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STATE OF WASHINGTON
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IN THE SUPREME COURT OF
THE STATE OF WASHINGTON

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STATE OF WASHINGTON
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No. 75731-8-1

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

MOUN KEODALAH and AUNG KEODALAH, husband and wife,

Respondents,

v.

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

Petitioners.

BRIEF OF AMICUS CURIAE
GEICO GENERAL INSURANCE COMPANY

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I. IDENTITY AND INTEREST OF AMICUS

GEICO General Insurance Company (“GEICO”), an affiliate of Government Employees Insurance Company, is an auto insurance company with headquarters in Maryland and offices throughout the country. GEICO is the second largest auto insurer in the United States, providing coverage for more than 16 million policyholders and over 27 million vehicles. GEICO’S office in Renton, Washington, employs more than 500 people.

In the short time since the Court of Appeals issued its decision in *Keodalah v. Allstate Ins. Co.*, 3 Wn.App.2d 31, 38, 413 P.3d 1059, 1062 (2018), GEICO’S Washington employees repeatedly have been sued or threatened with suit for alleged bad faith claims handling and violation of the Consumer Protection Act. The *Keodalah* decision has had and, if allowed to stand, will continue to have a direct and adverse impact on GEICO and its people.

GEICO’S Washington claims personnel work on the front lines of the insurance business. They respond to and strive to fairly pay GEICO insureds’ first-party claims, while guarding against exaggerated or fraudulent claims. GEICO claims people also work to investigate, defend, and settle third-party liability claims against GEICO insureds, often in conjunction with counsel retained to represent its insureds.

: :

The Court of Appeals' *Keodalah* decision represents a radical and unwarranted change in Washington law – one that casts a cloud over the work that claims employees for GEICO and all other Washington insurers must perform day in and day out to provide insurance benefits for Washington insureds. Because of the *Keodalah* decision, Washington claims personnel face the threat of becoming embroiled in litigation and held personally liable for alleged negligence, common law “bad faith” and violation of the Consumer Protection Act while acting in the course and scope of their employment.

Allstate Insurance Company's Petition for Review and Supplemental Brief, along with the Amicus Curiae Memorandum of American Insurance Association, *et al.*, amply demonstrate why the Court of Appeals' *Keodalah* decision is at odds with settled Washington insurance law. In this Brief, GEICO provides another perspective by addressing the practical effect of the Court of Appeals' erroneous decision on GEICO's own operations, its employees and litigation with GEICO insureds.

II. STATEMENT OF THE CASE

For the purposes of this amicus brief, GEICO adopts and relies upon the Statement of the Case set forth in Allstate Insurance Company's Petition for Review at 2-3 and in its Supplemental Brief at 2-4.

III. ARGUMENT

- A. **While the duty of good faith under RCW 48.01.030 applies to “all persons,” neither insurance company employees nor the insureds who tender claims to the insurance company should be liable for “bad faith” in connection with an insurance claim.**

RCW 48.01.030, entitled “Public Interest,” unequivocally imposes duties of good faith on insureds, as well as on insurers and their employees:

The business of insurance is one affected by the public interest, requiring that all persons be actuated by good faith, abstain from deception, and practice honesty and equity in all insurance matters. Upon the insurer, the insured, their providers, and their representatives rests the duty of preserving inviolate the integrity of insurance.

[Emphasis added].

Nevertheless, our courts never have found that RCW 48.01.030 creates a cause of action against “the insured” for breach of its own duties under the statute. For the same reasons Washington courts have not created a cause of action against insureds for breach of their own duty of good faith under RCW 48.01.030, there should be no such cause of action against claims personnel as individuals. As Judge Marsha J. Pechman opined in *Garoutte v. American Family Mut. Ins. Co.*, No. C12-1787MJP, 2013 WL 231104, at *2 (W.D. Wash. Jan. 22, 2013), Appendix A54-A56:

Plaintiffs assert that Washington law imposes a duty of good faith that is independent of the duty imposed on their employer. ... To support this position, Plaintiffs first cite to a provision of Washington's insurance code that states: “Upon the insurer, the insured, their providers, and their

representatives rests the duty of preserving inviolate the integrity of insurance.”... However, the text of this sentence makes clear that it does not create a cause of action against representatives of insurance companies; otherwise, it would also create a cause of action for bad faith against “the insured.” Id.

Judge Pechman also relied on basic principles of agency law, citing the Ninth Circuit’s decision in *Mercado v. Allstate Ins. Co.*, 340 F.3d 824, 826 (9th Cir.2003):

In *Mercado*, the Ninth Circuit held that an employee of an insurance company had been fraudulently joined [to defeat federal diversity jurisdiction] because she was being sued on the basis of actions within the scope of her employment. *Id.* The Ninth Circuit explained, “[i]t is well established that, unless an agent or employee acts as a dual agent ... she cannot be held individually liable as a defendant unless she acts for her own personal advantage.”

Garoutte, 2013 WL 231104, at *2.

The Court of Appeals should have applied that fundamental rule of agency law in this case. When an insurance company employee acts within the course and scope of her employment -- whether seeking the insured’s business, collecting premiums or processing claims – the employee should not be held individually liable and required to put her personal possessions, assets and income at risk merely for doing her job.

“The good faith duty between an insurer and an insured arises from a source akin to a fiduciary duty.” *St. Paul Fire and Marine Ins., Co. v. Onvia, Inc.*, 165 Wn.2d 122, 129, 196 P.3d 664 (2008). “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.*" *Id.* [Emphasis added]. In other words, both the courts and the Legislature have made clear that the duty of good faith exists because of the contractual and "quasi-fiduciary" relationship *between the insurance company and its insureds.*

As GEICO employees, GEICO claims personnel act on GEICO's behalf, not their own. They are backed by GEICO's assets and reputation, not their own. GEICO insureds look to GEICO, the corporate entity – and not its employees – to issue their insurance policies and pay their claims. The personal income and assets of GEICO's employees are utterly irrelevant to the insureds in such transactions; and the personal income and assets of GEICO employees should not be on the block when an insured pursues litigation related to such transactions.

No insured can reasonably believe that when she takes out a policy with an Insurer that the insurer's employees have tacitly agreed to put their own personal assets on the line. Every insured understands that GEICO, not each of its employees, is the party that issued the insurance policy; and that GEICO collects the premiums and pays the claims on that policy. Insureds justifiably rely on GEICO's financial backing – not on the personal assets of its claims handlers and other employees.

B. The Court of Appeals' construction and application of RCW 48.01.030 violates the fundamental rule that legislation must be interpreted to avoid absurd results.

When interpreting the plain language of a statute, Washington courts must “avoid interpretations ‘that yield unlikely, absurd or strained consequences.’” *Planned Parenthood of Great Northwest v. Bloodow*, 187 Wn.App. 606, 622, 350 P.3d 660 (2015). “Commonsense informs our analysis, as we avoid absurd results in statutory interpretation.” *Seattle Hous. Auth. v. City of Seattle*, 3 Wn.App.2d 532, 538-39, 416 P.3d 1280 (2017). The Court of Appeals' construction and application of RCW 48.01.030 violates these fundamental principles.

RCW 48.01.030 does not expressly create *any* private cause of action. Instead, it provides a broad statement of “public interest” that applies to “all persons” involved in an insurance transaction. It does not expressly state, nor does it imply, that “all persons” must be subject to liability as a result of their involvement in an insurance transaction – including employees acting in the course and scope of their employment, no matter how tangential their role with respect to the transaction might be.

Nevertheless, based on the Court of Appeals' holding in *Keodalah*, recent lawsuits against GEICO alleging bad faith and violation of the Consumer Protection Act have named individual adjusters as defendants. See, e.g., *Tidwell vs. GEICO et al.*, No. 18-2-02585-1 SEA (King County

Superior Ct., filed Jan. 30, 2018), Appendix A1-A11, and *Cherkin vs. GEICO et al.*, No. 18-2-11283-4 SEA (King County Superior Ct., filed May 3, 2018), Appendix A12-A28.¹

Lawsuits recently commenced against other Washington insurers also have alleged that numerous employees who assisted in processing the plaintiffs' insurance claims bear personal liability. *See, e.g., Gillies & Oil Family Cyclery, LLC et al. v. Ohio Security Ins. Co. et al.*, King County No. 18-2-18585-8 SEA (naming an accountant employed by the insurer as a defendant), Appendix A42-A53.

C. The Court of Appeals' decision unjustly exposes insurance company employees to personal no-fault and negligence liability in actions for common law bad faith and violation of the Consumer Protection Act.

The Court of Appeals' construction of RCW 48.01.030 makes employees of GEICO and other Washington insurers personally liable for common law "bad faith" as a result of negligent conduct in the course and scope of their employment. Under the Consumer Protection Act, an employee could even be liable on a "no-fault" basis for handling a claim in conformance with her employer's standard procedures, if a court later finds that the employer's procedures have a "capacity to deceive."

¹ Most recently, a GEICO insured involved in a dispute concerning the valuation of her UIM bodily injury claim sued not only the GEICO claims employee handling the claim but, emboldened by the holding in *Keodalah*, also asserted claims against outside counsel retained to perform an examination under oath (EUO) and to represent the insurer in the dispute. *Scudder v. GEICO et al.*, No. 18-2-28028-1 SEA (King County Superior Ct., filed November 7, 2018), Appendix A29-A41.

In Washington, an insurer may be liable for the common law tort of “bad faith” if its handling of a claim is “unreasonable.” The insurer need not act with an intent to harm. “[The] fiduciary duty to act in good faith is fairly broad and may be breached by conduct short of intentional bad faith or fraud.” *Indus. Indem. Co. of N.W., Inc. v. Kallevig*, 114 Wn.2d 907, 917, 792 P.2d 520 (1990). Indeed, in the context of third-party liability claims, a potential conflict of interest affecting the defense of the insured might constitute actionable “bad faith.” *Mut. of Enumclaw Ins. Co. v. Dan Paulsen Constr.*, 161 Wn.2d 903, 916, 169 P.3d 1 (2007); *Tank v. State Farm Fire & Casualty Co.*, 105 Wn.2d 381, 715 P.2d 1133 (1986). In this context, an insurer’s claims personnel readily could be exposed to a lawsuit for “insurance bad faith” as a result of a mere error of judgment, committed in what most laypeople would call “good faith.”

The *Keodalah* decision could create even greater exposure for claims employees under the Consumer Protection Act. Under the Act, a defendant may be held liable without regard to negligence or intent. Instead, a defendant can be liable when the plaintiff proves (1) an unfair or deceptive act or practice; (2) occurring in trade or commerce; (3) with a public interest impact; (4) injury to plaintiff in his or her business or property; (5) causation.” *Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co.*, 105 Wash.2d 778, 780, 719 P.2d 531 (1986). Under this standard, a claims employee could follow claims handling practices

precisely as her employer directs; and if those procedures are later found to be “unfair or deceptive,” could face personal liability for violation of the CPA.²

There is no evidence our Legislature intended such an absurd and draconian result when it enacted the broad statement of “public interest” set forth in RCW 48.01.030.

D. Allowing insureds to pursue bad faith and Consumer Protection Act claims against claims personnel will not enhance the rights and remedies of insureds; but *will* impose undue burdens on employees and the courts.

The creation of private causes of action against individual insurance company employees for common law bad faith and violation of the CPA will do nothing to advance the legitimate interests of insureds. Under the rule of *respondeat superior*, the insurance company will remain financially responsible for the actions of its employees. *See Evans v. Tacoma School Dist. No. 10*, 195 Wn. App. 25, 37, 380 P.3d 553 (2016) (stating the general rule that “an employer is vicariously liable to third parties for its employee’s torts committed within the scope of employment”).

² An “unfair or deceptive act or practice” does not require intent to deceive, or even proof the plaintiff was, in fact, deceived. The mere “capacity to deceive” is sufficient to make out a claim under the CPA. *Bain v. Metropolitan Mortg. Group, Inc.*, 175 Wn.2d 83, 115-116, 285 P.3d 34 (2012). According to the Court of Appeals’ decision here, that also could be sufficient to hold an insurance claims employee personally liable for treble damages, attorney fees and costs under the Act.

The only instance where the employee could add to an insured's monetary recovery would be in the unlikely event the insurer becomes insolvent. GEICO has consistently received the highest ratings for financial strength from Standard & Poor's (AA+ and Security Circle designation) and from A.M. Best (A++ rating) and is in no danger of insolvency. More generally, the market for and financial status of insurance companies in Washington State is monitored by the Washington State Insurance Commissioner³, and the Washington Insurance Guaranty Association exists to protect the public in the event of the failure of a property and/or casualty insurance company.⁴ As a practical matter, a cause of action against individual employees is unnecessary and adds no meaningful protection of a plaintiff's ability to recover a judgment for insurance bad faith or violation of the Consumer Protection Act. In the rare situation where an insurance company becomes insolvent, an individual insurance company claims employee would not be in a financial position to pay a substantial judgment obtained by an insured in an action for bad faith or violation of the CPA.⁵

³ See Washington State Office of the Insurance Commissioner, 2017 Market Information Report, available at <https://www.insurance.wa.gov/2017-market-information-report>.

⁴ RCW 48.32.010 et seq.

⁵ As *amicus curiae* American Insurance Association, *et al.*, point out, insurance claims personnel earn, on average, about \$65,000 per year. Memorandum of Amicus Curiae at 3-4.

Given the cost of housing and other expenses in King County, particularly Seattle, these individual employees are in no position to absorb substantial judgments and hefty litigation expenses. In Seattle, the cost of living for a family of four requires an annual income of \$75,000 to cover basic housing, food, transportation, health and child care expenses.⁶ Few if any claims personnel and other insurance company employees could pay a substantial judgment.

On the other hand, individual employees, as well as their spouses, face significant negative consequences, disproportionate to their authority and ability to effect change within the insurance company.

The individual defendant could face significant financial burdens. If a conflict of interest arises between the adjuster and her insurance company employer, she would then need to hire separate counsel, potentially incurring her own attorney fees and litigation costs. Otherwise, those costs might be borne by the insurance company/employer – potentially affecting the premiums that eventually will be charged to all insureds.

Being named as a defendant in a lawsuit, as well as having a sizeable judgment entered against her, will affect an employee's credit and

⁶ See, Diane M. Pearce, PhD, *The Self Sufficiency Standard for Washington State 2017*, prepared for the Work Force Development Council of Seattle-King County, (University of Washington, September 2017), available at http://selfsufficiencystandard.org/sites/default/files/selfsuff/docs/WA2017_SSS.pdf.

ability to obtain employment in the future. Lawsuits and judgments are public records, and when an employee applies for a credit card or a mortgage, seeks to rent an apartment or applies for another job, those public records are available and could be used as a basis to deny those applications.

Bad faith lawsuits against insurers are common and filed with ever-increasing frequency “at a time when the regulation of insurer practices is at its most comprehensive, leading to an incongruity where instead of heightened penalties and regulations operating to reduce the incidence of bad-faith claims more claims have been encouraged.”⁷ An individual adjuster thus could face numerous lawsuits over the course of a long career, often on the basis of disputed first party claim valuation and settlement authority for liability claims, over which she may have little control. Furthermore, the threat of personal exposure to bad faith and CPA litigation could very well discourage people from entering the profession, and for those already in the profession, may spur them to leave rather than risk the exposure to litigation and personal liability.

Bad faith causes of actions against individual employees serve only to allow plaintiffs to harass and punish individual employees—often for conduct based on nothing more than a disagreement over the value of a

⁷ Victor E. Schwartz & Christopher E. Appel, *Common-Sense Construction of Unfair Claims Settlement Statutes: Restoring the Good Faith in Bad Faith*, 58 Am. U.L. Rev. 1477, 1480 (2009).

claim. *See, e.g.*, Appendix A1-A53. For example, a plaintiff's attorney can selectively name certain employees as defendants, while electing not to name other employees in an effort to drive a wedge between employees and employer. Selectively naming certain employees as defendants in a suit, who have little or no involvement in a claim (instead of those employees who would have been the ones actually engaged in any of the alleged bad faith actions), can be done solely to gain an advantage in a civil matter. It can result in the use of unethical bargaining tactics, for example, including gaining the cooperation of employees under the pressure and stress of being named in a suit, to gain a negotiation advantage.

A plaintiff also can use a bad faith action against individuals as a strategic tool to defeat federal diversity jurisdiction. A plaintiff suing an out-of-state insurer in Washington can attempt to defeat diversity and prevent removal to federal court or force remand to state court by naming just one in-state claims employee as a defendant. *Tidwell v. Govt. Emp. Ins. Co.*, No. C18-318RSL, 2018 WL 2441774 (W.D. Wash. May 31, 2018) (slip opinion), Appendix A57-A58; *Mort v. Allstate Indem. Co.*, No. C18-568RSL, 2018 WL 4303660 (W.D.Wash. Sept. 10, 2018) (slip opinion), Appendix A59-A61.

These tactics will unnecessarily increase the cost and expense of litigation, particularly in discovery where multiple defendants will mean

additional depositions and written requests, as well as increased burden on the courts. “Without reasonable boundaries in bad-faith actions, courts may permit claimants to engage in abusive practices against insurers. This establishes an avenue for windfall recoveries for some claimants and offsets the insurance industry’s delicate tension between providing recovery and protecting against fraud and overpayment—each a cost which is internalized and ultimately borne by consumers.”⁸

IV. CONCLUSION

This Court should reject the unprecedented and ill-advised causes of action for common law insurance bad faith and violation of the Consumer Protection Act the Court of Appeals would now permit insureds to assert against the claims personnel and other employees of insurance companies doing business in Washington. RCW 48.01.030 does not expressly create any such causes of action. Implying such causes of action by virtue of the statute will not further the goals of the Washington insurance statutory and regulatory scheme and will do much harm to claims personnel and the insurance companies that employ them.

The Court should hold that RCW 48.01.030 does not create private causes of action for common law bad faith and under the Consumer Protection Act against insurance company employees acting within the course and scope of their employment.

⁸ Schwartz & Appel, *supra* at 1480.

Respectfully submitted this 26th day of December, 2018.

By:



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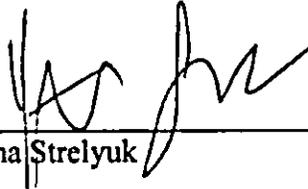
GEICO General Insurance Company

CERTIFICATE OF SERVICE

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the below date I caused to be served a true and correct copy of the foregoing *Brief of Amicus Curiae GEICO General Insurance Company* via U.S. Mail and Email upon the following:

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DATED at Seattle, Washington this 26th day of December, 2018.



Yana Strelyuk

NO. 958670

IN THE SUPREME COURT OF
THE STATE OF WASHINGTON

No. 75731-8-1

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

MOUN KEODALAH and AUNG KEODALAH, husband and wife,

Respondents,

v.

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

Petitioners.

APPENDIX TO BRIEF OF AMICUS CURIAE
GEICO GENERAL INSURANCE COMPANY

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ORIGINAL

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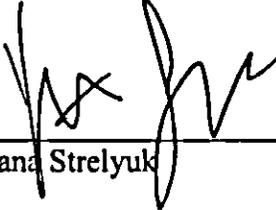
Complaint for Breach of Contract, Violation of Consumer Protection Act, Bad Faith, Negligence, and for Damages Under the Insurance Fair Conduct Act (RCW 48.30), January 30, 2018; <i>Tidwell v. Government Employees Insurance Company</i>	A1 – A11
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<i>Mort v. Allstate Indem. Co.</i> , No. C18-568RSL, 2018 WL 4303660 (W.D. Wash. Sept. 10, 2018)	A59 – A61

CERTIFICATE OF SERVICE

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the below date I caused to be served a true and correct copy of the foregoing *Appendix*, together with the concurrently filed *Brief of Amicus Curiae GEICO General Insurance Company* via U.S. Mail and Email upon the following:

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DATED at Seattle, Washington this 26th day of December, 2018.



Yana Strelyuk

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SUPERIOR COURT CLERK
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CASE NUMBER 18-2-02585-1 SEA

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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF KING

ELIZABETH TIDWELL,)	
)	
Plaintiff,)	No.
)	
v.)	COMPLAINT FOR BREACH OF
)	CONTRACT, VIOLATION OF
GOVERNMENT EMPLOYEES)	CONSUMER PROTECTION ACT,
INSURANCE COMPANY, a foreign insurer)	BAD FAITH, NEGLIGENCE, AND
doing business in Washington.)	FOR DAMAGES UNDER THE
)	INSURANCE FAIR CONDUCT
Defendant.)	ACT (RCW 48.30)
)	
)	

COMES NOW the Plaintiff, Elizabeth Tidwell ("Plaintiff"), by and through her attorneys, Tim Tesh and Jonathan Barash, of Ressler & Tesh, PLLC and complains and alleges against the above-named Defendant as follows:

I. PARTIES

1.1 Plaintiff is a resident of Graham, Pierce County, Washington, and resided in Graham, Pierce County, Washington, at all times relevant and material to this Complaint.

COMPLAINT - 1

RESSLER & TESH, PLLC
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3.1 Date: Plaintiff's injuries arise out of an automobile collision that occurred on September 4, 2013.

3.2 Location: The collision occurred in Spanaway, Pierce County, Washington, on State Road 7.

3.3 Details: On September 4, 2013 Plaintiff was driving northbound on State Road 7. As Plaintiff approached the intersection of State Road 7 and 204th Street E. the light changed to red and Plaintiff slowed to a stop. Suddenly, and without warning, underinsured motorist, Charles Granger, proceeded to collide with the rear of Plaintiff's vehicle. As a result, Plaintiff sustained serious neck, shoulder, jaw, and back injuries.

3.4 At this time, Plaintiff's past medical special damages exceed \$20,000.00. Plaintiff also has a claim for future medical care, future wage loss, past wage loss, and for general damages in an amount to be proven to the jury.

3.5 The underlying tortfeasor was uninsured at the time of the accident. Plaintiff has UIM policy limits of \$100,000.00.

3.6 At all times relevant to this action, Defendant had in full force and effect its automobile insurance policy number 4128-11-20-10 issued to Nancy Tidwell. Plaintiff is a listed "Additional Driver" under the policy.

3.7 At all times relevant to this action, Defendant's automobile insurance policy number 4128-11-20-10 specifically included underinsured motorist bodily injury coverage for and on behalf of Plaintiff.

COMPLAINT - 3

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1 3.8 At all times relevant to this action, Plaintiff was entitled to benefits under
2 the UIM provisions of her policy with Defendant. The policy provides, among other
3 things, underinsured motorist bodily injury coverage in the amount of \$100,000.00.

4 3.9 Plaintiff submitted an underinsured motorist claim for a tender of the
5 policy limits available. To date, Defendant has refused to tender the limits available
6 despite multiple opportunities to do so. In fact, GEICO has significantly undervalued
7 Plaintiff's claim, forcing her to sue. Additionally, despite multiple requests to present
8 the full settlement authority on the claim in accordance with Morella v. Safeco Ins. Co.
9 of Illinois, C12-0672RSL, 2013 WL 1562032 (W.D. Wash, Apr. 12, 2013), the
10 Defendant has failed to do so.
11

12 3.10 The timeline of events is as follows:
13 a. On May 2, 2016 Plaintiff sent a comprehensive policy limits
14 demand package requesting a tender of the UIM BI limits within
15 thirty (30) days. The demand package included detailed information
16 of the following:
17 i. Collision facts with supporting police report;
18 ii. Plaintiff's post-collision medical records;
19 iii. Recommended future medical care;
20 iv. Wage loss;
21 v. Vehicle damage report; and
22 vi. Evaluation of Plaintiff's general damages.
23 vii. A Declaration from one of Plaintiff's treating doctors.
24 b. On May 12, 2016, Defendant responded to Plaintiff's
comprehensive demand package with an offer of \$13,513.76.

COMPLAINT - 4

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c. On May 13, 2016, Defendant declined to resolve Plaintiffs claim via UIM arbitration.

d. Plaintiff continued to seek treatment for her ongoing injuries. On January 18, 2017, Plaintiff provided a supplement to her prior demand package with an additional \$2,791.00 in past medical specials. This brought her total past medical specials to well over \$20,000.00.

e. Plaintiff gave GEICO numerous chances to resolve this case for policy limits.

f. At no point has Plaintiff been offered more than \$13,513.76.

3.11 In sum, Defendant has failed to tender the policy limits available to Plaintiff, its own first party fiduciary insured on multiple occasions. Despite being provided extensive documentation and proof regarding the nature, extent, and permanency of its insured's injuries, Defendant failed to tender its full authority on the claim file, and/or the available UIM BI policy limits.

3.12 As a result of the above stated actions, Defendant has now compelled its own insured to submit to civil court litigation to recover amounts due and owing to her under the applicable underinsured motorist bodily injury policy. In fact, Defendant has forced Plaintiff to submit to civil litigation to receive any recovery, even the amounts that Defendant does not dispute Plaintiff is entitled to.

COMPLAINT - 5

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1 3.13 Defendant's file handling practices and negotiation tactics are 100%
2 adversarial, standard third party practice and procedure tactics and contrary to first party
3 good faith claims handling practice and the standard of care in regard to handling first
4 party claims.

5
6 **IV. LIABILITY AND CAUSES OF ACTION**

7 4.1 As a direct and proximate cause of the negligence and tortious conduct of
8 the underinsured driver, Plaintiff sustained severe, permanent, and debilitating injuries.

9 4.2 As a direct and proximate cause of the negligence and tortious conduct of
10 the underinsured driver, and subsequent personal injuries and medical treatment, Plaintiff
11 made an underinsured motorist claim with Defendant.

12 4.3 Plaintiff purchased underinsured motorist coverage from Defendant in the
13 amount of \$100,000.00. Plaintiff was entitled to \$100,000.00 in benefits under the
14 underinsured motorist provisions of her policy with Defendant. Her damages are in
15 excess of her policy limits available.

16 4.4 Breach of Duties Under the Insurance Fair Conduct Act: Defendant's
17 actions specified in paragraphs 3.1 through 3.13 herein are in violation of RCW
18 48.30.010 in its duty of good faith and fair dealing requiring that all actions be actuated
19 by good faith, to abstain from deception, and practice honesty and equity in all matters
20 related to the business of insurance. Defendant unreasonably denied payment of
21 \$100,000.00 in UIM benefits, in violation of the Insurance Fair Conduct Act. As a result
22 of Defendant's misconduct, Plaintiff is entitled to recover her actual damages sustained,
23

24 **COMPLAINT - 6**

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1 together with the costs of the action, including reasonable attorney's fees and litigation
2 costs.

3 4.5 Breach of Fiduciary Duty: Defendant's actions specified in paragraphs 3.1
4 through 3.13 herein are in violation of the Unfair Settlement Practices Act as set forth in
5 WAC 284-30 et. seq., including requiring prompt, fair, and equitable settlements, as well
6 as in violation of other statutory laws or regulations, including an express duty not to
7 compel its own insured to litigate against it to obtain payment of their own underinsured
8 motorist coverage.
9

10 4.6 Breach of Contract: Defendant's actions specified in paragraphs 3.1
11 through 3.13 herein are in violation of the express or implied terms and conditions of the
12 insurance contract and reasonable expectations of its insured to the terms and conditions
13 of the insurance policy. Specifically, Mutual of Enumclaw promised "to deliver an
14 insurance experience so rare and valuable that it can't be found elsewhere" and to
15 "provid[e] financial security by keeping our promises."
16

17 4.7 Breach of Consumer Protection Act: Defendant's actions specified in
18 paragraphs 3.1 through 3.13 herein are in violation of the Consumer Protection Act,
19 RCW 19.86., et seq.

20 4.8 Breach of Good Faith Duty: Defendant's actions specified in in paragraphs
21 3.1 through 3.13 herein are in violation of RCW 48.30.010 in its duty of good faith under
22 RCW 48.01.030 requiring that all actions be actuated by good faith, to abstain from
23 deception, and practice honesty and equity in all matters related to the business of

24 COMPLAINT - 7

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1 insurance. Defendant unreasonably denied payment of policy limits benefits in violation
2 of the Insurance Fair Conduct Act. As a result of Defendant's misconduct, Plaintiff is
3 entitled to recover her actual damages sustained, together with the costs of the action,
4 including reasonable attorneys' fees and litigation costs.

5
6 4.9 Negligence: Defendant's actions specified in paragraphs 3.1 through 3.13
7 herein were negligent and in violation of its duty to exercise reasonable care toward its
8 insured, Plaintiff Elizabeth Tidwell.

9 4.10 Proximate Cause: As a direct and proximate cause of Defendant's
10 breach of its duties as set forth in paragraphs 3.1 through 3.13, Plaintiff is forced to
11 commence litigation against Defendant to receive the full amount of her available UIM
12 insurance coverage.

13 **V. DAMAGES**

14 5.1 As a direct and proximate result of the negligence alleged herein, Plaintiff
15 has suffered physical injuries and Plaintiff is entitled to fair and reasonable
16 compensation.

17
18 5.2 As a direct and proximate result of the negligence alleged herein, Plaintiff
19 has incurred and may continue to incur medical expenses and other out-of-pocket
20 expenses, and Plaintiff is entitled to fair and reasonable compensation.

21 5.3 As a direct and proximate result of the negligence alleged herein, Plaintiff
22 has suffered and may continue to suffer physical pain and suffering, and Plaintiff is
23 entitled to fair and reasonable compensation.

24 COMPLAINT - 8

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1 5.4 As a direct and proximate result of the negligence alleged herein, Plaintiff
2 has suffered mental and emotional distress, loss of enjoyment of life, past and future
3 disability, permanency of injury, and Plaintiff is entitled to fair and reasonable
4 compensation.

5 5.5 As a direct and proximate result of the negligence alleged herein, Plaintiff
6 has sustained past wage loss and loss of future earning capacity.

7 5.6 Plaintiff is entitled to reasonable attorneys' fees and as authorized by the
8 Insurance Fair Conduct Act and Consumer Protection Act.

9 5.7 Plaintiff is entitled to prejudgment interest on all medical and other out-of-
10 pocket expenses directly and proximately caused by the negligence alleged in this
11 Complaint.

12 5.8 Plaintiff is entitled to costs and disbursements herein incurred and as
13 authorized by the Insurance Fair Conduct Act and Consumer Protection Act.

14 5.9 Exemplary Damages: Under Section 3 of the Insurance Fair Conduct Act,
15 Plaintiff will request that the Court increase the total award of damages to include treble
16 damages, actual costs, hourly attorney fees, and expert fees.

17
18
19 **VI. WAIVER OF PHYSICIAN/PATIENT PRIVILEGE**

20 6.1 Plaintiff asserts the physician/patient privilege for 88 days following the
21 filing of this Complaint. On the 89th day following the filing of this Complaint, the
22 Plaintiff hereby waives the physician/patient privilege.

23
24 **COMPLAINT - 9**

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6.2 The waiver is conditioned and limited as follows: (1) The Plaintiff does not waive her constitutional right of privacy; (2) the Plaintiff does not authorize contact with any of her health care providers except by judicial proceeding authorized by the Rules of Civil Procedure; (3) Defendant representatives are specifically instructed not to attempt ex parte contacts with Plaintiff's health care providers; and (4) Defendant's representatives are specifically instructed not to write letters to Plaintiff's health care providers telling them that they may mail copies of records to the Defendant.

Wherefore, Plaintiff requests for judgment against Defendant, and requests relief as follows:

VII. RELIEF SOUGHT

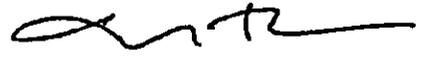
- 7.1 Judgment on all special damages stemming from the foregoing allegations;
- 7.2 Judgment on all general damages stemming from the foregoing allegations;
- 7.3 For treble damages against Defendant for bad faith and violation of the Insurance Fair Conduct Act and the other relief as set forth in the complaint;
- 7.4 For exemplary damages;
- 7.5 For reasonable hourly attorney fees, costs of experts, and costs of suit; and
- 7.6 For such other and further relief as the court deems just, equitable and proper for Plaintiff at the time of trial.

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DATED this 23rd day of January, 2018.

RESSLER & TESH, PLLC



Timothy R. Tesh, WSBA # 28249
Jonathan S. Barash, WSBA # 36878
Attorneys for Plaintiff

COMPLAINT - 11

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FILED
18 MAY 03 AM 9:00

KING COUNTY
SUPERIOR COURT CLERK
E-FILED
CASE NUMBER: 18-2-11283-4 SEA

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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR KING COUNTY

EMILY B. CHERKIN and BENJAMIN
GITENSTEIN, wife and husband,

Plaintiffs,

v.

GEICO GENERAL INSURANCE
COMPANY, a foreign insurer; JACQLYN
SEIFERT and JOHN DOE SEIFERT; and
LAWRENCE H. BORK and JANE DOE
BORK, and their marital community

Defendants.

No.

COMPLAINT FOR DAMAGES

COME NOW the above-named Plaintiffs, by and through their attorneys of record, OLIVE
LAW NORTHWEST PLLC, and by way of complaint for damages against Defendants, allege as
follows:

I. PARTIES

1.1 Plaintiffs. At all times relevant to the allegations herein, Plaintiffs Emily Cherkin
and Benjamin Gitenstein were wife and husband and residents of Seattle, King County,
Washington. The plaintiffs were involved in a motor vehicle accident on or about April 27, 2014
in the City of Seattle, Washington ("the accident").

COMPLAINT FOR DAMAGES

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IV. FACTS RE: THE ACCIDENT

4.1 Plaintiffs re-allege paragraphs 1.1 through 3.5 as if fully set forth herein.

4.2 At approximately 10:00 a.m. on or about April 27, 2014, the plaintiffs were involved in a violent motor vehicle collision.

4.3 Along with their two minor children, Plaintiffs were traveling westbound on Northeast 60th Street in their 2013 Toyota Highlander with Washington license plate number AMS6252. Plaintiff Gitenstein was driving the vehicle at a low rate of speed and Plaintiff Cherkin was riding in the front passenger seat. Their two minor children were riding in child safety seats affixed to the back seats of the vehicle.

4.4 At that time and place, an underinsured motorist, Aaron Moore, was traveling northbound on 36th Avenue Northeast in his 2012 Dodge Challenger. The photograph shown below as Figure 1 is a true and accurate depiction of Mr. Moore's vehicle immediately following the collision.



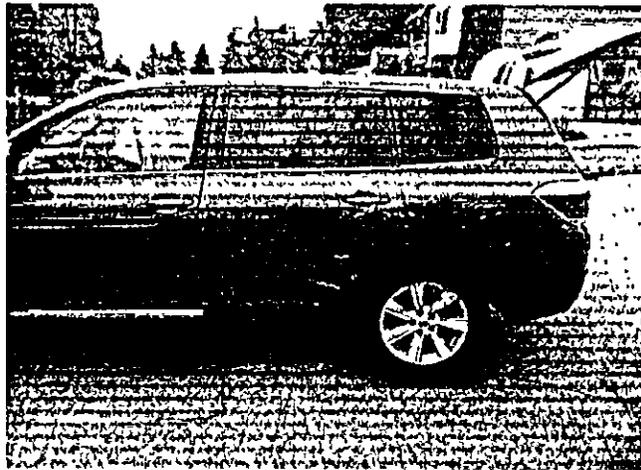
Figure 1: Mr. Moore's vehicle following the collision

COMPLAINT FOR DAMAGES

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1 As he approached the intersection with Northeast 60th Street, Mr. Moore failed to yield to the
2 plaintiffs' vehicle. Mr. Moore's vehicle crashed into the passenger side of the plaintiffs' vehicle,
3 causing over \$15,000 worth of property damage to the plaintiff's vehicle. The photographs
4 shown below as Figures 2, 3 and 4 are true and accurate depictions of Plaintiffs' vehicle
5 immediately following the collision.



15 **Figure 2: Plaintiffs' vehicle following the collision**



25 **Figure 3: Plaintiffs' vehicle following the collision**

COMPLAINT FOR DAMAGES

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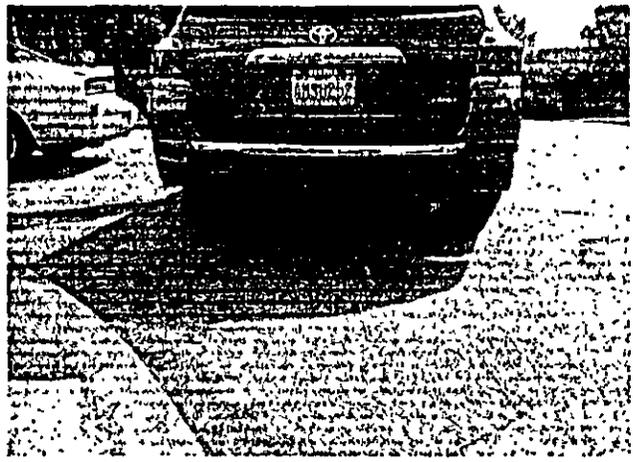


Figure 4: Plaintiffs' vehicle following the collision

4.5 Mr. Moore told the investigating Seattle Police Officer that he did not slow before crashing into the plaintiffs' vehicle and that he had been traveling 30 miles per hour or faster at the moment of impact.

4.6 During the impact, Ms. Cherkin was wearing her lap and shoulder belt. Nonetheless, she was thrown about the interior of the vehicle. Her head hit the headrest in the vehicle, struck the airbags, which had deployed, and struck a hard surface inside the vehicle. She felt immediate pain sensations in her body.

4.7 The plaintiffs' minor children, who were seven and four on the date of the collision, began crying. Mr. Gitenstein immediately got out of the vehicle to check on the well-being of his children.

4.8 After striking her head, Ms. Cherkin was initially dizzy and confused. She had developed noticeable red marks on her cheek and surrounding her right eye.

4.9 Ms. Cherkin was transported from the scene of the accident by ambulance to

1 Harborview Medical Center as a result of the nature of her injuries, which included a concussion
2 diagnosed at the hospital. See Figure 5.



15 Figure 5: Photograph of Ms. Cherkin at Harborview Medical Center on April 27, 2014

16 **V. FACTS RE: THE THIRD PARTY AND UJM CLAIMS**

17 5.1 Plaintiffs re-allege paragraphs 1.1 through 4.9 as if fully set forth herein.

18 5.2 On March 11, 2016, Plaintiffs brought a lawsuit against Mr. Moore captioned as
19 *Cherkin v. Moore*, King County Superior Court Case No. 16-2-05704-7 SEA (“the third party
20 claim”). In response to the plaintiffs’ complaint, Mr. Moore denied liability in the third party
21 claim. During the litigation of the third party claim, the plaintiffs responded to discovery sought
22 by and obtained discovery from Mr. Moore.

23 5.3 Through discovery, Plaintiffs learned that Mr. Moore was insured by a liability
24 insurance policy of insurance that provided up to \$100,000 of coverage for bodily injury for
25

COMPLAINT FOR DAMAGES

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1 which Mr. Moore was legally responsible (“the liability policy limit”). It was then and continues
2 to be the position of Defendant GEICO in this matter that the liability policy limit included the
3 derivative claims of Mr. Gitenstein’s and Ms. Cherkin’s two minor children.

4 5.4 It is also Defendant GEICO’s position that payment of Mr. Moore’s liability
5 policy limit to the plaintiffs and their two minor children did not fully compensate the plaintiffs.

6 5.5 On or about July 19, 2016, Plaintiffs notified Defendant GEICO of a potential
7 UIM claim in this matter. On or about August 10, 2016, Plaintiffs provided a “HIPAA
8 COMPLIANT AUTHORIZATION” form, which authorized GEICO to obtain medical records
9 from Plaintiff Cherkin’s healthcare providers.

10 5.6 The lawsuit arising out of the third party claim brought by the plaintiffs and a
11 separate lawsuit brought by their two minor children were consolidated by the court on
12 September 23, 2016.

13 5.7 Plaintiffs remained in regular contact with Defendant GEICO during this process.
14 On or about January 12, 2017, Plaintiffs provided to Defendant Seifert over 1,200 pages of
15 documents they had obtained at their own expense and/or pursuant to the third party claim. This
16 included discovery responses, medical records and billing statements and the sworn opinions of
17 two treating healthcare providers. The two providers in question opined, among other things,
18 that Plaintiff Cherkin was unable to continue her vocation as a middle school teacher, and that
19 she would “likely have ongoing chronic visual disturbances for the remainder of her life.”
20

21 5.8 Also on January 12, 2017, Plaintiffs stated that they were willing to assist
22 Defendant GEICO if “there is any additional information that GEICO needs to promptly,
23 reasonably and objectively evaluate and pay this claim.” The plaintiffs further stated: “Given
24 the chronic nature of the plaintiffs’ injuries in this case, it would appear ... that GEICO should
25

COMPLAINT FOR DAMAGES

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1 offer to pay its UIM policy limits in this case.” Plaintiffs requested that Defendant GEICO begin
2 its investigation of a UIM claim based on the voluminous documents then available to it.

3 5.9 On or about January 13, 2017, Defendant Seifert informed the plaintiffs that she
4 would review the information provided by the plaintiffs. By January of 2017, Mr. Moore’s
5 insurer, Safeco Insurance, offered a settlement of all of the third party claims in exchange for the
6 payment of Mr. Moore’s bodily injury policy limit.

7 5.10 On or about January 24, 2017, the plaintiffs, through their counsel, requested that
8 Defendant Seifert respond to the following questions in writing:

9 1. Does GEICO require any additional information in order to complete its
10 prompt investigation of the UIM claim of [] Emily Cherkin and Ben Gitenstein, or
their children, Max and Sylvie?

11 2. Will GEICO be able to complete its investigation of the UIM claim in
12 this case within 30 days?

13 3. Does GEICO agree with the analysis of Safeco that the
Cherkin/Gitenstein family are limited to recovery from Defendant Aaron [Moore]
to his \$100,000 per person policy limit? If not, why not?

14 4. If so, does GEICO wish to buy this claim pursuant to *Hamilton v.*
Farmers Ins. Co., 107 Wn.2d 721, 733 P.2d 213 (1987)?

15 5.11 On or about January 26, 2017, Defendant Seifert wrote that she could not accept
16 or reject the plaintiff’s “settlement demand because the following information is needed to fully
17 evaluate” the plaintiffs’ UIM claim: “Pending settlement of [the plaintiffs] Bodily Injury claim.”
18 No other information was requested by Defendant Seifert. Defendant Seifert did not otherwise
19 respond to the questions posed in the letter of January 24, 2017.

20 5.12 By February 21, 2017, the plaintiffs, through their counsel, requested a written
21 response to the following questions:

22 1. What, if any, additional information does GEICO require to fairly,
23 promptly, reasonably and objectively evaluate and pay this UIM claim?

24 2. Does GEICO claim that its insureds have failed to provide reasonable
assistance to GEICO in this matter?

25 3. Does GEICO agree that it owes benefits to my clients under their UIM

COMPLAINT FOR DAMAGES

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1 policy in this case?

2 4. When will GEICO pay what it believes it owes under the UIM policy?

3 5.13 In an email dated March 2, 2017, Defendant Seifert authored an email, which
4 stated: "Upon review of your client's underinsured motorist bodily injury claim, your client has
5 been fully compensated with the underlying carrier's limits of \$100,000 and the waiver of our
6 \$10,000 in PIP payments."

7 5.14 On or about March 8, 2017, the plaintiffs, through their counsel, sent a letter to
8 Defendant Seifert, asking the following questions:

9 1. What value did GEICO assign to "damages [that Ms. Cherkin is] legally
10 entitled to recover from the" underinsured driver?

11 2. For example, what value, if any, did GEICO assign to Ms. Cherkin's
12 economic damages, which include "medical expenses, loss of earnings, ...loss of
13 use of property, cost of replacement or repair, cost of obtaining substitute domestic
14 services, loss of employment, and loss of business or employment opportunities."

15 3. What value, if any, did GEICO place on Ms. Cherkin's noneconomic
16 damages, which "means subjective, nonmonetary losses, including, but not limited
17 to pain, suffering, inconvenience, mental anguish, disability or disfigurement
18 incurred by the injured party, emotional distress, loss of society and
19 companionship, loss of consortium, injury to reputation and humiliation, and
20 destruction of the parent-child relationship"?

21 4. What value did GEICO place on Mr. Gitenstein's economic damages, if
22 any?

23 5. What value did GEICO place on Mr. Gitenstein's noneconomic
24 damages?

25 5.15 GEICO responded by stating that it had no obligation to disclose the method by
which it calculated that Plaintiffs had been fully compensated by the offered settlement amount.
Without identifying what it believed would be useful, GEICO stated that it would consider
anything the plaintiffs provided to GEICO.

5.16 In a letter dated April 14, 2017, Plaintiffs, through their counsel, stated as follows:

The family of Emily Cherkin and Ben Gitenstein suffered the devastating impacts
of a collision that likely permanently injured Ms. Cherkin (she is still receiving
treatment for a brain injury she sustained in the accident in question). A sample of
the impact can be found in the responses to discovery in the underlying [claim].

COMPLAINT FOR DAMAGES

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1 which were already provided to GEICO at its insureds' expense. See
2 CHERIN000096-168. [Plaintiffs] would be willing to discuss any of these
3 documents or anything else they have provided to GEICO if GEICO so desires. The
4 accident in this case occurred 1,083 days ago. This family is still hurting and is
5 hopeful that their insurer will do a full investigation of their claims.

6 5.17 In a letter dated April 21, 2017, GEICO requested authorization to obtain
7 additional medical records given representations in the April 14, 2017 letter that Plaintiff Cherkin
8 was "likely permanently injured". By this time, Defendant GEICO had already been in
9 possession of a sworn statement from a doctor indicating that Plaintiff Cherkin had likely
10 sustained a permanent injury. The April 21, 2017 letter was the first time GEICO had requested
11 additional information from the plaintiffs, despite repeated offers to provide such information.

12 5.18 In a letter dated May 31, 2017, Plaintiffs reminded GEICO that they had
13 previously authorized GEICO to obtain any medical records it desired. On June 9, 2017, GEICO
14 requested an update of the identity of all of the plaintiffs' healthcare providers and a new
15 authorization to obtain the plaintiffs' medical records. Plaintiffs responded with the identities of
16 various medical providers and requested that GEICO give a reasonable estimate with regard to
17 how much additional time it would need to complete its investigation.

18 5.19 By agreement of the parties to the third party claim and pursuant to an Order
19 Approving Minor Settlements, the plaintiffs obtained a total of \$85,000 of the bodily injury
20 policy limits as a result of the third party claim on or about July 21, 2017.

21 5.20 On or about September 6, 2017, Plaintiffs provided a signed authorization
22 allowing Defendant GEICO to obtain all medical records of the plaintiffs. On October 11, 2017,
23 Plaintiffs requested an update on the investigation and again offered to discuss their claims
24 directly with GEICO. On October 18, 2017, Defendant GEICO stated that the length of its
25 investigation had been reasonable and that it had no definition for what would constitute an

COMPLAINT FOR DAMAGES

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1 unreasonable amount of time to investigate a UIM claim.

2 5.21 On or about November 7, 2017, Plaintiffs requested that GEICO pay the amount
3 it believed was currently owed, despite needing additional time to investigate. GEICO declined
4 to pay any amount at that time, instead asking "What 'initial payments' are you expecting or
5 requesting?"

6 5.22 On or about December 12, 2017, Plaintiffs sent a "20-Day Notice Pursuant to
7 RCW 48.30.015(8)(a)" ("the IFCA notice") to Defendant GEICO and to the Washington Office
8 of the Insurance Commissioner, alleging that Defendant GEICO's conduct constituted an
9 unreasonable denial of payment of benefits. Plaintiffs stated that GEICO could "resolve the basis
10 for a cause of action under IFCA by completing its investigation of the Cherkin and Gitenstein
11 claims and making payment within twenty days of its receipt of" the IFCA notice.

12 5.23 More than twenty days have passed since Defendant GEICO's receipt of the IFCA
13 notice and Defendant GEICO has failed to complete its investigation or make any payment to the
14 plaintiffs pursuant to the UIM claim.

15 5.24 On or about December 15, 2017, Defendant Bork informed the plaintiffs that he
16 had taken over the handling of the plaintiffs' UIM claim. Defendant Bork has failed to do any
17 additional investigation of the plaintiffs' UIM claim. GEICO has not responded to the plaintiffs
18 willingness to answer any questions GEICO may have directly, despite repeated efforts that they
19 are willing to answer any of GEICO's questions directly.
20

21 **VI. FIRST CAUSE OF ACTION: BREACH OF CONTRACT**

22 6.1 Plaintiff re-alleges paragraphs 1.1 through 5.24 as if fully set forth herein.

23 6.2 Defendants had a contractual duty to their insureds under the policy.

24 6.3 Defendants also had a duty to the plaintiffs to act reasonably and in good faith in
25

COMPLAINT FOR DAMAGES

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1 the investigation and adjustment of the claim, pursuant to the terms of the insurance contracts
2 between the parties and the implied covenant of good faith and fair dealing.

3 6.4 Defendants had a contractual duty to deal with Plaintiffs in good faith and fairly
4 as to the terms of the policy and not overreach the plaintiffs. Defendants breached the contract
5 of insurance and the implied duty of good faith and fair dealing by failing in their obligations to
6 pay benefits under the policy.

7 6.5 As a direct and proximate cause of these breaches of contract, the plaintiffs have
8 sustained economic and consequential noneconomic damages.

9 **VII. SECOND CAUSE OF ACTION AGAINST DEFENDANTS: VIOLATIONS**
10 **OF THE WASHINGTON CONSUMER PROTECTION ACT**

11 7.1 The plaintiff re-alleges paragraphs 1.1 through 6.5 as if fully set forth herein.

12 7.2 Defendants' acts and omissions constitute multiple violations of insurance
13 regulatory provisions of the Washington Administrative Code, including, but not limited to:

14 7.2.1 misrepresenting pertinent facts or insurance policy provisions by
15 claiming that Plaintiffs were required to provide certain investigatory information at
16 their own expense in violation of WAC 284-30-330(1);

17 7.2.2 failing to acknowledge and act reasonably promptly upon
18 communications by failing to gather information Plaintiffs suggested, including
19 interviewing Plaintiffs directly and/or seeking to discuss the plaintiffs' injuries with their
20 health care providers in violation of WAC 284-30-330(2);

21 7.2.3 failing to adopt and implement reasonable standards for the prompt
22 investigation of claims by delaying the use of investigatory tools at its disposal including
23 conducting interviews of the plaintiffs, requesting access to treating healthcare providers
24 that had offered opinions in support of Plaintiffs' claims and conducting other
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COMPLAINT FOR DAMAGES

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1 investigatory measures available to the defendants under the policy in violation of WAC
2 284-30-330(3);

3 7.2.4 refusing to pay claims without conducting a reasonable investigation by
4 opining that Plaintiffs had been fully compensated without stating the basis for reaching
5 such a conclusion or conducting any independent investigation of the UIM claim in
6 violation of WAC 284-30-330(4);

7 7.2.5 not attempting in good faith to effectuate prompt, fair and equitable
8 settlements of claims in which liability has become reasonably clear by delaying
9 investigation of a claim where the plaintiffs bore no fault in causing their own injuries
10 in violation of WAC 284-30-330(6);

11 7.2.6 compelling a first party claimant to initiate or submit to litigation, to
12 recover amounts due under an insurance policy by offering substantially less than the
13 amounts ultimately recovered in such actions or proceedings, by failing to pay any
14 amount despite repeated requests that it do so in violation of WAC 284-30-330(7);

15 7.2.7 attempting to settle a claim for less than the amount to which a reasonable
16 person would have believed he or she was entitled by reference to written or printed
17 advertising material accompanying or made part of an application, by advertising that
18 GEICO promises to pay for damages in situations where an at fault driver does not have
19 enough insurance to pay for all injuries and damages they cause in violation of WAC
20 284-30-330(8);

21 7.2.8 failing to promptly provide a reasonable explanation of the basis in the
22 insurance policy in relation to the facts or applicable law for denial of a claim or for the
23 offer of a compromise settlement by failing to respond to questions from the plaintiffs
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about the basis for its coverage decisions in violation of WAC 284-30-330(13);

7.2.9 failing to complete investigation of the UIM claim in this case within 30 days after notice of the claim was given and after the plaintiffs had provided reasonable assistance with the claim in violation of WAC 284-30-370;

7.3 Defendants' violations of the Washington Administrative Code, as alleged herein, constitute per se violations of RCW 19.86 *et. seq.*, the Consumer Protection Act.

7.4 Defendants' violations of certain enumerated provisions of the Washington Administrative Code also constitute the basis of additional remedies available under the Washington Insurance Fair Conduct Act, RCW 48.30.015 ("IFCA");

7.5 As a direct and proximate cause of these violations, the plaintiffs have been injured.

**VIII. THIRD CAUSE OF ACTION AGAINST DEFENDANTS:
NEGLIGENCE/BAD FAITH**

8.1 Plaintiffs re-allege paragraphs 1.1 through 7.5 as if fully set forth herein.

8.2 Defendants had a duty to act in good faith in the investigation and adjustment of the claims.

8.3 Defendants failed to act in good faith and deal fairly with the plaintiffs.

8.4 Such failure to act in good faith is a *per se* violation of the Washington Consumer Protection Act, RCW 19.86, *et. seq.* Such failure to act in good faith also sounds in tort.

8.5 As a direct and proximate cause of this negligence/bad faith, Plaintiffs have sustained physical and emotional injuries, which have caused economic and noneconomic damages.

**IX. FOURTH CAUSE OF ACTION AGAINST DEFENDANTS:
VIOLATION OF THE INSURANCE FAIR CONDUCT ACT**

COMPLAINT FOR DAMAGES

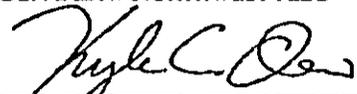
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- 6. For prejudgment interest on all damages to the extent permitted by applicable law;
- 7. For all other relief the Court deems fair, just and equitable.

DATED this 2nd day of May 2018.

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Attorney for Plaintiffs

COMPLAINT FOR DAMAGES

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KING COUNTY
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CASE NUMBER: 18-2-28028-1 SEA

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR KING COUNTY

KAREN and DELIAN SCUDDER, a
married couple,

Plaintiffs,

v.

GEICO GENERAL INSURANCE
COMPANY, a foreign insurer; and FIONA
ELIZABETH HUNT and ALFRED
EDWARD DONOHUE, persons engaged in
the business of insurance,

Defendants.

No.

COMPLAINT FOR DAMAGES

COME NOW the above-named Plaintiffs, by and through their attorneys of record, OLIVE
LAW NORTHWEST PLLC, and by way of complaint for damages against Defendants, allege as
follows:

I. PARTIES

1.1 **Plaintiffs:** At all times relevant to the allegations herein, Plaintiffs Karen and
Delian Scudder were wife and husband and residents of Seattle, King County, Washington.
Plaintiff Karen Scudder was involved in a motor vehicle accident on or about November 6, 2014
in Seattle, Washington ("the accident").

Complaint for Damages - Page 1 of 13

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1 1.2 Defendant GEICO General Insurance Company: At all times material
2 to this lawsuit, Defendant GEICO General Insurance ("GEICO") was a Maryland Insurance
3 Company with NAIC ID No. 35882 and WAOIC No. 497. Defendant GEICO issued
4 Washington Family Automobile Insurance Policy No. 4020-88-84-10 ("the policy") to the
5 plaintiffs. The policy was in effect between August 13, 2014 and February 13, 2015.

6 1.3 Defendant Fiona E. Hunt: At all times material to this lawsuit, Defendant
7 Fiona E. Hunt resided in King County, Washington. At all times material to this lawsuit,
8 Defendant Hunt was a person engaged in the business of insurance and acting as a GEICO
9 representative.

10 1.4 Defendant Alfred E. Donohue: At all times material to this lawsuit,
11 Defendant Alfred E. Donohue, resided in King County, Washington. At all times material to this
12 lawsuit, Defendant Donohue was a person engaged in the business of insurance and acting as a
13 GEICO representative.

14
15 II. JURISDICTION and VENUE

16 2.1 The above-named court has jurisdiction over the parties and the subject matter
17 of this action.

18 2.2 Defendant GEICO was served with the summons and complaint in this matter.

19 2.3 Defendant Hunt was served with the summons and complaint in this matter.

20 2.4 Defendant Donohue was served with the summons and complaint in this matter.

21 2.5 There is no person or entity not a party in this lawsuit that caused or contributed
22 to the damages alleged herein.

23 2.6 The King County Superior Court is an appropriate venue for this action pursuant
24 to RCW 4.12.020.

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III. POLICY OF INSURANCE

3.1 Plaintiffs re-allege paragraphs 1.1 through 2.6 as if fully set forth herein.

3.2 The policy provided both underinsured motorist (“UIM”) coverage and personal injury protection (“PIP”) coverage. Plaintiffs’ PIP coverage included a policy limit of \$35,000 for medical expenses caused by an accident. Plaintiffs’ UIM coverage included a policy limit of \$500,000 for each person and for each occurrence.

3.3 The UIM coverage provided that GEICO would pay “damages an *insured* is legally entitled to recover from the owner or operator of an *underinsured motor vehicle* due to ... *bodily injury* sustained by that *insured* and caused by an *accident*;

3.4 *Insured* is defined by the policy as *you* and *your relatives*. *You* and *your* is defined as “the policyholder named in the declarations or his or her spouse if a resident of the same household.” *Underinsured motor vehicle* is defined by the policy as a “land motor vehicle ... [w]hich has a liability bond or insurance that applies at the time of the *accident* but the limits of that insurance are less than the amount the *insured* is legally entitled to recover for damages.” *Accident* is defined by the policy as “an occurrence that is unexpected and unintended from the standpoint of the *insured*.”

3.5 At the time of an occurrence that was “unexpected and unintended from the standpoint of the” plaintiffs, the plaintiffs were policyholders named in the declarations that were legally entitled to recover damages from the owner or operator of a land motor vehicle which had liability insurance with limits of insurance that were less than the plaintiffs were legally entitled to recover for damages.

IV. FACTS RE: THE ACCIDENT

4.1 Plaintiffs re-allege paragraphs 1.1 through 3.5 as if fully set forth herein.

1 4.2 At approximately 9:15 a.m. on or about November 6, 2014, Plaintiff Karen
2 Scudder was involved in a motor vehicle accident caused by the negligence of Christina Johnston
3 ("Ms. Johnston").

4 4.3 Immediately following the impact, Plaintiff Karen Scudder began experiencing
5 headaches and musculoskeletal pain symptoms.

6 4.4. Plaintiff continues to have pain symptoms associated with the accident.

7 **V. FACTS RE: THE THIRD PARTY, PIP AND UIM CLAIMS**

8 5.1 Plaintiffs re-allege paragraphs 1.1 through 4.4 as if fully set forth herein.

9 5.2 Plaintiffs promptly notified GEICO of the accident following the loss and
10 requested that GEICO open a PIP policy for Plaintiff Karen Scudder. On or about February 24,
11 2016, GEICO received notice that the Scudders were represented by counsel. Plaintiffs' counsel
12 asked that GEICO inform the plaintiffs if GEICO needed any paperwork or assistance to obtain
13 PIP benefits.

14 5.3 In a letter dated March 2, 2016, Defendant Hunt responded acknowledging receipt
15 of the letter of representation. Defendant Hunt did not request any additional information from
16 the plaintiffs.

17 5.4 With a letter dated May 12, 2016, Plaintiffs asked Defendant Hunt to confirm that
18 it was still continuing to process and pay for medical treatment on behalf of Plaintiff Karen
19 Scudder pursuant to the PIP policy. Defendant GEICO sent an itemized list of PIP claims paid
20 on or about May 16, 2016. The itemized list of PIP payments made showed that GEICO had
21 paid PIP benefits as recently as April 12, 2016.

22 5.5 With a letter dated May 17, 2016, Defendant Hunt claimed that it was her
23 understanding that Plaintiff Scudder had ceased receiving treatment at the end of 2015. She
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1 indicated that if Plaintiff Scudder planned to continue receiving treatment, Defendant GEICO
2 would request that she be seen for an insurance medical exam ("IME").

3 5.6 With a letter dated July 6, 2016, Plaintiffs informed GEICO that "Ms. Scudder
4 intends to fully cooperate with any reasonable requests that GEICO may have related to her
5 ongoing treatment for injuries she sustained in a motor vehicle accident on November 6, 2014."

6 Plaintiffs proposed the following questions to Defendant Hunt:

- 7 "1. Will GEICO discuss Ms. Scudder's injuries, including causation, with her
8 healthcare providers, including Dr. Snyder prior to subjecting her to an IME, which
9 will take her away from work? If not, why not?
10 2. What effort will GEICO make to ensure that its selected examiner(s) are unbiased
11 against Ms. Scudder?
12 3. Does GEICO object to my client making a video recording of any IME it
13 requires? If so, on what basis?"

14 5.7 With a letter dated July 15, 2016, Defendant Donohue, writing on behalf of
15 Defendant GEICO, informed the plaintiffs that Plaintiff Karen Scudder was required to "submit
16 to examination at [GEICO's] expense, by doctors chosen by [GEICO], as [GEICO] reasonably
17 require[s]." Emphasis added. Defendant Donohue informed the plaintiffs that its chosen
18 physician, Dr. Jennifer James, did not object to video recording of the examination, but that she
19 had a policy of requiring three weeks' notice, a "professional videographer" and payment of \$580
20 to have an insurance medical examination video recorded.

21 5.8 In fact, Dr. James does not always require examinees she sees for videotaped
22 IMEs to provide three weeks' notice, use a "professional videographer", and pay \$580 for video
23 recording. GEICO knew or should have known that Dr. James did not have such policies in place
24 when it demanded that Plaintiff Karen Scudder be seen by Dr. James.

25 5.9 Plaintiff Karen Scudder underwent an IME performed by Dr. James on August
16, 2016. Defendant Hunt requested that Dr. James address five topic areas related to Plaintiff

1 Karen Scudder: (1) objective findings and their cause, (2) whether objective findings supported
2 treatment and, if so, what type, (3) whether treatment received to date had been reasonable,
3 necessary and related to the accident, (4) whether Plaintiff Scudder had a ratable disability, and
4 (5) whether Plaintiff Scudder had reached pre-injury status.

5 5.10 Dr. James opined that Plaintiff Scudder had following injuries related to the
6 accident: type 2 whiplash associated disorder of the cervical spine, lumbar strain, and bilateral
7 sacroiliac strain. She noted the following objective findings: bilateral sacroiliac tenderness,
8 decreased lumbar range of motion, and positive responses to bilateral sacroiliac injections.

9 5.11 Dr. James opined that objective findings warranted additional physical therapy.
10 She also opined that all treatment to that point had been reasonable, necessary and related to the
11 accident. She also opined that Plaintiff Scudder was not permanently disabled. Finally, she
12 opined that Plaintiff Scudder had not yet reached her pre-injury status.

13 5.12 On September 30, 2016, Defendant Hunt confirmed that GEICO had paid all
14 outstanding medical bills and would continue to do so under the plaintiffs' PIP policy.

15 5.13 During the litigation of the underlying claim, Defendants GEICO, Hunt and
16 Donohue all had notice of the litigation. Despite having notice of the litigation of the underlying
17 claim, Defendants failed to intervene, despite an opportunity to do so. As such, and pursuant to
18 the holdings of *Lenzi v. Redland Ins. Co.*, 140 Wn.2d 267 (2000); *Fisher v. Allstate Ins. Co.*, 136
19 Wn.2d 240 (1998); and *Finney v. Farmers Ins. Co.*, 21 Wn. App. 601 (1978), Defendant GEICO
20 is bound by the factual findings and conclusions of the court in the underlying litigation.

21 5.14 On February 27, 2018, Plaintiffs provided Defendants GEICO and Hunt with a
22 notice that Ms. Johnston's insurer, Liberty Mutual, had offered to pay Ms. Johnston's bodily
23 injury policy limit of \$100,000. The plaintiffs offered GEICO the opportunity to buy the claim
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1 pursuant to *Hamilton v. Farmers Ins. Co.*, 107 Wn.2d 721 (1987). On March 6, 2018, Defendant
2 Hunt responded, stating that GEICO declined to by the claim against Ms. Johnston and indicating
3 that she would handle the UIM claim.

4 5.15 With a letter dated March 7, 2018, Plaintiffs requested that GEICO advise them
5 whether they intended to seek reimbursement for amounts paid under the plaintiffs' PIP policy.
6 It was the plaintiffs position that settlement of the underlying claim and payment of PIP benefits
7 did not fully compensate the plaintiffs pursuant to *Thiringer v. Am. Motors Ins. Co.*, 91 Wn.2d
8 215 (1978).

9 5.16 In a letter dated March 16, 2018, Defendant Hunt requested that the plaintiffs
10 provide a "complete settlement demand" before she decided whether she made a decision about
11 whether the plaintiffs had been fully compensated. With a letter dated April 6, 2018, Plaintiffs
12 provided Defendant Hunt with 866 pages of pleadings, correspondence, and medical records
13 related to the UIM claim. With that letter, Plaintiffs requested that Defendant Hunt respond to
14 the following questions:
15

- 16 1. Does GEICO waive any alleged obligations of the Scudders to reimburse
17 it for payments made under their PIP policy? If not, please explain the basis
18 for such a decision.
- 19 2. Independent of any claim for offsets or setoffs, what does GEICO
20 conclude to be the value of the Scudders' UIM claim?
- 21 3. Does GEICO need more than 30 days to complete its investigation of
22 this UIM claim? If so, how much additional time is needed and on what
23 basis?
- 24 4. What, if any, other information does GEICO request from its insureds
25 pursuant to the insurance policy?

22 5.17 In a letter dated May 3, 2018, Defendant Hunt confirmed that GEICO would
23 waive its "PIP subrogation rights." She also indicated that she would forward additional records
24 to Dr. James.

1 5.18 In a letter dated May 7, 2018, Plaintiffs indicated that they were (1) willing to
2 meet with GEICO, provide signed authorizations to obtain additional medical records and
3 "otherwise reasonably assist GEICO in its investigation of the UIM claim in this matter." They
4 indicated that Plaintiff Scudder had seen four additional health care providers since GEICO last
5 requested records.

6 5.19 With a letter dated June 6, 2018, Defendant Hunt provided an addendum report
7 from Dr. James. In the report, Dr. James concluded that all post-accident treatment Plaintiff
8 Scudder had obtained to that date was "reasonable, necessary and related to the motor vehicle
9 accident." Dr. James concluded her report by stating that Plaintiff Scudder "may not have
10 reached preinjury status regarding her subjective complaints of low back pain."

11 5.20 On June 11, 2018, Defendant Donohue sent a "Notice of Examination Under
12 Oath" to Plaintiff Karen Scudder. By letter dated June 21, 2018, Plaintiff agreed that "because
13 Mrs. Scudder's ongoing injuries caused by the accident are material to GEICO's investigation of
14 the UIM claim," she would sit for an examination under oath related to those issues.

15 5.21 On June 21, 2018, Plaintiff Karen Scudder sat for an examination under oath taken
16 by Defendant Donohue. Defendant Donohue's questions exceeded the scope of the examination
17 agreed to by Plaintiff Scudder.

18 5.22 On June 27, 2018, Defendant Donohue informed Plaintiffs that GEICO would be
19 willing to pay some amount to resolve the claim. Defendant Donohue indicated that he believed
20 that Mrs. Scudder may have re-injured herself after the accident by working out. Plaintiffs
21 proposed that GEICO pay any amount it believed it owed, speak to Mrs. Scudder's treatment
22 providers directly, indicate what amount it believed was owed to Mr. Scudder and inform the
23 plaintiffs if there was additional information it needed.
24

1 5.23 With a letter dated July 11, 2018, Defendant Donohue indicated that the
2 mechanism of injury was inconsistent with Mrs. Scudder's injuries. He also indicated that "in
3 looking at Ms. Scudder's medical records and considering her deposition testimony, her
4 examination under oath testimony, and her husband's deposition testimony, it appears that her
5 injuries are related to her exercise program following the accident." He also indicated that
6 GEICO was still awaiting a "demand" from the plaintiffs.

7 5.24 In a letter dated July 13, 2018, Plaintiff's counsel wrote: "Let me be clear,
8 GEICO's insureds, the Scudders, demand that GEICO promptly pay what it owes. It is not the
9 Scudders' desire to commence a negotiation or litigate this claim. It is their desire to have their
10 insurer promptly investigate and pay what it owes. The Scudders are not obligated to do GEICO's
11 investigation for it. Do you disagree?" Emphasis in original. He also wrote: "It is you and
12 GEICO that seem to be at odds with the conclusions of the Scudders, Mrs. Scudder's treating
13 health care providers and a medical expert GEICO hired to evaluate Mrs. Scudder. As such, I
14 proposed that GEICO might benefit from hearing from Mr. Burns and Dr. Leifheit. Given the
15 additional burden this would likely place on these two professionals, I suggested that GEICO pay
16 for such access. While this seems unnecessary to Scudders, GEICO seems to be of the view that
17 the Scudders, their healthcare providers and the physician GEICO hired are not to be believed.
18 Given the passage of time, this is disappointing to the Scudders." Emphasis in original.

19 5.25 In a letter dated July 19, 2018, Defendant Donohue stated: "If after reviewing
20 [additional] records [from Dr. Leifheit], GEICO believes an interview is necessary to address
21 questions related to her treatment, I will contact you to coordinate a date for his interview at
22 GEICO's expense." GEICO did not request an opportunity to talk to Dr. Leifheit.

23 5.26 In a letter dated August 23, 2018, Plaintiffs sent a notice to the Washington Office
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1 of the Insurance Commissioner (the "OIC"), Defendant GEICO and Defendant Donohue
2 pursuant to RCW 48.30.015 (the "IFCA Notice"). The IFCA notice stated the bases of a potential
3 cause of action against GEICO pursuant to RCW 48.30.015. The IFCA noticed stated that
4 GEICO could "resolve the bases for such a cause of action by, within 20 days receipt of this
5 notice, concluding its investigation of this claim and paying all amounts owed under the policy."

6 5.27 The OIC and the defendants received the IFCA Notice. More than 20 days have
7 passed since they received the IFCA notice.

8 **VI. FIRST CAUSE OF ACTION: BREACH OF CONTRACT**

9 6.1 Plaintiff re-alleges paragraphs 1.1 through 5.27 as if fully set forth herein.

10 6.2 Defendants had a contractual duty to their insureds under the policy.

11 6.3 Defendants also had a duty to the plaintiffs to act reasonably and in good faith in
12 the investigation and adjustment of the claim, pursuant to the terms of the insurance contracts
13 between the parties and the implied covenant of good faith and fair dealing.

14 6.4 Defendants had a contractual duty to deal with Plaintiffs in good faith and fairly
15 as to the terms of the policy and not overreach the plaintiffs. Defendants breached the contract
16 of insurance and the implied duty of good faith and fair dealing by failing in their obligations to
17 pay benefits under the policy.

18 6.5 As a direct and proximate cause of these breaches of contract, the plaintiffs have
19 sustained economic and consequential noneconomic damages.

20 **VII. SECOND CAUSE OF ACTION AGAINST DEFENDANTS: VIOLATIONS**
21 **OF THE WASHINGTON CONSUMER PROTECTION ACT**

22 7.1 The plaintiff re-alleges paragraphs 1.1 through 6.5 as if fully set forth herein.

23 7.2 Defendants' acts and omissions constitute multiple violations of the insurance
24 regulatory provisions of the Washington Administrative Code, including, but not limited to:

1 7.2.1 WAC 284-30-330(1), by misrepresenting pertinent facts such as the
2 claim that GEICO is not obligated to pay any amount under the policy unless the
3 Scudders sign a release of all claims;

4 7.2.2 WAC 284-30-330(3), by failing to adopt and implement reasonable
5 standards for the prompt investigation of this claim. Despite acknowledging that some
6 payment is due, GEICO has made no payment under this policy, nor has it concluded an
7 investigation of this claim given that important witnesses like Dr. Leifheit and Mr. Burns
8 have not be consulted by the defendants;

9 7.2.3 WAC 284-30-330(4), by refusing to pay claims before having conducted a
10 reasonable investigation;

11 7.2.4 WAC 284-30-330(7), by compelling the Scudders to initiate litigation by
12 refusing to pay any amount, even though it agreed that some amount is owed;

13 7.2.5 WAC 284-30-370, by failing to complete its investigation of this UIM
14 claim within thirty days after receipt of all records it requested, where it was reasonable
15 to have done so;

16 7.3 Defendants' violations of the Washington Administrative Code, as alleged
17 herein, constitute per se violations of RCW 19.86 *et. seq.*, the Consumer Protection Act.

18 7.4 Defendants' violations of certain enumerated provisions of the Washington
19 Administrative Code also constitute the basis of *additional remedies* available under the
20 Washington Insurance Fair Conduct Act, RCW 48.30.015 ("IFCA");

21 7.5 As a direct and proximate cause of these violations, the plaintiffs have been
22 injured.
23

24 **VIII. THIRD CAUSE OF ACTION AGAINST DEFENDANTS:**
25 **NEGLIGENCE/BAD FAITH**

1 8.1 Plaintiffs re-allege paragraphs 1.1 through 7.5 as if fully set forth herein.
2 8.2 Defendants had a duty to act in good faith in the investigation and adjustment of
3 the claims.
4 8.3 Defendants failed to act in good faith and deal fairly with the plaintiffs.
5 8.4 Such failure to act in good faith is a *per se* violation of the Washington Consumer
6 Protection Act, RCW 19.86, *et. seq.* Such failure to act in good faith also sounds in tort.
7 8.5 As a direct and proximate cause of this negligence/bad faith, Plaintiffs have
8 sustained physical and emotional injuries, which have caused economic and noneconomic
9 damages.

10 **IX. FOURTH CAUSE OF ACTION AGAINST DEFENDANT GEICO:**
11 **VIOLATION OF THE INSURANCE FAIR CONDUCT ACT**

12 9.1 Plaintiffs re-alleges paragraph 1.1 through 8.5 as if fully set forth herein.
13 9.2 Pursuant to IFCA, Defendant GEICO's unreasonable denial of payment of
14 benefits constitutes a violation of IFCA.
15 9.3 Defendant GEICO, by and through its agents, have violated the Washington
16 Administrative Code ("WAC"), including, but not limited to, the violations set forth in
17 paragraphs 7.2.1 – 7.2.9, above, which constitutes *evidence of unreasonableness* and provides a
18 basis for enhanced damages pursuant to IFCA.
19 9.4 As a direct and proximate cause of these violations, the plaintiffs have been
20 injured.

21 **PRAYER FOR RELIEF**

22 Wherefore, Plaintiffs pray for judgment against Defendants as follows:

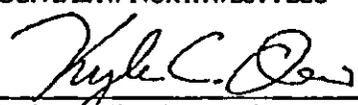
- 23 1. For all direct and consequential damages flowing from Defendants' breach of
24 contract, bad faith claims handling, negligence, violation of the CPA and
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violations of IFCA as set forth above, including contractual damages and extra contractual economic and noneconomic damages;

2. For trebling of said actual damages caused by Defendants pursuant to the CPA;
3. For trebling of said actual damages caused by Defendants pursuant to IFCA;
4. For reasonable attorney fees, litigation and expert costs incurred in prosecuting this action against Defendants pursuant to the CPA, IFCA, *Olympic S.S. Co., Inc. v. Centennial Ins. Co.*, 117 Wn.2d 37 (1991), and all other equitable remedies that may be available;
5. For injunctive relief, pursuant to the CPA to enjoin further violations by Defendants;
6. For prejudgment interest on all damages to the extent permitted by applicable law;
7. For all other relief the Court deems fair, just and equitable.

DATED this 7th day of November 2018.

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Attorney for Plaintiffs

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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF KING

GILLIES & OIL FAMILY CYCLERY,
LLC, dba G&O FAMILY CYCLERY, a
Washington Corporation; DAVID
GIUGLIANO and DANIELLE
FRIEDMAN, husband and wife and the
marital community composed thereof; and
TYLER GILLIES and KATHLEEN
HEGGERTY, husband and wife and the
marital community composed thereof,

Plaintiffs.

v.

OHIO SECURITY INSURANCE
COMPANY, an insurance company;
SERVICE MASTER OF SEATTLE, dba L
& M. SERVICES, INC., a Washington
corporation; CHRISTOPHER COGDILL
and JANE DOE COGDILL, husband and
wife and the marital community composed
thereof; BRIAN BUKOSKEY and MARY
ROE BUKOSKEY, husband and wife and
the marital community composed thereof;
and SAMANTHA GARVELINK, and
JOHN DOE GARVELINK, husband and
wife and the marital community composed
thereof,

Defendants.

NO. **18-2-18585-8 SEA**

COMPLAINT FOR DAMAGES

COMPLAINT FOR DAMAGES—1

LAW OFFICES OF MICHAEL T. WATKINS
12512 39TH AVENUE NE
SEATTLE, WA 98125
206/920-3373

1 COME NOW the plaintiffs, by and through their attorneys of record, Michael T.
2 Watkins and Bridget T. Schuster, and allege as follows:

3 I. PARTIES

4 1.1 On March 9, 2016 a gas service line in the Greenwood neighborhood of Seattle
5 exploded and destroyed and/or severely damaged several buildings, businesses and property.

6 1.2 At all times material hereto, plaintiffs Gillies & Oil Family Cyclery LLC, dba
7 G&O Family Cyclery ("G&O"), David Giugliano and Danielle Friedman, (collectively "the
8 Giuglianos") and Tyler Gillies and Kathleen Heggerty (collectively "the Gillies") were
9 residents of King County, state of Washington. At all times material hereto, plaintiffs owned
10 and operated a family cyclery business/bicycle shop at or near 8417 Greenwood Avenue North,
11 Seattle, WA 98103. The above referenced explosion severely damaged plaintiffs' business and
12 property.

13 1.3 At all times material hereto, defendant Ohio Security Insurance Company
14 ("Ohio"), upon information and belief, was an insurance company properly licensed and doing
15 business in King County, state of Washington. At all times material hereto, defendant Ohio
16 insured plaintiffs and the above referenced bicycle shop pursuant to a business owner's policy
17 of insurance.
18

19 1.4 At all times material hereto, defendant ServiceMaster of Seattle, dba L. & M.
20 Services, Inc. ("ServiceMaster"), upon information and belief, was a Washington restoration
21 company properly licensed and doing business in King County, state of Washington.
22

23 1.5. At all times material hereto, defendants Christopher Cogdill and Jane Doe
24 Cogdill (collectively "the Cogdills"), upon information and belief, were residents of the state of
25

1 Washington. All acts and omissions of Christopher Cogdill, as alleged herein, were performed
2 on behalf of, and/or for the benefit of the Cogdills' marital community. At all times material
3 hereto, Christopher Cogdill was an insurance adjuster retained by defendant Ohio to inspect,
4 investigate, report and assist in the adjustment of G&O's insurance claims.

5 1.6 At all times material hereto, defendants Brian Bukoskey and Mary Roe
6 Bukoskey (collectively "the Bukoskeys"), upon information and belief, were residents of the
7 state of California. All acts and omissions of Brian Bukoskey, as alleged herein, were
8 performed on behalf of, and/or for the benefit of the Bukoskeys' marital community. At all
9 times material hereto, Bukoskey was a loss auditor for defendant Ohio and was involved in
10 adjusting plaintiffs' insurance claims.
11

12 1.7 At all times material hereto, defendants Samantha Garvelink and John Doe
13 Garvelink (collectively "the Garvelinks"), upon information and belief, were residents of the
14 state of California. All acts and omissions of Samantha Garvelink, as alleged herein, were
15 performed on behalf of, and/or for the benefit of the Garvelinks' marital community. At all
16 times material hereto, Samantha Garvelink was an insurance adjuster employed by defendant
17 Ohio and was assigned to adjust plaintiffs' insurance claims.
18

19 **II. JURISDICTION AND VENUE**

20 2.1 Jurisdiction. Under article IV, section 6 of the Washington State Constitution, the
21 Superior Court, King County, state of Washington has original subject matter jurisdiction over
22 this lawsuit.

23 2.2 Venue. Venue is properly laid in King County under RCW 4.12.025 because at
24 all times material hereto, defendant Ohio transacted business in King County, Washington. In
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1 addition, at all times material hereto, defendant ServiceMaster was properly licensed and
2 transacting business in King County, Washington. In addition, all of the relevant events giving
3 rise to this action, including, but not limited to, the above referenced explosion and the
4 adjustment of plaintiffs' insurance claims, occurred in King County, Washington.

5 **III. FACTS**

6 3.1 On July 1, 2015 defendant Ohio, for a fee, issued a business owner's policy of
7 insurance to plaintiffs. This policy of insurance was in force and effect from July 1, 2015 to
8 July 1, 2016. This insurance policy provided insurance coverage for, *inter alia*, damage to the
9 plaintiffs' business, business personal property, business interruption, loss of business income,
10 loss of business expectancy, and extra expense, caused by explosion and fire.

11 3.2 On March 9, 2016, as alleged above, plaintiffs suffered an explosion and fire loss
12 to their family cyclery/bicycle shop business located at or near 8417 Greenwood Avenue
13 North, Seattle WA 98103.

14 3.3 The Washington State Utilities and Transportation Commission (the "UTC")
15 investigated the above referenced explosion and on September 20, 2016 released a report
16 finding, "that the immediate structural cause of the natural gas leak and explosion was external
17 damage to a threaded coupling in the above-ground portion of the service line attached to the
18 north-facing wall of the Mr. Gyros structure."
19

20 3.4 After the above referenced explosion, plaintiffs properly and timely submitted
21 insurance claims to defendant Ohio under their business owner's policy of insurance.
22

23 3.5 During the adjustment of the plaintiffs' insurance claims, defendant Ohio
24 intentionally, and/or unreasonably, failed to perform its statutory and contractual obligations to
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1 properly inspect, investigate, and assess the full extent of the plaintiffs' insured losses.
2 Defendant Ohio failed to fully and promptly pay all that it owed to the plaintiffs under their
3 insurance policy. On numerous occasions during the adjustment of the plaintiffs' insurance
4 claims, defendant Ohio violated several Washington Administrative Code claims handling
5 regulations contained in Chapter 296-30, *et seq.*, and failed, in bad faith, to give equal
6 consideration to the interests of the plaintiff insureds, as it did to its own.

7 3.6 During the adjustment of the plaintiffs' insurance claims, defendant Cogdill on
8 behalf of, and/or as an agent for defendant Ohio, failed to properly inspect, assess, investigate
9 and report the full nature and extent of the plaintiffs' insured losses. On numerous occasions
10 during the adjustment of the plaintiffs' insurance claims defendant Cogdill violated several
11 Washington Administrative Code claims handling regulations contained in Chapter 296-30, *et*
12 *seq.*, and failed in bad faith to give equal consideration to the interests of the plaintiff insureds,
13 as he did to defendant Ohio's.

14 3.7 During the adjustment of the plaintiffs' insurance claims, defendant Bukoskey on
15 behalf of, and/or as an agent for defendant Ohio, failed to properly investigate, assess and
16 report the full extent of the plaintiffs' insured losses. On numerous occasions during the
17 adjustment of the plaintiffs' insurance claims defendant Bukoskey violated several Washington
18 Administrative Code claims handling regulations contained in Chapter 296-30, *et seq.*, and
19 failed in bad faith to give equal consideration to the interests of the plaintiff insureds, as it did
20 to defendant Ohio's.

21 3.8 During the adjustment of the plaintiffs' insurance claims, defendant Garvelink on
22 behalf of, and/or as an agent for defendant Ohio, failed to properly investigate, assess and
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1 report the full extent of the plaintiffs' insured losses. On numerous occasions during the
2 adjustment of the plaintiffs' insurance claims defendant Garvelink violated several Washington
3 Administrative Code claims handling regulations contained in Chapter 296-30, *et seq.*, and
4 failed in bad faith to give equal consideration to the interests of the plaintiff insureds, as it did
5 to defendant Ohio's.

6 3.9 During the adjustment of the plaintiffs' insurance claims, defendant
7 ServiceMaster on behalf of, and/or as an agent for defendant Ohio, failed to properly inventory,
8 clean, assess, restore and return certain items of the plaintiffs' property. Defendant
9 ServiceMaster also unreasonably discarded items of plaintiffs' property without proper
10 authority.

11
12 **IV. BREACH OF CONTRACT (DEFENDANT OHIO)**

13 4.1 Plaintiffs reallege paragraphs 1.1 through 3.9 as if fully set forth herein.

14 4.2 Defendant Ohio owed a contractual duty to its insureds, the plaintiffs, to properly
15 inspect, investigate, and assess the full extent of the plaintiffs' insured losses. Defendant Ohio
16 also had a contractual duty to timely and fully pay for, *inter alia*, damage to the plaintiffs'
17 business, business personal property, business interruption, loss of business income, loss of
18 business expectancy, and extra expense, caused by explosion and fire in accordance with its
19 contract of insurance with the plaintiffs.
20

21 4.3 Defendant Ohio's wrongful acts and omissions, as alleged herein, breached its
22 contract of insurance with the plaintiffs.

23 **V. BAD FAITH (DEFENDANT OHIO)**

24 5.1 Plaintiffs reallege paragraphs 1.1 through 4.3 as if fully set forth herein.
25

1 5.2 Defendant Ohio's wrongful acts and omissions, as alleged herein, constituted bad
2 faith in violation of Washington statutory and decisional law. Such bad faith also violated the
3 Washington Consumer Protection Act, RCW 19.86, *et seq.*

4 **VI. WASHINGTON ADMINISTRATIVE CODE VIOLATIONS**
5 **(DEFENDANT OHIO)**

6 6.1 Plaintiffs reallege paragraphs 1.1 through 5.2 as if fully set forth herein.

7 6.2 Defendant Ohio's wrongful acts and omissions, as alleged herein, violated
8 several insurance claims handling regulatory provisions of the Washington Administrative
9 Code 284-30 *et seq.* Such acts and omissions also constituted *per se* violations of the
10 Washington Consumer Protection Act, RCW 19.86, *et seq.*

11 **VII. VIOLATION OF THE CONSUMER PROTECTION ACT**
12 **(DEFENDANT OHIO)**

13 7.1 Plaintiffs reallege paragraphs 1.1 through 6.2 as if fully set forth herein.

14 7.2 Defendant Ohio's wrongful acts and omissions, as set forth herein, including but
15 not limited to, its violations of the Washington Administrative Code and bad faith, constituted
16 *per se* violations of the Washington Consumer Protection Act, RCW 19.86 *et seq.*

17 **VIII. VIOLATION OF INSURANCE FAIR CONDUCT ACT (OHIO)**

18 8.1 Plaintiffs reallege paragraphs 1.1 through 7.2 as if fully set forth herein.

19 8.2 On or about May 11, 2017 the plaintiffs directed a written notice pursuant to the
20 Insurance Fair Conduct Act ("IFCA"), RCW 48.30.015, to defendant Ohio and the Office of
21 the Insurance Commissioner stating the basis for their cause of action and demanded payment
22 for their business interruption and extra expense claims. Defendant Ohio failed to resolve the
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1 basis for the plaintiffs' IFCA action within the twenty-day period after the plaintiffs' filed their
2 May 11, 2017 IFCA notice.

3 8.3 On December 8, 2017 the plaintiffs directed another written notice pursuant to
4 the IFCA, to defendant Ohio and the office of the insurance commissioner stating the basis for
5 their cause of action and demanded full payment of the appraisal award for their extra expense
6 claim.

7 8.4 Defendant Ohio failed to resolve the basis for the plaintiffs' IFCA action within
8 the twenty-day period after the plaintiffs' filed their December 8, 2017 IFCA notice.

9 **IX. BAD FAITH (DEFENDANTS COGDILL)**

10 9.1 Plaintiffs reallege paragraphs 1.1 through 8.4 as if fully set forth herein.

11 9.2 Defendant Cogdill's wrongful acts and omissions, as set forth herein, constituted
12 bad faith in violation of Washington statutory and decisional law.

13 **X. BAD FAITH (DEFENDANTS BUKOSKEY)**

14 10.1 Plaintiffs reallege paragraphs 1.1 through 9.2 as if fully set forth herein.

15 10.2 Defendant Bukoskey's acts and omissions, as set forth herein, constituted bad
16 faith in violation of Washington statutory and decisional law.

17 **XI. BAD FAITH (DEFENDANTS GARVELINK)**

18 11.1 Plaintiffs reallege paragraphs 1.1 through 10.2 as if fully set forth herein.

19 11.2 Defendant Garvelink's acts and omissions, as set forth herein, constituted bad
20 faith in violation of Washington statutory and decisional law. Such bad faith also constituted a
21 violation of the Washington Consumer Protection Act, RCW 19.86, *et seq.*

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contract in an amount to fairly compensate plaintiffs for all compensatory, special, general and consequential damages proximately caused by its wrongful acts and omissions;

B. Judgment against defendant Ohio Security Insurance Company for bad faith in an amount to fairly compensate plaintiffs for all compensatory, special, general and consequential damages proximately caused by its wrongful acts and omissions;

C. Judgment against defendant Ohio Security Insurance Company for violations of the Consumer Protection Act, RCW 19.86 *et seq.*, in an amount to fairly compensate plaintiffs for all compensatory, special, general, exemplary and consequential damages proximately caused by its wrongful acts and omissions, including an award of treble damages pursuant to RCW 19.86.090;

D. Judgment against defendant Ohio Security Insurance Company for violations of the Insurance Fair Conduct Act, RCW 48.30.015, in an amount to fairly compensate plaintiffs for all compensatory, special, general, exemplary and consequential damages proximately caused by its wrongful acts and omissions, including an award of treble damages pursuant to RCW 48.30.015(2);

E. Judgment against defendants Cogdill for bad faith in an amount to fairly compensate plaintiffs for all compensatory, special, general and consequential damages proximately caused by defendants' wrongful acts and omissions;

F. Judgment against defendants Bukoskey for bad faith in an amount to fairly compensate plaintiffs for all compensatory, special, general and consequential

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damages proximately caused by defendants' wrongful acts and omissions;

- G. Judgment against defendants Garvelink for bad faith in an amount to fairly compensate plaintiffs for all compensatory, special, general and consequential damages proximately caused by defendants' wrongful acts and omissions;
- H. Judgment against defendant ServiceMaster for breach of contract in an amount to fairly compensate plaintiffs for all compensatory, special, general and consequential damages proximately caused by its wrongful acts and omissions;
- I. Judgment against defendant ServiceMaster for negligence in an amount to fairly compensate plaintiffs for all compensatory, special, general and consequential damages proximately caused by its wrongful acts and omissions;
- J. Judgment against defendant Ohio Security Insurance Company for attorney fees and costs as allowed by law including, but not limited to, RCW 19.86, *et seq.*, 48.30, *et seq.*, and *Olympic Steamship v. Centennial Ins.*, 117 Wn.2d 37, P.2d 673 (1991);
- K. An award of pre-judgment interest on all items of special damages;
- L. For such other relief as the Court deems just and equitable.

DATED this 26th day of July, 2018.

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LAW OFFICES OF MICHAEL T. WATKINS



Michael T. Watkins, WSBA #13677
Attorney for Plaintiffs

BRIDGET T. SCHUSTER LAW, PLLC



Bridget T. Schuster, WSBA #41081
Attorney for Plaintiffs

KeyCite Yellow Flag - Negative Treatment
Disagreed With by Keodalah v. Allstate Insurance Company,
Wash.App Div. I, March 26, 2018

2013 WL 231104

Only the Westlaw citation is currently available.
United States District Court, W.D. Washington,
at Seattle.

Randy and Monica GAROUTTE, husband and
wife, and the marital community composed
thereof, Plaintiffs,

v.

AMERICAN FAMILY MUTUAL INSURANCE
COMPANY, an insurance company, et al.,
Defendants.

No. C12-1787MJP.

Jan. 22, 2013.

Attorneys and Law Firms

Michael Thomas Watkins, Law Offices of Michael T.
Watkins, George W. McLean, Jr., Law Offices of George
W. McLean Jr., Joel B. Hanson, Seattle, WA, for
Plaintiffs.

Rory W. Leid, III, Jennifer P. Dinning, Cole Wathen Leid
& Hall, Seattle, WA, for Defendants.

ORDER GRANTING DEFENDANTS' MOTION TO DISMISS DEFENDANT BEDDOE AND DENYING PLAINTIFFS' MOTION TO REMAND

MARSHA J. PECHMAN, District Judge.

*1 This matter comes before the Court on Defendants' motion to dismiss individual Defendant Kent Beddoe (Dkt. No. 6) and Plaintiffs' related motion to remand this case to state court (Dkt. No. 8). Having reviewed the motions, the opposition briefs (Dkt. Nos. 13, 15), the reply briefs (Dkt. Nos. 14, 17), and the remaining record, the Court GRANTS Defendants' motion to dismiss Defendant Beddoe and DENIES Plaintiffs' motion to

remand.

Background

This insurance dispute arose on January 22, 2012, when an accidental fire severely damaged the home of Plaintiffs Randy and Monica Garoutte. (Dkt. No. 1-3 at 2-3.) Plaintiffs held a Homeowner's Insurance policy with Defendant American Family Insurance Company ("AFIC"). (*Id.* at 3.) On July 16, 2012, an appraisal panel determined that \$148,605 was necessary for the cost of repairing the structure of the home. (Dkt. No. 8 at 2.)

On September 6, 2012, Plaintiffs filed this action against AFIC and its insurance adjuster, Defendant Kent Beddoe, for breach of the duty of good faith, violation of Washington's Consumer Protection Act, and violations of several insurance claims regulatory provisions of the Washington Administrative Code. (Dkt. No. 1-3 at 4.) After the commencement of this action, AFIC paid the amount due pursuant to the appraisal decision, but declined to compensate Plaintiffs for their personal property damage. (Dkt. No. 13 at 2.) AFIC also declined to pay a vendor, First Choice Response, who had cleaned much of Plaintiffs' personal property after the fire. (*Id.*)

Defendants removed this matter to this Court on Oct. 11, 2012, asserting diversity jurisdiction. (Dkt. No. 1 at 3.) Plaintiffs ask the Court to remand this case to state court, arguing that while Defendant AFIC is a resident of Wisconsin, Defendant Beddoe is a resident of Washington, so diversity jurisdiction is destroyed. (Dkt. No. 8 at 2-3.) Defendants have also filed a motion to dismiss Defendant Beddoe, asserting that, because all actions taken by Defendant Beddoe were in his capacity as an AFIC employee acting within the scope of his employment, there is no cause of action against him. (Dkt. No. 6 at 5.)

Discussion

A. Legal Standards

Any defendant may move to dismiss under Federal Rule 12(b)(6) for "failure to state a claim upon which relief can be granted." Fed.R.Civ.P. 12(b)(6). To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to "state a claim to relief that is plausible on its face." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570, 127 S.Ct. 1955, 167 L.Ed.2d 929(2007); accord *Ashcroft v. Iqbal*, 556 U.S. 662, 129 S.Ct. 1937, 173 L.Ed.2d 868 (2009). In considering a motion to dismiss, a court must accept the plaintiff's factual allegations as true, drawing all reasonable inferences in plaintiff's favor. See *Anderson v. Clow*, 89 F.3d 1399, 1403 (9th Cir.1996).

A defendant may remove any civil action from state court to federal court if the federal court would have had original subject matter jurisdiction. 28 U.S.C. § 1441(a). Federal district courts exercise original diversity jurisdiction over matters where the amount in controversy exceeds \$75,000 and where the parties are citizens of different states. 28 U.S.C. § 1332(a). Although removal based on diversity jurisdiction requires complete diversity of citizenship, "one exception to the requirement for complete diversity is where a non-diverse defendant has been 'fraudulently joined,'" *Morris v. Princess Cruises, Inc.*, 236 F.3d 1061, 1067 (9th Cir.2001). Joinder is fraudulent "[i]f the plaintiff fails to state a cause of action against a resident defendant and the failure is obvious according to the settled rules of the state." *Hunter v. Philip Morris USA*, 582 F.3d 1039, 1043 (9th Cir.2009).

*2 Here, Plaintiffs bring three causes of action against Defendants. The first cause of action is for violations of several insurance claims regulatory provisions of the Washington Administrative Code. (Dkt. No. 1-3 at 4.) The second is for violation of Washington's Consumer Protection Act. (*Id.*) The third is for violation of Washington's Insurance Fair Conduct Act. (*Id.*) Plaintiffs fail to state a claim against Defendant Beddoe under each cause of action. His joinder is therefore fraudulent and Plaintiffs' motion is DENIED.

B. Insurance Laws

No cause of action exists against Defendant Kent Beddoe under Washington's Insurance Fair Conduct Act or other state insurance regulations because Beddoe acted within the scope of his employment. See *Mercado v. Allstate Ins. Co.*, 340 F.3d 824, 826 (9th Cir.2003). In *Mercado*, the Ninth Circuit held that an employee of an insurance company had been fraudulently joined because she was being sued on the basis of actions within the scope of her

employment. *Id.* The Ninth Circuit explained, "[i]t is well established that, unless an agent or employee acts as a dual agent ... she cannot be held individually liable as a defendant unless she acts for her own personal advantage." *Id.* Here, Plaintiffs explicitly allege that Defendant Beddoe acted within the scope of his employment. (Dkt. No. 1-3 at 2 ("All acts and omissions of Beddoe, as alleged herein, were performed in the course and scope of his employment with AFIC in the State of Washington.")). Therefore, there is no separate cause of action against Defendant Beddoe.

Plaintiffs assert that Washington law imposes a duty of good faith that is independent of the duty imposed on their employer. (Dkt. No. 8 at 5.) To support this position, Plaintiffs first cite to a provision of Washington's insurance code that states: "Upon the insurer, the insured, their providers, and their representatives rests the duty of preserving inviolate the integrity of insurance." (*Id.*, citing RCW 48.01.030 (emphasis added by Plaintiffs).) However, the text of this sentence makes clear that it does not create a cause of action against representatives of insurance companies; otherwise, it would also create a cause of action for bad faith against "the insured." *Id.* Plaintiffs next cite Judge Lasnik's decision in *Lease Crutcher v. Nation Union Fire Ins. Co.*, which considered the duties of third-party companies in insurance contracts. C08-1862RSL, 2009 WL 3444762 *2 (W.D.Wash. Oct.20, 2009). But that decision explicitly confined its reasoning to the duties of third-party corporate entities, not to individuals directly employed by insurers. *Id.* at *3n.1. It therefore does not support Plaintiffs' position.

Plaintiffs next cite to the case of *Eastwood v. Horse Harbor Found., Inc.*, where the Washington Supreme Court held that an employee of a lessee could be held individually liable for the tort of waste even though he was acting within the scope of his employment. 170 Wash.2d 380, 400, 241 P.3d 1256 (2010). In *Eastwood*, the Court explained that "the duty to not cause waste is a tort duty that arises independently of a lease agreement[.]" *Id.* at 399, 241 P.3d 1256. But here, unlike in *Eastwood*, Plaintiffs do not show that Defendant Beddoe had any duty that arose independently of his employer's duties. *Id.*

*3 Washington's Insurance Fair Conduct Act creates a cause of action for insurance customers who are "unreasonably denied a claim for coverage or payment of benefits by an insurer[.]" RCW 48.30.015. The IFCA defines "insurer" as a "person engaged in the business of making contracts of insurance [.]" RCW 48.01.050. Here, Plaintiffs have not alleged any facts to suggest Defendant Beddoe meets the statutory definition of an insurer so that

he can be sued individually under IFCA, so Plaintiffs' claim against Defendant Beddoe for violations of IFCA fails.

C. Consumer Protection Act

Plaintiffs also cannot maintain an action against Defendant Beddoe for violations of Washington's Consumer Protection Act. RCW 19.86. It is settled law that "the CPA does not contemplate suits against employees of insurers." *Int'l Ultimate v. St. Paul Fire & Marine*, 122 Wash.App. 736, 758, 87 P.3d 774 (2004). Plaintiffs cite no cases to the contrary. (See Dkt. No. 8 at 6, citing *Washington State Physicians Ins. Exchange & Ass'n v. Fisons Corp.*, 122 Wash.2d 299, 312, 858 P.2d 1054 (1993) and *Panag v. Farmers Ins. Co. of Washington*, 166 Wash.2d 27, 41-44, 204 P.3d 885 (2009).) As a result, Plaintiffs have failed to state a claim against Defendant Beddoe for violating the CPA.

Conclusion

No cause of action exists against Defendant Kent Beddoe under Washington's Insurance Fair Conduct Act or any other insurance regulations because Beddoe acted within the scope of his employment. Plaintiffs also cannot maintain an action against Defendant Beddoe for violations of Washington's Consumer Protection Act because the CPA does not contemplate suits against employees of insurers. Because Plaintiffs fail to state a claim against Defendant Beddoe, the Court GRANTS Defendants' motion to dismiss Defendant Beddoe and DENIES Plaintiffs' motion to remand this case.

The clerk is ordered to provide copies of this order to all counsel.

Dated this 19th day of January, 2013.

All Citations

Not Reported In F.Supp.2d, 2013 WL 231104

Footnotes

¹ Plaintiffs use this date in their original complaint, while their motion to remand uses a different date, June 28, 2011. (Dkt. No. 8 at 2.) The difference is immaterial for the present motions.

2018 WL 2441774

Only the Westlaw citation is currently available.
United States District Court, W.D. Washington,
at Seattle.

Elizabeth TIDWELL, Plaintiff,
v.
GOVERNMENT EMPLOYEES INSURANCE
COMPANY, Defendant.

Case No. C18-318RSL

Signed 05/31/2018

Attorneys and Law Firms

Jonathan Samuel Barash, Timothy Rolland Tesh, Ressler
& Tesh, Seattle, WA, for Plaintiff.

Michelle Elizabeth Kierce, Natasha A. Khachatourians,
Shawna M. Lydon, Betts Patterson & Mines, Seattle, WA,
for Defendant.

**ORDER GRANTING MOTION FOR LEAVE TO
AMEND AND FOR REMAND TO STATE COURT**

Robert S. Lasnik, United States District Judge

*1 This matter comes before the Court on "Plaintiff's Motion for Leave to File an Amended Complaint and for Remand to State Court." Dkt. # 14. Defendant failed to respond to plaintiff's motion, which the Court may treat as an admission of the motion's merit. *See* LCR 7(b)(2).

In this uninsured motorist claim, plaintiff seeks to amend her complaint and add William Andrews, the claims adjuster in her case, as a defendant. Her request follows the recent decision by the Washington Court of Appeals in *Keodalah v. Allstate Ins. Co.*, 413 P.3d 1059, 1065 (Wash. Ct. App. 2018), holding that individual insurance adjusters can be liable for violating Washington's Consumer Protection Act, RCW 48.01.030.

Rule 15 of the Federal Rules of Civil Procedure provides that courts "should freely give leave [to amend pleadings]

when justice so requires." Fed. R. Civ. P. 15(a)(2). Based on "the strong policy permitting amendment," *Bowles v. Reade*, 198 F.3d 752, 757 (9th Cir. 1999), courts deny leave to amend "only if there is strong evidence of undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, or futility of amendment," *Sonoma Civ. Ass'n of Retired Emps. v. Sonoma County*, 708 F.3d 1109, 1117 (9th Cir. 2013) (marks and citation omitted). As for joinder, Rule 20 permits joinder of parties defending claims that arise out of the same transaction or occurrence and present common questions of law or fact. Fed. R. Civ. P. 20(a).

Mr. Andrews is a citizen of Washington State, and his joinder as a defendant would destroy complete diversity of citizenship and extinguish the Court's subject matter jurisdiction over this action. *See Owen Equip. & Erection Co. v. Kroger*, 437 U.S. 365, 373 (1978). It is within the Court's discretion whether to join Mr. Andrews as a defendant and remand the matter to state court. *See* 28 U.S.C. § 1447(e) ("If after removal the plaintiff seeks to join additional defendants whose joinder would destroy subject matter jurisdiction, the court may deny joinder, or permit joinder and remand the action to the State court.").

Plaintiff's claims against Mr. Andrews arise out of the same transaction or occurrence and present common questions of law and fact. *See* Fed. R. Civ. P. 20(a). Plaintiff's request comes relatively early in this case and was filed before the deadlines for joining parties and amending pleadings. *See* Dkt. # 11. Defendant does not oppose the motion and there is no other indication that joinder and remand would prejudice defendant. *See Ballard Condominiums Owners Ass'n v. Gen. Sec. Indem. Co. of Arizona*, No. C09-484RSL, 2011 WL 13193265, at *1 (W.D. Wash. Feb. 9, 2011). There has been no undue delay and nothing suggests the request is a tactic to defeat jurisdiction. *See id.* The Court finds that leave to amend and join Mr. Andrews as a defendant is appropriate, that the Court lacks subject matter jurisdiction following Mr. Andrews's joinder, and that this action should be remanded to state court.

*2 For the foregoing reasons, plaintiff's motion, Dkt. # 14, is GRANTED. The Court adopts as the operative pleading in this action plaintiff's proposed amended complaint. Dkt. # 15-3. The Clerk of Court is ORDERED to REMAND this matter to the Superior Court of the State of Washington for King County.

2018 WL 4303660

Only the Westlaw citation is currently available.
United States District Court, W.D. Washington,
at Seattle.

Peter MORT, Plaintiff,
v.
ALLSTATE INDEMNITY COMPANY, et al.,
Defendants.

Case No. C18-568RSL

Signed 09/10/2018

Attorneys and Law Firms

Neal Ernest Bonrud, Jr., Law Offices of Neal Bonrud
PLLC, Issaquah, WA, for Plaintiff.

Rory W. Leid, III, Cole Wathen Leid Hall PC, Brenton
Elswick, Maglio Christopher & Toale, P.A., Seattle, WA,
for Defendants.

**ORDER DENYING MOTION TO DISMISS
DEFENDANT RICHARDSON AND GRANTING
MOTION TO REMAND**

Robert S. Lasnik, United States District Judge

*1 This matter comes before the Court on plaintiff's "Motion to Remand," Dkt. # 5, and defendant Allstate Indemnity Company's "Motion to Dismiss Defendant Steven Richardson," Dkt. # 6. The Court has reviewed the motions, the parties' memoranda, the associated filings, and the remainder of the record. For the following reasons, Allstate's motion is DENIED, and plaintiff's motion to remand is GRANTED.

I. BACKGROUND

In this insurance dispute, plaintiff Peter Mort is suing Allstate and its insurance adjuster, defendant Steven Richardson, over the value of a claim for fire damage to Mort's Hoquiam, WA property. See Dkt. # 1-1. Mort filed the case's original complaint on March 15, 2018, in King

County Superior Court. Dkt. # 1-1. In it, he sued Allstate (but not Richardson) for breach of contract, bad faith, and violating Washington's Consumer Protection Act ("CPA"), RCW 19.86.020. Dkt. # 1-1. On March 26, 2018, the Washington Court of Appeals in Keodalaha v. Allstate Ins. Co., 3 Wn. App. 2d 31 (2018), held that insurance adjusters can be individually liable for bad faith and CPA claims, *id.* at 40-43. On April 6, 2018, Mort filed an amended complaint that added Richardson as an individual defendant. Dkt. # 1-2. On April 18, 2018, Allstate removed the case to this Court, invoking diversity jurisdiction as the basis for removal. Dkt. # 1; see 28 U.S.C. § 1332.

Mort then filed a motion for remand, asserting that the case lacks complete diversity, because he and Richardson are both residents of Washington State. Dkt. # 5. (Allstate is incorporated and has its principal place of business in Illinois. Dkt. # 1 ¶ 11.) Allstate filed a motion to dismiss Richardson as a defendant, arguing that he is a dispensable party under Rules 19 and 21 of the Federal Rules of Civil Procedure. Dkt. # 6.

II. DISCUSSION

The dispositive question for both motions is whether Steven Richardson is a proper defendant. If he is, then the parties lack complete diversity and the case should be remanded to state court. If Richardson is dismissed, then the Court's diversity jurisdiction is properly invoked and the case may remain in federal court.

Federal jurisdiction rests on the foundational principal that "[f]ederal courts are courts of limited jurisdiction." Kokkonen v. Guardian Life Ins. Co. of Am., 511 U.S. 375, 377 (1994). A defendant may remove any case brought in state court over which the federal district courts have original jurisdiction, 28 U.S.C. § 1441(a), but there is a presumption against removal and "federal jurisdiction must be rejected if there is any doubt as to the right of removal in the first instance." Gaus v. Miles, Inc., 980 F.2d 564, 566 (9th Cir. 1992). In addition, the defendant has the burden of establishing that removal is proper. *Id.* One proper basis for removing a case from state court is the federal courts' original diversity jurisdiction. See 28 U.S.C. § 1332(a)(1) (extending jurisdiction in cases with diverse parties and an amount in controversy exceeding \$75,000). Diversity jurisdiction requires complete diversity—that is, no plaintiff may be a

citizen of the same state as any defendant. Newman-Green, Inc. v. Alfonso-Larrain, 490 U.S. 826, 829 (1989); Strawbridge v. Curtiss, 7 U.S. (3 Cranch) 267, 267 (1806).

*2 Somewhat related is the courts' authority, codified in the Federal Rules of Civil Procedure, to determine a case's proper parties. In particular, Rule 19 describes parties that must be joined in an action. Fed. R. Civ. P. 19(a). Rule 21, on the other hand, empowers the Court to dismiss parties improperly joined in a case. Fed. R. Civ. P. 21. Some courts have used Rule 21 to dismiss nondiverse parties and preserve jurisdiction over cases originally filed in federal court. See 7 Charles Alan Wright & Arthur R. Miller et al., Fed. Prac. & Proc. Civ. § 1685 (3d ed. 2002 & Sep. 2018 update). It is rare, however, for courts to use Rule 21 to dismiss properly joined parties "solely to permit a defendant to acquire federal jurisdiction and remove the proceeding from the state forum in which it was originally brought." Oliva v. Chrysler Corp., 978 F. Supp. 685, 688 (S.D. Tex. 1997); see Ferry v. Bekum Am. Corp., 185 F. Supp. 2d 1285, 1290 (M.D. Fla. 2002); Garbie v. Chrysler Corp., 8 F. Supp. 2d 814, 817-18 (N.D. Ill. 1998).

The Court concludes that Richardson should not be dismissed, because Mort properly added him as a defendant in state court based on a viable state-law claim—that is, the individual-capacity claim that the Washington Court of Appeals articulated in Keodalaha, 3 Wn. App. 2d at 40-43. Significantly, the Keodalaha decision fell within the three-week period between when Mort filed his first complaint and when he amended it to add Richardson as an individual. Indeed, in the months since Keodalaha, the Court has allowed plaintiffs to add claims against individual insurance adjusters—including when doing so destroys complete diversity for jurisdictional purposes. See Tidwell v. Gov't Employees Ins. Co., No. C18-318RSL, 2018 WL 2441774, at *2 (W.D. Wash. May 31, 2018). Mort brought a viable claim against an appropriate defendant. The Court sees no reason for using Rule 21 to undermine that choice so Allstate can litigate this case in a forum plaintiff rejects and without one of his chosen defendants. See Garbie, 8 F. Supp. 2d at 818 ("[A]s masters of their complaint, plaintiffs have the right to choose who will be the named parties in the suit.").

Allstate cites a number of cases that dismissed parties in order to retain federal jurisdiction, but none of them involved a nondiverse defendant properly joined in state court. Many involved nondiverse defendants added after the case was properly removed. See Nash v. Hall, 436 F. Supp. 633, 634 (W.D. Okla. 1977); Calderon v. Lowe's

Home Ctrs. LLC, No. C15-1140ODW, 2015 WL 3889289, at *1 (C.D. Cal. June 24, 2015); Gieringer v. The Cincinnati Ins. Companies, No. C08-267TAV, 2008 WL 4186931, at *1 (E.D. Tenn. Sept. 5, 2008). In the only case cited where a nondiverse defendant existed before removal, the court made a finding of fraudulent joinder, Linnin v. Michielsens, 372 F. Supp. 2d 811, 817 (E.D. Va. 2005), which Allstate has not asserted or shown here.

Allstate also complains that when Mort added Richardson, the amended complaint did not meaningfully add new facts. Unless Allstate can successfully show that the amended complaint falls short of the relevant pleading standards or that it fails to state a claim against Richardson upon which relief can be granted, the amended complaint's marginal quantity of alleged facts is not a reason to dismiss Richardson from the case.

Allstate's argument that Mort added Richardson solely to defeat potential removal is also unavailing. Allstate has not shown that would be grounds for dismissing him. Even if it were, there is another perfectly plausible reason for Mort to have amended the complaint to add Richardson: the Keodalaha decision newly articulated an individual-capacity claim against insurance adjusters just after Mort filed his first complaint.

*3 The Court also rejects Allstate's argument that Richardson should be dismissed because Mort can fully recover from Allstate under principles of *respondeat superior*. That Mort could recover fully from Allstate—based on *respondeat superior* or joint and several liability—is not a valid reason to dismiss Richardson.

Given the Court's conclusion that Richardson should not be dismissed as a defendant, nothing has changed the parties' lack of complete diversity of citizenship. The Court accordingly concludes that it lacks jurisdiction to resolve the case and that remand is proper.¹ See Gaus, 980 F.2d at 566.

III. CONCLUSION

For the foregoing reasons, Allstate's motion, Dkt. # 6, is DENIED, and plaintiff's motion for remand, Dkt. # 4, is GRANTED. The Clerk of Court is ORDERED to REMAND this matter to the Superior Court of the State of Washington for King County.

Slip Copy, 2018 WL 4303660

All Citations

Footnotes

- ¹ In his remand motion, Mort seeks fees incurred responding to Allstate's removal. See 28 U.S.C. § 1447(c). Allstate's removal was within reason and fees are not appropriate. See Martin v. Franklin Capital Corp., 546 U.S. 132, 141 (2005).

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