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SUPREME COURT
OF THE STATE OF WASHINGTON

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

MOUN KEODALAH and AUNG KEODALAH, husband and wife,

Respondents,

v.

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

Appellants.

**BRIEF OF AMICUS CURIAE THE AMERICAN
INSURANCE ASSOCIATION, NATIONAL ASSOCIATION
OF MUTUAL INSURANCE COMPANIES AND PROPERTY
CASUALTY INSURERS ASSOCIATION OF AMERICA**

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I. IDENTITY AND INTERESTS OF AMICUS

The American Property Casualty Insurance Association (“APCI”) is the preeminent national trade association representing property and casualty insurers writing business in Washington, nationwide, and globally. APCI was recently formed through a merger of two longstanding trade associations — Property Casualty Insurers Association of America (“PCI”) and American Insurance Association (“AIA”). APCI’s members, which range in size from small companies to the largest insurers with global operations, represent nearly 60% of the United States property and casualty marketplace. On issues of importance to that marketplace, APCI advocates sound public policies on behalf of its members in legislative and regulatory forums at the state and federal levels and files amicus-curiae briefs in significant cases before federal and state courts. This allows APCI to share its broad national perspectives with the judiciary on matters that shape and develop the law. APCI’s interests are in the clear, consistent, and reasoned development of law that affects its members and the policyholders they insure.

NAMIC is the oldest property/casualty insurance trade association in the country, with more than 1,400-member companies representing 41 percent of the total market. NAMIC supports regional and local mutual

insurance companies on main streets across America and many of the country's largest national insurers.

NAMIC member companies serve more than 170 million policyholders and write more than \$253 billion in annual premiums. Our members account for 54 percent of homeowners, 43 percent of automobile, and 35 percent of the business insurance markets.

Through our advocacy programs we promote public policy solutions that benefit NAMIC member companies and the policyholders they serve and foster greater understanding and recognition of the unique alignment of interests between management and policyholders of mutual companies.

II. ISSUE

This brief of Amicus Curiae addresses the question of whether salaried employee adjusters of insurance companies should be subject to liability for bad faith or under the Consumer Protection Act for handling the claims submitted to their employers.

III. SUMMARY OF ARGUMENT

Amici do not condone the handling of any claim in the manner described in the Court of Appeals' opinion. However, despite the conduct alleged, the Court of Appeals misapplied Washington law and ignored significant public policy concerns in issuing an opinion that has potentially

broad negative consequences for the employees and representatives of insurers as well as for the industry as a whole. By imposing personal bad faith or CPA liability for the bad judgment of an adjuster acting within the scope of employment, the opinion would create a punitive remedy not grounded in state law and inconsistent with important public policy considerations. This severe outcome, which would impact all stakeholders to insurance transactions, is not offset by any significant benefit to plaintiff insureds. The Court of Appeals decision also has troubling implications for Washington's insurance code. The Court of Appeals imposed bad faith liability based solely on the broad language of RCW 48.01.030, which does not expressly create a private cause of action, but imposes broad general duties on "all persons." The Court of Appeals did not examine whether the legislature actually intended to create such a broad private cause of action and failed to conduct a *Bennett* analysis, which is a prerequisite to determining whether a cause of action should be implied from a statute. The exposure of individual adjusters to insurance enterprise risk arising within the course of their employment would significantly distance Washington from other states on this important issue and this Court should reject such an outcome.

IV. ARGUMENT

A. **Personal Liability for Adjusters Is Not Necessary to Advance the Legitimate Interests of Insureds in Litigation**

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

Insurers are accountable for their claim decisions and, in those instances where an insurer's conduct (which is necessarily the conduct performed for the insurer by its adjusters/employees/agents) is determined to constitute bad faith, the insurer is subject to bad faith damages. The measure of those damages is not broadened by the inclusion of a private right of action against the individual adjuster who engaged in the conduct forming the basis of the insurer's liability. If the insurer lacks the financial resources to pay a judgment, it is highly unlikely the individual adjuster would be able to step in and pay the judgment. According to government data, the 2017 median annual wage for insurance adjuster was \$64,900.¹ This negates any economic justification for suing an individual adjuster. Absent such justification, public policy counsels against allowing a private right of action against individual adjusters.

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

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

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

The idea that bad faith conduct should be "deterred" through the imposition of individual adjuster liability ignores the nature of the bad faith tort standards in Washington. As Justice Madsen recently noted, in the liability insurance context, this Court has found bad faith as a matter of law because an insurer merely failed to "anticipate whether and how the

law might change,” resulting in liability for a \$2 million judgment. *Xia v. ProBuilders Specialty Ins. Co.*, 188 Wn.2d 171, 196, 400 P.3d 1234 (2017) (Madsen, J. Dissenting). This sets a very high standard for insurer conduct and a fairly low bar for claimants to state a claim for bad faith. Most other states define bad faith as an intentional tort and require not just that the insurer’s conduct be unreasonable, but also require a showing of intentional, knowing, or reckless disregard for the lack of a reasonable basis for the insurer’s position.²

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

The effects of holding adjusters personally liable for the business enterprise risk of insurers will reverberate across a broad spectrum of individuals and entities with a stake in the proper handling of insurance claims and allocation of the attendant risks. Since the prospect of personal bankruptcy for individual adjusters is not far-fetched, they will understandably be hesitant to even handle Washington matters, and overly cautious in doing so even when willing. This will drastically slow the claims handling process on even routine claims, since otherwise trivial

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

disputes could result in a proliferation of bad faith suits that will unduly burden the courts, and the potentially significant increase in insured losses likely to result from this type of “defensive” claims handling would adversely impact not only insurers, but also their policyholders and other claimants.

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

C. The Court of Appeals’ Reasoning Extends Sweepingly to “All Persons”

Because the Court of Appeals holds that RCW 48.01.030 identifies the persons owing a good faith tort duty, it necessarily holds that “all persons” including “insureds” and their “representatives” and “providers” have such a tort duty. The Court of Appeals acknowledged this, stating “the legislature has expressly imposed an obligation of good faith on those who represent insurers and insureds,” and that “Washington courts have

expressly stated that the statute does impose a duty of good faith on both the insureds and the insurer.” *Keodalah v. Allstate Ins. Co.*, 413 P.3d 1059, 1062 (Wash. Ct. App. 2018). This is a remarkable proposition when one considers that bad faith in Washington consists of taking any “unreasonable” position on a claim. Under this reasoning, the insured who, without engaging in fraud or deceit, stubbornly insists that a very minor injury is worth the policy limits could now be sued for “bad faith” for unreasonably forcing his or her insurer to litigate the value of the claim in court instead of settling. And since the statute’s reach encompasses “representatives,” an insured’s public adjuster and attorneys would also be subject to liability. Liability for bad faith, where appropriate, should remain at the institutional level, i.e., restricted to insurers, who alone are in a position to absorb the consequences of mistakes, whether innocent or intentional, and to prevent or correct those mistakes, e.g., through supervision, claims handling procedures and other safeguards. The respondents argue that attorneys would be exempt, citing *Short v. Demopolis*, 103 Wn.2d 52, 61, 691 P.2d 163, 168 (1984). But *Short* stands for the proposition that the non-business aspects of the practice of law do not fall within “trade or commerce” within the meaning of the CPA. But RCW 48.01.030 has no such limiting language. RCW 48.01.030 would impose a good faith duty on any “representative”

of an “insurer” or “insured.” Respondents point to no reason why an attorney representing an insured would not be a “representative” of an “insured” within the meaning of the statute.

The statute extends even further to “providers” working on behalf of either insurers or insureds. Thus, a building contractor providing an estimate to an insured for insurance repairs would also owe a duty of good faith to the insurer. It is unlikely that the legislature’s sweeping language was the result of a considered public policy decision to create tort duties running in every direction to every person or firm involved in an insurance-related transaction. It is unclear whether the Court of Appeals even considered the implications of its decision. Respondents argue that “providers” would include such entities, but they supply no convincing argument to that effect. They cite footnote 6 of the Court of Appeals decision in *Merriman v. Am. Guarantee & Liab. Ins. Co.*, 198 Wn. App. 594, 396 P.3d 351 (2017), which discusses the legislature’s motivation for including “providers” in the statute’s language. But the footnote in *Merriman* does not suggest that the term “providers” has a meaning that is narrower than its plain, ordinary meaning or somehow would not capture any entity that provides services to an insured or insurer.

D. A Bennett Analysis is Necessary for RCW 48.01.030

Respondents suggest that the Court should dispose of the *Bennett v. Hardy*, 113 Wn.2d 912, 784 P.2d 1258 (1990), test because this Court has already held that RCW 48.01.030 creates a cause of action.

While it is true that this Court has occasionally referenced RCW 48.01.030 as a source (among others) of an insurer's tort duty of good faith, it has never done so when the outcome of the case turned in any way on whether the cause of action was based on the common law or the statute. These cases therefore do not stand for the proposition that the duty created in RCW 48.01.030 is the basis for a cause of action. For example, Respondents cite *Ellwein v. Hartford Acc. & Indem. Co.*, 142 Wn.2d 766, 775, 15 P.3d 640, 644 (2001), where the court simply stated that "RCW 48.01.030 imposes a duty to act in good faith upon insurers, and violation of that duty may give rise to a tort action for bad faith." *Id.* The statute is not further discussed in the case. Similarly, *Indus. Indem. Co. of the NW, Inc. v. Kallevig*, 114 Wn.2d 907, 916, 792 P.2d 520, 526 (1990), cites the statute as requiring "insurers to act in good faith in dealing with their insureds." *Id.* Both *Kallevig* and *Ellwein* cite the statute in the context of traditional bad faith cases brought by an insured against an insurer where the actual language of the statute does not

produce a different result than the traditional common law tort cause of action for bad faith.

This use of the statute as a part of the background discussion of the law in prior cases is not precedent when the outcome of those cases in no way turned on the statute. These passing observations are dicta and do not substitute for conducting a *Bennett* analysis in case where it actually matters whether the statute provides an independent basis for the bad faith cause of action.

The three prongs of the *Bennett* test are “first, whether the plaintiff is within the class for whose ‘especial’ benefit the statute was enacted; second, whether legislative intent, explicitly or implicitly, supports creating or denying a remedy; and third, whether implying a remedy is consistent with the underlying purpose of the legislation.” *Swank v. Valley Christian Sch.*, 188 Wn.2d 663, 675, 398 P.3d 1108 (2017) (citing *Bennett v. Hardy*, 113 Wn.2d 912, 784 P.2d 1258 (1990)).

The statute at issue fails the first prong because it is not for the benefit of a class of individual persons. Instead, the beneficiaries are “the business of insurance” and “the integrity of insurance.” With respect to the second and third factors, the legislative intent is easily discerned from the statute’s highly general language and its place within the code. It is the first substantive statement about insurance in the first chapter of

Title 48, preceded only by the sections stating the short title and scope of the code. It is simply an expression of the general public policy animating the remainder of Title 48. The specifics of how the legislature intends to advance those policies are found in the remainder of Title 48.

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

E. The Consumer Protection Act is Inapplicable to Employee Adjusters

The Consumer Protection Act (“CPA”) is directed at ensuring fairness in trade or commerce. It states that “Unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce are hereby declared unlawful.” RCW 19.86.020. The Act further defines “trade” and “commerce” to “include the sale of assets or services, and any commerce directly or indirectly affecting the people of the state of Washington.” RCW 19.86.010 Finally, pursuant to RCW 19.86.070, “The labor of a human being is not a commodity or article of commerce.”³

This Court has previously recognized that “[t]he term ‘trade’ as used by the Consumer Protection Act includes only the entrepreneurial or commercial aspects of professional services, not the substantive quality of

³ The exemption in RCW 19.86.070 is generally understood to exist for the benefit of labor unions to prevent organized labor from constituting an anti-competitive activity. *E.g., Rhodes v. Rains*, 195 Wn. App. 235, 244, 381 P.3d 58, 63 (2016) (noting purpose of statute and holding exemption inapplicable to employee not being sued for poor performance but for using deceit to obtain position with employer for financial gain). However, union activities are expressly exempted by separate sentence of the statute that stands apart from the general declaration of the opening sentence. The full statute reads: “The labor of a human being is not a commodity or article of commerce. Nothing contained in this chapter shall be construed to forbid the existence and operation of labor, agricultural, or horticultural organizations, instituted for the purposes of mutual help, and not having capital stock or conducted for profit, or to forbid or restrain individual members of such organizations from lawfully carrying out the legitimate objects thereof.”

services provided.” *Michael v. Mosquera-Lacy*, 165 Wn.2d 595, 602–03, 200 P.3d 695, 699 (2009). It should further recognize that salaried employee adjusters do not conduct “trade or commerce” when they handle insurance claims because they have no entrepreneurial stake in the insurance enterprise. Rather, only the insurer is engaging in trade or commerce through the employee.

Here, the insurer clearly has an entrepreneurial or commercial stake in how individual claims are resolved. The insurer is the one writing (or not writing) the claim payment checks and the only one that stands to obtain any direct unfair benefit from unfair or deceptive practices by its agents.

Adjusters, as salaried employees of insurance companies, have no entrepreneurial or commercial stake whatsoever in the handling of any given claim. Thus, while a lawyer or a surgeon may have both entrepreneurial aspects to what they do (billing, marketing) and non-entrepreneurial aspects (providing the professional services themselves), the employee claims professional is not an entrepreneur in any sense. They simply do their work and draw a salary. A salaried adjuster handling a claim for its employer is not himself engaging in commerce because they lack the necessary financial stake in the transaction; they simply cause their employer to engage in commerce as its agents. A salaried employee

of an insurance company is simply furnishing labor for its employer within the express exemption to “Trade or Commerce” found in RCW 19.86.070.

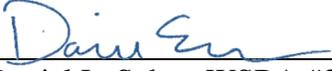
The above limitation only makes policy sense in light of the dangers the Consumer Protection Act was intended to address. The civil action is meant to deter unfair practices and unfair methods of competition. It should thus naturally focus on those in a position to benefit from the unfair acts or practices and on the unfair competitors themselves.

V. CONCLUSION

Because RCW 48.01.030 does not meet the criteria for creating an implied cause of action against “all persons” or “representatives” of all persons engaging in insurance, this Court should hold that a bad faith cause of action is not available against employee adjusters. And because salaried employees of insurers lacking any entrepreneurial stake in claims handling are not themselves engaging in “trade or commerce,” individual employee adjusters should not be subject to liability under the CPA.

RESPECTFULLY SUBMITTED this 28th day of January, 2019.

BETTS, PATTERSON & MINES, P.S.

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CERTIFICATE OF SERVICE

I, Valerie D. Marsh, declare as follows:

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

2) By the end of the business day on January 28, 2019, I caused to be served upon counsel of record at the addresses and in the manner described below, the following documents:

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- **Certificate of Service.**

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

DATED this 28th day of January, 2019.



Valerie D. Marsh

BETTS, PATTERSON & MINES, P.S.

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