.2d 896 (1994)	11
<i>Dep't of Ecology v. Campbell & Gwinn, LLC</i> , 146 Wn.2d 1, 43 P.3d 4 (2002)	3
<i>Ellwein v. Hartford Accident & Indemnity Co.</i> , 142 Wn.2d 766, 15 P.3d 640 (2001), <i>rev'd on other grounds, Smith v. Safeco Ins. Co.</i> , 150 Wn.2d 478, 78 P.3d 1274 (2003)	9, 10, 12
<i>Fisher v. Allstate Ins. Co.</i> , 136 Wn.2d 240, 961 P.2d 350 (1998)	9

TABLE OF AUTHORITIES

	<u>Page</u>
<i>Glaubach v. Regence BlueShield</i> , 149 Wn.2d 827, 74 P.3d 115 (2003)	13
<i>Greeno v. Pub. Employees Mut. Ins. Co.</i> , 135 Wn.2d 799, 959 P.2d 657 (1998)	9
<i>Indus. Indem. Co. of the N.W., Inc. v. Kallevig</i> , 114 Wn.2d 907, 792 P.2d 520 (1990)	6
<i>Keenan v. Indus. Indem. Ins. Co. of the N.W.</i> , 108 Wn.2d 314, 738 P.2d 270 (1987)	9, 10
<i>Kirk v. Mt. Airy Ins. Co.</i> , 134 Wn.2d 558, 951 P.2d 1124 (1998)	4
<i>Louisiana-Pac. Corp. v. Asarco, Inc.</i> , 131 Wn.2d 587, 934 P.2d 685 (1997)	13
<i>McNeal v. Allen</i> , 95 Wn.2d 265, 621 P.2d 1285 (1980)	8
<i>Medina v. Pub. Util. Dist. No. 1 of Benton County</i> , 147 Wn.2d 303, 53 P.3d 993 (2002)	15
<i>Mut. of Enumclaw Ins. Co. v. Dan Paulson Constr., Inc.</i> , 161 Wn.2d 903, 169 P.3d 1 (2007)	4, 6
<i>Olympic S.S. Co. v. Centennial Ins. Co.</i> , 117 Wn.2d 73, 811 P.2d 673 (1991)	11
<i>Panag v. Farmers Ins. Co. of Wash.</i> , 166 Wn.2d 27, 204 P.3d 885 (2009)	5
<i>Potter v. Wash. State Patrol</i> , 165 Wn.2d 67, 196 P.3d 691 (2008)	8, 12
<i>Safeco Ins. Co. of Am. v. Butler</i> , 118 Wn.2d 383, 823 P.2d 499 (1992)	4
<i>Shumway v. Payne</i> , 136 Wn.2d 383, 964 P.2d 349 (1998)	13

TABLE OF AUTHORITIES

Page

Smith v. Safeco Ins. Co.,
150 Wn.2d 478, 78 P.3d 1274 (2003)4

St. Paul Fire & Marine Ins. Co. v. Onvia, Inc.,
165 Wn.2d 122, 196 P.3d 664 (2008)4, 5, 7

Tank v. State Farm Fire & Cas. Co.,
105 Wn.2d 381, 715 P.2d 1133 (1986)12

Federal Cases

Norgal Seattle P-Ship v. Nat'l Sur. Corp.,
2012 WL 1377762 (W.D. Wash. 2012)15

Constitutional Provisions, Statutes, and Court Rules

RAP 16.16(a)13

RCW 2.60.02013

RCW 19.866

RCW 19.86.0906

RCW 48.02.0605

RCW 48.22.0309

RCW 48.306

RCW 48.30.0106

RCW 48.30.010(2)6

RCW 48.30.01514

RCW 48.30.015(1)7

RCW 48.30.015(1)-(3)14

RCW 48.30.015(2)7

TABLE OF AUTHORITIES

	<u>Page</u>
RCW 48.30.015(8)	15
RCW 48.30.015(8)(a)	15
RCW 48.30.015(8)(b)	15

Treatises

T. HARRIS, WASH. INS. LAW (3d ed. 2010)	11
---	----

I. INTRODUCTION

This brief is submitted on behalf of three trade associations—the American Insurance Association (AIA), the National Association of Mutual Insurance Companies (NAMIC), and the Property Casualty Insurers Association of America (PCIAA)—who appear jointly as amici curiae and submit this brief on two main subject areas.

First, the certified question presents a narrow but important issue under the Insurance Fair Conduct Act (IFCA): Do the “actual damages” recoverable under the act and subject to potential trebling by the court include, in addition to any consequential damages caused by an unreasonable denial of coverage or benefits, the amount of the benefits unreasonably denied? This Court should answer this question in the negative. A negative answer is required under the plain meaning of the statute in the context of Washington insurance bad faith law, and it is confirmed by principles of statutory construction and public policy.

Second, the certified question is not the only legal issue regarding IFCA in the underlying federal district court case. This Court should *expressly* decline to address at least two collateral issues to avoid the possibility that its silence on those issues will be construed as implicit holdings. First, this Court should expressly decline to address whether delay alone, followed by payment, may constitute an “unreasonable denial of a claim for coverage or payment of benefits.” Second, this Court should expressly decline to address whether notice of an IFCA claim provided after

the basis for the complaint is fully resolved complies with IFCA's 20-day notice requirement.

II. STATEMENT OF INTEREST

Amici Curiae, the American Insurance Association, the National Association of Mutual Insurance Companies, and the Property Casualty Insurers Association of America (collectively "Amici") are the leading national trade associations representing the property and casualty insurers writing business in Washington, nationwide, and globally. Amici's members underwrote the vast majority of the more than \$8.7 billion in property and casualty premiums written in Washington in 2012. Amici's members, including companies based in Washington and virtually all other states, range in size from small companies to the largest insurers with global operations.¹ On issues of importance to the property and casualty insurance industry and marketplace, Amici advocate sound public policies on behalf of their members in legislative and regulatory forums at the state and federal levels and have filed amicus curiae briefs in significant cases before federal and state courts, including this Court.

¹ Liberty Mutual Insurance Company, the parent company of Defendant Safeco Insurance Company of Illinois, is a member of the National Association of Mutual Insurance Companies and the Property Casualty Insurers Association of America.

III. ARGUMENT

A. This Court Should Answer the Certified Question by Holding that “Actual Damages” under IFCA Do Not Include the Amount of the Denied Benefits.

1. A Plain Meaning Analysis Establishes that “Actual Damages” Does Not Include the Amount of the Denied Benefits.

The court’s objective in determining a statute’s meaning is to ascertain and carry out the legislature’s intent. *Dep’t of Ecology v. Campbell & Gwinn, LLC*, 146 Wn.2d 1, 9, 43 P.3d 4 (2002). If the meaning of the statute’s language is plain on its face, then the court must give effect to that plain meaning. *Id.* at 9-10. It is only when, after a plain-meaning analysis, a statute remains susceptible to more than one reasonable interpretation that the statute is deemed ambiguous, making it appropriate to resort to aids of construction. *Id.* at 12.

A statute’s plain meaning is discerned from all that the legislature has said in the statute at issue and in related statutes that disclose legislative intent regarding that statute. *Campbell & Gwinn*, 146 Wn.2d at 11. This Court has stated, “When we seek to determine the meaning of words used but not defined in the statute, we give careful consideration to the subject matter involved, the context in which the words are used, and the purpose of the statute.” *City of Tacoma v. Taxpayers of Tacoma*, 108 Wn.2d 679, 693, 743 P.2d 793 (1987). Thus, when a term of art is used, this Court will presume that the legislature intended to use the term in the technical sense, even where a different common definition is also available. *City of Spokane*

ex rel. Wastewater Mgmt. Dept. v. Wash. State Dept. of Revenue, 145 Wn.2d 445, 452, 38 P.3d 1010 (2002).

A plain meaning analysis of IFCA, and specifically its use of the term “actual damages,” is informed by the context of this statute within Washington law on insurance bad faith, which is embodied in the common law as well as statutory and regulatory provisions. *St. Paul Fire & Marine Ins. Co. v. Onvia, Inc.*, 165 Wn.2d 122, 128, 196 P.3d 664 (2008). Insurers generally owe their insureds a common-law duty of good faith arising from the insurance relationship. This duty applies to both first-party and third-party coverage. *Id.* at 130. Bad faith handling of an insurance claim is a common-law tort. *Safeco Ins. Co. of Am. v. Butler*, 118 Wn.2d 383, 389, 823 P.2d 499 (1992). “Claims of insurer bad faith ‘are analyzed applying the same principles as any other tort: duty, breach of that duty, and damages proximately caused by breach of duty.’” *Mut. of Enumclaw Ins. Co. v. Dan Paulson Constr., Inc.*, 161 Wn.2d 903, 916, 169 P.3d 1 (2007), quoting *Smith v. Safeco Ins. Co.*, 150 Wn.2d 478, 485, 78 P.3d 1274 (2003).

To establish bad faith, the insured must show that the insurer’s breach of duty was “unreasonable, frivolous, or unfounded.” *Dan Paulson Constr.*, 161 Wn.2d at 916, quoting *Kirk v. Mt. Airy Ins. Co.*, 134 Wn.2d 558, 560, 951 P.2d 1124 (1998); *see also Onvia*, 165 Wn.2d at 130. An insured may have a cause of action against his or her insurer for bad faith handling of a claim even if a court ultimately determines that there is no coverage. *Onvia*, 165 Wn.2d at 131-32, citing *Coventry Assocs. v. Am.*

States Ins. Co., 136 Wn.2d 269, 276, 961 P.2d 911 (1998). However, in the context of first-party coverage, there is no presumption that harm resulted from the bad faith. *Id.* at 133.

In *Coventry Associates*, this Court recognized that a declaration of coverage or a judgment for benefits due under first-party coverage is a contractual remedy, as opposed to a remedy for damages caused by bad faith handling of the claim. With respect to bad faith, this Court held, “[A]n insurer is not liable for the policy benefits but, instead, liable for the consequential damages to the insured as a result of the insurer’s breach of its contractual and statutory obligations.” *Coventry Assocs.*, 136 Wn.2d at 284 (emphasis added); see also *Onvia*, 165 Wn.2d at 133 (holding that the insured “must prove actual harm, and its ‘damages are limited to the amounts it has incurred as a result of the bad faith...as well as general tort damages’”), quoting *Coventry Assocs.*, 136 Wn.2d at 285. This Court has referred to these recoverable consequential damages as the “actual damages” caused by the insurer’s bad faith conduct. See, e.g., *Onvia*, 165 Wn.2d at 135; *Panag v. Farmers Ins. Co. of Wash.*, 166 Wn.2d 27, 64, 204 P.3d 885 (2009), citing *Coventry Assocs.*, 136 Wn.2d 269.

In addition to the common law, numerous statutes and regulations protect Washington insureds from unfair or unreasonable conduct by insurance companies. The elected insurance commissioner has broad regulatory authority over the insurance business in the state of Washington. See RCW 48.02.060. The insurance code authorizes the commissioner to

promulgate regulations governing the claims-handling process. RCW 48.30.010(2). A violation of chapter 48.30 RCW or a regulation promulgated thereunder constitutes an unfair practice under the Consumer Protection Act (CPA), chapter 19.86 RCW. *Indus. Indem. Co. of the N.W., Inc. v. Kallevig*, 114 Wn.2d 907, 921-23, 792 P.2d 520 (1990). The CPA provides a cause of action for a person injured in his or her business or property by a violation to recover the “actual damages” sustained as a result of the violation. RCW 19.86.090.

The Legislature inserted IFCA as a new section in chapter 48.30 RCW, which contains numerous provisions directed at curbing unfair methods of competition and unfair or deceptive acts or practices by insurers. *See* RCW 48.30.010. IFCA provides a statutory cause of action for bad faith in certain circumstances, adopting the common law standard of “unreasonable” conduct for determining liability. *See Dan Paulson*, 161 Wn.2d at 916. Similar to the CPA and this Court’s precedents on insurance bad faith, IFCA permits recovery of “actual damages.”

As this Court recognized in *Coventry Associates*, the right to coverage or benefits under an insurance policy is a contractual right that is enforceable by an action for breach of contract, independent of any bad faith cause of action. *Coventry Assocs.*, 136 Wn.2d at 284. The Legislature enacted IFCA to *supplement* this right, not to duplicate or supplant it. The plain meaning of the statute shows IFCA was enacted to provide insureds a statutory cause of action for bad faith with a remedy of consequential

damages proximately caused by the unreasonable denial of benefits. These are the “actual damages” referenced in RCW 48.30.015(1) and (2).

Characterizing the amount of the benefits denied as “actual damages” would in effect apply a presumption of harm, contrary to *Coventry Associates* and *Onvia*, allowing the insured to receive an award of punitive damages (if these supposed “actual damages” are trebled) absent a showing of any actual harm flowing from the insurer’s conduct. To interpret IFCA as eliminating the requirement under the common law that the damages recoverable for bad faith be proximately caused by the insurer’s conduct would require a clear expression of legislative intent not found in IFCA.

The context of the term “actual damages” within the statute itself further illuminates its meaning. The statute provides a cause of action to a first party claimant “who is unreasonably denied a claim for coverage or payment of benefits.” RCW 48.30.015(1). The authorized remedy is recovery of “the actual damages sustained.” *Id.*² Consistent with the common-law bad faith remedies, the recoverable damages are plainly the damages “sustained” *as a result of* the unreasonable denial of coverage or

² IFCA provides in part:

A first party claimant to a policy of insurance *who is unreasonably denied a claim for coverage or payment of benefits* by an insurer may bring an action in the superior court of this state *to recover the actual damages sustained*, together with the costs of the action, including reasonable attorney’s fees and litigation costs, as set forth in subsection (3) of this section.

RCW 48.30.015(1) (emphasis added).

benefits. *See Coventry Assocs.*, 136 Wn.2d at 284. Under first-party coverage, the “benefits” are due under the contract and not as a result of any wrongdoing by the insurer.

Under the plain meaning of IFCA within the context of Washington insurance bad faith law, the recoverable “damages” are those that provide compensation for the wrong caused by the insurer, not for the benefits due under the policy.

2. Statutory Construction Confirms that “Actual Damages” Does Not Include the Amount of the Denied Benefits.

A statute in derogation of the common law “must be strictly construed and no intent to change that law will be found, unless it appears with clarity.” *Potter v. Wash. State Patrol*, 165 Wn.2d 67, 77, 196 P.3d 691 (2008), quoting *McNeal v. Allen*, 95 Wn.2d 265, 269, 621 P.2d 1285 (1980). Punitive damages are contrary to long-established public policy in Washington and are not allowed unless expressly authorized by the Legislature or by application of choice-of-law rules. *Barr v. Interbay Citizens Bank of Tampa, Fla.*, 96 Wn.2d 692, 699-700, 635 P.2d 441 (1981). Accordingly, unless the Legislature specifies otherwise, a statute that imposes punitive damages must be strictly construed. *See Broughton Lumber Co. v. BNSF Ry. Co.*, 174 Wn.2d 619, 633, 278 P.3d 173 (2012). Because IFCA authorizes punitive damages, it must be strictly construed. This means that “actual damages” must be given the narrowest construction consistent with the statutory language. *See Potter*, 165 Wn.2d at 77.

IFCA is also in derogation of the common law in that it expands the remedies available to claimants under underinsured motorist (UIM) coverage. Although this Court's answer to the certified question presumptively could apply to coverages other than UIM, this Court should frame its analysis within that context given the unique relationship between UIM insurer and insured which is at issue here.

Automobile insurers are required by statute to offer UIM coverage. *See* RCW 48.22.030. Unless the insured rejects UIM coverage in writing, the insurer is obligated to pay, up to the limits of the UIM coverage, the amount the insured is legally entitled to recover from the underinsured tortfeasor. *Keenan v. Indus. Indem. Ins. Co. of the N.W.*, 108 Wn.2d 314, 320, 738 P.2d 270 (1987). The purpose of UIM coverage is *not* "full compensation," but to provide a layer of coverage that "floats" above any other applicable coverage and supplements it to the extent of the applicable UIM coverage limit. *Greengo v. Pub. Employees Mut. Ins. Co.*, 135 Wn.2d 799, 809-10, 959 P.2d 657 (1998).

This Court has contrasted the UIM carrier's duty with an insurer's duty in the third-party liability context, observing that "the relationship between a UIM insurer and its insured is 'by nature adversarial and at arm's length.'" *Ellwein v. Hartford Accident & Indemnity Co.*, 142 Wn.2d 766, 779, 15 P.3d 640 (2001), *rev'd on other grounds*, *Smith v. Safeco Ins. Co.*, 150 Wn.2d 478, 78 P.3d 1274 (2003), quoting *Fisher v. Allstate Ins. Co.*, 136 Wn.2d 240, 249, 961 P.2d 350 (1998). An insurer providing UIM

coverage “stand[s] in the shoes” of the tortfeasor and is entitled to the benefits of all defenses available to the tortfeasor. *Id.* at 780. “UIM coverage requires that a UIM insurer be free to be adversarial within the confines of the normal rules of procedure and ethics. To require otherwise would contradict the very nature of UIM coverage.” *Id.* A UIM insurer is allowed to maintain an adversarial posture with its insured because “[t]he injured party is not entitled to be put in a better position, by virtue of being struck by an underinsured motorist, than she would had she been struck by a fully insured motorist.” *Keenan*, 108 Wn.2d at 321.

As with any other first-party coverage, there is no presumption of harm or coverage by estoppel as a result of bad faith handling of a UIM claim. *Coventry Assocs.*, 136 Wn.2d at 285. In his treatise, *Washington Insurance Law*, Thomas V. Harris identifies the damages elements most commonly recovered in UIM bad faith actions. Not surprisingly given this Court’s decision in *Coventry Associates*, they do *not* include the policy benefits themselves, but rather:

1. The amount of attorney fees and expenses that would not have been incurred if the UIM insurer had timely settled for an appropriate amount;
2. Interest or other earnings that the UIM payment would have generated if it had been paid earlier;
3. When a UIM insured is denied timely access to his UIM benefits, the economic losses that he suffered because he was not able to meet his business or personal responsibilities; and
4. Emotional distress resulting from the UIM insurer’s bad-faith refusal to pay the benefits in a timely manner.

T. HARRIS, WASH. INS. LAW 41-6, § 41.02 (3d ed. 2010).

This Court applied these principles in *Dayton v. Farmers Insurance Group*, 124 Wn.2d 277, 876 P.2d 896 (1994), where it held that a UIM insured is not entitled to an award of *Olympic Steamship*³ fees in a UIM arbitration proceeding. In reaching that conclusion, this Court observed:

Compensatory damage awards are highly individual, and depend on the facts of the particular case. We have no precise valuation formula with which to calculate awards. ... This is particularly true in personal injury recoveries. Even in cases where the facts appear similar, juries vary greatly in their estimates of what constitutes adequate compensation for certain types of pain and suffering. ... ***Legitimate differences of opinion in the value of a claim negotiated in good faith do not deprive an insured of the benefit of coverage bargained for and mandated by statute.***

Id. at 280-81 (emphasis added). UIM coverage can involve a legitimate adversarial dispute between insurer and insured regarding liability, damages, or both. *See Dayton*, 124 Wn.2d at 281.

Moreover, even if a trier of fact could conclude that the UIM insurer initially made what it knew to be an unreasonably low offer given the actual facts of the insured's injuries, if in the end the insured is paid an amount that reflects a reasonable valuation of the insured's claim (e.g., through a determination by a UIM arbitrator, as was the case here), there is no basis under Washington UIM insurance law to allow an insured to recover that amount, much less *three times* that amount, as "actual damages" in a follow-on IFCA action. By definition, the UIM insured in such a case has been

³ *Olympic S.S. Co. v. Centennial Ins. Co.*, 117 Wn.2d 73, 811 P.2d 673 (1991).

paid the full benefits due, and whatever other costs that insured may complain were incurred as a result of the insurer initially refusing to make a reasonable offer, the benefits ultimately paid out under the policy cannot logically or fairly be characterized as “actual damages” incurred by the insured.

Finally, an insured in Washington has no direct cause of action against a tortfeasor’s insurer for coverage or bad faith. *Tank v. State Farm Fire & Cas. Co.*, 105 Wn.2d 381, 391, 715 P.2d 1133 (1986). In contrast, given the existence of an insurance relationship, a UIM insured has contractual and bad faith remedies against his or her insurance carrier, notwithstanding the policy that UIM coverage should not put the claimant in a better position than if the tortfeasor had been fully insured. *Ellwein*, 142 Wn.2d at 779. IFCA *expands* those remedies, in further contravention of that policy. Therefore, absent clearly contrary legislative intent, this Court should strictly construe that expansion of remedies by giving “actual damages” the narrowest construction consistent with the statutory language. *See Potter*, 165 Wn.2d at 77.

In sum, this Court should interpret the term “actual damages” in IFCA consistent with its use in the common law on first-party bad faith and in the CPA and hold that the “actual damages” recoverable as a result of an insurer’s unreasonable denial of coverage or payment of benefits do not include the benefits due under the policy.

B. This Court Should Limit Its Analysis to the Certified Question and Expressly Decline to Address Certain Collateral Issues.

This Court has discretion whether to answer a certified question. *Bain v. Metro. Mortgage Grp., Inc.*, 175 Wn.2d 83, 115 n.17, 285 P.3d 34 (2012). Although this Court may reformulate the question, once this Court elects to answer the question, its jurisdiction is limited to providing the answer. *Shumway v. Payne*, 136 Wn.2d 383, 391, 964 P.2d 349 (1998), citing RCW 2.60.020 and RAP 16.16(a). Thus, when asked to address collateral issues, this Court has expressly declined to do so. *See, e.g., Glaubach v. Regence BlueShield*, 149 Wn.2d 827, 835 n.2, 74 P.3d 115 (2003) (noting the rejection of amicus briefs because they “raised...issues outside the strict scope of the certified question”).⁴

Multiple legal issues collateral to the certified question exist in this case. This Court should explicitly decline to consider at least two of those issues to avoid the possibility that its silence on those issues will be construed as implicit holdings.

1. This Court Should Expressly Decline to Address Whether Delay Alone May Constitute an “Unreasonable Denial of Coverage or Benefits.”

IFCA provides a cause of action to a first party claimant “who is unreasonably denied a claim for coverage or payment of benefits by an

⁴ *See also Bain v. Metro. Mortgage Grp., Inc.*, 175 Wn.2d 83, 115 n.17, 285 P.3d 34 (2012); *Carlsen v. Global Client Solutions, LLC*, 171 Wn.2d 486, 495 n.2, 256 P.3d 321 (2011); *Louisiana-Pac. Corp. v. Asarco, Inc.*, 131 Wn.2d 587, 603-04, 934 P.2d 685 (1997); *Bird-Johnson Corp. v. Dana Corp.*, 119 Wn.2d 423, 424 n.1, 833 P.2d 375 (1992).

insurer.” RCW 48.30.015. The original bill proposed in the legislature would have provided a cause of action to a first party claimant “who is unreasonably denied *or delayed* a claim for coverage or payment of benefits by an insurer.” *See* Appendix A (emphasis added). The words “or delayed” were stricken by amendment of the proposed bill before it was enacted. *See* Appendix B. As a result, the statute as enacted and approved by referendum does not expressly provide for a cause of action based on delay of a claim for coverage or benefits.⁵

The District Court concluded that delay by Safeco in increasing its settlement offer before arbitration was an unreasonable denial of benefits as a matter of law. *Certification Order* at 6-8. Unless this Court is inclined to step outside the bounds of the certified question and hold that delay of payment alone can never constitute an unreasonable denial of benefits, this Court should *expressly* decline to address this issue, lest its silence be construed as an implicit holding that delay, followed by payment, can be an unreasonable denial of benefits under IFCA.

⁵ Although IFCA provides for recovery of treble damages and attorney’s fees if a violation of certain administrative regulations is established, including regulations addressing delay, such a violation alone does not provide a cause of action under IFCA. RCW 48.30.015(1)-(3); *Certification Order* at 7, n.2.

2. This Court Should Expressly Decline to Address Whether Notice Provided after the Basis for the Complaint Is Fully Resolved Complies with IFCA's 20-Day Notice Requirement.

IFCA contains a mandatory claim notice requirement as a precursor to filing suit. RCW 48.30.015(8). At least 20 days before filing suit, the claimant must provide written notice of the basis for the cause of action (*i.e.*, the alleged unreasonable denial of coverage or benefits) to the insurer and the insurance commissioner. RCW 48.30.015(8)(a). The purpose of the notice and 20-day period is “to allow the insurer to correct violations before suit is filed.” *Norgal Seattle P-Ship v. Nat’l Sur. Corp.*, 2012 WL 1377762 at *4 (W.D. Wash. 2012). *Cf. Medina v. Pub. Util. Dist. No. 1 of Benton County*, 147 Wn.2d 303, 310, 53 P.3d 993 (2002) (“It is generally accepted that one of the purposes of the claim filing provisions is to allow...time to investigate, evaluate, and settle claims.”).⁶

The record here discloses that, although Plaintiff Enzo Morella’s attorney sent an IFCA claim notice to Safeco and the insurance commissioner, he did not do so until nearly seven months after Safeco offered what turned out to be almost 75% of the eventual arbitration award amount, and not until five months after Safeco paid the full amount of the award. By that time, there was plainly nothing further Safeco could do to “resolve the basis” for Morella’s complaint, *i.e.*, that Safeco unreasonably

⁶ IFCA provides: “If the insurer fails to resolve the basis for the action within the twenty-day period after the written notice by the first party claimant, the first party claimant may bring the action without any further notice.” RCW 48.30.015(8)(b).

delayed payment of benefits. By waiting to provide notice under IFCA until the basis for the complaint had been fully resolved, Morella deprived Safeco of an opportunity to resolve the basis for the action as contemplated by IFCA. If this Court were approve (either expressly or impliedly by silence) Morella's providing notice after the basis for the action was resolved, it would render the notice requirement meaningless. Therefore, unless this Court is inclined to step outside the bounds of the certified question and rule that Morella's notice was untimely, this Court should *expressly* decline to address that issue.

IV. CONCLUSION

This Court should (1) answer the certified question by holding that "actual damages" recoverable as a result of an insurer's unreasonable denial of coverage or payment of benefits do not include the benefits due under the policy and (2) expressly decline to address the two collateral issues discussed above.

RESPECTFULLY SUBMITTED this 20th day of September, 2013.

CARNEY BADLEY SPELLMAN, P.S.

By Michael B. King
Michael B. King, WSBA No. 14405
Jason W. Anderson, WSBA No. 30512
Attorneys for Amici Curiae AIA, PCIAA, and NAMIC

APPENDIX

A

SSB 5726 - S AMD 155

By Senator Weinstein

ADOPTED AS AMENDED 03/13/2007.

1 Strike everything after the enacting clause and insert the
2 following:

3 "NEW SECTION. Sec. 1. This act may be known and cited as the
4 insurance fair conduct act.

5 Sec. 2. RCW 48.30.010 and 1997 c 409 s 107 are each amended to
6 read as follows:

7 (1) No person engaged in the business of insurance shall engage in
8 unfair methods of competition or in unfair or deceptive acts or
9 practices in the conduct of such business as such methods, acts, or
10 practices are defined pursuant to subsection (2) of this section.

11 (2) In addition to such unfair methods and unfair or deceptive acts
12 or practices as are expressly defined and prohibited by this code, the
13 commissioner may from time to time by regulation promulgated pursuant
14 to chapter 34.05 RCW, define other methods of competition and other
15 acts and practices in the conduct of such business reasonably found by
16 the commissioner to be unfair or deceptive after a review of all
17 comments received during the notice and comment rule-making period.

18 (3) (a) In defining other methods of competition and other acts and
19 practices in the conduct of such business to be unfair or deceptive,
20 and after reviewing all comments and documents received during the
21 notice and comment rule-making period, the commissioner shall identify
22 his or her reasons for defining the method of competition or other act
23 or practice in the conduct of insurance to be unfair or deceptive and
24 shall include a statement outlining these reasons as part of the
25 adopted rule.

26 (b) The commissioner shall include a detailed description of facts
27 upon which he or she relied and of facts upon which he or she failed to
28 rely, in defining the method of competition or other act or practice in

1 the conduct of insurance to be unfair or deceptive, in the concise
2 explanatory statement prepared under RCW 34.05.325(6).

3 (c) Upon appeal the superior court shall review the findings of
4 fact upon which the regulation is based de novo on the record.

5 (4) No such regulation shall be made effective prior to the
6 expiration of thirty days after the date of the order by which it is
7 promulgated.

8 (5) If the commissioner has cause to believe that any person is
9 violating any such regulation, the commissioner may order such person
10 to cease and desist therefrom. The commissioner shall deliver such
11 order to such person direct or mail it to the person by registered mail
12 with return receipt requested. If the person violates the order after
13 expiration of ten days after the cease and desist order has been
14 received by him or her, he or she may be fined by the commissioner a
15 sum not to exceed two hundred and fifty dollars for each violation
16 committed thereafter.

17 (6) If any such regulation is violated, the commissioner may take
18 such other or additional action as is permitted under the insurance
19 code for violation of a regulation.

20 (7) An insurer engaged in the business of insurance may not
21 unreasonably deny or delay a claim for coverage or payment of benefits
22 to any first party claimant. "First party claimant" has the same
23 meaning as in section 3 of this act.

24 NEW SECTION. Sec. 3. A new section is added to chapter 48.30 RCW
25 to read as follows:

26 (1) Any first party claimant to a policy of insurance who is
27 unreasonably denied or delayed a claim for coverage or payment of
28 benefits by an insurer may bring an action in the superior court of
29 this state to recover the actual damages sustained, together with the
30 costs of the action, including reasonable attorneys' fees and
31 litigation costs, as set forth in subsection (3) of this section.

32 (2) The superior court may, after finding that an insurer has acted
33 unreasonably in denying or delaying a claim for coverage or payment of
34 benefits or has violated rules under the Washington Administrative Code
35 adopted by the commissioner under RCW 48.30.010(2), increase the total
36 award of damages to an amount not to exceed three times the actual
37 damages.

1 (3) The superior court shall, after a finding of unreasonable
2 denial or delay of a claim for coverage or payment of benefits, or
3 after a finding of a violation of rules under the Washington
4 Administrative Code adopted by the commissioner under RCW 48.30.010(2),
5 award reasonable attorneys' fees and actual and statutory litigation
6 costs, including expert witness fees, to the first party claimant of an
7 insurance contract who is the prevailing party in such an action.

8 (4) The remedies set forth in this chapter are separate from the
9 remedies prescribed by RCW 19.86.090 of the consumer protection act.

10 (5) "First party claimant" means an individual, corporation,
11 association, partnership, or other legal entity asserting a right to
12 payment under an insurance policy or insurance contract arising out of
13 the occurrence of the contingency or loss covered by such a policy or
14 contract."

SSB 5726 - S AMD

By Senator Weinstein

ADOPTED AS AMENDED 03/13/2007

15 On page 1, line 1 of the title, after "act;" strike the remainder
16 of the title and insert "amending RCW 48.30.010; adding a new section
17 to chapter 48.30 RCW; creating a new section; and prescribing
18 penalties."

--- END ---

APPENDIX

B

SSB 5726 - S AMD TO S AMD (S-2651.1/07) 257
By Senators Berkey, Weinstein

ADOPTED 03/13/2007

- 1 On page 2, line 21 of the amendment, after "deny" strike "or delay"
- 2 On page 2, line 27 of the amendment, after "denied" strike "or
3 delayed"
- 4 On page 2, line 33 of the amendment, after "denying" strike "or
5 delaying"
- 6 On page 3, line 2 of the amendment, after "denial" strike "or
7 delay"
- 8 On page 3, line 12 of the amendment, after "payment" insert "as a
9 covered person"

EFFECT: (1) The act no longer addresses unreasonable delays in payment of insurance benefits.

(2) Only a claimant who is a covered person under the relevant insurance policy may seek redress under this act.

--- END ---

NO. 88706-3

SUPREME COURT
OF THE STATE OF WASHINGTON

RECEIVED BY E-MAIL

CERTIFICATION FROM THE
UNITED STATES DISTRICT
COURT FOR THE WESTERN
DISTRICT OF WASHINGTON in

DECLARATION OF
SERVICE.

ENZO MORELLA,

Petitioner,

vs.

SAFECO INSURANCE
COMPANY OF ILLINOIS,

Respondent.

I certify that on the date set forth below I served a copy of *the following documents*:

- *Motion for Leave to File Brief of Amici Curiae American Insurance Association, National Association of Mutual Insurance Companies, and Property Casualty Insurers Association of America;*
- *Brief of Amici Curiae American Insurance Association, National Association of Mutual Insurance Companies, and Property Casualty Insurers Association of America;* and,
- *Certificate of Service*

on the following counsel:

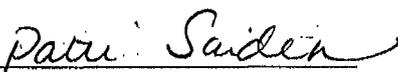
Michael T. Schein, WSBA 21646
Sullivan Law Firm
701 Fifth Ave., Suite 4600
Seattle, WA 98104
mschein@sullivanlawfirm.org

U.S. Mail, postage prepaid
 Electronic Mail

James E. Banks, WSBA 41758 Raymond E. Sean Bishop, WSBA 22794 Bishop Law Office PS 19743 1 st Avenue S Normandy Park, WA 98166 james@bishoplegal.com ray@bishoplegal.com	<input checked="" type="checkbox"/> U.S. Mail, postage prepaid <input checked="" type="checkbox"/> Electronic Mail
Kelly P. Corr, WSBA 00555 Paul R. Raskin, WSBA 24990 Corr, Cronin, Michelson, Baumgardner & Preece LLP 1001 Fourth Ave., Ste. 3900 Seattle, WA 98154 kcorr@corrchronin.com praskin@corrchronin.com	<input checked="" type="checkbox"/> U.S. Mail, postage prepaid <input checked="" type="checkbox"/> Electronic Mail
John Michael Silk, WSBA 15035 Sarah Eversole, WSBA 36335 Wilson Smith Cochran Dickerson 901 Fifth Ave., Ste. 1700 Seattle, WA 98164-2050 silk@wscd.com eversole@wscd.com	<input checked="" type="checkbox"/> U.S. Mail, postage prepaid <input checked="" type="checkbox"/> Electronic Mail
Bryan P. Harnetiaux 517 E 17 th Avenue Spokane, WA 99203	<input checked="" type="checkbox"/> U.S. Mail, postage prepaid
George M. Ahrend 16 Basin Street SW Ephrata, WA 98823	<input checked="" type="checkbox"/> U.S. Mail, postage prepaid
Melissa O'Loughlin White Cozen O'Connor 1201 Third Ave., Suite 5200 Seattle, WA 98101	<input checked="" type="checkbox"/> U.S. Mail, postage prepaid

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

DATED this 20th day of September, 2013.


Patti Saiden, Legal Assistant

OFFICE RECEPTIONIST, CLERK

From: OFFICE RECEPTIONIST, CLERK
Sent: Friday, September 20, 2013 3:26 PM
To: 'Saiden, Patti'
Cc: King, Mike; Anderson, Jason; 'mschein@sullivanlawfirm.org'; 'james@bishoplegal.com'; 'ray@bishoplegal.com'; 'kcorr@corrchronin.com'; 'praskin@corrchronin.com'; 'silk@wscd.com'; 'eversole@wscd.com'
Subject: RE: 88706-3; Enzo Morella v. . Safeco Insurance Company of Illinois

Received 9/20/13

Please note that any pleading filed as an attachment to e-mail will be treated as the original. Therefore, if a filing is by e-mail attachment, it is not necessary to mail to the court the original of the document.

From: Saiden, Patti [<mailto:saiden@carneylaw.com>]
Sent: Friday, September 20, 2013 3:22 PM
To: OFFICE RECEPTIONIST, CLERK
Cc: King, Mike; Anderson, Jason; 'mschein@sullivanlawfirm.org'; 'james@bishoplegal.com'; 'ray@bishoplegal.com'; 'kcorr@corrchronin.com'; 'praskin@corrchronin.com'; 'silk@wscd.com'; 'eversole@wscd.com'
Subject: 88706-3; Enzo Morella v. . Safeco Insurance Company of Illinois

Dear Clerk:

Attached for filing is *Motion for Leave to File Brief of Amici Curiae American Insurance Association, National Association of Mutual Insurance Companies, and Property Casualty Insurers Association of America; Brief of Amici Curiae American Insurance Association, National Association of Mutual Insurance Companies, and Property Casualty Insurers Association of America; and, Declaration of Service.*

Case Name: *Enzo Morella v. Safeco Insurance Company of Illinois*

Cause #: 88706-3

Filing Attorney:

Michael B. King, WSBA #14405
Carney Badley Spellman
701 5th Avenue, Suite 3600
Seattle, WA 98104
Tel: 206-622-8020
Fax: 206-467-8215
king@carneylaw.com

Thank you.

*Patti Saiden
Legal Assistant
Carney Badley Spellman
701 5th Avenue, Suite 3600
Seattle, WA 98104*

DD: (206) 607-4109