

No. 95867-0

No. 75731-8-I

COURT OF APPEALS, DIVISION ONE,
OF THE STATE OF WASHINGTON

MOUN KEODALAH and AUNG KEODALAH, husband and wife,

Appellants,

v.

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

Respondents.

REPLY BRIEF OF APPELLANTS

Scott David Smith, WSBA # 48108
C. Steven Fury, WSBA # 8896
Fury Duarte, PS
1606 148th Avenue SE – Suite 102
Bellevue, Washington 98007
425.643.1606
scott@furyduarte.com
steve@furyduarte.com
Attorneys for Appellants

Vonda M. Sargent, WSBA # 24552
Law Office of Vonda M. Sargent
119 First Avenue South – Suite 500
Seattle, Washington 98104
206.838.4970
sisterlaw@me.com
Attorney for Appellants

TABLE OF CONTENTS

I. INTRODUCTION.....1

II. REPLY ARGUMENT2

A. Washington law permits bad-faith and CPA claims against individual, employee insurance adjusters like Tracey Smith, and the trial court’s CR 12(b)(6) order dismissing Smith should be reversed.....2

 1. Both RCW 48.01.030 and the CPA’s unambiguous language impose independent duties on employee adjusters, and insureds can assert claims against the adjusters for violating the independent duties2

 2. Smith is liable under both Title 48 and the CPA, regardless of the fact she was a “disclosed agent” working in the scope of her employment, because she owed her own independent duties.....5

 3. Relevant decision that properly apply Washington—or similar—law demonstrate that insureds may assert claims against individual, employee adjusters for violating RCW 48.01.030 or CPA duties.....6

B. Smith’s witness-immunity argument, raised for the first time on appeal, does not bar Keodalah’s claims against Smith10

 1. The trial court correctly held post-UIM-complaint conduct can form the basis for bad-faith and CPA actions, and Smith did not request discretionary review of that broader issue11

 2. The narrower issue Smith does address—witness immunity—does not bar Keodalah’s bad-faith/CPA claims against Smith for her post-filing conduct12

 a. Smith’s litigation conduct raises hypothetical facts regarding her claim-handling conduct during the litigation, which is not subject to immunity, and which give rise to liability13

b.	Witness-immunity does not bar introduction of Smith’s litigation conduct as evidence of Smith’s bad-faith and CPA-violative claim-handling conduct during the litigation	17
C.	Smith’s statute of limitations argument is irrelevant and does not provide a basis to affirm the CR 12(b)(6) order	23
III.	<u>CONCLUSION</u>	24

TABLE OF AUTHORITIES

Washington State Cases

<u>Annechino v. Worthy,</u> 175 Wn.2d 630, 290 P.3d 126 (2012).....	5
<u>Avnet, Inc. v. Dep’t of Rev.,</u> 187 Wn. App. 427, 348 P.3d 1273 (2015).....	3
<u>Deegan v. Windermere Real Estate/Center-Isle, Inc.,</u> 197 Wn. App. 875, __ P.3d __, (2017).....	13
<u>Ellwein v. Hartford Accident & Indem. Co.,</u> 142 Wn.2d 766, 15 P.3d 640 (2001).....	11
<u>Halverson v. Dahl,</u> 89 Wn.2d 673, 574 P.2d 1190 (1978).....	14 n.6
<u>Holland v. Tacoma,</u> 90 Wn. App. 533, 954 P.2d 290 (1998).....	12 n.4
<u>Int’l Ultimate v. St. Paul Fire & Marine,</u> 122 Wn. App. 736, 87 P.3d 774 (2004).....	6, 7, 8, 9
<u>Kirk v. Mount Airy Ins. Co.,</u> 134 Wn.2d 558, 951 P.2d 1124 (1998).....	16
<u>Ledcor Indus., Inc. v. Mut. of Enumclaw Ins. Co.,</u> 150 Wn. App. 1, 206 P.3d 1255 (2009).....	16
<u>Merriman v. Am. Guar. & Liab. Ins.,</u> 198 Wn. App. 594, __ P.3d __ (2017).....	<i>passim</i>
<u>Mut. of Enumclaw Ins. Co. v. Dan Paulson Constr., Inc.,</u> 161 Wn.2d 903, 169 P.3d 1 (2007).....	19 n.8
<u>Panag v. Farmers,</u> 166 Wn.2d 27, 204 P.3d 885 (2009).....	6, 8

<u>Tank v. State Farm Fire & Cas. Co.,</u> 105 Wn.2d 381, 715 P.3d 1133 (1986).....	2, 3, 16
<u>Wash. State Phys. Ins. Exch. & Ass'n v. Fisons Corp.,</u> 122 Wn.2d 299, 858 P.2d 1054 (1993).....	8
<u>Waste Mgmt. v. Utils. & Transp. Comm'n,</u> 123 Wn.2d 621, 869 P.2d 1034 (1994).....	3
<u>Wynn v. Earin,</u> 163 Wn.2d 361, 181 P.3d 806 (2008).....	11, 13, 14 n.5

Federal Cases

<u>Am. Gen. Life Ins. Co. v. James,</u> 2015 U.S. Dist. LEXIS 20768 (N.D. Cal. Feb. 19, 2016)	18
<u>Babai v. Allstate,</u> 2015 U.S. Dist. LEXIS 54152 (W.D. Wash. 2015).....	12
<u>Collins v. Quintana,</u> 2016 U.S. Dist. LEXIS 11000 (W.D. Wash. 2016).....	7, 9 n.1
<u>Fid. Nat'l Fin., Inc. v. Nat'l Union Fire Ins. Co.,</u> 2014 U.S. Dist. LEXIS 47041 (S.D. Cal. 2014).....	22 n.10
<u>Garoutte v. Am. Fam. Mut. Ins. Co.,</u> 2013 U.S. Dist. LEXIS 8559 (W.D. Wash. 2013).....	7, 8, 9, 9 n.1
<u>Hicks v. Progressive Cas. Ins. Co.,</u> 2017 U.S. App. LEXIS 5733 (9th Cir. Apr. 3, 2017).....	18
<u>Homer v. Nationwide Mut.,</u> 2016 U.S. Dist. LEXIS 114548 (W.D. Penn. 2016).....	19, 23
<u>Lains v. Am. Family,</u> 2015 U.S. Dist. LEXIS 97834 (W.D. Wash. 2015).....	12
<u>Lease Crutcher Lewis WA, LLC v. Nat'l Union Fire Ins. Co. of Pitt.,</u> 2009 U.S. Dist. LEXIS 97899 (W.D. Wash. 2009).....	4, 6, 7, 9

<u>Niver v. Travelers Indem. Co.,</u> 433 F. Supp. 2d 968 (N.D. Iowa 2006).....	10 n.2
<u>Rice v. State Farm Mut. Auto. Ins. Co.,</u> 2005 WL 2487975 (W.D. Wash. 2005).....	7, 8, 9
<u>Searcy v. Esurance,</u> 2017 U.S. Dist. LEXIS 38705 (D. Nev. Mar. 17, 2017).....	18
<u>Tavakoli v. Allstate,</u> 2013 U.S. Dist. LEXIS 6078 (W.D. Wash. 2013).....	11
<u>Zuniga v. Std. Guar. Ins. Co.,</u> 2017 U.S. Dist. LEXIS 79821 (W.D. Wash. 2017).....	8

Other State Cases

<u>Barefield v. DPIC,</u> 215 W. Va. 544, 600 S.E.2d 256 (W. Va. 2004)	20, 21
<u>Cal. Phys. Serv. v. Sup. Ct.,</u> 9 Cal. App. 4th 1321, 12 Cal. Rptr. 2d 95 (Cal. Ct. App. 1992) ...	21
<u>Knotts v. Zurich Ins. Co.,</u> 197 S.W.2d 512 (Ky. 2006).....	12, 14
<u>Nies v. Nat’l Auto. & Cas. Ins. Co.,</u> 199 Cal. App. 3d 1192, 245 Cal. Rptr. 518 (Cal. Ct. App. 1988)..	22
<u>O’Fallon v. Farmers Ins. Exch.,</u> 260 Mont. 233, 859 P.2d 1008 (Mont. 1993)	7, 9
<u>Taylor v. Nationwide Mutual Insurance Co.,</u> 214 W. Va. 324, 589 S.E.2d 55 (W. Va. 2003)	7, 9
<u>Tucson Airport Auth. v. Certain Underwriters at Lloyd’s,</u> 186 Ariz. 45, 918 P.2d 1063 (Ariz. Ct. App. 1996).....	<i>passim</i>
<u>White v. W. Title Ins. Co.,</u> 40 Cal.3d 870, 710 P.2d 309 (Cal. 1985).....	<i>passim</i>

Washington Statutes

RCW 4.16.08024

RCW 19.86.12024

RCW 48.01.0204

RCW 48.01.030 *passim*

RCW 48.94.0205

RCW 48.94.0305

Other State Statutes

Cal. Civ. Code § 47.....17

Cal. Ins. Code § 12340.11.....13

Washington State Rules

CR 12(b)(6)..... *passim*

CR 30(b)(6).....14

RAP 2.4.....12 n.4

RAP 2.5.....10 n.3

I. INTRODUCTION

This Court should reverse the King County Superior Court's August 1, 2016 CR 12(b)(6) order, which dismisses Moun Keodalah's bad-faith and CPA claims against Allstate's individual, employee adjuster, Tracey Smith. Both RCW 48.01.030's and the CPA's plain, unambiguous statutory terms impose on individual, employee adjusters separate, independent, actionable good-faith and CPA duties respectively. Indeed, Division III in Merriman v. Am. Guar. & Liab. Ins., 198 Wn. App. 594, 612, __ P.3d __ (2017), just recently held that these statutes impose actionable duties on independent corporate adjusters, and it engaged in a statutory-interpretation analysis and reasoning identical to that Keodalah sets forth, and which applies equally to employee adjusters. Moreover, because the adjusters owe these independent duties, they are liable for their breach, even in the scope of employment.

Likely given Merriman, Smith argues that (1) witness immunity and the (2) statute of limitations—issues raised for the first time on appeal—provide alternative bases to affirm. They do not. Witness immunity does not apply to Smith's tortious claim-handling conduct during the UIM litigation. Nor does it bar Keodalah from introducing her UIM-litigation conduct as evidence of her post-complaint, bad-faith or CPA-violative claim-handling conduct. Further, Keodalah's claims against Smith all fall within the statutes of limitations. Thus, the trial court's CR 12(b)(6) order should be reversed.

II. REPLY ARGUMENT

A. **Washington law permits insurance-bad-faith and CPA claims against individual employee adjusters like Smith, and the trial court's CR 12(b)(6) order dismissing Smith should be reversed.**

1. Both RCW 48.01.030 and the CPA's unambiguous language impose independent duties on employee adjusters, and insureds can assert claims against those adjusters for violating those independent duties.

Keodalah established in his opening brief that both RCW 48.01.030 and the CPA's plain, unambiguous language impose separate, independent, actionable duties on individual, employee adjusters. E.g., App. Brief at 11-17, 30-32. Indeed, Division III in Merriman, 198 Wn. App. 594, recently held, since this Court granted review, that such duties apply to corporate adjusters, and its reasoning—the same Keodalah has applied throughout the current litigation—applies equally to employee adjusters like Smith. In response, Smith spends little time addressing RCW 48.01.030's statutory language, does not address the CPA's language, and the brief arguments she makes as to RCW 48.01.030's terms are inconsistent with Washington law.

First, Smith argues that the insurance good-faith duty arises solely from the insurance contract and the quasi-fiduciary duty between an insured and insurer. Resp. Brief at 18. This is incorrect. Indeed, RCW 48.01.030's existence belies that argument. In Tank v. State Farm Fire & Cas. Co., 105 Wn.2d 381, 715 P.2d 1133 (1986), the case upon which Smith relies for her argument, the Washington Supreme Court first notes the good-faith duty's

contractual and fiduciary sources, and it notes the fact that a “long line” of judicial decisions has placed that good-faith duty on insurers. Id. at 385-86. But it then recognizes: “[n]ot only have the courts imposed on insurers a duty of good faith, the Legislature has imposed it as well.” Id. at 386. Thus, RCW 48.01.030 also provides a clear statutory source. No contract between Smith and Keodalah needed to exist to establish a good-faith duty.

Second, Smith argues that, because the Insurance Commissioner’s regulations that implement RCW 48.01.030 apply only to insurers, the term “representative” in RCW 48.01.030 must also refer only to insurers. Resp. Brief at 23-25. This argument fails. First, there exists no indication that the Commissioner was interpreting the statutory term representative in focusing its regulations on insurers. It instead appears that the Commissioner simply intended to focus on only insurers. Further, even if it had been interpreting the term, because RCW 48.01.030 is unambiguous, App. Brief at 11-17, 30-32, the Commissioner’s “interpretation” is entitled to no deference. Waste Mgmt. v. Utils. & Transp. Comm’n, 123 Wn.2d 621, 627-28, 869 P.2d 1034 (1994). Finally, even if the Commissioner had been interpreting the term, its interpretation impermissibly narrows RCW 48.01.030’s intended scope. An administrative agency cannot alter a statutory requirement by regulation. Avnet, Inc. v. Dep’t of Rev., 187 Wn. App. 427, 440, 348 P.3d 1273 (2015), aff’d, 184 Wn.2d 1026, 364 P.3d 120 (2016). Thus, the Commissioner’s

decision to target insurers does not—and could not—limit the Legislature’s plain statutory language, which unambiguously imposes a good-faith duty upon insurers and their representatives. RCW 48.01.030.

Division III also just rejected this same argument in Merriman: “As for the claims handling regulations, the [Commissioner] is powerless to narrow the plainly broad language of RCW 48.01.030. In choosing to focus regulation on insurers, the commissioner did not purport to narrow the statutory duty of good faith.” 198 Wn. App. at 612; see also Lease Crutcher Lewis WA, LLC v. Nat’l Union Fire Ins. Co. of Pitt., C08-1862, 2009 U.S. Dist. LEXIS 97899 (W.D. Wash. Oct. 20, 2009) (“[Courts] should not defer to an agency’s interpretation of a statute if [it] conflicts with the statutory mandate. . . . [RCW 48.01.030] is unambiguous: both the insurer and its representative must act in good faith toward the insured. . . .”).

Finally, Smith argues that in using the term representative instead of employee, the Legislature intended to exclude employees from the statute. The statutory scheme as a whole demonstrates otherwise. The Legislature explicitly applied Title 48 broadly. RCW 48.01.020 (“All insurance and insurance transactions in this state . . . and all persons having to do therewith are governed by [Title 48].” (emphasis added)), 48.01.030 (“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.” (emphasis added)). As Keodalah sets forth in his opening brief, the term “representative” is broader than “employee”, and the definition, as well as the Legislature’s use of the term in other Title 48 sections, shows that the Legislature intended to use a broader term that encompassed many entities, including employees, in its reach. App. Brief at 14-16. Indeed, if it did not want to include employees in the term, the Legislature has shown it can remove employees from the term when it so desires. See RCW 48.94.020(1)(k) (stating “representative” did not include “employee” in the subsection), 48.94.030(4)(k) (same).

2. Smith is liable under both Title 48 and the CPA, regardless of the fact she was a “disclosed agent” who was working within the scope of her employment, because she owed her own independent duties.

Relying on Annechino v. Worthy, 175 Wn.2d 630, 638, 290 P.3d 126 (2012)), Smith also argues that she cannot be held liable for her actions because an agent cannot be held personally liable unless he or she owes his or her own independent duty to a third party. See Resp. Brief at 15-18. But, as Keodalah establishes above, see discussion supra Part II.A.1., and in his opening brief, App. Brief at 11-17, 30-32, Smith did owe independent good-faith and CPA duties to Keodalah, and she is liable for their breach here. In recently holding that a corporate adjuster may be liable under Title 48 and the CPA, Division III in Merriman, quoting Annechino, stated: “[u]nder Washington law . . . [a]n employee or agent is personally liable to a third

party injured by his or her tortious conduct, even if that conduct occurs within the scope of employment or agency.” 198 Wn. App. at 617-18 n.8 (internal citations omitted) (quoting Annechino, 175 Wn.2d at 638). Smith’s status as an employee does not bar liability.

3. Relevant decisions that properly apply Washington—or similar—law demonstrate that insureds may assert claims against individual, employee adjusters for violating RCW 48.01.030 or CPA duties.

No Washington state court has had a chance to consider the precise issue of whether individual, employee adjusters owe an independent RCW 48.01.030 good-faith duty that, if breached, subjects the adjuster to personal liability for bad faith. Further, Int’l Ultimate v. St. Paul Fire & Marine, 122 Wn. App. 736, 87 P.3d 774 (2004), the only Court of Appeals decision to directly address whether such adjusters can be held liable under the CPA—and incorrectly held they could not—was overruled *sub silentio* in Panag v. Farmers, 166 Wn.2d 27, 204 P.3d 885 (2009). App. Brief at 33-34.

Moreover, both Division III in Merriman and the US District Court for the Western District of Washington in Lease Crutcher Lewis WA, LLC v. Nat’l Union Fire Ins. Co. of Pitt. have held that corporate adjusters can be liable under both RCW 48.01.030 and the CPA, relying on reasoning that applies equally to individual, employee adjusters, and which Keodalah has employed throughout this litigation to demonstrate that Smith is liable here. Merriman, 198 Wn. App. 594; Lease, 2009 U.S. Dist. LEXIS 97899; App.

Brief at 12-13 (Merriman), 21-22 (Lease). Further, two sister state courts have held that employee adjusters can be held personally liable for bad faith and consumer-protection statute violations, relying on similar reasoning and based on similar language. O’Fallon v. Farmers Ins. Exch., 260 Mont. 233, 859 P.2d 1008 (Mont. 1993); Taylor v. Nationwide Mutual Insurance Co., 214 W. Va. 324, 589 S.E.2d 55 (W. Va. 2003); App. Brief at 17-19.

Smith does not contest the Merriman, Lease, O’Fallon, or Taylor courts’ reasoning or their ultimate conclusions. Rather, she relies primarily on Ultimate, 122 Wn. App. 736, and several Western District of Washington cases that improperly apply Washington law. Rice v. State Farm Mut. Auto. Ins., C05-5595, 2005 WL 2487975 (W.D. Wash. Oct. 7, 2005), Garoutte v. Am. Fam. Mut. Ins. Co., C12-1787, 2013 U.S. Dist. LEXIS 8559 (W.D. Wash. Jan. 22, 2013); Collins v. Quintana, C15-1619, 2016 U.S. Dist. LEXIS 11000 (W.D. Wash. Jan. 28, 2016). Keodalah detailed the flaws in these cases in his opening brief, and only briefly addresses them in reply.

Ultimate did not address RCW 48.01.030’s good-faith duty. Rather, it held “the CPA does not contemplate suits against employees of insurers”. 122 Wn. App. at 758. However, it based that holding on an uncited, flawed legal conclusion: “[t]o be liable under the CPA, there must be a contractual relationship between the parties.” Id. This is incorrect. Both pre- and post-Ultimate Washington Supreme Court precedent in fact holds that the CPA

does not require a contractual relationship. Panag, 166 Wn.2d at 41-44, 45; Wash. State Phys. Ins. Exch. & Ass'n v. Fisons, 122 Wn.2d 299, 312-13, 858 P.2d 1054 (1993). Therefore, Ultimate's holding cannot stand—a fact that Division III recognized in Merriman. 198 Wn. App. at 626 n.11 (noting Ultimate “cannot survive the Supreme Court’s holding in Panag”).

Rice, 2005 WL 2487975, which held that no bad-faith or CPA cause of action exists against individual, employee adjusters, also fails. It provides no statutory-interpretation analysis as to either RCW 48.01.030 or the CPA, App. Brief at 22-24, and its holding as to RCW 48.01.030 relies heavily on the fact that the Insurance Commissioner specifically aimed its regulations at insurers, id., an analysis that is incorrect, see discussion supra Part II.A.1., and which Division III rejected in Merriman. 198 Wn. App. at 612. Finally, in holding that an employee adjuster cannot be liable under the CPA, Rice relied solely on Ultimate, which is not good law. In fact, in a recent post-Merriman decision—which remanded a case against an employee adjuster to state court because it could not conclude the adjuster was fraudulently joined—the Western District of Washington itself concluded the Ultimate decision could not stand. Zuniga v. Std. Guar. Ins. Co., C17-5176, 2017 U.S. Dist. LEXIS 79821, at *5-6 (W.D. Wash. May 24, 2017).

Garoutte, 2013 U.S. Dist. LEXIS 8559, is likewise flawed. First, it held an employee adjuster cannot be liable for bad faith or under the CPA

when he or she is working within the scope of employment. Id. at *5-6. This assertion is incorrect. See discussion supra Part II.A.2.¹ And, like Rice, in holding that employee adjusters cannot be liable under the CPA, id. at *8, Garoutte relies solely on Ultimate, and is thus incorrect.

Moreover, Smith only fleetingly addresses Division III's Merriman decision or the Western District's Lease decision, both of which held, using analysis that is equally applicable here, that an insured can hold a corporate adjuster liable under RCW 48.01.030 and the CPA. She contests neither the reasoning nor the conclusions, and she does not state why the reasoning does not apply to individual, employee adjusters. She argues only that the cases were decided on the fact that they "relate solely to companies that step wholly into the insurer's shoes and thereby take over the insurer's statutory and regulatory duties in handling claims." But neither court stated it relied on such a finding. Rather, each relied on statutory-interpretation principles and applied the Legislature's unambiguous intent to the issues.

Nor does Smith address in any depth the Montana or West Virginia supreme courts' O'Fallon v. Farmers Ins. Exch., 260 Mont. 233, or Taylor v. Nationwide Mutual Ins. Co., 214 W. Va. 324, decisions, which, applying similar statutes and reasoning identical to the reasoning Merriman, Lease,

¹ Smith cites to Collins, 2016 U.S. Dist. LEXIS 11000, for the same proposition. But that case relies on the same cases as Garoutte, and suffers the same legal defects.

and Keodalah apply, held that individual, employee adjusters can be held liable for bad faith and consumer-protection statute violations. Smith argues only that these cases do not apply since they do not consider the Insurance Commissioner’s “interpretation of Washington statute” or the “fact” that “our Legislature knows how to use the term ‘employees’”. Resp. Brief at 26. Not only do these arguments not invalidate these foreign cases, they do not distinguish Washington cases either. See discussion supra Part II.A.1.²

B. Smith’s witness-immunity argument, raised for the first time on appeal, does not bar Keodalah’s claims against Smith.

Given the Legislature’s unambiguous intent to impose on individual adjusters both a good-faith and CPA duty, Smith now spends extensive time arguing—for the first time in this action—that this Court should affirm the CR 12(b)(6) order on an alternative ground: the witness-immunity rule.³ Witness immunity—a general rule that provides that “witnesses in judicial proceedings are absolutely immune from suit founded on their testimony”,

² While a policy analysis is unnecessary, it is worth noting that Smith is incorrect in stating that a cause of action against an employee adjuster would not benefit insureds. As only one example, such an action provides a strong deterrent effect against both an insurer and its representative. For instance, insurers have encouraged employee adjusters to engage in bad-faith conduct through employee-incentive programs. See, e.g., Niver v. Travelers Indem. Co., 433 F. Supp. 2d 968, 980-82 (N.D. Iowa 2006). In such cases, both an insurer and its employee are motivated to engage in such conduct; no institutional incentive, *i.e.*, adverse employment consequences, exist to deter bad-faith conduct. Civil liability can, despite such programs, act to deter the adjuster from engaging in bad-faith conduct.

³ This Court generally does not consider errors raised for the first time on appeal. RAP 2.5(a). While the parties did brief the issue below of whether post-UIM-complaint conduct can form a basis for bad-faith claims, CP 60-61, 117-19, Smith never raised immunity as an issue. But even if she had done so, the CR 12(b)(6) order should still be reversed.

Wynn v. Earin, 163 Wn.2d 361, 369-70, 181 P.3d 806 (2008)—does not provide a ground to affirm.

1. The trial court correctly held that post-UIM-complaint conduct can form the basis for bad-faith and CPA actions, and Smith did not request discretionary review of that broader issue.

As the trial court held—a holding over which Smith did not request review but briefly addresses in her response—post-UIM-complaint conduct can form the basis for bad-faith and CPA actions. CP 149. Indeed, Ellwein v. Hartford, 142 Wn.2d 766, 15 P.3d 640 (2001), overruled in part by Smith v. Safeco, 150 Wn.2d 478, 78 P.3d 1274 (2003), which Smith quotes for the proposition that “UIM coverage requires that a UIM insurer be free to be adversarial within the confines of the normal rules of procedure and ethics”, id. at 780, states immediately after that quote:

Having found that an “enhanced” duty does not exist does not mean, however, that the duty of good faith simply disappears after a UIM claim is made. Many other courts have held, as we do today, that the duty of good faith and fair dealing survives within the UIM relationship. This is because, although the relationship becomes adversarial, the insured still has “the ‘reasonable expectation’ that he will be dealt with fairly and in good faith by his insurer”

Id. Directly addressing the issue, the Western District of Washington has held that post-UIM-complaint conduct is actionable if an insured’s claim stays open and the insurer continues to adjust the claim. Tavakoli v. Allstate, C11-1587, 2013 U.S. Dist. LEXIS 6078, at *11 (W.D. Wash. Jan. 15, 2013) (“[W]here the insured’s claim remains open, the insured’s decision to sue

its insurer does not cut off the insurer’s obligations to adjust the claim.”); Lains v. Am. Family, C14-1982, 2015 U.S. Dist. LEXIS 97834, at *6-7 (W.D. Wash. July 27, 2015); Babai v. Allstate, C12-1518, 2015 U.S. Dist. LEXIS 54152, at *12-13 (W.D. Wash. Apr. 24, 2015). This is the majority view. Knotts v. Zurich Ins. Co., 197 S.W.3d 512, 517 (Ky. 2006). Thus, an insurer and its representative carry good-faith and CPA duties post filing.⁴

2. The narrower issue Smith does address—witness immunity—does not bar Keodalah’s bad-faith/CPA claims against Smith for her post-filing conduct.

Whether witness-immunity bars bad-faith and CPA actions based on UIM-litigation conduct is an issue of first impression in Washington. The rule does not apply to bar Keodalah’s claims against Smith here.

First, the allegations Keodalah sets forth in his complaint concerning Smith’s UIM-litigation conduct also raise and support hypothetical facts concerning her claim-handling conduct during that same UIM litigation. The claim-handling facts are sufficient to support Keodalah’s claim, are not subject to witness immunity, and defeat a CR 12(b)(6) motion.

⁴ This Court will “grant a respondent affirmative relief by modifying the decision which is the subject matter of the review only (1) if the respondent also seeks review of the decision by the timely filing of a notice of appeal or a notice of discretionary review, or (2) if demanded by the necessities of the case.” RAP 2.4(a). Smith argued below that she cannot be liable for actions taken after a UIM complaint is filed. CP 60-61, 117-19. The trial court disagreed. CP 149. Smith did not file a notice of discretionary review as to that issue. Nor does she devote argument to the issue other than to hint at the issue. Resp. Brief at 27, 34-36; Holland v. Tacoma, 90 Wn. App. 533, 537-38, 954 P.2d 290 (1998) (“Passing treatment of an issue or lack of reasoned argument is insufficient to merit judicial consideration.”).

Moreover, as other courts hold, even where witness-immunity bars a claim based specifically on litigation conduct itself, that litigation conduct may still be admissible as evidence in later bad-faith actions to prove the underlying bad-faith claim-handling conduct during that litigation. E.g., White v. W. Title Ins. Co., 40 Cal.3d 870, 887-89, 221 Cal. Rptr. 509, 710 P.2d 309 (Cal. 1985), superseded by statute on other grounds, Cal. Ins. Code § 12340.11; Tucson Airport Auth. v. Certain Underwriters at Lloyd's, 186 Ariz. 45, 48-49, 918 P.2d 1063 (Ariz. Ct. App. 1996).

- a. *Smith's UIM-litigation conduct supports hypothetical facts as to her claim-handling conduct during the litigation, which is not subject to immunity, and which give rise to liability.*

Any hypothetical situations and facts a complaint conceivably raises will defeat a CR 12(b)(6) motion if legally sufficient to support a plaintiff's claim. Deegan v. Windermere Real Estate/Center-Isle, 197 Wn. App. 875, 884, ___ P.3d ___ (2017). Smith's witness-immunity argument relies heavily on the fact that Keodalah's complaint highlights Smith's litigation conduct, i.e., testifying and certifying discovery responses, to demonstrate Smith's bad-faith and CPA-violative conduct. Indeed, Smith devotes little to no time arguing that Smith's conduct in adjusting or handling the open claim during the UIM litigation is subject to witness immunity. Nor is it. See Wynn, 163

Wn.2d at 376;⁵ White, 40 Cal.3d at 887-89; Knotts, 197 S.W.3d at 523; Tucson Airport, 186 Ariz. at 48-49. Here, since the facts alleged regarding Smith’s UIM-litigation-conduct also support hypothetical facts regarding her claim-handling conduct during the litigation—which is not subject to immunity—and the hypothetical facts are sufficient to support Keodalah’s bad-faith/CPA claims, the CR 12(b)(6) order should be reversed.⁶

Keodalah has alleged in his complaint that Smith, in responding to discovery requests, stated that Keodalah failed to stop at a stop sign, despite the fact she had the Seattle Police Department (“SPD”) report, which found the motorcyclist that hit Keodalah was at fault, and Allstate’s own expert’s, Traffic Collision Analysis, report, which concluded Keodalah had stopped and the motorcyclist was at fault. CP 7-8. She later then testified, as a CR 30(b)(6) representative, that Keodalah ran the stop sign, but then admitted he had not. CP 8. She then later testified at trial that when Allstate initially stated Keodalah failed to stop, she knew that statement was not true. CP 9-

⁵ In Wynn, the Court recognized a difference between a claim for negligent diagnosis and treatment versus a claim of negligence based on testimony. 163 Wn.2d at 376. As the Court stated, “a health care provider cannot, by testifying in a court proceeding about treatment, thereby immunize himself or herself from a malpractice suit based on negligent diagnosis or treatment.” Id. Likewise, an adjuster adjusting an open claim during litigation cannot immunize herself from bad-faith and CPA claims by testifying as to the claim.

⁶ Smith’s argument that “the Court should analyze [Keodalah’s] claims only in light of the factual allegations set out in the complaint”, Resp. Brief at 16 n.65, is without merit. Keodalah can rely on hypothetical facts, including any raised for the first time on appeal. Halvorson v. Dahl, 89 Wn.2d 673, 674-75, 574 P.2d 1190 (1978). This is especially true here where Smith did not raise witness immunity until her response brief on appeal.

10. And despite the fact she testified there was no evidence Keodalah failed to yield other than a crash occurred, she held to that position. CP 10.

Smith also testified at the deposition that Keodalah had been on his cell phone, but then she admitted he was not. CP 8. She again testified at trial that Keodalah was on his cell phone, and refused to change her position regarding liability after learning he was not on his cell phone. CP 10.

She further testified at trial that Keodalah was 70 percent at fault, despite the fact she stated that Allstate relied on the eyewitness statements, SPD report, which did not find fault, and TCA report, which did not find fault, to reach that conclusion. CP 9-11. She further testified that Allstate refused to change its position regarding liability after it learned that, but for the cyclist's speed, the collision would not have occurred, and she conceded that the TCA report did not support her or Allstate's finding of fault. CP 10.

These litigation-conduct allegations that Keodalah has asserted also support hypothetical facts regarding Smith's claim-handling conduct during the litigation that establish bad-faith and CPA liability. Smith continued to adjust Keodalah's open UIM claim during the UIM litigation. During that time, Smith intentionally ignored material facts that supported Keodalah's claim. She ignored the SPD report, which found that Keodalah had stopped at the stop sign and was not at fault. She ignored the TCA report, which also found that Keodalah had stopped and was not at fault. She also ignored eye-

witness statements. By ignoring these reports and statements, Smith failed to conduct a proper investigation in adjusting Keodalah's claim and placed her own interests in settling his claim for the least amount possible above Keodalah's interests in a fair UIM recover.

Moreover, by ignoring these reports and statements, Smith failed to effect a proper settlement, i.e., the \$25,000 policy limits, when liability was more than reasonably clear. Indeed, despite the SPD and TCA reports and witness statements, Smith tried to settle Keodalah's claim for \$15,000—\$10,000 less than the \$25,000 policy limits—in a case where the jury later returned a \$108,868.20 verdict. CP 8, 11.

Smith's claim-handling conduct—ignoring material facts, failing to properly investigate, failing to settle when liability was reasonably clear, and attempting to settle for a sum significantly below the claim's proper value—were unreasonable, frivolous, and unfounded, and it demonstrates that Smith failed to treat Keodalah with honesty and lawfulness of purpose and placed her interests over Keodalah's. Therefore, her conduct amounted to bad faith, see Kirk v. Mount Airy Ins. Co., 134 Wn.2d 558, 560, 951 P.2d 1124 (1998); Tank, 105 Wn.2d at 385, and violated the CPA. Ledcor Indus., Inc. v. Mut. of Enumclaw Ins. Co., 150 Wn. App. 1, 12-13, 206 P.3d 1255 (2009) (stating that bad faith constitutes a per se CPA violation).

- b. *Witness-immunity does not bar the introduction of Smith’s litigation conduct as evidence of her bad-faith and CPA-violative claim-handling conduct during the litigation.*⁷

The California Supreme Court’s White v. W. Title Ins., 40 Cal.3d 870, decision is considered the leading case to have addressed the witness-immunity rule—also known as the litigation privilege—in the context of an insurance bad-faith claim. In that case, the Whites filed a breach-of-contract action against their title insurer, Western. Id. at 878-79. During the action, Western allegedly made low settlement offers, and the Whites amended the complaint to include a bad-faith claim against Western. Id. As part of the bifurcated trial that ultimately dealt with the bad-faith claim, the Whites introduced as evidence Western’s “conduct, including settlement offers, during the whole course of the litigation.” Id. at 879. The jury found that Western breached its good-faith duty. Id. Western appealed, arguing “that the court erred in admitting, as evidence of breach, settlement offers and other matters occurring after commencement of litigation.” Id. at 885.

The California Supreme Court affirmed admission of the litigation-conduct evidence, despite California’s codified privilege. Cal. Civ. Code § 47(b). Though Western argued the privilege barred the White’s from basing liability on a communication in a judicial proceeding, the court held:

⁷ Because the hypothetical facts concerning Smith’s post-UIM-complaint claim-handling conduct defeat a CR 12(b)(6) motion themselves, the Court need not in fact consider this issue of whether litigation conduct is admissible as evidence of Smith’s bad faith.

It is obvious, however, that even if liability cannot be founded upon a judicial communication, it can be proved by such a communication Defendant's argument, consequently, forces us to draw a careful distinction between a cause of action based squarely on a privileged communication, such as an action for defamation, and one based upon an underlying course of conduct evidenced by the communication. In the present case plaintiffs do not assert that defendant's communications were defamatory, or done with the intent of causing emotional distress, but instead that they show that defendant was not evaluating and seeking to resolve their claim fairly and in good faith. In our opinion, [the privilege] does not bar admission of the offers for that purpose.

Id. at 888; see also Hicks v. Progressive Cas. Ins. Co., 15-55953, 2017 U.S. App. LEXIS 5733, at *4 (9th Cir. Apr. 3, 2017) (citing White); Am. Gen. Life Ins. Co. v. James, C-14-04242, 2015 U.S. Dist. LEXIS 20768 (N.D. Cal. Feb. 19, 2016) (same); Searcy v. Esurance, 2:15-cv-00047, 2017 U.S. Dist. LEXIS 38705, at *16-19 (D. Nev. Mar. 17, 2017) (same).

The Arizona Court of Appeals followed White several years later in Tucson Airport Auth. v. Certain Underwriters at Lloyd's, 186 Ariz. 45, and held that a party may use litigation conduct as evidence of underlying bad faith. Id. at 48-49. Agreeing with the California Supreme Court, the Arizona Court further noted: "To be sure, the insurers in this case, unlike those in White, do not contend that the filing of the coverage actions erased their duties of good faith and fair dealing. The duties nonetheless would be rendered meaningless if, as we understand these insurers to argue, the

litigation privilege could be employed to excuse a breach of those duties, which occurs as part of the conduct of a coverage action.” Id. at 48.

In fact, while not specifically addressing witness-immunity, many courts around the country allow a party to introduce litigation conduct to evidence bad faith.⁸ The dispute that exists between the courts concerns less whether litigation conduct may be admitted as bad-faith evidence, and more the type of litigation conduct that is admissible. Four general approaches—based on differing local policy issues—have developed: (1) most litigation conduct can constitute bad faith; (2) no litigation conduct can constitute bad faith; (3) only litigation conduct that involves settlement offers can constitute bad faith; and (4) litigation conduct can constitute bad faith, but only in “rare cases involving extraordinary facts.” Homer v. Nationwide

⁸ In fact, while witness immunity was not raised in the case, the Washington Supreme Court has held that an insurer acted in bad faith through litigation conduct. Mut. of Enumclaw Ins. Co. v. Dan Paulson Constr., Inc., 161 Wn.2d 903, 914-919, 169 P.3d 1 (2007). There, a homeowner started arbitration proceedings against Dan Paulson (“DPCI”), an Enumclaw (“MOE”) insured, for construction defects. Id. at 908-09. MOE defended DPCI under a reservation of rights. Id. at 909. MOE then filed a parallel declaratory action to resolve coverage issues, and right before the arbitration, it sent to the arbitrator an ex parte letter and subpoena requiring the arbitrator to appear at a deposition after the arbitration, provide documents, and detail his thoughts as to the arbitration. Id. at 910-11. MOE then dismissed its declaratory action, but refiled after the arbitration. Id. at 912. In the second declaratory action, the homeowners, to whom DPCI had assigned potential bad-faith claims as part of the arbitration settlement, counterclaimed for bad faith. Id. at 912-13. The Supreme Court held, based on its conduct, MOE engaged in bad faith: “MOE owed DPCI a duty to refrain from engaging in any ‘unreasonable, frivolous, or unfounded,’ ‘action which would demonstrate a greater concern for [MOE’s] monetary interest than for [DPCI’s] financial risk.’ Through its subpoena and ex parte communications to the arbitrator, MOE breached this duty.” Id. at 916. It further stated: “[S]imply ‘filing a parallel declaratory judgment action does not immunize an insurer’s bad faith conduct’”. Id. at 919.

Mut., 15-1184, 2016 U.S. Dist. LEXIS 114548, at *17-18 (W.D. Penn. Aug. 26, 2016).

Keodalah has alleged that Smith’s UIM-litigation conduct included testifying that Keodalah failed to stop at the stop sign, was on his cell phone, and caused the crash, despite the SPD report, TCA report, and eyewitness statements to the contrary. CP 7-11. He further alleged that Smith offered unreasonably low offers to settle the case, and that Smith failed to attempt to properly settle the case when liability had become reasonably clear. CP 7-11. All this litigation conduct provides clear evidence of Smith’s post-UIM-complaint, bad-faith claim-handling conduct, and clearly supports the hypothetical post-complaint claim-handling conduct that Keodalah alleged Smith engaged in above. See discussion supra Part B.2.a. And, the conduct is admissible to prove Smith’s bad-faith and CPA-violative claim-handling conduct under all three relevant approaches.⁹

Barefield v. DPIC, 215 W. Va. 544, 600 S.E.2d 256 (W. Va. 2004), exemplifies the most-litigation-conduct-can-constitute-bad-faith approach. There, a legal-malpractice-action plaintiff filed a second action against the defendant’s insurer, alleging the insurer violated West Virginia’s consumer-

⁹ Because Washington recognizes that the good-faith duty survives the UIM relationship, the approach that holds that no litigation conduct can constitute bad faith is irrelevant here. See Tucson Airport, 186 Ariz. at 48. Further, because the facts establish a claim under any of the three approaches—which defeats a CR 12(b)(6) motion—this Court need not now decide which approach Washington would follow.

protection act by requiring/permitting the defense attorney the insurer hired in the malpractice action to violate the act. Id. at 547-48. The Court held the insurer could be sued under the consumer act for litigation conduct in the malpractice suit, but it could not generally be liable for actions its attorney took on an insured's behalf. Id. at 550. But, it further held that an insurer can "be liable for its *own* conduct if it is shown [the insurer] breached the Act by knowingly encouraging, directing, participating in, relying upon or ratifying the wrongful conduct of an attorney" the insurer hired. Id. at 552.

Under this line, Smith's litigation conduct is admissible to prove her bad-faith claim-handling conduct. Keodalah does not allege Smith violated her good-faith/CPA duty through an attorney. He alleges she breached her duties by intentionally certifying untruthful discovery responses, providing untrue testimony, misrepresenting facts, disregarding facts that establish liability, and placing her interests over Keodalah's. CP 7-11; App. Brief at 27-29. This conduct is admissible under this approach, evidences the bad-faith claim-handling conduct Keodalah alleged above, see discussion supra Part B.2.a., and is legally sufficient to support liability.

California has been cited as following the only-litigation-conduct-relating-to-settlement-offers-can-constitute-bad-faith line. Cal. Phys. Serv. v. Sup. Ct., 9 Cal. App. 4th 1321, 1330, 12 Cal. Rptr. 2d 95 (Cal. Ct. App. 1992) (noting that "ridiculously low statutory offers of settlement", but not

defensive pleadings, “may be introduced in a bifurcated trial, after liability has been established, as bearing on the issue of bad faith of the insurance company.”). Interpreting California law to be so limited in the scope of what it will admit is questionable.¹⁰ But, even if Cal. Physician set California’s standard, Smith’s conduct is admissible under the line. During the litigation, Smith offered to settle the UIM claim for \$15,000—\$10,000 less than the \$25,000 policy limits—where the jury later returned a \$108,868.20 verdict. CP 8, 11. To the extent the \$15,000 offer were litigation conduct, rather than claim-handling conduct, it would be admissible to demonstrate Smith’s bad-faith and CPA-violative claim-handling conduct.

Smith’s conduct is also admissible under the litigation-conduct-can-constitute-bad-faith-in-rare-cases approach. The US District Court for the Western District of Pennsylvania recognized that examples of such conduct include “filing a baseless counter claim in a coverage action, an insurer inducing the plaintiff to drop his lawsuit by misrepresenting its intent to settle his claim, or actions described as ‘an intentional attempt to conceal,

¹⁰ Despite California’s lower courts’ attempts to limit White’s reach to settlement offers, see Cal. Phy., 9 Cal. App. 4th 1321; Nies v. Nat’l Auto. & Cas. Ins. Co., 199 Cal. App. 3d 1192, 245 Cal. Rptr. 518 (Cal. Ct. App. 1988), White stated, after reviewing all the insurer’s pre- and post-filing conduct, that “[t]he entire pattern of conduct shows a clear attempt by defendant to avoid responsibility for its obvious failure to discover and report the recorded easement of River Estates Mutual Water Corporation.” White, 40 Cal.3d at 889. Thus, White permitted the introduction of litigation tactics, and the California Supreme Court has not retreated from White. See Fid. Nat’l Fin., Inc. v. Nat’l Union Fire Ins. Co., 09-cv-140, 2014 U.S. Dist. LEXIS 47041, at *15-19 (S.D. Cal. Mar. 28, 2014).

hide or otherwise cover-up the conduct of [insurer's] employees". Homer, 2016 U.S. Dist. LEXIS 114548, at *19 (internal citations omitted).

Keodalah has alleged that, among other things, Smith intentionally misrepresented facts both in certifying discovery answers and responses and in providing sworn testimony in deposition and court. CP 7-11. The conduct flowed from Smith's clear refusal to consider material facts, including the UIM defense's own expert-witness report from TCA, the SPD report, and eyewitness accounts. CP 7-11. Intentionally misleading both the Court and jury rises to level of extraordinary circumstances and permits introduction of this conduct to evidence bad faith and CPA violations.¹¹

C. Smith's statute-of-limitations argument is irrelevant and does not provide a basis to affirm the CR 12(b)(6) order.

Smith alternatively argues that she cannot be held liable for actions she took on Keodalah's claim more than three years before he filed this action. Resp. Brief at 14, 38-42. This argument is aimed only at tortious *pre-UIM-litigation* conduct Keodalah alleged that Smith undertook. Id. at 42. The statute of limitations has no bearing on Keodalah's claims against Smith and does not provide a basis to affirm the trial court's order here.

¹¹ Smith's argument that allowing litigation conduct to form a basis for lawsuits will allow litigation to continue ad infinitum is meritless. Resp. Brief at 37. Smith is not adjusting Keodalah's claim now and no claim is open. Because Smith is not adjusting a claim in this action, her conduct in this action would not form the basis for future additional insurance-bad-faith or CPA claims.

As Smith states in her brief, Keodalah has not alleged that Smith took action on the file prior to August 13, 2012, see CP 7, and he filed the current action on August 4, 2015. See CP 1. Therefore, his claims against Smith are within the bad-faith three-year statute, RCW 4.16.080, and four-year CPA statute, RCW 19.86.120. Thus, the statutes of limitations have no bearing on the claims alleged against Smith. Moreover, as the statutes of limitations provide no basis to affirm the trial court's CR 12(b)(6) order, any discussion of the "continuing tort doctrine" is likewise irrelevant here.

III. CONCLUSION

For the foregoing reasons, this Court should reverse the trial court's CR 12(b)(6) order dismissing Keodalah's bad-faith and CPA claims against Smith and remand the action back to the trial court for further proceedings.

Respectfully submitted this 14th day of July, 2017.

/s/ Scott David Smith
Scott David Smith, WSBA # 48108
C. Steven Fury, WSBA # 8896
Attorneys for Appellants

/s/ Vonda M. Sargent
Vonda M. Sargent, WSBA # 24552
Attorney for Appellants

CERTIFICATE OF SERVICE

The undersigned hereby certifies under the penalty of perjury under the laws of the State of Washington that on this date I caused to be served in the manner noted below a true and correct copy of the foregoing *Reply Brief of Appellants* and *Appendix to Reply Brief of Appellants* on the facilities and to the parties mentioned below as indicted:

ORIGINAL TO:

Court of Appeals Division I	<input type="checkbox"/>	Via U.S. Mail
Court of Appeals Clerk	<input type="checkbox"/>	Via Messenger Service
One Union Square	<input type="checkbox"/>	Via Facsimile
600 University Street	<input type="checkbox"/>	Via Email
Seattle, Washington 98101	<input checked="" type="checkbox"/>	Via Electronic Filing

COPIES TO:

<i>Attorney for Allstate Insurance Company and Tracy Smith</i>		
Gavin Skok	<input checked="" type="checkbox"/>	Via U.S. Mail
Daniel J. Gunter	<input type="checkbox"/>	Via Messenger Service
Fox Rothschild, LLP	<input type="checkbox"/>	Via Facsimile
1001 Fourth Avenue – Suite 4500	<input checked="" type="checkbox"/>	Via Electronic Service
Seattle, Washington 98154		

SIGNED at Bellevue, Washington this 14th day of July, 2017.



Tonya Arico

No. 75731-8-I

COURT OF APPEALS, DIVISION ONE,
OF THE STATE OF WASHINGTON

MOUN KEODALAH and AUNG KEODALAH, husband and wife,

Appellants,

v.

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

Respondents.

APPENDIX TO REPLY BRIEF OF APPELLANTS

Scott David Smith, WSBA # 48108
C. Steven Fury, WSBA # 8896
Fury Duarte, PS
1606 148th Avenue SE – Suite 102
Bellevue, Washington 98007
425.643.1606
scott@furyduarte.com
steve@furyduarte.com
Attorneys for Appellants

Vonda M. Sargent, WSBA # 24552
Law Office of Vonda M. Sargent
119 First Avenue South – Suite 500
Seattle, Washington 98104
206.838.4970
sisterlaw@me.com
Attorney for Appellants

APPENDIX

<u>Am. Gen. Life Ins. Co. v. James,</u> 2015 U.S. Dist. LEXIS 20768 (N.D. Cal. 2016)	A001-A006
<u>Babai v. Allstate,</u> 2015 U.S. Dist. LEXIS 54152 (W.D. Wash. 2015)	A007-A010
<u>Collins v. Quintana,</u> 2016 U.S. Dist. LEXIS 11000 (W.D. Wash. 2016)	A011-A014
<u>Fid. Nat'l Fin., Inc. v. Nat'l Union Fire Ins. Co.,</u> 2014 U.S. Dist. LEXIS 47041 (S.D. Cal. 2014)	A015-A023
<u>Garoutte v. Am. Fam. Mut. Ins. Co.,</u> 2013 U.S. Dist. LEXIS 8559 (W.D. Wash. 2013)	A024-A026
<u>Hicks v. Progressive Cas. Ins. Co.,</u> 2017 U.S. App. LEXIS 5733 (9th Cir. 2017)	A027-A028
<u>Homer v. Nationwide Mut.,</u> 2016 U.S. Dist. LEXIS 114548 (W.D. Penn. 2016)	A029-A038
<u>Lains v. Am. Family,</u> 2015 U.S. Dist. LEXIS 97834 (W.D. Wash. 2015)	A039-A042
<u>Lease Crutcher Lewis WA, LLC v. Nat'l Union Fire Ins. Co. of Pitt.,</u> 2009 U.S. Dist. LEXIS 97899 (W.D. Wash. 2009)	A043-A047
<u>Searcy v. Esurance,</u> 2017 U.S. Dist. LEXIS 38705 (D. Nev. 2017)	A048-A053
<u>Tavakoli v. Allstate,</u> 2013 U.S. Dist. LEXIS 6078 (W.D. Wash. 2013)	A054-A058
<u>Zuniga v. Std. Guar. Ins. Co.,</u> 2017 U.S. Dist. LEXIS 79821 (W.D. Wash. 2017)	A059-A061



[Am. Gen. Life Ins. Co. v. James](#)

United States District Court for the Northern District of California

February 19, 2015, Decided; February 19, 2015, Filed

No. C-14-04242 DMR

Reporter

2015 U.S. Dist. LEXIS 20768 *; 96 Fed. R. Evid. Serv. (Callaghan) 1085; 2015 WL 730010

AMERICAN GENERAL LIFE INSURANCE COMPANY, Plaintiff, v. MELISSA JAMES, JOHN A. JAMES II, COLEMAN C. JAMES and C.W.J., a minor, Defendants.

Coleman C. James ("Coleman James"), and C.W.J.'s¹ (hereinafter "Defendants"²) Counterclaim. Having reviewed the relevant legal authority, and the papers and arguments of the parties, the court DENIES AGLIC's motion to strike for the reasons set forth below.

Prior History: [Am. Gen. Life Ins. Co. v. James, 2014 U.S. Dist. LEXIS 159809 \(N.D. Cal., Nov. 13, 2014\)](#)

Counsel: [*1] For American General Life Insurance Company, Plaintiff, Counter-defendant: Laura E. Fannon, Wilson, Elser, Moskowitz, Edelman & Dicker LLP, San Francisco, CA; Michael K. Brisbin, Wilson, Elser, Moskowitz, Edelman & Dicker, San Francisco, CA.

I. Background

A. AGLIC's Complaint in Interpleader

This is an action for interpleader pursuant to [28 U.S.C. § 1335](#) and [Federal Rule of Civil Procedure 22](#) to resolve competing claims to life insurance proceeds.

For Melissa James, Defendant: Daphne Anne Beletsis, Malcolm Tecumseh Manwell, LEAD ATTORNEYS, PERRY JOHNSON ANDERSON MILLER AND MOSKOWITZ LLP, Santa Rosa, Ca; Deborah Sandine Bull, Perry Johnson et al, Santa Rosa, CA.

AGLIC issued John A. James ("the decedent") a life insurance policy in 2008. Defendant Melissa James, the decedent's then-wife, was the primary beneficiary. (Compl. ¶¶ 8-11.) In July 2012, the decedent filed a petition for dissolution of marriage. (M. James Decl., Oct. 23, 2014, ¶ 1.) In January 2013, the decedent reduced his policy benefits to \$500,000 from \$1,000,000, and in July 2013, the decedent's insurance agent advised AGLIC that he and the decedent were working on a change in beneficiary. (Compl. ¶¶ 11-13.) AGLIC alleges upon information and belief that the decedent never returned a fully-executed change in beneficiary form to the agent, nor did AGLIC ever receive a change in beneficiary form prior to the decedent's death on [*3] July 4, 2014. (Compl. ¶¶ 14-18.) Following the decedent's death, Melissa James submitted a claim for the insurance proceeds. (Compl. ¶¶ 21-22.) AGLIC subsequently received a letter from

For John A. James II, Coleman C. James, C.W.J., Defendants, Counter-claimants: Matthew Allen Chavez, The Law Office of Matthew A. Chavez, Santa Rosa, CA.

Judges: DONNA M. RYU, United States Magistrate Judge.

Opinion by: DONNA M. RYU

Opinion

ORDER DENYING PLAINTIFF'S MOTION TO STRIKE PORTIONS OF DEFENDANTS' COUNTERCLAIM [DOCKET NO. 49]

Plaintiff American General Life Insurance Company ("AGLIC") moves the court pursuant to [Federal Rule of Civil Procedure 12\(f\)](#) to strike portions of Defendants and Counter-Plaintiffs John A. James II ("John James"),

¹Although [*2] AGLIC disclosed C.W.J.'s name in its Complaint for Interpleader, the court is identifying only the minor's initials in this filing in accordance with [Federal Rule of Civil Procedure 5.2\(a\)](#).

²Melissa James is also a defendant but she is not involved in this motion. As used in this order, the term "Defendants" does not include Melissa James.

an attorney regarding John James's claim for the life insurance benefits, along with a change in beneficiary form dated July 11, 2013, listing as beneficiaries the decedent's three sons, John James, Coleman James, and C.W.J. (Compl. ¶¶ 21-23.)

On September 16, 2014, AGLIC paid to Melissa James what it describes as her "verifiable community property share" of the decedent's \$500,000 life insurance benefit, plus interest, in the sum of \$166,675. (Compl. ¶ 25.) AGLIC alleges that this sum is based on "four of six years the policy existed where community property funds were used to pay the premiums." (Compl. ¶ 25.)

Both John James and Melissa James claim entitlement to the life insurance proceeds. (Compl. ¶¶ 28, 29.) AGLIC filed its complaint for interpleader relief pursuant to [Federal Rule of Civil Procedure 22](#) on September 19, 2014, naming as defendants Melissa James, John James, Coleman C. James, and C.W.J. AGLIC seeks a determination of the rights of Defendants as to the remaining death benefits of \$333,325 plus interest. (Compl. ¶ 30.) [*4]

B. Defendants' Answer and Counterclaims

On December 2, 2014, Defendants filed their answer to AGLIC's complaint, along with two counterclaims based on the non-interpleaded funds that AGLIC paid to Melissa James prior to filing its complaint. [Docket No. 38 (Counterclaim) ¶¶ 76-103.]

Defendants maintain that they are the rightful policy beneficiaries, given that decedent sent an email to his insurance agent attaching a fully executed change of beneficiary form designating Defendants as the beneficiaries. (Counterclaim ¶¶ 15, 46-47, 55-59, Exs. 5-7.)

Defendants allege that upon receiving AGLIC's letter notifying Defendants that it had paid out \$166,675.00 to Melissa James, counsel for Defendants promptly sent an email to AGLIC's counsel informing him of divorce proceedings in which a court had made various orders regarding decedent and Melissa James's community property. (Counterclaim ¶ 69, Ex.10.) As a result of the divorce proceedings and ensuing court order, Defendants allege that the periodic payments for the policy were made by decedent using his separate funds beginning after his separation from Melissa James on July 20, 2012 through the date of his death on July 4, 2014. Therefore, [*5] according to Defendants, Melissa James did not have a community interest in the policy or in any benefits. (Counterclaim ¶¶ 48-50.) Defendants

assert that AGLIC did not inquire into the divorce proceedings, but nevertheless paid \$166,675.00 to Melissa James outside of the interpleader action, without any judicial determination as to the lawful beneficiary and owner of such funds. (Counterclaim ¶ 70, Ex. 11; ¶ 71, Exs. 10-11.)

Defendants further allege that on October 30, 2014 and November 13, 2014, counsel for AGLIC requested that Defendants dismiss AGLIC and release it from liability under the policy, including for the sums already paid to Melissa James, in exchange for AGLIC not seeking attorneys' fees and costs in filing the interpleader action. (Counterclaim ¶ 72, Ex. 12; ¶ 73, Ex. 13; ¶ 74, Ex. 14; ¶ 75, Ex. 15.) Defendants bring two counterclaims against AGLIC: (1) breach of contract, and (2) breach of the duty of good faith and fair dealing. Only the second cause of action is relevant to this motion.³ Defendants allege that "AGLIC has a duty of good faith and fair dealing in handling the claims and addressing the rights of [Defendants]." (Counterclaim ¶ 89). Defendants assert that [*6] AGLIC breached its duty of good faith and fair dealing by paying Melissa James \$166,675 of the policy proceeds without first notifying Defendants or properly investigating the court orders in the divorce proceedings, in violation of AGLIC's "express representation to [Defendants] that it was a disinterested stakeholder," and that it would interplead the entirety of the proceeds. (Counterclaim ¶¶ 89-96.) In addition, Defendants allege that AGLIC breached its duty of good faith and fair dealing by improperly seeking release from liability as to the \$166,675 paid to Melissa James in exchange for forgoing attorneys' fees and costs associated with the interpleader action. (Counterclaim ¶¶ 100-103.)

C. AGLIC's Motion to Strike

AGLIC now moves the court to strike from Defendants' Counterclaim paragraphs 72, 73, and 100 through 103 in their entirety, as well as exhibits 12 through 15, which contain the settlement communications in which counsel

³In their first cause of action for breach of contract, Defendants allege that the life insurance policy is a binding contractual agreement under which AGLIC must pay proceeds to the rightful beneficiaries. (Counterclaim ¶ 77.) Defendants allege that AGLIC breached its contractual obligations to Defendants by initiating the interpleader suit—thus relinquishing its interests in the policy—and wrongfully paying Melissa James \$166,675 of the policy proceeds on September 16, 2014 without first notifying [*7] Defendants. (Counterclaim ¶¶ 77-85.)

for AGLIC offered to forgo attorneys' fees and costs in the interpleader action in exchange for a dismissal and release from all liability. AGLIC moves to strike the paragraphs and exhibits on the grounds that they are "redundant, immaterial, impertinent, or scandalous matter" within the meaning of [Rule 12\(f\) of the Federal Rules of Civil Procedure](#), because they constitute or refer to (1) privileged litigation statements under [California Civil Code Section 47\(b\)](#); and (2) inadmissible settlement communications pursuant to [Rule 408 of the Federal Rules of Evidence](#).

Defendants oppose the motion. [Docket No. 50 (Defs.' Opp'n).] On January 30, 2015, the court ordered the parties to provide supplemental briefing regarding the motion to strike, which the parties timely filed. [Docket Nos. 56, 57.]

II. LEGAL STANDARD

Pursuant to [Federal Rule of Civil Procedure 12\(f\)](#), upon motion or *sua sponte*, a court may strike "from any pleading any insufficient defense or any redundant, immaterial, impertinent, or scandalous matter." [Fed. R. Civ. P. 12\(f\)](#). [Rule 12\(f\)](#) motions should not be granted unless it is clear that [*8] the matter to be stricken could have no possible bearing on the subject matter of the litigation. [Rosales v. Citibank](#), 133 F. Supp. 2d 1177, 1180 (N.D. Cal. 2001); [Colaprico v. Sun Microsystems, Inc.](#), 758 F. Supp. 1335, 1339 (N.D. Cal. 1991). A decision to strike material from the pleadings is vested to the sound discretion of the trial court. [Nurse v. United States](#), 226 F.3d 996, 1000 (9th Cir. 2000).

The function of a [Rule 12\(f\)](#) motion to strike is to avoid the expenditure of time and money that will arise from litigating spurious issues by dispensing with those issues prior to trial. [Sidney-Vinstein v. A.H. Robins Co.](#), 697 F.2d 880, 885 (9th Cir. 1983) (motions to strike are proper if striking part of a pleading would make trial less complicated or otherwise streamline the ultimate resolution of the action). In contrast, the function of [Rule 12\(f\)](#) is not served when the moving party attempts to strike portions of the nonmoving party's pleading for certain types of relief, or if the motion would require the court to resolve "disputed and substantial factual or legal issues." [Whittlestone, Inc. v. Handi-Craft Co.](#), 618 F.3d 970, 973-75 (9th Cir. 2010).

When a court considers a motion to strike, "it must view the pleading in a light most favorable to the pleading party." [Oracle Am., Inc. v. Micron Tech., Inc.](#), 817 F. Supp. 2d 1128, 1131-32 (N.D. Cal. 2011) (citing *In re*

[TheMart.com, Inc. Sec. Lit.](#), 114 F. Supp. 2d 955, 965 (C.D. Cal. 2000)). A court must deny the motion to strike if there is any doubt as to whether the allegations in the pleading could be relevant in the action. *Id.*

III. DISCUSSION

As the moving party, AGLIC is required to set forth the legal standards governing a [Rule 12\(f\)](#) [*9] motion to strike and establish that it has satisfied those standards. AGLIC failed to do so. On that basis alone, the court could deny AGLIC's motion. The court will nonetheless proceed with its analysis of both Civil Code [section 47\(b\)](#) and [Federal Rule of Evidence 408](#).

A. [California Civil Code Section 47\(b\)](#)

AGLIC first moves to strike the offending portions of Defendants' Counterclaim on the grounds that they constitute privileged litigation statements under [California Civil Code section 47\(b\)](#).

[Section 47\(b\) of the California Civil Code](#) provides in pertinent part that, "[a] privileged publication or broadcast is one made . . . [i]n any . . . judicial proceeding" [Cal. Civ. Code § 47\(b\)](#). The privilege has the effect of "immunizing [litigants and witnesses] from liability for torts arising from communications made during judicial proceedings." [Silberg v. Anderson](#), 50 Cal. 3d 205, 214, 266 Cal. Rptr. 638, 786 P.2d 365 (1990). California's litigation privilege "applies to any communication (1) made in judicial or quasi-judicial proceedings; (2) by litigants or other participants authorized by law; (3) to achieve the objects of the litigation; and (4) that have some connection or logical relation to the action." *Id.* at 212. The purposes of requiring courts to enforce an "absolute" litigation privilege are to "ensur[e] free access to the courts, promot[e] complete and truthful testimony, encourag[e] zealous advocacy, giv[e] finality to judgments, and avoid[] unending litigation." *Id.* at 214-15 (citing [*10] [McClatchy Newspapers, Inc. v. Superior Court](#), 189 Cal. App. 3d 961, 970, 234 Cal. Rptr. 702 (1987)); see also [Holmes v. Elec. Document Processing, Inc.](#), 966 F. Supp. 2d 925, 936 (N.D. Cal. 2013) (citing cases).

The litigation privilege is "absolute," [Silberg](#), 50 Cal. 3d at 215, and extends to any communication, whether or not it amounts to a publication. *Id.* at 212. Furthermore, the privilege has an "an expansive reach." [Rubin v. Green](#), 4 Cal. 4th 1187, 1194, 17 Cal. Rptr. 2d 828, 847 P.2d 1044 (1993), and "[a]ny doubt as to whether the privilege applies is resolved in favor of applying it."

[Comstock v. Aber](#), 212 Cal. App. 4th 931, 952, 151 Cal. Rptr. 3d 589 (2012) (citing [Adams v. Superior Court](#), 2 Cal. App. 4th 521, 529, 3 Cal. Rptr. 2d 49 (1992)). California courts have given "judicial proceeding" an expansive definition, and have found that settlement negotiations fit within the [section 47\(b\)](#) privilege. See, e.g., [Torres v. Unum Life Ins. Co. of Am.](#), No. C 08-1940 MHP, 2009 U.S. Dist. LEXIS 1170, 2009 WL 69358, at *12 (N.D. Cal. Jan. 9, 2009) (citing [Home Ins. Co. v. Zurich Ins. Co.](#), 96 Cal. App. 4th 17, 23, 116 Cal. Rptr. 2d 583 (2002)).

Here, AGLIC argues that the paragraphs and exhibits which are the subject of this motion refer to or constitute privileged negotiations that took place after the interpleader litigation began, and thus fall within the scope of California's litigation privilege. Defendants argue that the privilege does not apply even if the settlement offers were made after the litigation began. Defendants assert that the offers are admissible to prove that AGLIC breached its duty of good faith and fair dealing in part by improperly seeking a release of liability as to all of the insurance funds, including those paid to Melissa James, [*11] in exchange for forgoing attorneys' fees and costs associated with the interpleader action.

The California Supreme Court has held that the [section 47](#) litigation privilege does not bar admission of settlement offers made after the commencement of litigation for the purpose of establishing a breach of the covenant of good faith and fair dealing. [White v. W. Title Ins. Co.](#), 40 Cal. 3d 870, 221 Cal. Rptr. 509, 710 P.2d 309 (1985). In *White*, the plaintiff insureds sued the defendant insurer for breach of contract and negligence. *Id.* at 878-89. During the course of litigation the insurer made low settlement offers. *Id.* at 879. The plaintiffs obtained leave to amend the complaint to state a claim for breach of the covenant of good faith and fair dealing, based on the insurer's conduct throughout the litigation, including the settlement offers. *Id.* On appeal, the insurer argued that the court erred in admitting evidence of settlement offers occurring after litigation commenced as evidence of its breach, and contended that its settlement offers were absolutely privileged under Civil Code [section 47](#). *Id.* at 885-88.

The *White* court held that the trial court did not err in admitting into evidence the settlement offers, and in so doing, drew "a careful distinction between a cause of action based squarely on a privileged communication, [*12] such as an action for defamation, and one based upon an underlying course of conduct

evidenced by the communication." *Id.* at 887 (emphasis added). The court reasoned that the plaintiffs did not assert that the insurer's communications themselves were "defamatory, or done with the intent of causing emotional distress," but rather that the communications showed that the "defendant was not evaluating and seeking to resolve their claim fairly and in good faith." *Id.* at 888. As such, *White* held that the [section 47](#) litigation privilege does not bar admission of a settlement communication when offered for the purpose of showing an underlying course of conduct such as bad faith, reasoning that "even if liability cannot be founded upon a judicial communication, it can be proved by such a communication[.]" *Id.*; see also [Competitive Techs. v. Fujitsu Ltd.](#), 286 F. Supp. 2d 1118, 1153-54 (N.D. Cal. 2003) (declining to apply [Cal. Civ. Code § 47\(b\)](#), and denying motion to dismiss unfair competition claims when injury alleged was not based on misrepresentations occurring during negotiations themselves, but instead, "the alleged misrepresentations [were] offered as evidence of the underlying course of conduct rather than as the actual source of the harm"); [Microsoft Corp. v. A-Tech Corp.](#), 855 F. Supp. 308, 314 (C.D. Cal. 1994) (holding [Cal. Civ. Code § 47\(b\)](#) did not bar defendants' counterclaim for unfair business practices [*13] where alleged improper statements offered to prove conduct actionable in abuse of process claim). Here, as in *White*, Defendants contend that they will offer the challenged settlement communications to prove a course of conduct, that is, AGLIC's alleged breach of its duty of good faith and fair dealing. (Counterclaim ¶¶ 100-03.)

AGLIC argues in its supplemental briefing that *White*'s holding "has been modified by multiple cases[.]" including by the California Supreme Court in *Silberg*. While *Silberg* provides a lengthy discussion of the policies supporting an absolute and wide-reaching litigation privilege, the court does not address, or otherwise modify *White*'s holding. See [Silberg](#), 50 Cal. 3d at 215-16. Moreover, the California Supreme Court has subsequently cited *White* with approval. See, e.g., [Action Apartment Assn., Inc. v. City of Santa Monica](#), 41 Cal. 4th 1232, 1248, 63 Cal. Rptr. 3d 398, 163 P.3d 89 (2007) ("We have drawn a careful distinction between a cause of action based squarely on a privileged communication, such as an action for defamation, and one based upon an underlying course of conduct evidenced by the communication." (citing [White](#), 40 Cal. 3d at 888)). Furthermore, courts in this circuit continue to follow *White* on this issue. See, e.g., [Competitive Techs.](#), 286 F. Supp. 2d at 1153-54; [Microsoft Corp. v. A-Tech Corp.](#), 855 F. Supp. at 314; [Fid. Nat. Fin., Inc. v.](#)

Nat'l Union Fire Ins. Co. of Pittsburg, PA, No. 09-CV-140-GPC-KSC, 2014 U.S. Dist. LEXIS 47041, 2014 WL 1286392, at *6 (S.D. Cal. Mar. 28, 2014) (holding "[*14] *White* controls" on issue of whether Cal. Civ. Code § 47 bars evidence concerning aggressive litigation tactics for purpose of showing insurance company's bad faith conduct, noting "[f]ederal courts also follow the 'careful distinction' set forth in *White* to allow insureds to introduce evidence of the insurer's litigation conduct in bad faith insurance cases." (internal citations omitted)).

The court concludes that *White* remains good law and applies here. Accordingly, the court denies Plaintiff's motion to strike with respect to application of the litigation privilege.

B. Federal Rule of Evidence 408

Rule 408 provides in relevant part that:

(a) Evidence of the following is not admissible—on behalf of any party—either to prove or disprove the validity or amount of a disputed claim or to impeach by a prior inconsistent statement or a contradiction:

...

(2) conduct or a statement made during compromise negotiations about the claim

...

(b) The court may admit this evidence for another purpose, such as proving a witness's bias or prejudice, negating a contention of undue delay, or proving an effort to obstruct a criminal investigation or prosecution.

Fed. R. Evid. 408.

As the Ninth Circuit has held, "[t]he text of the rule is clear." Rhoades v. Avon Products, Inc., 504 F.3d 1151, 1161 (9th Cir. 2007). Evidence of conduct or a statement made during [*15] settlement negotiations may not be considered to prove the validity or amount of a disputed claim, but Rule 408 expressly does not bar such evidence when offered for another purpose. *Id.*

In this case, the challenged portions of Defendants' counterclaims are not introduced to "prove the validity or amount of a disputed claim." Rather, as Defendants argue, they are offered for the purpose of providing support for their allegation that AGLIC breached its duty of good faith and fair dealing. See Fed. R. Evid. 408 advisory committee's note (stating that "[t]he intent [of the 2006 Amendment] is to retain the extensive case law finding Rule 408 inapplicable when compromise

evidence is offered for a purpose other than to prove the validity, invalidity, or amount of a disputed claim." (citing Athey v. Farmers Ins. Exchange, 234 F.3d 357 (8th Cir. 2000)); see also Phoenix Solutions Inc. v. Wells Fargo Bank, N.A., 254 F.R.D. 568, 584 (N.D. Cal. 2008) (holding that the intent of the 2006 amendment to Rule 408 was to retain case law finding the rule inapplicable when compromise evidence is offered for another purpose (citing Athey, 234 F.3d 357)).

In *Athey*, the Eighth Circuit held that "[a]lthough evidence of conduct during settlement negotiations generally is inadmissible [under Rule 408] to prove a party's liability for the underlying claim, it may be admitted "when the evidence is offered for another purpose" Athey, 234 F.3d at 362 [*16]. The court reasoned that within the Eighth Circuit, courts have held that "an insurer's attempt to condition the settlement of a breach of contract claim on the release of a bad faith claim may be used as evidence of bad faith." *Id.* (citing cases). Therefore, the court ruled that evidence of conduct during a settlement conference was not inadmissible under Rule 408, because it was "offered for another purpose." *Id.* (internal quotation marks omitted).

Although AGLIC cites Clemco Industries v. Commercial Union Insurance Co., 665 F. Supp. 816, 829 (N.D. Cal. 1987), for its proposition that any evidence concerning settlement negotiations from one party to another is inadmissible, there is no generalized "settlement privilege" under Rule 408. See Phoenix Solutions Inc., 254 F.R.D. at 584 (explaining the Advisory Committee Notes to Rule 408 further state that "evidence, such as documents, is not rendered inadmissible merely because it is presented in the course of compromise negotiations . . .").

The court finds that the settlement communications contained within the challenged portions of the Counterclaim are not offered to prove the validity or amount of a disputed claim, but rather for another purpose, namely, as evidence of AGLIC's course of conduct. Therefore, those communications do not fall within the ambit of Rule 408, and are not subject to a motion to strike.

IV. CONCLUSION

For the foregoing reasons, Plaintiff's motion to strike is DENIED.

IT IS SO ORDERED.

Dated: February 19, 2015

/s/ Donna M. Ryu

DONNA M. RYU

United [*17] States Magistrate Judge

End of Document

Babai v. Allstate Ins. Co.

United States District Court for the Western District of Washington

April 24, 2015, Decided; April 24, 2015, Filed

CASE NO. C12-1518 JCC

Reporter

2015 U.S. Dist. LEXIS 54152 *; 2015 WL 1880441

SHELMINA BABAI, Plaintiff, v. ALLSTATE INSURANCE COMPANY, Defendant.

Prior History: [Babai v. Allstate Ins. Co., 2013 U.S. Dist. LEXIS 175336 \(W.D. Wash., Dec. 13, 2013\)](#)

Counsel: [*1] For Shelmina Babai, an individual, Plaintiff: Jason R. Donovan, LEAD ATTORNEY, Emily Rose Kelly, FOSTER PEPPER LLC, SEATTLE, WA.

For Allstate Insurance Company, a foreign insurer, Defendant: Jonathan R Missen, Rick J Wathen, LEAD ATTORNEYS, Jennifer P Dinning, COLE WATHEN LEID HALL PC, SEATTLE, WA.

Judges: HONORABLE JOHN C. COUGHENOUR, UNITED STATES DISTRICT JUDGE.

Opinion by: JOHN C. COUGHENOUR

Opinion

ORDER DENYING DEFENDANT'S MOTION TO QUASH TRIAL SUBPOENA

This matter comes before the Court on Defendant Allstate Insurance Company's Motion to Quash the Trial Subpoena to Rick Wathen (Dkt. No. 98), Plaintiff's response (Dkt. No. 100), and Allstate's reply (Dkt. No. 102).

Having thoroughly considered the parties' briefing and the relevant record, the Court finds oral argument unnecessary and hereby DENIES the motion for the reasons explained herein.

I. BACKGROUND

This case arises out of Plaintiff Shelmina Babai's claim to Defendant Allstate Insurance Company (Allstate)

after discovering water damage in her home. (Dkt. No. 1, Ex. A.) After an initial investigation, Allstate denied Plaintiff's claim on February 1, 2012. (Dkt. No. 1, Ex. A at 3.) Subsequently, Plaintiff retained Mr. Donovan as counsel, and on June 12, 2012, [*2] sent Allstate a letter challenging the denial of coverage. (*Id.* at 4; Dkt. No. 27-3, Ex. B at 8.) Allstate similarly retained counsel, including Rick Wathen, after the denial of coverage. (Dkt. No. 102 at 2.)

Several email and letter correspondences between Mr. Wathen and Mr. Donovan during the period of June 20, 2012 to August 1, 2012 demonstrate the reopening of the investigation and reconsideration of Plaintiff's claim after the initial denial of coverage and are relevant to the issue before the Court. In an email on June 20, Mr. Wathen coordinated the inspection of Plaintiff's property by an engineer. (Dkt. No. 101, Ex. 3 at 2—3.) Mr. Wathen inquired into the cause of the loss to Plaintiff's property on June 22 (Dkt. No. 101, Ex. 3 at 2) and July 19 (Dkt. 101, Ex. 4), and whether Plaintiff had completed repairs to the property on June 26. (Dkt. No. 101, Ex. 3 at 1). In a letter on August 1, Mr. Wathen sent a copy of the insurance policy, a copy of a Washington State Supreme Court case, and further inquired into the cause of the loss and Plaintiff's theory of coverage so that "[p]rior to making Allstate's final coverage determination . . . Allstate [could] investigate and respond accordingly." [*3] (Dkt. No 101, Ex. 6.) Mr. Donovan responded to Mr. Wathen's inquiries by email on June 20 and 26 (Dkt. No. 101, Ex. 3), and by letter on July 20 (Dkt. No. 202, Ex. 5) and August 31 (Dkt. No. 101, Ex. 7).

The case was originally set to go to trial on May 5, 2014. (Dkt. No. 49.) The Court vacated that trial date in light of a request for additional briefing. (Dkt. No. 78.) On October 8, 2014, the Court granted summary judgment for Plaintiff on two issues. (Dkt. No. 91.) Jury trial is now set for May 4, 2015 to address the remaining issues. (Dkt. No. 93.)

On February 17, 2015, Plaintiff served a subpoena on Mr. Wathen, requiring that he testify at trial. (Dkt. No. 99, Ex. A.) Allstate now moves to quash the subpoena. (Dkt. No. 98.) Allstate previously submitted these arguments as a motion in limine on April 7, 2014 (Dkt. No. 66), which the Court terminated in light of the Court's order vacating the May 5, 2014 trial date. (Dkt. Nos. 78; 84.)

II. DISCUSSION

A. Standard for Quashing Subpoenas Under Fed. R. Civ. P. 45(d)(3)(A)

The Court must quash or modify a subpoena that, inter alia, "requires disclosure of privileged or other protected matter, if no exception or waiver applies" or "subjects a person to undue burden." [*4] Fed. R. Civ. P. 45(d)(3)(A)(iii), (iv).

Allstate presents several arguments for quashing the trial subpoena to Mr. Wathen. First, Allstate argues that the subpoena would require Mr. Wathen to testify regarding information protected by the work product doctrine and the attorney-client privilege. Second, Allstate argues that the disqualification of Mr. Wathen as counsel would constitute an undue burden. Lastly, Allstate argues that the correspondence between Mr. Wathen and Mr. Donovan is not relevant to Plaintiff's bad faith and extra-contractual claims. In addition, Allstate asserts that if the Court requires Mr. Wathen to testify, it must also allow Allstate to call Mr. Donovan as a witness because the relevant correspondence occurred between the two individuals.

B. Disclosure of Privileged or Other Protected Matter under Rule 45(3)(A)(iii)

Allstate attempts to invoke the protection of the work product doctrine and attorney client privilege to protect Mr. Wathen's testimony on the basis that his work on Plaintiff's claim occurred after the February 1, 2012 denial of coverage and after Plaintiff retained counsel and took an adversarial position to Allstate. (Dkt. No. 98 at 6—7.)

1. Work Product Doctrine

The work product doctrine is inapplicable [*5] to Mr. Wathen's testimony at trial because (1) Plaintiff seeks testimony, not the production of documents or tangible things, and (2) even if it did, the testimony sought does not relate to materials prepared in anticipation of

litigation. The work-product doctrine is a qualified immunity that protects "certain materials prepared by an attorney acting for his client in anticipation of litigation." United States v. Nobles, 422 U.S. 225, 237—38, 95 S. Ct. 2160, 45 L. Ed. 2d 141 (1975) (internal quotation marks omitted) (citing Hickman v. Taylor, 329 U.S. 495, 508, 67 S. Ct. 385, 91 L. Ed. 451 (1947); Fed. R. Civ. P. 26(b)(3)). The work product doctrine only applies to "documents and tangible things." Fed. R. Civ. P. 26(d)(3); Myer v. Nitetrain Coach Co. Inc., No. C06-804C, 2007 U.S. Dist. LEXIS 101689, 2007 WL 686357, at *1 (W.D. Wash. Mar. 2, 2007); Admiralty Ins. Co. v. U.S. Dist. Court for Dist. Ariz., 881 F.2d 1486, 1494 (9th Cir.1989). Materials prepared in the ordinary course of business are not protected. Fed. R. Civ. P. 26(b)(3), 1970 Advisory Committee Notes.

First, Allstate does not identify any underlying documents it seeks to protect. Nor does the trial subpoena call for the production of any documents. Thus, Allstate may not avail itself of the work product doctrine. Next, even if Allstate had identified the emails and letters to Mr. Donovan as the documents it sought to protect or if the work product doctrine's protections extended past "documents and tangible things", Allstate has failed to show that Mr. Wathen acted in anticipation of litigation. The Court acknowledges that Allstate [*6] retained Mr. Wathen after the initial denial of coverage of Plaintiff's claim and after Plaintiff's attorney contacted Allstate to challenge the denial. (Dkt. No. 18 at 3—4.) Although Mr. Wathen did not participate in the investigation leading to the initial denial of coverage, the Court is not convinced that Mr. Wathen acted in anticipation of litigation because he was involved, to some degree, in the continuing investigation of Plaintiff's claim. (Dkt. No. 27-3, Ex. B.) Mr. Wathen's emails and letters to Mr. Donovan between June 20, 2012 and August 1, 2012 cannot be fairly characterized as "in anticipation of litigation." Rather, the correspondence is characteristic of an investigation of Plaintiff's claim: Mr. Wathen inquired into the cause of the loss and status of repairs and sent an engineer to inspect Plaintiff's property so that Allstate could make an informed final coverage determination. (Dkt. No. 101, Ex. 3; 4; 6.) Mr. Wathen's August 1, 2012 letter to Mr. Donovan explicitly requests further information from Plaintiff "so that Allstate can investigate and respond accordingly." (Dkt. No. 101, Ex. 6 at 4.) The fact that the correspondence occurred after the initial denial [*7] of coverage does not negate the fact that Mr. Wathen performed the duty of investigating Plaintiff's claims prior to any expressly anticipated litigation. Furthermore, Plaintiff did not file a complaint until August 31, 2012, after the relevant

correspondence.

The Court refuses to extend the work product doctrine to protect a routine reconsideration and investigation of an insurance claim. Such a stretch would hardly serve the underlying purpose of the work product doctrine, which is to "shelter[] the mental processes of the attorney, [and] provid[e] a privileged area within which he can analyze and prepare his client's case. [Nobles, 422 U.S. at 238](#).

2. Attorney-Client Privilege

Nor does the attorney-client privilege protect Mr. Wathen's testimony regarding the investigation of Plaintiff's claim because while Mr. Wathen participated in the investigation and handling of Plaintiff's claim, he was not acting in his capacity as Allstate's advisor.

The party asserting the attorney-client privilege bears the burden of proving that the privilege applies to a given set of documents or communications. [U.S. v. The Corporation, 974 F.2d 1068, 1070 \(9th Cir. 1992\)](#). The party must show: 1) that legal advice was sought, 2) that the legal advice was sought from a professional legal advisor [*8] in his capacity as an advisor, 3) that the communications relating to that purpose were 4) made in confidence 5) by the client and that the communications were 6) at the client's instance, permanently protected from disclosure by the client or by the legal advisor, 7) unless the protection is waived. [In re Fischel, 557 F.2d 209, 211 \(9th Cir. 1977\)](#). The attorney-client privilege only protects disclosure of communications, and does not extend to disclosure of the underlying facts. [Upjohn Co. v. United States, 499 U.S. 383, 395, 101 S. Ct. 677, 66 L. Ed. 2d 584 \(1981\)](#).

In Washington, "in first party insurance claims by insured's [sic] claiming bad faith in the handling and processing of claims . . . there is a presumption of no attorney-client privilege." [Cedell v. Farmers Ins. Co. of Wash., 176 Wash. 2d 686, 700, 295 P.3d 239 \(2013\)](#) (en banc). An insurer can overcome that presumption and assert an attorney-client privilege or that documents are protected by the work product doctrine "upon a showing in camera that the attorney was providing counsel to the insurer and not engaged in a quasi-fiduciary function" such as investigating and evaluating or processing the claim. [Cedell, 176 Wash. 2d at 699—700](#). "[T]o the extent that an attorney acts as a claims adjuster, claims process supervisor, or claims investigation monitor, and not as a legal advisor, the attorney-client privilege does not apply." [HSS](#)

[Enterprises, LLC v. AMCO, No. C06-1485-JPD, 2008 U.S. Dist. LEXIS 11841, 2008 WL 163669 at *3 \(W.D. Wash. Jan. 14, 2008\) \[*9\]](#) .

The correspondence between Mr. Wathen and Mr. Donovan plainly shows that Allstate's investigation of Plaintiff's claim extended past the February 1, 2012 denial of coverage. Plaintiff has successfully shown that Mr. Wathen was involved in the "quasi-fiduciary tasks of investigating and evaluating or processing" Plaintiff's claim. Allstate has not presented evidence that Mr. Wathen was acting in his role as legal advisor providing counsel to Allstate when he corresponded with Mr. Donovan. In the absence of such evidence, Allstate fails to overcome the presumption that no attorney-client privilege attaches to the testimony sought.

C. Undue Burden under [Rule 45\(d\)\(3\)\(A\)\(iv\)](#)

Allstate also argues that Plaintiff's "late naming" of Mr. Wathen as a witness is a strategic attempt to disqualify him as defense counsel, which would impose an undue burden on Allstate. Allstate asserts that Plaintiff did not disclose or name Mr. Wathen as a witness through initial disclosures, in response to discovery requests, or in Plaintiff's Supplemental Witness Disclosure, and instead did so in Plaintiff's pre-trial statement on March 5, 2014.¹ The Court notes that Plaintiff has never filed a motion to disqualify Mr. [*10] Wathen as counsel.

The Court finds that requiring Mr. Wathen to testify will not impose an undue burden on Allstate because Allstate had sufficient notice that Mr. Wathen would be called. First, Plaintiff's Complaint and Amended Complaint, filed on August 31, 2012 and December 7, 2012 respectively, allege facts that are directly based on the correspondence between Mr. Wathen and Mr. Donovan between June 20, 2012 and August 1, 2012. (Dkt. No. 1, Ex. A at ¶ 22—26; Dkt. No. 18 at ¶ 23—27.) Plaintiff's bad faith and extra-contractual claims are partly based on Allstate's failure to conduct a further and timely investigation of Plaintiff's claim or inspection of Plaintiff's property after June 21, 2012. Because Mr. Wathen served as the Allstate representative communicating with Plaintiff during that time period, he

¹ [Fed. R. Civ. P. 45](#) does not provide a remedy for Plaintiff's failure to disclose Mr. Wathen as a witness through initial disclosures. While a party may bring a motion pursuant to [Rule 37\(c\)](#) to prohibit a party from using a witness or evidence at trial that it did not disclose according to the requirements of [Rule 26\(a\)](#), the Court has serious reservations that this record would support such a motion.

is a logical witness. [*11] Furthermore, Plaintiff's production of the pre-litigation emails and letters between Mr. Wathen and Mr. Donovan during discovery should have provided Allstate with notice that Plaintiff considered this correspondence to "substantiate, show, relate to, describe or contain information" concerning Plaintiff's legal action. (Dkt. No. 101, Ex. 2, at 20.)

Even if the complaints and discovery proved insufficient to put Allstate on notice that Plaintiff planned to call Mr. Wathen as a witness, both parties agree that Plaintiff's Pre-Trial Statement from March 5, 2014 identifies Mr. Wathen as a witness. (Not docketed.) Allstate responded with a motion in limine on April 7, 2014. (Dkt. No. 66.) As Allstate's present motion to quash is a verbatim copy of the April 7, 2014 motion in limine, it is unconvincing that the lack of notice could prejudice Allstate, let alone require Allstate to "retain new counsel with no time to prepare for the pending trial." (Dkt. No. 98 at 4.) What might have been a valid and timely concern over one year ago is now entirely illogical. While calling Mr. Wathen as a witness may indeed lead to his disqualification as counsel, the Court finds that the year since March [*12] 5, 2014 should have provided Allstate with ample time to adjust its representation and strategy accordingly.

D. Post Denial Correspondence

Allstate argues that the post denial correspondence between Mr. Wathen and Mr. Donovan is not relevant to Plaintiff's bad faith and extra-contractual claims because much of the communication occurred after litigation commenced. The Court finds no basis to assume that Allstate's ongoing contractual obligation to Plaintiff terminated after the initial coverage determination on February 1, 2012 and after Plaintiff retained counsel. Allstate's argument has also been rejected by other courts. See [Tavakoli v. Allstate Prop. & Cas. Ins. Co., No. C11-1587RAJ, 2013 U.S. Dist. LEXIS 6078, 2013 WL 153905, at *4 \(W.D. Wash. Jan. 15, 2013\)](#) (finding that the insurer has a continuing obligation to adjust the insured's open claim even after litigation has commenced); see also [Garoutte v. Am. Family Mut. Ins. Co., No. C12-1787 BHS, 2013 U.S. Dist. LEXIS 103062, 2013 WL 3819923, at *4 \(W.D. Wash. July 23, 2013\)](#) (declining to adopt rule that performance under an insurance contract need not occur once a complaint is filed and distinguishing [Blake v. Federal Way Cycle Center, 40 Wash. App. 302, 698 P.2d 578 \(1985\)](#)).

Furthermore, Allstate provides no evidence to suggest that the present litigation initiated before the filing of

Plaintiff's Complaint [*13] on August 31, 2012 and before much of the correspondence between Mr. Wathen and Mr. Donovan. (Dkt. No. 1 Ex. A.) The February 1, 2012 denial of coverage did not liberate Allstate of its contractual obligations to Plaintiff. Thus, the Court finds the post-denial correspondence to be relevant to Plaintiff's bad faith and extra-contractual claims.

E. Naming Plaintiff's Counsel as a Witness

Allstate suggests that if the Court permits Mr. Wathen to be called as a witness it must also allow Allstate to call Mr. Donovan as a witness because the relevant correspondence occurred between the two individuals. In so arguing, Allstate conflates Mr. Wathen's role as a quasi-fiduciary investigating and handling Plaintiff's claim with serving as an attorney. In addition to providing legal counsel to Allstate, Mr. Wathen played an active role in Allstate's normal business activities such as the investigation of Plaintiff's claim. To the contrary, Mr. Donovan corresponded with Mr. Wathen solely on behalf of Plaintiff as her representative and had no personal knowledge of Allstate's decision-making. Thus, Mr. Donovan lacks the capacity to address any of the relevant legal issues that will be presented [*14] at trial and could likely avail himself of the attorney-client privilege.

III. CONCLUSION

For the foregoing reasons, Defendant's Motion to Quash Trial Subpoena to Rick Wathen (Dkt. No. 98) is DENIED.

DATED this 24th day of April 2015.

/s/ John C. Coughenour

John C. Coughenour

UNITED STATES DISTRICT JUDGE

End of Document



Cited

As of: July 14, 2017 7:15 PM Z

Collins v. Quintana

United States District Court for the Western District of Washington

January 28, 2016, Decided; January 28, 2016, Filed

CASE NO. C15-1619RAJ

Reporter

2016 U.S. Dist. LEXIS 11000 *

LAUREN COLLINS, Plaintiff, v. NINA QUINTANA, et al.,
Defendants.

Counsel: [*1] Lauren Collins, Plaintiff, Pro se, Seattle,
WA.

For Nina Quintana, Mercury Insurance Company,
Defendants: Donald J Verfurth, LEAD ATTORNEY,
Stephanie M. Ries, GORDON & REES (WA),
SEATTLE, WA.

Judges: The Honorable Richard A. Jones, United
States District Judge.

Opinion by: Richard A. Jones

Opinion

ORDER

I. INTRODUCTION

This matter comes before the Court on Defendants Mercury Insurance Company ("Mercury") and Nina Quintana's Motion to Dismiss. Dkt. # 20. Plaintiff Lauren Collins filed an untimely and unresponsive opposition to Defendants' Motion. For the reasons set forth below, the Court hereby **GRANTS** Defendants' Motion to Dismiss (Dkt. # 20) and **DENIES** Plaintiff's Motion to Appoint Counsel (Dkt. # 16).

II. BACKGROUND

On or about November 13, 2013 Plaintiff was involved in a motor vehicle accident with an individual insured by Mercury, Sean O'Connell. Ms. Quintana, one of Mercury's claim representatives, investigated Plaintiff's insurance claim and denied coverage. On or about July 21, 2015, Plaintiff filed a complaint, which Defendants removed to this Court on October 9, 2015. Dkt. # 1.

Plaintiff then amended the complaint on or about November 13, 2015 in response to Defendants' first Motion to Dismiss (Dkt. # 5). In [*2] the Amended Complaint (Dkt. # 18), Plaintiff appears to allege breach of contract, negligence, bad faith, discrimination under Title VI of the Civil Act of 1964 and Age Discrimination Act of 1975 against Defendant Mercury, and the same claims as independent causes of action against Ms. Quintana.

III. LEGAL STANDARD

a. 12(b)(6) Motion to Dismiss For Failure to State A Claim

[Fed. R. Civ. P. 12\(b\)\(6\)](#) permits a court to dismiss a complaint for failure to state a claim. The rule requires the court to assume the truth of the complaint's factual allegations and credit all reasonable inferences arising from those allegations. [Sanders v. Brown, 504 F.3d 903, 910 \(9th Cir. 2007\)](#). A court "need not accept as true conclusory allegations that are contradicted by documents referred to in the complaint." [Manzarek v. St. Paul Fire & Marine Ins. Co., 519 F.3d 1025, 1031 \(9th Cir. 2008\)](#). The plaintiff must point to factual allegations that "state a claim to relief that is plausible on its face." [Bell Atl. Corp. v. Twombly, 550 U.S. 544, 568, 127 S. Ct. 1955, 167 L. Ed. 2d 929 \(2007\)](#). If the plaintiff succeeds, the complaint avoids dismissal if there is "any set of facts consistent with the allegations in the complaint" that would entitle the plaintiff to relief. [Id. at 563; Ashcroft v. Iqbal, 556 U.S. 662, 679, 129 S. Ct. 1937, 173 L. Ed. 2d 868 \(2009\)](#).

The court typically cannot consider evidence beyond the four corners of the complaint, although it may rely on a document to which the complaint refers if the document is central [*3] to the party's claims and its authenticity is not in question. [Marder v. Lopez, 450 F.3d 445, 448 \(9th Cir. 2006\)](#). The court may also consider evidence subject to judicial notice. [United States v. Ritchie, 342](#)

[F.3d 903, 908 \(9th Cir. 2003\)](#).

Where a plaintiff proceeds *pro se*, the court must construe his "complaints liberally even when evaluating it under the *Iqbal* standard." [Johnson v. Lucent Techs. Inc.](#), 653 F.3d 1000, 1011 (9th Cir. 2011) (citing [Hebbe v. Piller](#), 627 F.3d 338, 342 (9th Cir. 2010)). "Furthermore, '[l]eave to amend should be granted unless the pleading could not possibly be cured by the allegation of other facts, and should be granted more liberally to *pro se* plaintiffs." *Id.* (quoting [McQuillion v. Schwarzenegger](#), 369 F.3d 1091, 1099 (9th Cir. 2004)).

b. 12(b)(5) Motion to Dismiss For Insufficient Service

[Fed. R. Civ. P. 12\(b\)\(5\)](#) allows the dismissal of a complaint due to "insufficient service of process." "[I]n the absence of proper service of process, the district court has no power to render any judgment against the defendant's person or property unless the defendant has consented to jurisdiction or waived lack of process." [S.E.C. v. Ross](#), 504 F.3d 1130, 1138-39 (9th Cir. 2007). This case was initially filed in King County Superior Court, then removed to this Court. Since the initial filing was in King County Superior Court, service of process is analyzed under Washington state law. [Lee v. City of Beaumont](#), 12 F.3d 933, 937 (9th Cir. 1993). In Washington, [CR 4\(d\)\(4\)](#) requires Plaintiff to obtain a court order should they wish to effectuate service by mail. If no such order is sought or granted, [*4] Plaintiff must serve the complaint by personal service. [CR 4\(d\)\(2\)](#).

IV. ANALYSIS

Before proceeding to the substance of the motion, the Court notes that although Plaintiff filed an opposition to Defendants' Motion (Dkt. # 25) on January 6, 2016, it was due on December 14, 2015. In addition to the opposition being over three weeks late, it did not respond to the substantive arguments present in Defendants' Motion to Dismiss (Dkt. # 20). Pursuant to this Court's Local Rules, Plaintiff's failure "to file papers in opposition to a motion . . . may be considered by the court as an admission that the motion has merit." See [Local Rules W.D. Wash. LCR 7\(b\)\(2\)](#). Parties proceeding *pro se* are afforded substantial lenience, but must still comply with the Local Rules (*cf.* [Draper v. Coombs](#), 792 F.2d 915, 924 (9th Cir. 1986)), which require opposition papers to "be filed and served not later than the Monday before the noting date" ([Local Rules W.D. Wash. 7\(d\)\(3\)](#)). Because Plaintiff did not

timely oppose and did not address the merits of Defendants' Motion, the Court finds that she has admitted that the Motion has substantial merit and should be granted.

a. Dismissal of Complaint Under 12(b)(5) Insufficient Service

Defendants' argument that proper service [*5] was not effectuated in accordance with [CR 4\(d\)\(4\)](#) is well taken. "Under [CR 4\(d\)\(4\)](#), a party may conduct service by mail. A court will issue an order allowing service by mail when there are 'circumstances justifying service by publication' and if the serving party demonstrates, by affidavit, facts which show that service by mail is just as likely to give actual notice as service by publication. [CR 4\(d\)\(4\)](#)." [Jones v. Stebbins, et al.](#), 122 Wn.2d 471, 860 P.2d 1009 (1993). Plaintiff did not seek a court order permitting service by mail. See Dkt. # 21 (Verfurth Decl.) Ex. 1. Despite not having the court's permission for mail service, Plaintiff still attempted to serve Defendants by mail. For this reason, service of process was insufficient. Nevertheless, in light of Plaintiff's *pro se* status and the fact that any defect in service could be remedied, the Court proceeds to the merits of Plaintiff's claims.

b. Breach of Contract Claim

Plaintiff first alleges a breach of contract against Mercury. To bring a cause of action for breach of contract, there must be privity between the parties involved. [Lobak Partitions, Inc. v. Atlas Const. Co., Inc.](#), 50 Wn. App. 493, 497, 749 P.2d 716 (1988) (lack of privity precludes breach of contract claim); [Klickman v. Title Guaranty Co. of Lewis County](#), 105 Wn.2d 526, 529, 716 P.2d 840 (1986). Plaintiff was not a policyholder with Mercury and thus the parties did not have a contractual relationship. [*6] Mercury insured Sean O'Connell, the other party in the accident. However, privity does not extend to Plaintiff simply by way of Mercury and Mr. O'Connell's relationship. *Cf.* [Blackburn v. Safeco Ins. Co.](#), 115 Wash.2d 82, 105, 794 P.2d 1259 (1990) (to receive third party insurance coverage, Plaintiff must either be in privity with the insurance company or an occupant in the vehicle that is insured). In addition, the insurance policy contains a provision explicitly stating that a third party has no right of action against the company unless "the amount of the insured's obligation to pay shall have been finally determined either by judgment, against the insured after a contested trial or by written agreement of the insured." Dkt. # 22 (Schmitt Decl. at 9) Ex. 4. Plaintiff has not

alleged any such judgment or agreement in this case. As such, Plaintiff held no contractual relationship with Defendant Mercury, therefore a breach of contract claim is improper in this circumstance.

c. Negligence Claim

Plaintiff claims Defendants were "negligent to pay close attention to details and made a wrongful decision to compensate me for my claim in the date of loss." Dkt. # 18 at 3.¹ The elements of a negligence claim include "(1) the existence of a duty owed to the complaining [*7] party; (2) a breach thereof; (3) a resulting injury; and (4) a proximate cause between the claimed breach and resulting injury." [Hansen v. Washington Nat. Gas Co., 95 Wash.2d 773, 776, 632 P.2d 504 \(1981\)](#). Mercury owed no requisite duty to Plaintiff because Plaintiff is not a party to the insurance policy and retains no right of action as a third-party uninsured. [Hartford Fire Ins. Co. v. Leahy, 774 F. Supp. 2d 1104, 1121 \(W.D. Wash. 2011\)](#). Furthermore, even if such a duty existed, there is no factual showing that Defendants breached this alleged duty. The accident report does not definitively assign fault to one of the parties, and instead attributes about fifty-percent fault to each side. Dkt. # 22 (Schmitt Decl.) Ex. 3. Because no duty existed and no apparent breach of the alleged duty is present, Plaintiff does not have a viable negligence claim.

d. Bad Faith Claim

Plaintiff alleges a tenuous bad faith claim against Defendants citing incomprehensive review of the relevant facts when denying her insurance claim. "Bad faith handling of an insurance claim is a tort [*8] analyzed applying the same principles of other torts: duty, breach of that duty, proximate cause and damages. Insurers have a duty to act in good faith separate from their contractual coverage obligations to their insureds." [Aecon Bldgs., Inc. v. Zurich N. A., 572 F. Supp. 2d 1227, 1234 \(W.D. Wash. 2008\)](#). Third party claimants who are injured by the insured, however, do not have a cause of action against the insurance company. [Tank v. State Farm Fire & Cas. Co., 105 Wash.2d 381, 391, 715 P.2d 1133 \(1986\)](#) ("We hold that third party claimants may not sue an insurance company directly for alleged breach of a duty of good

¹The grounds for this negligence claim appear to be indistinguishable from the breach of contract claim. Since Plaintiff was not in privity with Mercury, Mercury has no duty to the Plaintiff. However, the Court proceeds with a substantive analysis of the negligence claim.

faith under a liability policy"). Plaintiff is not the insurance policyholder, nor is she permitted to bring a third party claim. Therefore, Plaintiff has no standing to sue either Defendant under a theory of bad faith.

e. Discrimination Under Title VI of the Civil Rights Act of 1964 and Age Discrimination Act of 1975

Plaintiff next alleges discrimination under Title VI of the Civil Rights Act of 1964 and the Age Discrimination Act of 1975. Title VI of the Civil Rights Act of 1964 provides that "No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving federal financial [*9] assistance." [42 U.S.C. § 2000d](#). To prevail on a Title VI claim, "Plaintiff must show that (1) there is a racial or national origin discrimination and (2) the entity engaging in the discrimination receives federal financial assistance." [Atkins v. The Bremerton Sch. Dist., No. C04-5779RBL, 2005 U.S. Dist. LEXIS 49094, 2005 WL 135661, at *2 \(W.D. Wash. June 7, 2005\)](#). Plaintiff does not allege sufficient facts to satisfy either of these two prongs. There is no evidence to suggest that an act of racial discrimination occurred during the handling of her insurance claim, other than the fact that her claim was denied. Such a denial does not convey that her claim was handled differently as compared with other claims similar in nature and circumstance, especially because the police report suggests that both parties were about equally responsible for the resulting accident. With regard to the federal assistance prong, there is no evidentiary showing that Defendant Mercury is a recipient of federal funds. Without more facts to bolster the alleged act of discrimination, a violation of Title VI of the Civil Rights Act of 1964 does not appear to be present.

Plaintiff also alleges a violation of the Age Discrimination Act of 1975 ("ADA"), which prohibits "discrimination on the basis of age [*10] in programs or activities receiving federal financial assistance." [42 U.S.C. § 6101](#). There is no indication in the Complaint—or in any pleading since presented—that age played a role in the assessment of Plaintiff's insurance claim. The fact that the insurance claim was denied does not evidence a violation of the ADA. Moreover, there again is no showing that Mercury receives federal financial assistance. For the reasons stated above, Plaintiff does not present a colorable ADA claim.

f. Independent Cause of Action Against Nina

Quintana

Plaintiff names Ms. Quintana, Mercury's insurance adjuster in this claim, as a separate Defendant. Both the Ninth Circuit and the Western District of Washington interpreting Washington law have held no cause of action exists against the employee of an insurance company if the employee is acting within the scope of their employment. [Mercado v. Allstate Ins. Co., 340 F.3d 824, 826 \(9th Cir. 2003\)](#); [Garoutte v. Am. Family Mut. Ins. Co., Case No. C12-1787MJP, 2013 U.S. Dist. LEXIS 8559, 2013 WL 231104, at *2 \(W.D. Wash., Jan. 22, 2013\)](#). Ms. Quintana was well within her scope of employment when assessing and denying the insurance claim and Plaintiff's allegations do not reveal any more. In fact, Plaintiff's allegations substantively require Ms. Quintana to have done [*11] her job: adjust the claim. As such, no individual cause of action may be asserted against Ms. Quintana.

g. Plaintiff's Additional Claims in Subsequent Responsive Pleadings

The Court notes that Plaintiff has alleged a myriad of additional claims against a number of different (and not yet added) defendants in her oppositions to Defendants' Motion to Dismiss. Dkt. # 25, 28, 29. The claims merely state various laws without any facts or evidence to support the allegations. To be clear, the dismissal of a case "with prejudice" or "without prejudice" bears on the ability of the Plaintiff to refile the same claims and has no relation to the ordinary meaning "prejudice" may carry outside the lexicon of court procedure. To dismiss a claim "with prejudice" means Plaintiff may not refile the alleged claim(s) after dismissal, however to dismiss a claim "without prejudice" means Plaintiff may refile the claim(s) in the same or different court. Because Plaintiff did not respond to the substantive arguments of Defendants' Motion to Dismiss, and the additional claims are not supported by sufficient facts, Plaintiff's Complaint will be dismissed with prejudice.

h. Motion to Appoint Counsel

Plaintiff has [*12] an outstanding Motion to Appoint Counsel. Dkt. # 16. This is a civil action and, as a general matter, plaintiff has no right to counsel. See [Storseth v. Spellman, 654 F.2d 1349, 1353 \(9th Cir. 1981\)](#). However, a court may under "exceptional circumstances" appoint counsel for indigent civil litigants pursuant to 28 U.S.C. § 1915(e)(1). [Agyeman v. Corr. Corp. of Am., 390 F.3d 1101, 1103 \(9th Cir. 2004\)](#). When determining whether "exceptional circumstances"

exist, a court must consider "the likelihood of success on the merits as well as the ability of a petitioner to articulate his claims *pro se* in light of the complexity of the legal issues involved." [Weygandt v. Look, 718 F.2d 952, 954 \(9th Cir. 1983\)](#). A plaintiff must plead facts that show he or she has an insufficient grasp of his or her case or the legal issue involved and an inability to articulate the factual basis of the claim. [Agyeman, 390 F.3d at 1103](#).

As discussed above, Plaintiff's allegations lack merit and thus do not satisfy the requisite "exceptional circumstances" standard. For this reason, Plaintiff's Motion to Appoint Counsel is **DENIED**.

V. CONCLUSION

For the foregoing reasons, the Court **GRANTS** Defendants' Motion to Dismiss (Dkt. # 20) and **DENIES** Plaintiff's Motion to Appoint Counsel (Dkt. # 16). Plaintiff has failed to substantively oppose this motion, effectuated improper service, and failed to state a claim upon which relief can be granted. [*13] Plaintiff's Complaint is therefore **DISMISSED with prejudice**. The Clerk to close this case.

DATED this 28th day of January, 2016.

/s/ Richard A. Jones

The Honorable Richard A. Jones

United States District Court

End of Document



Positive

As of: July 14, 2017 7:16 PM Z

[Fid. Nat'l Fin., Inc. v. Nat'l Union Fire Ins. Co.](#)

United States District Court for the Southern District of California

March 28, 2014, Decided; March 28, 2014, Filed

CASE NO. 09-CV-140-GPC-KSC

Reporter

2014 U.S. Dist. LEXIS 47041 *

FIDELITY NATIONAL FINANCIAL, INC., CHICAGO TITLE INSURANCE CO., and CHICAGO TITLE CO., Plaintiffs, vs. NATIONAL UNION FIRE INSURANCE CO. OF PITTSBURG, PA, et al., Defendants.

Prior History: [Fid. Nat'l Fin., Inc. v. Nat'l Union Fire Ins. Co., 2011 U.S. Dist. LEXIS 477 \(S.D. Cal., Jan. 4, 2011\)](#)

Counsel: [*1] For Fidelity National Financial, Inc., Plaintiff: Andrew Agati, Oliver J. Dunford, LEAD ATTORNEYS, PRO HAC VICE, Hahn Loeser & Parks LLP, Cleveland, OH; Cary B Lerman, Eric J. Lorenzini, Joseph J. Ybarra, LEAD ATTORNEYS, Munger Tolles & Olson LLP, Los Angeles, CA; Joni Todd, LEAD ATTORNEY, PRO HAC VICE, Sikora Law LLC, Mentor, OH; Steven A. Goldfarb, LEAD ATTORNEY, PRO HAC VICE, Hahn, Loeser & Parks LLP, Cleveland, OH; Jon Paul Anthony, PRO HAC VICE, Hahn, Loeser, and Parks LLP, Cleveland, OH.

For Chicago Title Insurance Company, Plaintiff: Andrew Agati, Oliver J. Dunford, LEAD ATTORNEYS, PRO HAC VICE, Hahn Loeser & Parks LLP, Cleveland, OH; Cary B Lerman, Eric J. Lorenzini, LEAD ATTORNEYS, Munger Tolles & Olson LLP, Los Angeles, CA; Steven A. Goldfarb, LEAD ATTORNEY, PRO HAC VICE, Hahn, Loeser & Parks LLP, Cleveland, OH.

For Chicago Title Company, Plaintiff: Andrew Agati, Oliver J. Dunford, LEAD ATTORNEYS, PRO HAC VICE, Hahn Loeser & Parks LLP, Cleveland, OH; Cary B Lerman, Eric J. Lorenzini, Joseph J. Ybarra, LEAD ATTORNEYS, Munger Tolles & Olson LLP, Los Angeles, CA; Steven A. Goldfarb, LEAD ATTORNEY, PRO HAC VICE, Hahn, Loeser & Parks LLP, Cleveland, OH.

For National Union Fire Insurance [*2] Company of Pittsburg, PA, Defendant: Dana Alden Fox, LEAD ATTORNEY, Lewis Brisbois Bisgaard & Smith, Los Angeles, CA; David Emmett Reynolds, LEAD ATTORNEY, Lewis Brisbois Bisgaard and Smith, Los

Angeles, CA; Kenneth D Watnick, LEAD ATTORNEY, Anderson, McPharlin & Conners, Los Angeles, CA; Rebecca R. Weinreich, LEAD ATTORNEY, Lewis Brisbois Bisgaard & Smith LLP, Los Angeles, CA; Stephen V Kovarik, LEAD ATTORNEY, Lewis Brisbois Bisgaard & Smigh, Los Angeles, CA.

Judges: HON. GONZALO P. CURIEL, United States District Judge.

Opinion by: GONZALO P. CURIEL

Opinion

ORDER RE: *DAUBERT* MOTIONS

The parties challenge the admissibility of four expert witnesses.¹

District [*3] courts act as the gatekeeper for expert testimony by carefully applying [Federal Rule of Evidence 702](#) to ensure evidence is "not only relevant, but reliable." [Daubert v. Merrell Dow Pharms. Inc., 509 U.S. 579, 589, 113 S. Ct. 2786, 125 L. Ed. 2d 469 \(1993\)](#); accord [Kumho Tire Co. Ltd. v. Carmichael, 526 U.S. 137, 147, 119 S. Ct. 1167, 143 L. Ed. 2d 238 \(1999\)](#) (*Daubert* imposed a special "gatekeeping obligation" on trial judge); [Estate of Barabin v.](#)

¹ The Court read and considered the extensive arguments in the briefs. To the extent that the Court does not specifically address a moving parties' particular argument, the Court rejects it. "[T]he test of *Daubert* is not the correctness of the expert's conclusions but the soundness of his methodology." [Daubert v. Merrell Dow Pharms., Inc., 43 F.3d 1311, 1318 \(9th Cir. 1995\)](#). "Vigorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence." [Daubert, 509 U.S. at 596](#).

[AstenJohnson, Inc., 740 F.3d 457, 463-64 \(9th Cir. 2014\)](#) (en banc).

The expert must be qualified by "knowledge, skill, experience, training, or education" on the proposed subject matter. [Daubert, 509 U.S. at 592](#) ("an expert is permitted wide latitude to offer opinions, including those that are not based on firsthand knowledge" because [Rule 702](#) "is premised on the assumption that the expert's opinion will have a reliable basis in the knowledge and experience of his discipline").

An expert witness may testify "if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case." [Fed. R. Evid. 702](#); see [Cooper v. Brown, 510 F.3d 870, 880 \(9th Cir. 2007\)](#) (proponent [*4] of evidence bears burden of proving testimony satisfies [Rule 702](#)). In undertaking this "daunting task," the trial judge "must strike the appropriate balance between admitting reliable, helpful expert testimony and excluding misleading or confusing testimony to achieve the flexible approach outlined in [Daubert](#)." [United States v. Cordoba, 104 F.3d 225, 228 \(9th Cir. 1997\)](#) (citation omitted).

A. FNF's Motion to Exclude Dean Felton – Claims Handling Expert

Dean Felton is an insurance broker who wrote a text book about financial institution bonds ("FIB"). Watnick Decl., Ex. 1 at 1-2. Defendant National Union ("NU") hired Felton to give his expert opinion on a variety of topics, including the customs and "best practices" of fidelity bonds and the application of contested provisions of the insurance policy. *Id.* at 1.

Plaintiffs Fidelity National Financial, Inc., Chicago Title Insurance Co., and Chicago Title Co. (hereinafter "FNF") challenge several aspects of Felton's testimony.

1. Reliance on Excluded Documents

In March 2011, the Magistrate Judge held that NU could not use Christopher Money's activities as proof of NU's efforts to comply with its obligation to investigate FNF's claim. [Doc. [*5] No. 194] NU had initially retained Money as part of its coverage investigation, but NU immediately designated Money as an expert witness on damages. *Id.* at 2. NU contended it did not have to disclose evidence of Money's activities until the experts exchanged their reports. "Having taken this position in discovery," the Magistrate Judge held that NU "may not

offer the retention and efforts of Mr. Money at some later point in this litigation as evidence of its efforts to comply with its obligation to investigate Fidelity's claims." Because NU elected to offer Money's "expert analysis for purposes of defending the litigation[, his] efforts cannot be offered as evidence of National's ordinary business efforts to investigate and adjust Fidelity's claim." *Id.*

Felton submitted his initial report four months later, in July 2011. Watnick Decl., Ex. 1 (hereinafter "Initial Report").

In August 2011, NU tried to produce a claims analysis letter, but the Magistrate Judge excluded the coverage letter for all purposes. [Doc. No. 297 (Sept. 2011)]

Felton submitted his rebuttal report in January 2012. Watnick Decl., Ex. 7 (hereinafter "Rebuttal Report"). FNF took Felton's deposition in February 2012. [*6] Watnick Decl., Ex. 2 (hereinafter "Depo.").

FNF contends that Felton's rebuttal report violates the Magistrate Judge's orders. First, Felton relies on Money's invoices and reports as proof that NU conducted an adequate investigation of the amount of FNF's loss. Rebuttal Report at 48 (¶ 6) (opining that NU promptly investigated the claim, Felton cites "[t]he 'Money' invoices" and "[t]he 'Money' Report of July 15, 2011" as evidence of "a quantum investigation by NU"). Second, Felton relies on the August 2011 coverage letter to support his opinion that "[t]he timing of this letter is reasonable given FNF's continued modifications of its claim." *Id.* at 3 (¶ 5), 41-42 (citing letter). FNF argues that [Rule 702](#) requires an expert to base his opinion on "the facts of the case," which means he cannot rely on facts that the court excluded as inadmissible. FNF argues the reliance on inadmissible documents infects Felton's opinion about NU's claims investigation.

This argument has merit. Felton may not rely on evidence that the Magistrate Judge excluded.

The Court rejects NU's contention that FNF's own experts first interjected Money's investigation. NU highlights Peter Haley's statement that "[i]n [*7] October 2008, National Union hired an accountant to review the escrow files in order to assist in quantifying the loss. The request for escrow files and this retention should have been done at least a year earlier, in October 2007." Watnick Decl., Ex. 3 at 4, 5, 18. NU also cites Paul Amoruso's observation that NU hired an "accountant." Watnick Decl. Ex. 4, at 13. Amoruso then criticizes the lack of investigation by the claims adjustor,

who was only involved in administrative tasks. *Id.* at 20 ¶¶ 96-97. The Court concludes that these unadorned factual statements do not, as NU argues, inappropriately interject Money's activities as an accounting expert into FNF's analysis. The Magistrate Judge issued both Orders before Felton prepared his reports, and NU is obligated to comply with those decisions.

Similarly, NU defends its use of the August 2011 coverage opinion letter because Amoruso (FNF's expert) commented that NU had promised to issue a coverage letter very soon. Watnick Decl. Ex. 4 at 10 ¶ g. Amoruso opines that NU acted in bad faith by waiting so long to issue a coverage opinion. *Id.* at 11 ("Even if National Union does finally issue a coverage opinion, it would be many years [*8] too late."). NU further contends FNF "falsely" asserted in its summary judgment motion that NU "never" issued a coverage determination. According to NU, the Court should not permit FNF to use evidence for its own benefit and then challenge the opponent's response. *E.g., Mitchell v. Superior Ct., 37 Cal. 3d 591, 609, 208 Cal. Rptr. 886, 691 P.2d 642 (1984).*

The chronology of events defeats this argument. Felton prepared his expert reports before FNF filed its summary judgment motion and the rebuttal reports were exchanged on the same day. The Court finds nothing in Amoruso's report or the summary judgment motion that would open the door to NU's use of inadmissible evidence. Accordingly, the Court concludes that the experts may not testify about evidence or documents that were excluded by the Magistrate Judge.

2. "Formal Proof of Loss" Opinion Contradicts California Regulation

As noted, Felton wrote a book about fidelity bonds in 1992. There, Felton stated that an insurance company does not have a duty to investigate *until* the insured submits a "properly executed proof-of-loss form." At his deposition, Felton defended the rule in Employee Dishonesty cases to protect against defamation claims. Depo. at 121-22.

The Court agrees [*9] with FNF that Felton's opinion requiring a "formal" proof of loss form contradicts California law. The Insurance Regulations define a "proof of claim" as "[a]ny evidence or documentation . . . that provides any evidence of the claim and that reasonably supports the magnitude or the amount of the claimed loss." *Cal. Code Regs., tit. 10, § 2695.2.* Felton agrees that "proof of loss" is the same as "proof of

claim." Depo. at 225-26. Had Felton been the claims handler, he would have been bound to follow California's more lenient regulation. *Rosen v. Ciba-Geigy Corp., 78 F.3d 316, 318 (7th Cir. 1996)* (expert cannot have a double standard for testimony versus professional work). Consequently, FNF correctly notes that Felton's opinion is not based on sufficient "data" – the governing regulation – and is thus inadmissible. Felton's conflicting standard would confuse the jury about when the duty to investigate arises.

By contrast, in other sections of the report, Felton discusses the language in the FIB and the applicable California code. That part of his opinion is admissible. See *Hangarter v. Provident Life & Accident Ins. Co., 373 F.3d 998, 1016-17 (9th Cir. 2004)* (expert may refer to law [*10] while discussing facts).

Moreover, the Court found no instance in which a witness ever mentioned a concern that FNF's employees might bring a defamation action if the insurance claim was processed under the Employee Dishonesty provision. Felton speculated that outside coverage counsel might have raised this issue; however, "there is simply no evidence to support Mr. Felton's opinion." Pls.' Br. at 8. In addition, Felton's concern with defamation is unwarranted. *Estate of Barabin, 740 F.3d at 463-64.* In California, an insurance company has an absolute privilege to report alleged fraud, whether made with or without malice. *Cal. Civ. Code § 47; Cal. Ins. Code § 1872.5; Fremont Comp. Ins. Co. v. Superior Ct., 44 Cal. App. 4th 867, 877, 52 Cal. Rptr. 2d 211 (1996); Doctors' Co. Ins. Servs. v. Superior Ct., 225 Cal. App. 3d 1284, 1295, 275 Cal. Rptr. 674 (1990).*

3. Reliance on Wrong Bond for Discovery and Termination Analysis

The annual anniversary date of FNF's policies is November 18. Felton relied on the 2003-2004 FIB to form his opinion that FNF discovered the employee's dishonesty on November 15, 2004 (the date Medhi wrote a letter to Nieto asking for a credit). Initial Report at 29, 50. In his next report, Felton discusses the [*11] 2004-2005 bond. Rebuttal Report at 6 (¶ 12). During his deposition, he explained his reasons for evaluating those policy years in relation to the Termination provision. Depo. at 95-101. NU relies on a similar theory in its summary judgment motion.

FNF argues this opinion must be excluded because the prior bonds are not at issue. FNF made its claim under

the 2005-2006 FIB and the language of the Discovery and Termination Riders is unique to that bond.

NU defends Felton's analysis. Depo. at 97-101. Felton opined that if FNF discovered Nieto's dishonesty in 2004, then no future bond could cover her conduct. NU contends that Felton's testimony will help the jury understand that a fact can only be discovered once. [Newpark Res. v. Marsh & McLennan, Inc., 691 So. 2d 208, 213 \(La. App. 1997\)](#). According to NU, once FNF discovered Nieto's dishonesty, the bond terminated as to all related conduct. [Oriental Fin. Grp. v. Fed. Ins. Co., 309 F. Supp. 2d 216, 229 \(D. P.R. 2004\)](#). In any event, NU notes that other parts of Felton's reports show that he analyzed the 2005-2006 bond as well. *E.g.*, Initial Report at 42-43 (citing language from both bonds).

The Court is troubled by Felton's reliance on the [*12] earlier bonds to analyze the Discovery provision because the language is different. The 2003-2004 bond refers to discovery by the "Insured." *E.g.*, [Hudson Ins. Co. v. Oppenheim, 81 A.D. 3d 427, 916 N.Y.S.2d 68 \(Sup. Ct. App. Div. 2011\)](#). But FNF negotiated language in the 2005-2006 bond (Rider 13) to narrow the Discovery clause to those in the "Risk Management department or Legal department." It appears, however, that Felton actually relied only on Nancy Richmond's knowledge – a claims attorney in the legal department – to support his argument about when FNF discovered the loss. *E.g.*, Rebuttal Report at 42, 44, ¶ 6. Thus, FNF can explore any weakness in Felton's analysis during cross-examination. [Daubert, 509 U.S. at 596](#).

Similarly, the language in the Termination clause (Rider 25) was altered in 2005-2006. Although the Court is concerned that the jury will be confused by reference to prior bonds, it appears that the specific changes do not impact Felton's actual analysis. For example, the 2005-2006 policy added a \$10,000 threshold, but it would be met by the \$25,000 credit involved in the Medhi transaction. Moreover, Felton explains his theory that the earlier bonds terminated coverage for Nieto. FNF [*13] may cross examine Felton about any perceived flaws.

4. Opinions Outside Expert's Area of Expertise

FNF challenges Felton's qualification to testify about two topics.

First, Felton opines that "an experienced escrow attorney" should have recognized that "bank fraud is dishonest" because the owner did not provide the rebate funds. Initial Report at 29, 51-52.

The Court agrees with FNF that Felton is not qualified to testify that the Medhi escrow transaction was or was not fraudulent. [Estate of Barabin, 740 F.3d at 463-64](#). NU has not shown that Felton has the necessary experience or training to give an opinion about escrow transactions, banking laws, and fraud. Initial Report at 1 & 76-78 (resume lists experience as an insurance broker); *e.g.*, Initial Report at 29 (beginning with "To an experienced escrow attorney" and ending with "how much was involved."), 51-52 (¶ 2) ("which would have violated federal banking laws," "a violation of banking laws," and "a fraud"); Depo. at 16-35.

Second, Felton opines that NU did not have to pay the FIB claim because FNF had other policies in its "Tower of Insurance" that contributed to the settlements of the victims' lawsuits. Initial Report at 46-51 (¶ [*14] 10) (opining that FNF's entire claim was invalid "because any possible basis for indemnity from any peril has been satisfied by other insurance" carriers); Rebuttal Report at 45-46.

NU defends Felton's analysis that the payments made under other insurance policies for the losses described in the Proof of Loss forms show that they were made. NU argues Felton has the experience to give that opinion because he "literally wrote the book" on fidelity bonds.

The Court is not persuaded by NU's argument. The law governing "Other Insurance" clauses is complex. It requires a legal analysis of the language in the various policies to determine if the clause is enforceable or whether the policies contain conflicting clauses that cancel each other. *E.g.*, [Edmondson Prop. Mgmt. v. Kwock, 156 Cal. App. 4th 197, 203-04, 67 Cal. Rptr. 3d 243 \(2007\)](#) (collecting cases). Felton did not conduct any analysis of the language in any of the primary and excess policies in the E&O or FIB tower, but instead reaches a conclusion drawn from whole cloth. Depo. at 167-69. Thus, his opinions on this topic are unreliable. The Court grants the motion to exclude Felton's opinions about the application of the "Other Insurance or Indemnity" provision. [*15] *E.g.*, Initial Report at 47-50; Rebuttal Report at 45-46 (¶ 10).

B. NU's Motion to Exclude Paul Amoruso and Peter Haley – Bad Faith Claims Investigation Experts

FNF designated two experts concerning NU's handling of its FIB claim: Paul Amoruso and Peter Haley. NU attacks both of these experts on similar grounds.

Paul Amoruso gives his opinion that NU failed to

conduct a reasonable investigation based on several factors. Pls.' Opp. Ex. 2 (hereinafter "Amoruso Report"). As support for FNF's request for punitive damages, Amoruso further opines that NU acted maliciously with the intent to harm FNF. *Id.* at 29-36.

Peter Haley's initial expert also covers NU's allegedly flawed investigation. For example, Haley concludes that NU erred by treating the claim as one for Employee Dishonesty despite FNF's clear explanation that other types of coverage, such as Forgery, applied. Pls.' Opp. Ex. 3 (hereinafter "Haley Report"). Haley opines that NU acted in bad faith and failed to pay benefits due. *Id.* at 5-6, 18-28.

1. Litigation Privilege in Bad Faith Insurance Cases

NU argues that Amoruso and Haley violate the litigation privilege, [California Civil Code § 47](#), by testifying about NU's conduct defending [*16] this action.² [Silberg v. Anderson](#), 50 Cal. 3d 205, 212-13, 266 Cal. Rptr. 638, 786 P.2d 365 (1990); [Rubin v. Green](#), 4 Cal. 4th 1187, 1193-94, 17 Cal. Rptr. 2d 828, 847 P.2d 1044 (1993).

This argument does not warrant a lengthy discussion as the cases cited by NU do not support its contention. In *Nies*, for example, the California Court of Appeals held that the litigation privilege did not apply. [Nies v. Nat'l Auto. & Cas. Ins. Co.](#), 199 Cal. App. 3d 1192, 1202-03, 245 Cal. Rptr. 518 & n.7 (1988).

Moreover, FNF correctly observes that the California Supreme Court held that Civil Code [§ 47](#) is a limitation

² NU cites instances when Amoruso states: (1) that the victims relied on NU's federal pleadings to show that FNF "admitted" its employees actively participated in Norton's fraud, Amoruso Report at 15 (¶ f); (2) "It can reasonably be said that National Union's claims department has not investigated the Claim at all either before or after the lawsuit was filed, first hiding behind the 'Formal Proof of Loss Defense' and now apparently hiding behind its litigation attorneys," *id.* at 37 (¶ 2); and (3) "National Union's claims department is effectively responsible for the conduct that National Union's litigation attorneys have engaged in during the course of this litigation, including their attempt to prejudice the insureds as they defended the ongoing underlying litigation," *id.* at 38 (¶ 5).

Similarly, NU objects to these passages in Haley's report: (1) the heading "National Union Uses The Litigation To Conduct a 'Claims Investigation,'" Haley Report at 5, 18; and (2) comments on the substance of NU's litigation strategy of "repetitive discovery" and refusing to stay or mediate [*17] this action, *id.* at 5, 8, 15.

on liability and has "never been thought to bar the evidentiary use" of litigation statements. [Oren Royal Oaks Venture v. Greenberg, Bernhard, Weiss & Karma, Inc.](#), 42 Cal. 3d 1157, 1168, 232 Cal. Rptr. 567, 728 P.2d 1202 (1986); [White v. W. Title Ins. Co.](#), 40 Cal. 3d 870, 887-89, 221 Cal. Rptr. 509, 710 P.2d 309 (1985). "Accordingly, when allegations of misconduct properly put an individual's intent at issue in a civil action, statements made in the course of a judicial proceeding may be used for evidentiary purposes." [Oren Royal](#), 42 Cal. 3d at 1168. In *White*, the state high court held that an insured can introduce evidence of litigation misconduct to prove breach of the good faith covenant because the insurer's special duty continues after litigation commences. [White](#), 40 Cal. 3d at 887-89. The Court drew a careful distinction [*18] between (1) imposing liability "based squarely on a privileged communication," such as founding a defamation cause of action on a judicial communication, and (2) an insured using "an underlying course of conduct evidenced by the communication" to "prove liability for breach of the covenant." *Id.* at 888-89.

[White](#) controls. The litigation privilege does not bar evidence concerning aggressive litigation tactics for the purpose of trying to show an insurance company's bad faith conduct. *Id.* (admitting evidence that insurer made unreasonable, "nuisance-value" settlement offers; failed to attempt to appraise the amount of loss; and filed a summary judgment motion despite unanimous body of case law establishing that the policy covered plaintiff's claim because the "entire pattern of conduct shows a clear attempt by defendant to avoid responsibility"). Federal courts also follow the "careful distinction" set forth in *White* to allow insureds to introduce evidence of the insurer's litigation conduct in bad faith insurance cases. [Competitive Technologies v. Fujitsu Ltd.](#), 286 F. Supp. 2d 1118, 1154 (N.D. Cal. 2003); [Evanston Ins. Co. v. OEA, Inc.](#), 2005 U.S. Dist. LEXIS 34671, 2005 WL 3500799, at *4 (E.D. Cal. 2005); accord [*19] California Practice Guide: Insurance Litigation ¶ 12.1326 (2011); see John DiMugno & Paul Glad, Cal. Ins. Law Handbook § 11:143 (2013) (improper litigation tactics are admissible to show that the insurer breached the covenant of good faith and fair dealing).

Also, FNF seeks punitive damages and NU's alleged misconduct during the lawsuit bears on whether it acted with malice.

To the extent that NU contends that certain examples infringe on its right to conduct a vigorous defense against this lawsuit, NU may file an *in limine* motion.

See [Nies, 199 Cal. App. 3d at 1200-01](#); DiMugno, *supra*, § 11:143 ("courts recognize that insurers have a constitutional right to defend themselves and are therefore reluctant to impose liability on insurers for aggressive litigation tactics"). NU's concern with limited relevance and undue prejudice is more appropriately framed as a pretrial motion to exclude specific evidence than as a *Daubert* motion.

2. Speculative Opinions about Credibility and Motive

NU argues that Amoruso and Haley overstep the role of an expert by giving opinions about the credibility of witnesses and speculating about the motives of others. "[T]he jury must decide a witness's credibility [*20] without receiving expert testimony." [United States v. Candoli, 870 F.2d 496, 506 \(9th Cir. 1989\)](#).

The Court reviewed the reports and finds that the experts have not bolstered or impugned the credibility of any witness. Instead, the experts base their opinions on their knowledge of industry standards, their own work experience, and the facts of the case. The Ninth Circuit permits an expert in a bad faith insurance case to testify to his opinion that the insurer's conduct "deviated from industry standards." [Hangarter, 373 F.3d at 1016](#) (citing [Ford v. Allied Mut. Ins. Co., 72 F.3d 836, 841 \(10th Cir. 1996\)](#) (where expert relied on industry standard that flowed from Iowa insurance law to testify about bad faith denial of claim)).

In addition, [Federal Rule of Evidence 704](#) allows experts to testify to ultimate facts. [Fed. R. Evid. 704](#) (it is "not objectionable just because it embraces an ultimate issue"); e.g., [Peckham v. Cont'l Cas. Ins. Co., 895 F.2d 830, 837 \(1st Cir. 1990\)](#) (in bad faith insurance case, expert can give opinion on causation); [United States v. Gold, 743 F.2d 800, 816-17 \(10th Cir. 1984\)](#) (in Medicare fraud criminal case, expert can testify to opinion that claim is covered by [*21] policy when court gives a limiting instruction) (collecting cases); see [Goldwater v. Ginzburg, 414 F.2d 324, 343-44 \(2d Cir. 1969\)](#) (before adoption of [Rule 704](#), court held expert can discredit defendant's polling methods by comparing to good industry standards); accord [Neal v. Farmers Ins. Exch., 21 Cal. 3d 910, 924, 148 Cal. Rptr. 389, 582 P.2d 980 \(1978\)](#) (allowing expert to testify to assist lay jury assess "the conduct and motives of an insurance company in denying coverage under its policy" because expert, "by profession and experience, was peculiarly equipped to evaluate such matters in the context of similar disputes").

The examples cited by NU do not rise to the level of a *Daubert* motion. NU can test the weight of the opinion through cross examination. NU, however, identified a few examples when the expert's language may be unduly prejudicial.³ The Court will revisit the issue if NU files a motion in limine.

The Court, however, shares NU's concern about Amoruso's discussion of the *Acacia* lawsuit. In a prior federal action, a different insured, *Acacia*, prevailed against NU on a breach of the covenant of good faith claim. Amoruso reviewed the federal court's findings of fact and conclusions of law and gives his opinion that the same defects (by the same claims adjuster) occurred here. Amoruso Report at 33-36. Based on the similar facts, Amoruso concludes that "National Union's conduct in the handling of this claim is not an isolated incident." *Id.* at 35 (¶ e). He uses the *Acacia* verdict to state that "the lack of a claims manual is a systemic problem bound to repeat itself" and to conclude that NU "missed the teaching opportunity [*23] that *Acacia* gave. *Acacia* resulted in a \$30 million verdict." *Id.* at 36 (¶¶ 2 & 3).

NU argues that Amoruso improperly extrapolates the findings in a single case in violation of the rule that expert testimony cannot be based on speculation and conjecture. NU argues it is an "unproven fact" that *Acacia*, "viewed in isolation as a self-contained summation of National Union's nationwide claims handling practices by every representative in every office" is not proper.

The Court is inclined to sustain NU's objection to the discussion of the prior litigation by a different insured, but for a slightly different reason. While it is possible to exclude this particular testimony as "not relevant and ergo, non-helpful," [Daubert, 509 U.S. at 591](#), the Court

³For example, NU objects to Amoruso's statements that (1) "National Union acted maliciously with the intent to injure and harm its insured in October 2009" by refusing to renew the FIB policy, Amoruso Report at 29 (heading format omitted); and (2) NU's reason for raising rates "appears to have been manufactured," [*22] *id.* at 30 (¶ b), (¶ c).

NU objects to Haley's statements that (1) "National Union appears to be engaging in eleventh-hour theorizing," and describing a theory as "unconvincing," Haley Report at 6, 19; (2) "National Union has always had the information it claims to have now obtained," thus its conduct "makes no sense, and appears to be simple harassment," *id.* at 18; and (3) the Senior Executives' theory is "amazing" and "cannot be made in good faith," *id.* at 21-22.

strikes the expert testimony under the standard prejudice test of *Rule 403*. *United States v. 87.98 Acres of Land More or Less in Merced*, 530 F.3d 899, 904-05 (9th Cir. 2008); *In re Hanford Nuclear Reservation Litig.*, 534 F.3d 986, 1016 (9th Cir. 2008) (citing *Daubert*, 509 U.S. at 595, for proposition that trial court has "more control" to restrict expert testimony under *Rule 403*). This action involves complicated facts and there is no need to confuse [*24] the jury with unrelated facts. The Court agrees with NU's observation that Amoruso's discussion of the *Acacia* verdict could "poison the well."

3. Testimony about Legal Conclusions and Ultimate Facts

NU contends that both Amoruso and Haley violate the basic rule that an expert cannot state legal conclusions. Such testimony is not "helpful" because the trial judge instructs the jury on the law. *Hangarter*, 373 F.3d at 1016; *Aguilar v. Int'l Longshoremen's Union Local No. 10*, 966 F.2d 443, 447 (9th Cir. 1992). "Each courtroom comes equipped with a 'legal expert,' called a judge, and it is his or her province alone to instruct the jury on the relevant legal standards." *Burkhart v. Wash. Metro. Area Transit Auth.*, 112 F.3d 1207, 1213, 324 U.S. App. D.C. 241 (D.C. Cir. 1997).

The Court denies the *Daubert* motion, as this issue is best left to a motion in limine or to specific instances during trial. There is a thin line between an expert witness who improperly invades "the court's authority by discoursing broadly over the entire range of the applicable law" and the permissible, helpful expert testimony that "direct[s] the jury's understanding of the legal standards upon which their verdict must be based." *Specht v. Jensen*, 853 F.2d 805, 809 (10th Cir. 1988), [*25] cited with approval in *Hangarter*, 373 F.3d at 1017 ("a witness may properly be called upon to aid the jury in understanding the facts in evidence even though reference to those facts is couched in legal terms"). Federal law precludes an expert from invading the province of the court to instruct on the law, but allows an expert to testify to the "best" practices in an industry. *Fed. R. Evid.* 702, 704; *Hangarter*, 373 F.3d at 1010-11 (affirming admission of expert testimony that insured's coverage letter was "misleading, deceptive, and fell below industry standards"; its investigation was "biased"; and its adjustment process "violated the insurance industry principle" of examining each claim objectively); *Pinal Creek Grp. v. Newmont Mining Corp.*, 352 F. Supp. 2d 1037, 1046 (D. Ariz. 2005) (concluding that law professor could not interpret the law or apply to facts, but is permitted to opine on "corporate norms");

accord *Neal*, 21 Cal. 3d at 924; *Elder v. Pacific Tel. & Tel. Co.*, 66 Cal. App. 3d 650, 664, 136 Cal. Rptr. 203 (1977) (architect may "testify to the custom and practices" but not "applicability to defendants of certain construction safety orders" whether based on statute or regulation). The rule [*26] is easy to state but difficult to apply and the outcome depends upon how the expert expresses his opinion. E.g., *McHugh v. United Serv. Auto. Ass'n*, 164 F.3d 451, 454 (9th Cir. 1999) ("Although experts may disagree in their conclusions, their testimony cannot be used to provide legal meaning or interpret the policies as written.") (collecting cases); *Sancom, Inc. v. Qwest Commc'ns Corp.*, 683 F. Supp. 2d 1043 (D. S.D. 2010); *Summers v. A.L. Gilbert Co.*, 69 Cal. App. 4th 1155, 1180, 82 Cal. Rptr. 2d 162 (1999) (interpreting *Neal* as allowing expert to testify on "such factual issues as the promptness of the insurer's response" or "industry standards for dealing with covered claims" but "when an expert's opinion amounts to nothing more than an expression of his or her belief on how a case should be decided, it does not aid the jurors, it supplants them").

Having reviewed the passages in both reports, the Court denies the *Daubert* motion in so far as NU seeks to exclude the entire testimony. When considered in the broader context of the experts' testimony, none of the cited comments crosses the line from permissible opinion on a fact question. The Ninth Circuit allows an expert to refer to the applicable laws [*27] and regulations that inform his opinion. *Hangarter*, 373 F.3d at 1017 (noting that claims handling expert "relied in part on his understanding of the requirements of state law"). Here, Amoruso couched his opinion in legal terms, but he may "refer to the law in expressing his opinion" so as to assist the jury understand the facts. *Id.* While two of Amoruso's *headings* convey strong statements of how to apply the law to the facts (e.g., "NU acted in bad faith" and "acted maliciously"), the *body* of his report gives concrete information about industry customs to analyze the facts that support those opinions.

Similarly, Haley referred to the California regulations to inform the applicable guidelines, but he properly reviews the factual record to give his expert opinion that the investigation was not fair. Haley Report at 10. Haley is permitted to give his opinion that NU did not fulfill its obligations to its insured. Haley used documents in the claim file, together with his experience handling FIB claims, to support his view that NU had sufficient information to make payment in October 2007. His opinion necessarily refers to terms of art and relies on his legal experience. Finally, Haley's [*28] analysis of

the FIB policy is directed at NU's allegedly bad faith refusal to cover the Norton claim. The Ninth Circuit permits this, as shown by its citation to *Ford*, the Tenth Circuit case in which the expert explained why the policy covered the claim as part of his opinion that the insurance company had acted in bad faith. [Hangarter, 373 F.3d at 1016](#) (citing [Ford, 72 F.3d at 841](#)).

However, the Court will revisit the issue if NU decides to file a motion in limine to challenge specific testimony. See [Burkhart, 112 F.3d at 1212](#); [In re MTBE Prod. Liab. Litig., 643 F. Supp. 2d 482, 504-05 \(S.D.N.Y. 2009\)](#) ("At its essence, [Rule 704](#) restricts how an expert may frame her opinions."). The Court will also entertain a request for a cautionary jury instruction.

4. Explanations of Facts

NU also contends that Amoruso and Haley explain facts that the jury is capable of understanding without an expert. For example, NU complains that they selected only the evidence that favors FNF. NU argues that the jury is capable of distilling the facts and deciding, for instance, whether NU should have had a written claims manual, complied with its own standards, and discussed coverage with underwriters. NU argues [*29] that the jury has the common sense to decide on its own whether NU "threatened" FNF and what the claims adjustor did and did not do properly. NU complains that FNF is using the experts to argue the theory of its case, which gives it unfair weight and "gravitas" through its "mouthpiece."

The record does not support NU's premise. This is not a simple case. The jurors may not be familiar with fidelity bonds. The testimony of claims handling experts, like Amoruso, Haley, and Felton, will help the jury understand the best practices to handle fidelity insurance claims. The adjustment of a complex claim like the Norton fraud is not self-evident to a layperson. See [Amadeo v. Principal Mut. Life Ins. Co., 290 F.3d 1152, 1161-64 \(9th Cir. 2002\)](#) (bad faith claims-handling, inadequate investigation, and unreasonable interpretation of insurance contracts under layman's understanding of coverage are factual questions for jury). The Ninth Circuit and California Supreme Court both recognize that an expert may help the jury understand whether the claim was handled improperly in bad faith insurance action. [Hangarter, 373 F.3d at 1016](#) (expert qualified to testify about claims adjustment standards and practices); [*30] [Neal, 21 Cal. 3d at 924](#). Such an expert can inform the jury about the industry standards based on his experience and knowledge of

the insurance industry. *Id.*; cf. [Cal. Shoppers, Inc. v. Royal Globe Ins. Co., 175 Cal. App. 3d 1, 66, 221 Cal. Rptr. 171 \(1985\)](#) (attorney lacked special experience to give expert opinion on insurance coverage and best practices).

C. FNF's Motion to Exclude Christopher Money – Damages Expert

FNF's own accounting expert, Kent Barrett, analyzed thousands of documents to trace the cash flow in and out of the escrow accounts. He prepared a chart for each victim and calculated a \$5.2 million loss.

NU's accounting expert, Christopher Money, used Barrett's data and noted his adjustments to the specific line items. Money rejected most of the claimed losses, however, he estimates that the Jr. Holdaways sustained a \$1 million loss. Pls.' Exs. 4-6. Money eliminates the other victims on the theory that Safe Harbor (Norton's entity) was responsible for funding the transactions, thus, the victims did not directly contribute funds to purchase or refinance the condominium units. Pls.' Ex. 4 (July Report at 4-15). As to the Jr. Holdaways' transactions, Money eliminates most losses on the theory [*31] that they authorized Norton to refinance the property. Money calculates losses only in those transactions when disbursements went to Norton. Pls.' Exs. 4 (July Report at 17-18) & 5 (Dec. Report at 16-19).

FNF argues that Money's opinion is unreliable and unhelpful. It argues that Money did not conduct any accounting services, but instead, applied the attorney's subjective interpretation of the FIB policy to reject certain escrow fees as losses. [De Jager Constr., Inc. v. Schleining, 938 F. Supp. 446 \(W.D. Mich. 1996\)](#). For example, Money used the list the attorney gave him of "quid pro quo" transactions and rejected any escrow in that category. Depo. at 134-35. FNF further argues that Money is not qualified to apply a coverage analysis, but that he provides one by regurgitating counsel's theory. [In re Tri St. Outdoor Media Grp., Inc., 283 B.R. 358, 364 \(Bank. M.D. Ga. 2002\)](#). Moreover, FNF argues that Money's analysis is based on incorrect facts. [DeJager Constr., Inc. v. Schleining, 938 F. Supp. 446, 449 \(W.D. Mich. 1996\)](#). For example, Money contends that the Jr. Holdaways signed a power of attorney to allow Norton to sign documents for them; but Money ignores the victims' deposition [*32] testimony that Norton forged all the documents used to close the Crown Point escrows.

The Court denies the *Daubert* motion. Having read the

summary judgment motions, it appears to the Court that Money's calculation of damages is based on NU's theory of its case. FNF can pursue any perceived flaws in the expert's data and analysis during cross-examination.

CONCLUSION

Upon due consideration of the parties' memoranda and exhibits, the arguments advanced at hearing, and for the reasons set forth above, the Court hereby (1) **GRANTS IN PART and DENIES IN PART** FNF's motion to exclude Dean Felton's expert opinion and testimony [Doc. No. 326]; (2) **DENIES** NU's motion to exclude Paul Amoruso's expert testimony [Doc. No. 321]; (3) **DENIES** NU's motion to exclude Peter Haley's expert testimony [Doc. No. 320]; and (4) **DENIES** FNF's motion to exclude Christopher Money's expert opinion and testimony [Doc. No. 319].

IT IS SO ORDERED.

DATED: March 28, 2014

/s/ Gonzalo P. Curiel

HON. GONZALO P. CURIEL

United States District Judge

End of Document

Garoutte v. Am. Family Mut. Ins. Co.

United States District Court for the Western District of Washington

January 19, 2013, Decided; January 22, 2013, Filed

CASE NO. C12-1787MJP

Reporter

2013 U.S. Dist. LEXIS 8559 *; 2013 WL 231104

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.

Subsequent History: Partial summary judgment granted by [Garoutte v. Am. Family Mut. Ins. Co., 2013 U.S. Dist. LEXIS 103062 \(W.D. Wash., July 23, 2013\)](#)

Motion denied by, Stay denied by [Garoutte v. Am. Family Mut. Ins. Co., 2013 U.S. Dist. LEXIS 153774 \(W.D. Wash., Oct. 24, 2013\)](#)

Counsel: [*1] For Randy Garoutte, Monica Garoutte, husband and wife, and marital community composed thereof, Plaintiffs: Joel B. Hanson, LEAD ATTORNEY, SEATTLE, WA; Michael Thomas Watkins, LEAD ATTORNEY, LAW OFFICES OF MICHAEL T. WATKINS, SEATTLE, WA; George W. McLean, Jr, LAW OFFICES OF GEORGE W. MCLEAN JR., SEATTLE, WA.

For American Family Mutual Insurance Company, an insurance company, Jane Doe Beddoe, husband and wife, and marital community composed thereof, Kent Beddoe, Defendants: Rory W Leid, III, LEAD ATTORNEY, Jennifer P Dinning, COLE WATHEN LEID & HALL, SEATTLE, WA.

Judges: Marsha J. Pechman, United States District Judge.

Opinion by: Marsha J. Pechman

Opinion

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

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 [*2] on January 22, 2012, when an accidental fire severely damaged the home of Plaintiffs Randy and Monica Garoutte. (Dkt. No. 1-3 at 2-3.¹) 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 [*3] Plaintiffs' personal property after the fire. (*Id.*)

¹ Plaintiff's 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.

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 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 [*4] 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 \(9th Cir. 2009\)](#).

Here, Plaintiffs bring three causes of action against Defendants. The first cause of action is for violations of several insurance claims regulatory provisions [*5] 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 [*6] 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 U.S. Dist. LEXIS 97899, 2009 WL 3444762 *2 \(W.D. Wash. Oct. 20, 2009\)](#). But that decision explicitly confined its reasoning to the duties of third-party [*7] 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 Wn.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](#). But here, unlike in [Eastwood](#), Plaintiffs do not show that Defendant Beddoe had any duty that arose independently of his employer's duties. [Id.](#)

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' [*8] 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 Wn. 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 Wn.2d 299, 312, 858 P.2d 1054 \(1993\)](#) and [Panag v. Farmers Ins. Co. of Washington, 166 Wn.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 [*9] 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.

/s/ Marsha J. Pechman

Marsha J. Pechman

United States District Judge

End of Document



Hicks v. Progressive Cas. Ins. Co.

United States Court of Appeals for the Ninth Circuit

March 7, 2017, Argued and Submitted, Pasadena, California; April 3, 2017, Filed

No. 15-55953

Reporter

2017 U.S. App. LEXIS 5733 *; 2017 WL 1208599

CHRIS WYATT HICKS, Plaintiff-Appellant, v.
PROGRESSIVE CASUALTY INSURANCE COMPANY,
Defendant-Appellee.

Notice: PLEASE REFER TO *FEDERAL RULES OF APPELLATE PROCEDURE RULE 32.1* GOVERNING THE CITATION TO UNPUBLISHED OPINIONS.

Prior History: [*1] Appeal from the United States District Court for the Central District of California. D.C. No. 2:14-cv-06316-PA-SH. Percy Anderson, District Judge, Presiding.

[Hicks v. Progressive Cas. Ins. Co., 2015 U.S. Dist. LEXIS 71985 \(C.D. Cal., June 1, 2015\)](#)

Counsel: For CHRIS WYATT HICKS, Plaintiff - Appellant: Martin Stanley, Attorney, The Law Office of Martin Stanley, Santa Monica, CA; Maximilian Lee, Attorney, Law Office of Maximilian Lee, Santa Monica, CA.

For PROGRESSIVE CASUALTY INSURANCE COMPANY, Defendant - Appellee: Julia H. Azrael, Esquire, Attorney, John S. Curtis, Esquire, Attorney, Law Offices of Julia Azrael, North Hollywood, CA; Katherine Lesley Curtis, Attorney, Law Offices of Katherine Curtis, North Hollywood, CA.

Judges: Before: REINHARDT, TASHIMA, and NGUYEN, Circuit Judges.

Opinion

MEMORANDUM*

Wyatt Hicks appeals the district court's grant of summary judgment to Progressive Casualty Insurance Company in his suit for bad faith insurance denial. We have jurisdiction under 28 U.S.C. § 1291. Reviewing de novo, see [Attorneys Liab. Prot. Soc'y, Inc. v. Ingaldson Fitzgerald, P.C., 838 F.3d 976, 980 \(9th Cir. 2016\)](#), we reverse and remand.

An insurer "must give at least as much consideration to the interests of the insured as it gives to its own interests." [Wilson v. 21st Cent. Ins., 42 Cal. 4th 713, 68 Cal. Rptr. 3d 746, 171 P.3d 1082, 1087 \(Cal. 2007\)](#) (quoting [Frommoethelydo v. Fire Ins. Exch., 42 Cal. 3d 208, 228 Cal. Rptr. 160, 721 P.2d 41, 44 \(Cal. 1986\)](#)). While the insurer "has no obligation . . . to pay every claim its insured makes, the insurer cannot deny the claim 'without fully investigating [*2] the grounds for its denial.'" *Id.* (quoting [Frommoethelydo, 721 P.2d at 44](#)). "[D]enial of a claim on a basis unfounded in the facts known to the insurer, or contradicted by those facts, may be deemed unreasonable." *Id.* "The insurer may not just focus on those facts which justify denial of the claim." *Id.* (quoting [Mariscal v. Old Republic Life Ins., 42 Cal. App. 4th 1617, 50 Cal. Rptr. 2d 224, 227 \(Ct. App. 1996\)](#)).

Viewing the facts in the light most favorable to Hicks, Progressive performed an inadequate and biased investigation into the accident—one that was designed to protect its own interests without any regard for Hicks's interests. Progressive immediately formed an opinion that Hicks's injury was caused by an earlier accident and never seriously considered any other possibility. It based its opinion on conversations with representatives of Safeway Insurance Company and Karl Kantarjian—parties who had an obvious interest in minimizing Hicks's injury from the collision with Kantarjian—and failed to account for the substantial evidence that any

* This disposition is not appropriate for publication and is not

precedent except as provided by [Ninth Circuit Rule 36-3](#).

prior injury had no bearing on the present case.

It was uncontroverted that any prior injury to Hicks's back or lower spine had healed years before the Kantarjian collision, and there was no evidence that Hicks's constant pain years after the Kantarjian collision was attributable [*3] to the earlier accident. The "genuine dispute" doctrine does not apply here "where the evidence shows 'the insurer dishonestly selected its experts[,] the insurer's experts were unreasonable[,] [or] the insurer failed to conduct a thorough investigation.'" [McCoy v. Progressive W. Ins.](#), 171 Cal. App. 4th 785, 90 Cal. Rptr. 3d 74, 80 (Ct. App. 2009) (quoting [Chateau Chamberay Homeowners Ass'n v. Associated Int'l Ins.](#), 90 Cal. App. 4th 335, 108 Cal. Rptr. 2d 776, 785 (Ct. App. 2001)).

"The size of the arbitration award, if it substantially exceeds the insurer's offer, although not conclusive, furnishes an inference that the value of the claim is the equivalent of the amount of the award" [2 Robert C. Clifford & Paul A. Eisler, California Uninsured Motorist Law § 24.11 \(2016\)](#) (citing [Crisci v. Sec. Ins. Co. of New Haven, Conn.](#), 66 Cal. 2d 425, 58 Cal. Rptr. 13, 426 P.2d 173, 177 (Cal. 1967)); see also [Brehm v. 21st Cent. Ins.](#), 166 Cal. App. 4th 1225, 83 Cal. Rptr. 3d 410, 421 (Ct. App. 2008) (holding that insurer's "unreasonably low" settlement offer "in light of the medical evidence in its possession at that time" was evidence of bad faith). Although Progressive offered to settle for \$5,500 to avoid certain arbitration costs, it did not value Hicks's claim at \$105,500. Rather, it took the position that Hicks's claim was worth at most \$57,000 when the undisputed facts showed it was worth between \$175,000 (by Progressive's own estimate) and \$200,000 (by the arbitrator's).

Throughout its investigation, Progressive sought to portray Hicks and his mother as liars. During arbitration, Progressive's [*4] attorney attempted to undermine Hicks's mother's credibility by asking her whether she "[did] pornography." This is evidence of Progressive's bias towards its insured. See 11 John K. DiMugnoa & Paul E.B. Glad, [California Insurance Law Handbook § 143 \(2016\)](#) ("An insurer's duty of good faith and fair dealing continues after litigation commences. Thus, 'various litigation tactics . . . and other conduct' are admissible to show that the insurer breached the covenant of good faith and fair dealing." (quoting [White v. W. Title Ins.](#), 40 Cal. 3d 870, 221 Cal. Rptr. 509, 710 P.2d 309, 317 n.9 (Cal. 1985))). Contrary to the district court's assertion, evidence of bad faith litigation tactics to show bias is not barred by [California Civil Code](#)

[section 47\(b\)](#). See [Oren Royal Oaks Venture v. Greenberg, Bernhard, Weiss & Karma, Inc.](#), 42 Cal. 3d 1157, 232 Cal. Rptr. 567, 728 P.2d 1202, 1208-09 (Cal. 1986); see also [White](#), 710 P.2d at 318.

REVERSED and REMANDED.

End of Document

Homer v. Nationwide Mut. Ins. Co.

United States District Court for the Western District of Pennsylvania

August 26, 2016, Decided; August 26, 2016, Filed

Civil Action No. 15-1184

Reporter

2016 U.S. Dist. LEXIS 114548 *

MARC HOMER, Plaintiff, v. NATIONWIDE MUTUAL INSURANCE COMPANY, Defendant.

Counsel: [*1] For MARC HOMER, Plaintiff: Andrew J. Leger, Jr., LEAD ATTORNEY, Law Office of Andrew J. Leger, Jr., Pittsburgh, PA; Richard N. Lettieri, Lettieri Law Firm, LLC, Pittsburgh, PA.

For NATIONWIDE MUTUAL INSURANCE COMPANY, Defendant: Daniel L. Rivetti, Jennifer L. Miller, Mark A. Martini, Robb Leonard Mulvihill LLP, Pittsburgh, PA.

Judges: Hon. Nora Barry Fischer, United States District Judge.

Opinion by: Nora Barry Fischer

Opinion

MEMORANDUM OPINION

I. INTRODUCTION

This is a diversity action filed by Marc Homer ("Homer" or "Plaintiff") against Nationwide Mutual Insurance Company ("Nationwide" or "Defendant") alleging insurance bad faith and violations of the Unfair Trade Practices and Consumer Protection Law ("UTCPL"), 73 Pa. Cons. Stat. §§ 201.1 *et seq.*, for actions taken by Nationwide during a previous underinsured motorist trial between the same parties. Nationwide has moved for dismissal of this action on the grounds that Homer cannot rely on litigation conduct as the basis for an insurance bad faith claim under Pennsylvania law and that he has not sufficiently pled the elements of a UTCPL claim. The case appears to present an issue of first impression with respect to litigation conduct and insurance bad faith. The Motion has been extensively briefed, [*2] (Docket Nos. 7, 9, 12, 19, 31, 39, 44), and

the Court heard oral argument¹ on May 11, 2016. (*Id.*) The Motion is now ripe for disposition. After careful consideration of the parties' positions and an exhaustive review of the relevant legal authority in Pennsylvania and other jurisdictions, for the reasons that follow, Nationwide's Motion to Dismiss [18] is granted.

II. FACTUAL BACKGROUND AND PROCEDURAL HISTORY²

Homer was injured in a motor vehicle accident on May 24, 2008. (Docket No. 17 at ¶¶ 3-8). He suffered a number of medical problems as a result of the accident, including traumatic head injury, impaired cognition, and neck and back problems. (*Id.* at ¶ 9). The third-party driver who crashed into Homer was insured up to \$25,000. (*Id.* at ¶ 11). Homer eventually settled with the third-party driver for \$24,500. (*Id.* at ¶ 31). At the time of the accident, Homer was driving a car owned by his mother, who had Underinsured Motorist ("UIM") coverage though Nationwide up to \$500,000 for [*3] bodily injury. (*Id.* at ¶¶ 14-19, 34). Homer made a written demand for the full \$500,000 to compensate him for the injuries he sustained. (*Id.* at ¶¶ 25, 34). Nationwide offered \$12,500, which Homer rejected, and the case proceeded to trial in the Court of Common Pleas of Allegheny County. (*Id.* at ¶¶ 34-37).

On June 1, 2015, while the trial was ongoing, Homer's counsel drafted, and the parties signed, a Binding "High-Low" Settlement Agreement (the "Agreement"),³ which

¹ The parties elected not to order the transcript from the oral argument. (Docket No. 35).

² For the purposes of a Motion to Dismiss, the Court assumes as true the factual allegations in Homer's Amended Complaint. [Connelly v. Lane Constr. Corp., 809 F.3d 780, 790 \(3d Cir. 2016\)](#).

³ Pennsylvania courts have held that high-low agreements are

stipulated that Homer would receive a settlement payment within the range of \$100,000 to \$300,000, depending on the verdict of the jury. (*Id.* at ¶ 38; Docket No. 17-1 at 35-36). In addition to a monetary settlement within the agreed-upon range, the Agreement contained the following provisions that are the basis of the present case:

5. All claims for bad faith for acts or omissions occurring prior to the date of the execution of this Agreement, including all claims contained in GD No. 13-009777, are dismissed with prejudice and barred, released and controlled by this Binding High- Low Agreement.

6. Any claims for bad faith for acts or omissions occurring after the date of the execution of this Binding High-Low Agreement will [*4] not be barred by the Agreement.

(Docket No. 17-1 at 35-36) (emphasis added).

On the same day the Agreement was signed, Nationwide introduced into evidence videotaped testimony of two medical experts during its case-in-chief. (Docket No. 17 at ¶¶ 39, 41). The following day, June 2, 2015, both parties gave closing arguments, and counsel for Nationwide referenced the testimony of the medical experts. (*Id.* at ¶¶ 79-82). Homer alleges that Nationwide knew these experts were biased and, thus, committed bad faith by offering their testimony at trial and relying on same during closing arguments. (Docket No. 31 at 2). On June 2, 2015, the jury returned a verdict in favor of Homer for \$1.61 million dollars. (*Id.* at 4). Two days later, Nationwide filed a motion to mold the verdict, seeking to have the Judge reduce the verdict to \$300,000 and to dismiss Homer's bad faith claim for acts that occurred "as of June 1, 2015." (Docket No. 17 at ¶¶ 89-96). In response, Homer objected to the wording of Nationwide's motion, arguing instead that given the Agreement, it should reflect "all claims for bad faith or acts or omissions occurring [*5] prior to June 1, 2015" be dismissed with prejudice. (Docket No. 17-2 at 72-74, 77). The Court of Common Pleas of Allegheny County ruled in favor of Homer and against Nationwide. (Docket No. 31 at 16).

Homer filed the present lawsuit on September 10, 2015, alleging Nationwide acted in bad faith when it introduced the videotaped testimony of its experts at trial, referenced the experts' testimony during closing arguments, and filed the motion to mold with what

settlement agreements. [Vargo v. Mangus, 94 Fed. Appx. 941, 943 \(3d Cir. 2004\)](#).

Homer believes was inaccurate wording. (Docket No. 1). Nationwide moved to dismiss. (Docket No. 6). Following briefing and argument, the Court ruled on the record that Homer's initial Complaint was conclusory in nature and did not meet the federal pleading requirements, after which Homer requested, and was granted, leave to amend. (Docket No. 14). Homer then proceeded to file an Amended Complaint which addressed in more detail his allegations of bias exhibited by Nationwide's experts, the use of those experts at trial, and the circumstances surrounding the Agreement. (Docket Nos. 17; 31 at 5). As requested by the Court, Homer also provided relevant portions of the trial transcript and the deposition testimony and reports of the [*6] challenged experts.⁴ (*Id.*).

A. Nationwide's Litigation Conduct

Nationwide's first expert, Dr. Frances T. Ferraro, is a neurosurgeon. (Docket No. 17 at ¶¶ 43-44). The crux of Homer's argument regarding Dr. Ferraro's bias is that his testimony contradicted his report. (*Id.* at ¶¶ 69, 81-83). Dr. Ferraro noted in his report that Homer's ". . . major problem at this time appears to be his cognitive memory issues." (Docket No. 31 at 8). Nevertheless, at his deposition, and after "Nationwide's employee met with [him] in private," Homer claims Dr. Ferraro dramatically changed his testimony. (*Id.*) ("The doctor instead testifies that Plaintiff's major 'complaint' during Dr. Ferraro's examination was not neck or back pain, but, actually from *Plaintiff's perspective a complaint* about impaired cognition. Dr. Ferraro then concluded in his deposition that as a neurosurgeon, he was not qualified to address such a complaint.") (emphasis in the original).

Nationwide's second [*7] expert, Dr. James D. Petrick, a clinical neurologist, reported that he performed "a comprehensive battery of neuropsychological measures" on Homer. (Docket No. 17 at ¶¶ 50-51). From these tests, Dr. Petrick concluded that Homer suffered from depression but was otherwise normal, did not have significant cognitive defects or traumatic brain

⁴Since these documents are attached to the Amended Complaint, the Court may consider them on a motion to dismiss. [Bruni v. City of Pittsburgh, No. 15-CV-1755, 824 F.3d 353, 2016 U.S. App. LEXIS 10019 \(3d Cir. June 1, 2016\)](#) ("The court may . . . rely upon 'exhibits attached to the complaint and matters of public record.'") (quoting [Pension Benefit Guar. Corp. v. White Consol. Indus., Inc., 998 F.2d 1192, 1196 \(3d Cir. 1993\)](#)); see also [Schmidt v. Skolas, 770 F.3d 241, 249 \(3d Cir. 2014\)](#).

injury, and could continue working as a mechanical engineer. (*Id.* at ¶¶ 52-55). When cross-examined by Plaintiff's counsel, Dr. Petrick admitted that 60% of his examinations were performed for employers and insurance companies and 30% of his entire practice is defense medical examinations. (*Id.* at ¶¶ 59-60). Homer's attorney cross-examined Dr. Petrick on sixteen of his past reports, and in all sixteen he conceded he was a defense expert and testified in each of those cases that there was no cognitive defect or disability. (*Id.* at ¶¶ 61-63). He was then asked about another report which he submitted at the request of a plaintiff's attorney where he concluded that the individual in that case could not return to work. (*Id.* at ¶¶ 65-67). Homer avers that Dr. Petrick was "devastated" by this cross-examination as it showed Dr. Petrick would always support [*8] whichever party retained him. (*Id.* at ¶ 71).

During closing arguments, the attorney for Nationwide recapped the testimony of both experts. (*Id.* at ¶¶ 79-84). Homer now argues that in light of the facts described above, Nationwide knew or should have known that the experts were biased and should not have used their testimony at trial or referenced it again during closing arguments.

B. Nationwide's Motion to Mold

As noted, Nationwide filed a motion to mold the verdict pursuant to the High-Low Agreement and to dismiss the bad faith claim with prejudice. (*Id.* at ¶ 89). Nationwide's motion to mold stated: "Plaintiff's bad faith claim is dismissed with prejudice as of June 1, 2015." (*Id.* at ¶ 91). Homer argues that as written, Nationwide's motion would have dismissed any and all bad faith claims, in particular those that occurred after, but on the same day as, the signing of the High-Low Agreement. (*Id.* at ¶¶ 90-96). Homer counters Nationwide's argument that its motion was "in artfully [sic] drafted," arguing "Plaintiff pointed out this effect in Plaintiff's Response to Defendant's Motion to Mold Verdict and Defendant never sought to correct the same." (*Id.* at ¶¶ 95-96).

III. LEGAL STANDARD

[*9] A valid complaint requires only "a short and plain statement of the claim showing that the pleader is entitled to relief." *Fed. R. Civ. P. 8(a)(2)*. To survive a motion to dismiss brought pursuant to *Federal Rule of Civil Procedure 12(b)(6)*, "a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S.

544, 570, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)). The United States Supreme Court in *Iqbal* clarified that its decision in *Twombly* "expounded the pleading standard for 'all civil actions.'" *Iqbal*, 556 U.S. at 684. The Supreme Court further explained that even though a court must accept as true all of the factual allegations contained in a complaint, that requirement does not apply to legal conclusions; therefore, the pleadings must include factual allegations to support the legal claims asserted. *Id.* at 678-79. "Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Id.* at 678 (citing *Twombly*, 550 U.S. at 555). Thus, "[a]lthough a reviewing court now affirmatively disregards a pleading's legal conclusions, it must still . . . assume all remaining factual allegations to be true, construe those truths in the light most favorable to the plaintiff, and then draw all reasonable inferences from them." *Connelly*, 809 F.3d at 790 (citing *Foglia v. Renal Ventures Mgmt., LLC*, 754 F.3d 153, 154 n.1 (3d Cir. 2014)). The facial plausibility requirement is met "when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged. The plausibility standard is not akin to a 'probability requirement,' but it asks for more than a sheer possibility that a defendant has acted unlawfully." *Iqbal*, 556 U.S. at 678 (citing *Twombly*, 550 U.S. at 556-57) (internal citations omitted). Furthermore, the determination as to whether a complaint contains a plausible claim for relief is "a context-specific task that requires the reviewing court to draw on its judicial experience and common sense." *Id.* at 679 (citation omitted).

In light of *Iqbal*, the United States Court of Appeals for the Third Circuit has instructed that district courts should first separate the factual and legal elements of a claim, and accepting the "well-pleaded facts as true," should then "determine whether the facts alleged in the complaint are sufficient to show that the plaintiff has a 'plausible claim for relief.'" *Fowler v. UPMC Shadyside*, 578 F.3d 203, 211 (3d Cir. 2009) (citing *Iqbal*, 556 U.S. at 679). The matter for this Court's determination is not whether the pleading party ultimately will prevail on the claim, but rather whether that party is entitled to offer evidence in support of it. *United States ex rel. Wilkins v. United Health Grp.*, 659 F.3d 295, 302 (3d Cir. 2011). Accordingly, a plaintiff must plead "factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal*, 556 U.S. at 678 (citing *Twombly*, 550 U.S. at 556). As part of this task, this Court must "identify those allegations that, being merely conclusory, are not

entitled to the presumption of truth." [Connelly, 809 F.3d at 789](#). The Court is mindful that to meet the standard a plaintiff "need only put forth allegations [of fact] that raise a reasonable expectation that discovery [*10] will reveal evidence of the necessary element." [Fowler, 578 F.3d at 213](#) (internal quotations omitted); see also [Connelly, 809 F.3d at 791](#).

In considering a motion to dismiss, courts are not permitted "to go beyond the facts alleged in the Complaint and the documents on which the claims made therein were based." [In re Burlington Coat Factory Sec. Litig., 114 F.3d 1410, 1425 \(3d Cir. 1997\)](#). A court may, however, consider documents attached to the complaint. [Bruni, 824 F.3d 353, 2016 U.S. App. LEXIS 10019, at *12](#) ("The court may . . . rely upon 'exhibits attached to the complaint and matters of public record.'") (quoting [Pension Benefit Guar. Corp., 998 F.2d at 1196](#)); see also [Schmidt, 770 F.3d at 249](#). A court must treat a motion to dismiss as one for summary judgment only when "other 'matters outside the pleadings are presented to and not excluded by the court.'" [Bruni, 824 F.3d 353, 2016 U.S. App. LEXIS 10019, at *12](#) (quoting [Fed. R. Civ. P. 12\(d\)](#)). Under those circumstances, "[a]ll parties must be given a reasonable opportunity to present all the material that is pertinent to the motion." *Id.* (quoting [Fed. R. Civ. P. 12\(d\)](#)).

IV. DISCUSSION

As an initial matter, the Court finds that the parties have not presented "other 'matters outside the pleadings.'" *Id.* (quoting [Fed. R. Civ. P. 12\(d\)](#)). Accordingly, the Court will treat Nationwide's motion as a motion to dismiss and not as a motion for summary judgment. The Court will separately address Homer's insurance bad faith and UTPCPL claims.

A. Insurance Bad Faith Claim

Bad faith on the part of an insurer [*11] under [42 Pa. Cons. Stat. § 8371](#) is defined as a "frivolous or unfounded refusal to pay proceeds of a policy." [Romano v. Nationwide Mut. Fire Ins. Co., 435 Pa. Super. 545, 646 A.2d 1228, 1232 \(Pa. Super. Ct. 1994\)](#) (citations omitted). The standard that a plaintiff must meet under Pennsylvania law is a relatively high one:

To succeed in a bad faith claim, the insured must present clear and convincing evidence that "the insurer did not have a reasonable basis for denying benefits under the policy and that the insurer knew of or recklessly disregarded its lack of reasonable

basis in denying the claim." [O'Donnell v. Allstate Ins. Co., 1999 PA Super 161, 734 A.2d 901, 906 \(Pa. Super. Ct. 1999\)](#), (citing [MGA Ins. Co. v. Bakos, 699 A.2d 751, 754 \(Pa. Super. Ct. 1997\)](#)). Bad faith in the context of insurance litigation has been defined as "any frivolous or unfounded refusal to pay proceeds of [a] policy." [Adamski v. Allstate Ins. Co., 1999 PA Super 241, 738 A.2d 1033, 1036 \(Pa. Super. Ct. 1999\)](#). To constitute bad faith it is not necessary that the refusal to pay be fraudulent. However, mere negligence or bad judgment is not bad faith. *Id.* To support a finding of bad faith the insurer's conduct must be such as to "import[] a dishonest purpose." *Id.* It also must be shown that the insurer breached a known duty (*i.e.*, good faith and fair dealing), through some motive of self interest or ill will. *Id.*

[Bonenberger v. Nationwide Mut. Ins. Co., 2002 PA Super 14, 791 A.2d 378, 380 \(Pa. Super. Ct. 2002\)](#); see also [Northwestern Mut. Life Ins. Co. v. Babayan, 430 F.3d 121, 137 \(3d Cir. 2005\)](#) (setting forth the elements of a bad faith claim); [W.V. Realty, Inc. v. N. Ins. Co., 334 F.3d 306, 312 \(3d Cir. 2003\)](#) (same). Bad faith conduct "implies an actual, subjective decision to commit a wrong act." [Schleinkofer v. Nat'l Cas. Co., 339 F. Supp. 2d 683, 688 \(W.D. Pa. 2004\)](#) (quoting [*12] [Danley v. State Farm Mutual Auto. Ins. Co., 808 F. Supp. 399, 402 \(M.D. Pa. 1992\)](#)).

Nationwide takes the position that there is no precedent under Pennsylvania law for litigation tactics to serve as the basis of a bad faith claim. (Docket No. 19 at 1). It argues that allowing Homer's Amended Complaint to go forward would "open the doors for any insurer to be subject to a bad faith lawsuit for putting on a defense at trial and [would] allow[] plaintiffs to dictate defendants' trial strategy." (Docket No. 19 at 14). Homer counters that courts in Pennsylvania have held that an insurer's conduct during the course of litigation may support a finding of bad faith. (Docket No. 31 at 11-12).

Review of Pennsylvania case law does not yield a hard and fast rule regarding what types of litigation tactics may serve as the basis for an insurance bad faith claim. Yet, some decisions indicate that certain acts committed during the course of litigation can constitute bad faith. [O'Donnell, 734 A.2d at 906](#). Courts are also mindful that all litigation is inherently adversarial and defendant insurers have a right to defend themselves in court. Therefore, state and federal courts in Pennsylvania have allowed bad faith claims for certain types of litigation conduct and not others, such as discovery

violations:

The [*13] Pennsylvania Superior Court has held that bad faith is actionable regardless of whether it occurs before, during or after litigation. *O'Donnell v. Allstate Ins. Co., 1999 PA Super 161, 734 A.2d 901, 906 (Pa. Super. 1999)* ("[W]e refuse to hold that an insurer's duty to act in good faith ends upon the initiation of suit by the insured."). The Superior Court made quite clear, however, that this did not mean that insureds may recover under Pennsylvania's bad faith statute "for discovery abuses by an insurer or its lawyer in defending a claim predicated on its alleged prior bad faith handling of an insurance claim." *Id. at 908* (quoting *Slater v. Liberty Mut. Ins. Co., No. 98-1711, 1999 U.S. Dist. LEXIS 3753, 1999 WL 178367, at *2 n.3 (E.D. Pa. Mar. 30, 1999)*). This general proposition comes with the caveat that using litigation in a bad faith effort to evade a duty owed under a policy would be actionable under *Section 8371*.

In those cases in which nothing more than discovery violations were alleged, courts have declined to find bad faith. . . .

W.V. Realty, Inc., 334 F.3d at 313; see also *Slater, 1999 U.S. Dist. LEXIS 3753, 1999 WL 178367, at *2* ("*Section 8371* provides a remedy for bad-faith conduct by an insurer in its capacity as an insurer and not as a legal adversary in a lawsuit filed against it by an insured. The court is confident that the legislature did not contemplate a potentially endless cycle of *§ 8371* suits, each based on alleged discovery abuses by the insurer in defending itself in the prior suit.").

There are [*14] a few cases outside the discovery context where courts have allowed bad faith claims to go forward. In one case, a court denied a motion to dismiss a bad faith claim premised on an insurance company's "misrepresentations to the court" and filing of abusive motions during an insurance coverage action. See *Gen. Refractories Co. v. Fireman's Fund Ins. Co., 2002 U.S. Dist. LEXIS 25324, 2002 WL 376923, at *3 (E.D. Pa. Feb. 28, 2002)*, reversed in part on other grounds, *337 F.3d 297 (3d Cir. 2003)* ("Since Plaintiff's cause of action for insurance bad faith is not entirely founded on Defendants' discovery tactics, the Court cannot say, at this time, that Plaintiffs cannot prove any set of facts which would entitle them to relief . . ."). In another case, the court allowed a bad faith claim where the insurer "engaged in obstructive conduct and induced [plaintiff] to discontinue his state court suit by

misrepresenting its intent to evaluate and settle his claim." *Cooper v. Nationwide Mut. Ins. Co., 2002 U.S. Dist. LEXIS 21552, 2002 WL 31478874, at *4 (E.D. Pa. Nov. 7, 2002)*. A third court refused to dismiss a bad faith claim where the insurer allegedly filed a baseless counterclaim against the insured in a coverage action. *Krisa v. The Equitable Life Assurance Soc., 109 F. Supp. 2d 316, 321 (M.D. Pa. 2000)*. Consequently, a somewhat ill-defined line appears to be drawn between conduct which can be described as "defending the claim" and that which suggests "that the conduct was intended to evade the insurer's obligations under the insurance [*15] contract." *W.V. Realty, Inc., 334 F.3d at 313-14*.

The parties cite a few cases specifically relating to expert witnesses, none of which are completely analogous. Nationwide points to *Gallatin Fuels, Inc. v. Westchester Fire Ins. Co., 2006 U.S. Dist. LEXIS 1327, 2006 WL 2289789, at *7 (W.D. Pa. Jan. 13, 2006)*. In *Gallatin*, the plaintiff argued the insurance company's use of an expert was in bad faith because the expert's methodology had no basis in Pennsylvania law and the expert had never actually applied that methodology before. *Id.* The court rejected that argument, finding it to be "a common and acceptable litigation tactic that Westchester had every right to employ" and noted that the plaintiff could subject the expert to vigorous cross-examination. *Id.* Homer cites to *Hollock v. Erie Ins. Exchange, 2004 PA Super 13, 842 A.2d 409 (Pa. Super. Ct. 2004)*, for the proposition that a pattern and practice of choosing biased experts can constitute a bad faith claim. The facts in *Hollock*, however, were considerably more egregious than the present case. See *id. at 416* (characterizing the insurance company's conduct as "an intentional attempt to conceal, hide or otherwise cover-up the conduct of [its] employees").

In other jurisdictions, courts have developed more comprehensive rules for dealing with bad faith claims premised on litigation conduct. Essentially four approaches are employed. See *Knotts v. Zurich Ins. Co., 197 S.W.3d 512, 518-20 (Ky. 2006)* (collecting decisions). Arkansas, Wyoming, and Missouri [*16] have a blanket prohibition on introducing evidence of litigation conduct to show an insurer's bad faith. See *Sinclair v. Zurich American Ins. Co., 129 F. Supp. 3d 1252, 1258 (D.N.M. 2015)*; *Knotts, 197 S.W.3d at 518 n.3*. California takes another approach, allowing for "the introduction of unreasonable settlement behavior (specifically, low settlement offers) that occurs after suit has been filed while prohibiting the admission of litigation conduct, techniques, and strategies." *Knotts,*

[197 S.W.3d at 519](#) (surveying California case law). At least one state, West Virginia, takes a more permissive approach and allows the introduction of litigation strategies and techniques as long as the insurer knowingly encouraged, directed, participated in, relied upon, or ratified the alleged wrongful conduct. See [Barefield v. DPIC Companies, Inc., 215 W. Va. 544, 600 S.E.2d 256, 271 \(W.V. 2004\)](#).

The fourth approach, and that which appears to be the one used in the greatest number of jurisdictions, allows evidence of litigation conduct to be admissible as evidence of bad faith in "rare cases involving extraordinary facts." [Sinclair, 129 F. Supp. 3d at 1258](#) (collecting decisions). This view allows for the possibility that particularly egregious litigation conduct may constitute bad faith, but places significant emphasis on the interests of insurers in defending themselves, the responsibility of their attorneys to zealously represent them, the [*17] risk of confusion to the jury, and the ability of courts and rules of civil procedure to remedy most litigation abuses. See e.g., [Timberlake Const. Co. v. U.S. Fidelity & Guar. Co., 71 F.3d 335, 341 \(10th Cir. 1995\)](#); [Sinclair, 129 F. Supp. 3d at 1258](#); [Palmer v. Farmers Ins. Exchange, 261 Mont. 91, 861 P.2d 895, 913-15 \(Mont. 1993\)](#); [Parsons v. Allstate Ins. Co., 165 P.3d 809, 818-19 \(Colo. App. 2006\)](#); see also [The Insurer's Duty of Good Faith in the Context of Litigation, 60 Geo. Wash. L. Rev. 1931, 1976-79 \(Aug. 1992\)](#) ("This Note advocates excluding evidence of postfiling conduct unless its probative value substantially outweighs its prejudicial effect. At the very least, courts approving previously unprecedented inroads upon the practical access of insurers to the courts should consider more carefully the costs and benefits of their decisions.").

In summary, the four approaches are: (1) most litigation conduct can constitute bad faith; (2) no litigation conduct can constitute bad faith; (3) only litigation conduct relating to settlement offers can constitute bad faith; and (4) litigation conduct can constitute bad faith but only in "rare cases involving extraordinary facts." It appears that the Supreme Court of Pennsylvania has not adopted an approach, to date. While other courts in the Commonwealth have found various types of litigation conduct to either constitute bad faith or not, no prior case is directly on point and these cases generally do not establish an overarching rule. See *supra* at 7-10. Thus, [*18] this Court must predict how Pennsylvania's highest court would decide the issue. [Kleinknecht v. Gettysburg Coll., 989 F.2d 1360, 1365-66 \(3d Cir. 1993\)](#). The Court now predicts that the Supreme Court

of Pennsylvania would adopt the fourth approach described above, i.e., that evidence of litigation conduct can be admissible as evidence of bad faith but only in "rare cases involving extraordinary facts."

In this Court's view, the Supreme Court of Pennsylvania would mostly likely adopt this approach for three reasons. First, it is the approach that most effectively balances an insurer's interest in defending itself and the ability of courts and rules of civil procedure to handle most litigation abuses with the relatively broad scope of § 8731. The approaches that allow either the vast majority of litigation conduct or no litigation conduct to constitute bad faith do not adequately balance the competing sets of interests. Second, this is the approach used in most jurisdictions. [Sinclair, 129 F. Supp. 3d at 1258](#) (finding on an issue of first impression under New Mexico law "I believe that New Mexico courts would follow what appears to be the majority view that allows evidence of bad faith in rare cases involving extraordinary facts"). Third, and most importantly, this is the only approach that is [*19] consistent with the Pennsylvania case law that already exists on the issue. As already discussed, the Superior Court has made clear that § 8731 applies to conduct before, during, and after litigation, but that it does not include minor or routine litigation conduct, such as discovery abuses. [O'Donnell, 734 A.2d at 906-10](#). Subsequent decisions have allowed bad faith claims for more egregious conduct, such as filing a baseless counter claim in a coverage action, [Krisa, 109 F. Supp. 2d at 321](#), an insurer inducing the plaintiff to drop his lawsuit by misrepresenting its intent to settle his claim, [Cooper, 2002 U.S. Dist. LEXIS 21552, 2002 WL 31478874, at *4](#), or actions described as "an intentional attempt to conceal, hide or otherwise cover-up the conduct of [insurer's] employees," [Hollock, 842 A.2d at 416](#). Other decisions have refused to allow bad faith claims for actions which amounted to "a common and acceptable litigation tactic[.]" [Gallatin, 2006 U.S. Dist. LEXIS 1327, 2006 WL 2289789, at *7](#).

Having concluded that Pennsylvania precedent is most consistent with the fourth of the approaches described above, the Court now adopts the approach described in *Sinclair*, i.e., that evidence of litigation conduct is admissible as evidence of bad faith, but only in "rare cases involving extraordinary facts." [129 F. Supp. 3d at 1258](#). With this standard in mind, the Court will evaluate each of Homer's allegations, in turn. [*20]

i. *The Use of Dr. Ferraro's Testimony*

Homer contends Nationwide acted in bad faith when it

played Dr. Ferraro's videotaped deposition testimony at trial because it knew he was biased in its favor. (Docket No. 17 ¶ at 98). Unlike his allegations regarding Dr. Petrick (who is discussed below), Homer makes no accusation that Dr. Ferraro always finds in favor of whichever side pays him, always appears for defendants, or anything similar. (See generally Docket Nos. 17 at ¶¶ 81-84; 30 at ¶¶ 42-53; 31 at 8-9). Rather, the entire claim of bias stems from the fact that Dr. Ferraro noted in his report that Homer's ". . . major problem at this time appears to be his cognitive memory issues." (*Id.*). Homer attempted, during cross-examination and attempts now, to characterize this statement as Dr. Ferraro diagnosing Homer with cognitive problems. (*Id.*). Homer then argues that Dr. Ferraro "backtracked" under cross-examination and "dramatically changed his opinion" when he explained that he meant in his report that the cognitive issues were Homer's main *complaint* and that he did not, and is not qualified to, diagnose same. (*Id.*). Homer contends that this purported contradiction between Dr. Ferraro's [*21] report and his testimony demonstrates that he was biased and that Nationwide knew of his bias.

Contrary to Homer's assertion, nothing in Dr. Ferraro's report forecloses the explanation he provided during cross-examination. (See Docket No. 17-1 at 66). Rather, the more reasonable reading of the report is exactly as Dr. Ferraro explained. Nowhere in it does he write that he *diagnosed* Homer with cognitive problems. Rather, he raises a suspicion and suggests additional testing:

At the present time, I do not feel that Mr. Homer needs any additional formal treatment for his neck or back problems. However, I *suspect* that his difficulty trying to find and maintain a job has to do with his cognitive problems. *I would recommend he undergo formal neuropsychological testing and evaluation at either a Concussion Clinic or by a psychiatrist.*

(*Id.*) (emphasis added). The plain language of the report shows that Dr. Ferraro evaluated Homer for neck and back problems and, upon finding none, recommended that Homer see an appropriate specialist to evaluate his complaints of cognitive problems. Consequently, Nationwide's decision to use Dr. Ferraro's testimony at trial in no way shows that "the insurer knew [*22] of or recklessly disregarded its lack of reasonable basis in

denying the claim."⁵ Homer's bias allegation against Dr. Ferraro fails as conclusory and the Court grants Nationwide's Motion to Dismiss as it pertains to the use of Dr. Ferraro's testimony at trial.

ii. *The Use of Dr. Petrick's Testimony*

The allegations concerning Nationwide's second expert, Dr. Petrick, present a slightly closer case, but also do not rise to the level of bad faith. Homer's claim [*24] of bias is essentially that during cross-examination, his attorney "devastated" Dr. Petrick by questioning him on his prior reports and revealing that Dr. Petrick always finds in favor of the party paying him, which is usually

⁵ While not entirely clear from the record before this Court, there is no indication Homer objected to the use of the experts' videotaped testimony at the time of trial. (See Docket No. 44 at 3). Hence, there could be an issue of waiver here, as there are a number of ways a party can waive an argument or objection. See e.g., [Belmont Indus., Inc. v. Bethlehem Steel Corp.](#), 62 F.R.D. 697, 702-03 (E.D. Pa. 1974) ("[E]vidence to which a timely objection is not made becomes competent."); [Anderson v. McAfoos](#), 618 Pa. 478, 57 A.3d 1141, 1149 (Pa. 2012) (failure to object to the competence of an expert at trial is waived on appeal) (citing [Pa.R.A.P. 302\(a\)](#)); [Warden v. Zanella](#), 283 Pa. Super. 137, 423 A.2d 1026, 1029 (Pa. Super. Ct. 1980) (argument that service of the complaint was improper was waived when not raised until after trial). Likewise, Homer did not plead that he raised the High-Low Agreement as a defense to the use of the testimony at trial. To the extent he and his counsel interpreted same to preclude the challenged presentation of the testimony, that argument may have also been waived because even if there was language in the contract prohibiting same, contract provisions may [*23] be waived either expressly or through implication. See, e.g., [Trumpp v. Trumpp](#), 351 Pa. Super. 205, 505 A.2d 601, 603 (Pa. Super. Ct. 1985). An explicit contractual provision may be waived when "there is either an unexpressed intention to waive, which may be clearly inferred from the circumstances, or no such intention in fact to waive, but conduct which misleads one of the parties into a reasonable belief that a provision of the contract has been waived." [Den-Tal-Ez, Inc. v. Siemens Capital Corp.](#), 389 Pa. Super. 219, 566 A.2d 1214, 1223 (Pa. Super. Ct. 1989). In the Court's view, Plaintiff's counsel should have placed an objection on the record at the time Nationwide introduced the now challenged testimony. This Court is not convinced a plaintiff and his counsel should be permitted to create a bad faith claim simply by silently allowing conduct they find objectionable to take place. It is particularly concerning in this case given the depositions had been videotaped in advance and Homer and his counsel were fully aware of the facts on which they base their allegations of bias by the time they drafted the High-Low Agreement and Nationwide used the testimony at trial.

the defense. (Docket No. 30 at 9-10). Nationwide argues now, as Dr. Petrick testified on cross, that Homer simply "cherry-picked" the sixteen reports and used them out of context. (Docket No. 19 at 11) ("In doing so, counsel selectively summarized lengthy reports down to a conclusory paragraph, and asked Dr. Petrick to agree with him."). In response, Homer maintains that those sixteen reports were the only ones he could find and that all sixteen support his charge of bias against Dr. Petrick. (Docket No. 31 at 9).

The cross-examination of Dr. Petrick may have been effective, but does not appear to be extraordinary. (See *generally* Docket No. 17-1 at 69-84). Rather, it was the sort of cross-examination that is typical of these kinds of cases. Dr. Petrick explained in detail the "comprehensive battery of neuropsychological measures" he employed in evaluating Homer. (Docket No. 17-1 at 72-73). But, Homer did not cross-examine him on the medicine or methodology. Rather, [*25] Plaintiff's counsel zeroed in on the nature and number of examinations Dr. Petrick performs annually. He testified that he does between 50 and 100 litigation related examinations a year (out of a total of around 500 examinations he performs yearly). (*Id.* at 80). That Homer produced sixteen reports over the course of Dr. Petrick's twenty plus year career is not a particularly remarkable sample size.⁶ Indeed, Homer was able to fully address his concerns about Dr. Petrick through cross-examination. See [Gallatin, 2006 U.S. Dist. LEXIS 1327, 2006 WL 2289789, at *7](#) (on different facts, finding no bad faith claim relating to expert and explaining the plaintiff could effectively address his concerns through cross-examination). If anything, Homer benefited from Nationwide's decision to use Dr. Petrick's testimony at trial, particularly given the size of the verdict the jury rendered. And, from a policy perspective, it would be problematic to allow an insured to bring a bad faith claim every time there is an effective cross-examination of one of the insurance company's experts.

Homer also argues that Dr. Petrick's opinion conflicted [*26] with the opinion of Homer's expert. (Docket Nos. 17 at ¶¶ 56-57; 17-1 at 75). The mere presence of dueling experts is not novel or unique, and even where the insured prevails with the jury, does not necessarily establish that the insurer's expert was

wrong, let alone that the insurer acted in bad faith in allowing the expert to testify. See [Montgomery v. Mitsubishi Motors Corp., 2006 U.S. Dist. LEXIS 46360, 2006 WL 1892719, at *2 n.3 \(E.D. Pa. July 10, 2006\)](#) (where one party's experts did not agree with the other party's expert, "this disagreement does not lead the Court to conclude that one expert's opinion is wrong and the other correct. Rather, the credibility and veracity of these 'dueling' expert witnesses is a matter for cross-examination at trial."); see also The Pennsylvania Bar Institute, [Pennsylvania Suggested Standard Civil Jury Instructions, 4.100 \(Civ\) \(4th ed. 2016\)](#) ("In resolving any conflict that may exist in the testimony of expert witnesses, you are entitled to weigh the opinion of one expert against that of another.").

In the Court's view, nothing that Homer alleges about the defense experts is at all rare, extraordinary, or egregious. His concerns were fully addressed by cross-examination and use of his own experts. Hence, Nationwide's Motion to Dismiss is granted as it relates to [*27] the allegations of bias in Dr. Petrick's testimony.

iii. Nationwide's Closing Argument

Homer next alleges that Nationwide committed bad faith when its attorney referenced the purportedly biased testimony of Dr. Ferraro and Dr. Petrick in his closing argument to the jury. (Docket No. 17 at ¶ 98). As an initial matter, since the Court has already found that Nationwide's use of expert testimony did not constitute bad faith, referencing same in closing arguments likewise cannot be bad faith. Also, since counsel for Homer did not object during Nationwide's closing argument, (*see generally* Docket No. 17-2 at 2-26), there is a serious question as to whether his challenge has now been waived. See *supra* at 15 n.4. Moreover, Homer was not prejudiced by the expert testimony or Nationwide's closing argument, as the jury returned a \$1.61 million verdict in his favor.

Recounting the evidence presented at trial is the point of a closing argument, and doing so is a perfectly reasonable part of conducting a defense. See The Pennsylvania Bar Institute, [Pennsylvania Suggested Standard Civil Jury Instructions, 1.170 \(Civ\) \(4th ed. 2016\)](#) ("After all the evidence has been presented, the lawyers will present to you closing [*28] arguments to summarize and interpret the evidence in an attempt to highlight the significant evidence that is helpful to their clients' positions. As with opening statements, closing arguments are not evidence."). Reviewing Nationwide's closing argument, its counsel simply recapped the testimony the jury heard and it was then up to the jury to

⁶ Additionally, by Homer's logic, every one of the other parties that hires Dr. Petrick 50-100 times a year is equally guilty of bad faith.

determine credibility; find the facts; and apply the law.

Parsing an insurer's closing argument after the fact through a bad faith action endangers an insurer's ability to defend itself. It would also threaten the independent duty held by an insurer's attorney to perform competently and professionally in zealously representing his or her client. See [Pa. RPC 1.1](#), 1.3 (a lawyer has a duty to competently represent his or her client and to act with reasonable diligence). The conduct Homer calls bad faith goes directly to the heart of the strategy and work product of Nationwide's attorney.⁷ It is a stretch to ask this Court to not only second-guess that strategy after the fact, but also to call it bad faith.

iv. Nationwide's Motion to Mold

Homer alleges that Nationwide's wording of its motion to mold represented bad faith because it would have (arguably) dismissed any and all bad faith claims, even those occurring after June 1, 2015. (Docket No. 17 ¶¶ 90-94, 98). Nationwide responds that it was simply a case of inartful drafting of its motion and points out that the High-Low Agreement itself, which was drafted by Plaintiff's counsel, was ambiguous in the first place. (Docket No. 19 at 16-17). Since the Agreement stated that bad faith claims "prior to the date" and "after the date" were dismissed, the Court agrees with Nationwide that the Agreement was ambiguous with regard to bad faith claims arising on the date of the Agreement.⁸ See [Vargo, 94 Fed. Appx. at 943](#) (holding that "under Pennsylvania law, a high-low agreement may be construed as a settlement" and explaining that "'basic contract principles do indeed apply to settlement agreements") (internal quotations omitted). The Court

would further note that under [*30] Pennsylvania law, ambiguous contract provisions are to be construed against the drafter.⁹ [Keystone Dedicated Logistics, LLC v. JGB Enterprises, Inc., 2013 PA Super 225, 77 A.3d 1, 7 \(Pa. Super. Ct. 2013\)](#) (citations omitted). One would think Homer and his counsel would have taken extra care in drafting the bad faith waiver given the possibility that Nationwide might still use expert testimony Homer already believed to be biased and in bad faith.¹⁰

Nationwide further notes that Homer's response to its motion to mold also deviated from the actual wording of the agreement, stating "on or after" rather than "prior to the date" and "after the date." Ultimately, the allegations regarding the motion to mold do not establish bad faith. Homer's interpretation of Nationwide's wording — that it would have effectively barred all claims — is possible, but the inclusion of "as of June 1, 2015" seems an odd choice, if Nationwide's purpose was to have the Court dismiss all past, present, and future claims of bad faith by Homer. Whether or not "as of June 1, 2015" would dismiss claims arising on June 1, 2015 is especially ambiguous. Regardless, Homer has not pled any facts that suggest it is plausible that Nationwide and its counsel knowingly acted in bad faith with its wording of the motion to mold. Nationwide's wording seems reasonable given the somewhat ambiguous wording of the agreement itself, as drafted by Plaintiff's counsel and agreed to by Defendant's counsel. Ambiguous wording of a motion pursuant to an ambiguously worded agreement is not the type of rare or extraordinary litigation conduct that should constitute [*32] bad faith. At most, what the Court sees is sloppy lawyering on both sides.

In his brief, Homer contends that Nationwide's argument that the Agreement was ambiguous is barred by collateral estoppel because the state court used Homer's wording and not Nationwide's in its order molding the verdict. (Docket No. 31 at 16). That is not the purpose of collateral estoppel, which would prevent

⁷The Court notes that were this case to proceed into discovery, there would be considerable challenges with respect to attorney-client privilege [*29] and attorney work product. See, e.g., [In re Cendant Corp. Securities Litigation, 343 F.3d 658 \(3d Cir. 2003\)](#); [Cottillion v. United Refining Co., 279 F.R.D. 290 \(W.D. Pa. 2011\)](#); [FED. R. CIV. P. 26\(b\)](#). Further, counsel for both parties in the previous action would need to be witnesses, may have to be deposed, and likely need to secure their own representation.

⁸As discussed, the Agreement excluded claims for bad faith acts occurring "prior to" and "after" the date of its execution. The term "prior" is defined as "[t]he former; earlier; preceding," and "at any time prior to" is defined as "mean[ing] that it occurred before the given date." BLACK'S LAW DICTIONARY (10th ed. 2014). The term "after" is defined as "[l]ater, succeeding, subsequent to, inferior in point of time or of priority or preference." *Id.*

⁹Homer's counsel is experienced, Homer is educated, and regardless, "[c]ontracting parties are normally bound by their agreements, without regard to whether the terms thereof were read and fully understood." [Simeone v. Simeone, 525 Pa. 392, 581 A.2d 162, 165 \(Pa. 1990\)](#).

¹⁰Nationwide would have provided Homer with a pre-trial statement indicating that Dr. Ferraro and Dr. Petrick may be witnesses at trial. See Allegheny Court of Common Pleas Local Rule 212.2 (requiring the parties to exchange pre-trial statements in conformity [*31] with [Pa.R.C.P. 212.2](#)).

this Court from *ruling* differently than the state court. See generally [Greenleaf v. Garlock, Inc., 174 F.3d 352, 356-57 \(3d Cir. 1999\)](#) (the doctrine of collateral estoppel is about preventing parties from "relitigating" in a new court and giving acts of the first court full faith and credit). Nationwide's point is only that its position in the first action was not unreasonable, not that this Court should issue a ruling contrary to that of the Court of Common Pleas. The doctrine of collateral estoppel, thus, has no application here.

In sum, there is no basis for bad faith related to the drafting and presentation of Nationwide's motion to mold.

B. UTPCPL Claim

"To state a claim under Pennsylvania's [UTP]CPL, plaintiffs must allege facts from which the court can plausibly infer: (1) deceptive conduct or representations by defendant; and (2) justifiable reliance by plaintiffs on [*33] defendant's deceptive conduct that caused plaintiffs' harm." [Papurello v. State Farm Fire & Cas. Co., 144 F. Supp. 3d 746, 776 \(W.D. Pa. 2015\)](#) (citing [Toy v. Metro. Life Ins. Co., 593 Pa. 20, 928 A.2d 186, 208 \(Pa. 2007\)](#); [Yocca v. Pittsburgh Steelers Sports, Inc., 578 Pa. 479, 854 A.2d 425, 438 \(Pa. 2004\)](#)).

Nationwide moves for dismissal of the UTPCPL claim on the grounds that Homer has not pled sufficient facts to establish the elements of justified reliance or ascertainable loss. (Docket No. 19 at 17-18). Homer's response on either of these elements is not entirely clear. (See generally Docket No. 31 at 16-17). It does not appear from the facts alleged in the Amended Complaint that Homer justifiably relied on Nationwide's actions in any way. Similarly, it is not clear what Homer's ascertainable loss would be since he received the maximum award possible in light of the High-Low Agreement. Pennsylvania courts have held that the hiring of an attorney to bring a UTPCPL claim does not satisfy the ascertainable loss requirement. [Grimes v. Enterprise Leasing Co. of Phila., LLC, 629 Pa. 457, 105 A.3d 1188, 1193 \(Pa. 2014\)](#). Because Homer has not pled justified reliance or ascertainable loss, his UTPCPL claim will be dismissed.

V. CONCLUSION

For the foregoing reasons, the Court finds Homer has not alleged facts sufficient to state a claim for insurance bad faith or violation of the UTPCPL. Nationwide's Motion to Dismiss [18] will be granted and Homer's Amended Complaint will be dismissed, with prejudice.

An appropriate [*34] order follows.

/s/ Nora Barry Fischer

Nora Barry Fischer

United States District Judge

Date: August 26, 2016

End of Document



Neutral

As of: July 14, 2017 7:19 PM Z

[Lains v. Am. Family Mut. Ins. Co.](#)

United States District Court for the Western District of Washington

July 27, 2015, Decided; July 27, 2015, Filed

CASE NO. C14-1982-JCC

Reporter

2015 U.S. Dist. LEXIS 97834 *; 2015 WL 4523294

HENRY LAINS, and CARLENE GUSTIN LAINS, Plaintiffs, v. AMERICAN FAMILY MUTUAL INSURANCE COMPANY, Defendant.

Prior History: [Lains v. Am. Family Mut. Ins. Co., 2015 U.S. Dist. LEXIS 180659 \(W.D. Wash., July 7, 2015\)](#)

Counsel: [*1] For Henry Lains, Carlene Gustin Lains, husband and wife, individually and on behalf of their son Brett Lains, Plaintiffs: Kathryn M Knudsen, William Candler Smart, LEAD ATTORNEYS, Isaac Ruiz, KELLER ROHRBACK, SEATTLE, WA.

For American Family Insurance Group, Defendant: Rory W Leid, III, Timothy T Parker, LEAD ATTORNEYS, COLE WATHEN LEID HALL PC, SEATTLE, WA.

For Crawford & Company, Philip Miller, Unknown: Troy A. Biddle, GORDON & REES LLP, SEATTLE, WA.

Judges: HONORABLE John C. Coughenour, UNITED STATES DISTRICT JUDGE.

Opinion by: John C. Coughenour

Opinion

ORDER ON PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT

This matter comes before the Court on Plaintiffs' motion for partial summary judgment (Dkt. No. 25). Having thoroughly considered the parties' briefing and the relevant record, the Court finds oral argument unnecessary and hereby GRANTS the motion in part and DENIES the motion in part for the reasons explained herein.

I. BACKGROUND

The Court has already summarized the factual background of the case in a prior order (Dkt No. 43 at 1-2) and will not do so again here. Plaintiffs have brought the present motion seeking summary judgment on several of their claims.

II. DISCUSSION

A. Summary Judgment Standard

Pursuant [*2] to [Rule 56 of the Federal Rules of Civil Procedure](#), "[t]he court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." [Fed. R. Civ. P. 56\(a\)](#). In making such a determination, the Court must view the facts and justifiable inferences to be drawn there from in the light most favorable to the nonmoving party. [Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255, 106 S. Ct. 2505, 91 L. Ed. 2d 202 \(1986\)](#). Once a motion for summary judgment is properly made and supported, the opposing party "must come forward with 'specific facts showing that there is a *genuine issue for trial*.'" [Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587, 106 S. Ct. 1348, 89 L. Ed. 2d 538 \(1986\)](#) (quoting [Fed. R. Civ. P. 56\(e\)](#)). Material facts are those that may affect the outcome of the case, and a dispute about a material fact is genuine if there is sufficient evidence for a reasonable jury to return a verdict for the non-moving party. [Anderson, 477 U.S. at 248-49](#). Conclusory, non-specific statements in affidavits are not sufficient, and "missing facts" will not be "presumed." [Lujan v. National Wildlife Federation, 497 U.S. 871, 888-89, 110 S. Ct. 3177, 111 L. Ed. 2d 695 \(1990\)](#). Ultimately, summary judgment is appropriate against a party who "fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." [Celotex Corp. v. Catrett, 477 U.S. 317, 324, 106 S. Ct. 2548, 91 L. Ed. 2d 265 \(1986\)](#).

B. Misrepresentation

Under [Section 284-30-330\(1\) of the Washington Administrative Code](#) ("WAC") it is unlawful for an insurance company to misrepresent pertinent [*3] facts of policy provisions. Plaintiffs argue that an August 13, 2014 letter to Plaintiffs' counsel by Defendant's adjuster Spencer Marsh in which Marsh wrote "[t]here is no mold infestation to our knowledge" (Dkt. No. 24, Ex. F at 1) constitutes clear evidence of misrepresentation such that there can be no genuine dispute of material fact as to the basis for their claim under this WAC provision.

Defendant argues that it acknowledged the presence of mold and accounted for its removal costs in its repair estimates of July 24, 2014 and August 22, 2014. (Dkt. No. 42, Ex. F at *8, Ex. K at *8, *43.) Defendant acknowledges the existence of the August 13, 2014 letter stating that "[t]here is no mold infestation to our knowledge," but discounts it, claiming that it was merely "confusing" and was, in any event, "irrelevant" given the repair estimates. (Dkt. No. 40 at 12.)

The Court finds Defendant knew of heavy mold as early as February, 2014. This is reflected in Defendant's claim-file documents. (See Dkt. No. 24, Ex. Q at 12) (notation to photo reading "Heavy mold in places. Must be eliminated with antimicrobial [sic] and cleaned prior to odor sealing."). Further, the Court finds that Defendant's explanation for its conclusion that [*4] "[t]here is no mold infestation to our knowledge" was itself a misrepresentation: before expressing the belief that there was no mold infestation, the letter noted that "[t]he home was properly demoded [sic] and mitigated by Servpro." (Dkt. No. 24, Ex. F at 1.) The Servpro demolition process was completed in February 2014 (Dkt. No. 24, Ex. P.), but as late as July 17, 2015, Defendant's claim notes acknowledged the continuing need for mold remediation. (Dkt. No. 24, Ex. R at 2192-94.) The Servpro demolition process therefore can not have possibly provided Defendant with any reasonable or honest basis for determining that there was no mold infestation.

Given this context, the claim that "[t]here is no mold infestation to our knowledge" cannot be plausibly read as merely "confusing." Instead, it was a straightforward and unequivocal denial of knowledge of a problem about which Defendant was fully aware. The passing references acknowledging the expense of mold remediation in Defendant's repair estimates of July 24, 2014 and August 22, 2014 do not change or significantly mitigate the explicit denial of the problem contained in

the August 13, 2014 letter. There is no question that the misrepresentations were [*5] pertinent to the claim, as Defendant's own internal claim notes consistently acknowledged the need for mold remediation. The Court therefore holds that there is no genuine dispute as to any material fact about Defendant's violation of [WAC section 284-30-330\(1\)](#), and Plaintiffs are entitled to judgment as a matter of law.

C. Denial of Payment

Under [WAC § 284-30-330\(4\)](#), insurance companies are prohibited from denying payment without conducting a reasonable investigation. Plaintiffs argue that, despite knowing about heavy mold in the house in February, 2014, Defendant waited until a year after the loss to retain the services of an industrial hygienist, and that none of the RCV calculations have incorporated an industrial hygienist's findings or have taken into the account the cost to remediate the house for mold, asbestos, or lead. (Dkt. No. 25 at 16.) Moreover, Plaintiffs note that Defendant has never paid any money allocated to the remediation of the home pursuant to an industrial hygienist's protocol.

While these points are well-taken, the Court notes that, despite Defendant's misrepresentation about its knowledge of the mold problem (addressed above), it did provide repair estimates including line items for antimicrobial treatment [*6] (Dkt. No. 42, Ex. F, Ex. K.), and it has apparently never refused to make payment. The Court therefore finds a genuine issue of material fact as to whether Defendant denied payment without conducting a reasonable investigation. Summary judgment is, therefore, inappropriate for this claim.

D. Failure to Respond to Proofs of Loss

Under [WAC § 284-30-380\(1\)](#), an insurer must notify a first party claimant whether its claim has been accepted or denied within fifteen working days after receipt of fully completed and executed proofs of loss. Plaintiffs provided proofs of loss on December 29, 2014, and Defendant has not yet responded. Plaintiffs argue that this is a violation of [WAC 284-30-380\(1\)](#). (Dkt. No. 25 at 17.) Defendant notes that the proofs of loss were not filed until after litigation had commenced, and argues that post-lawsuit conduct cannot give rise to a violation of WAC claims handling procedures. (Dkt. No. 40 at 15.)

When an insurer has already paid its insured and closed its file before the insured files suit, the act of filing suit effectively halts any claims settlement process and

subjects plaintiffs to the rules governing litigation. See [Stegall v. Hartford Underwriters Ins. Co., No. C08-668MJP, 2009 U.S. Dist. LEXIS 2690, 2009 WL 54237, *1-3 \(W.D. Wash. Jan. 7, 2009\)](#). [*7] In such cases, conduct occurring after the lawsuit is filed cannot give rise to WAC claims handling procedure violations. However *Stegall* did not "impose a broad rule that an insurer cannot be liable for unlawful claims handling after its insured sues." [Tavakoli v. Allstate Property & Casualty Insurance Co., No. C11-1587-RAJ, 2013 U.S. Dist. LEXIS 6078, 203 WL 153905 at *4 n.1 \(W.D. Wash. Jan. 15, 2013\)](#). Instead, "where the claim remains open, the insured's decision to sue its insurer does not cut off the insurer's obligations to adjust the claim." [2013 U.S. Dist. LEXIS 6078, \[WL\] at *3-4](#).

Here, Defendant continued to process Plaintiffs' claim even after Plaintiffs filed suit. (See Dkt. No. 24, Ex. F at 1; Ex. B. at 9, 73.) The case is therefore distinguishable from *Stegall*, in that it cannot be said that when "Plaintiffs filed this action, they effectively halted any claims settlement process." [Stegall, 2009 U.S. Dist. LEXIS 2690, 2009 WL 54237 at *3](#). The commencement of litigation therefore did not relieve Defendant of its WAC claims processing obligations. Because it is clear that Defendant failed to notify Plaintiffs whether their claim had been accepted or denied within fifteen working days after receipt of their fully completed and executed proofs of loss, there is no genuine dispute of material fact as to whether Defendant violated [WAC § 284-30-380\(1\)](#). Plaintiffs are [*8] entitled to summary judgment on this issue.

E. Bad Faith

An insurer who fails to adequately investigate a claim creates hardship for the insured who "must either perform its own investigation to determine if coverage should have been provided or take no action at all." [Coventry Associates v. American States Insurance Co., 136 Wn.2d 269, 281-82, 961 P.2d 933 \(1998\)](#). Either way, the consequence of the bad faith investigation is that "the insured does not receive the full benefit due under its insurance contract." *Id.*

Here, Plaintiffs ask the Court to hold that Defendant's refusal to pay for the services of an industrial hygienist hired by Plaintiffs (Susan Evans) constitutes insurance bad faith because Defendants forced Plaintiffs to hire Ms. Evans by refusing to conduct their own investigation to determine the extent of mold infestation and to determine the necessary scope of remediation. (Dkt. No. 25 at 18.) However, because Defendant's claims

notes did make some acknowledgement of the mold problem, it is unclear at this stage of the proceedings whether Defendant's actions can be said to have forced Plaintiffs to pay for their own investigation. The Court therefore finds there is a genuine issue of material fact as to this issue, and that summary judgment is not warranted for the [*9] bad faith claim.

F. Insurance Fair Conduct Act Claims

The Insurance Fair Conduct Act ("IFCA") is codified at [RCW §§ 48.30.010\(7\) and 48.30.015](#). [RCW 48.30.015\(1\)](#) provides, inter alia, "[a]ny first party claimant to a policy of insurance who is unreasonably denied a claim for coverage or payment of benefits by an insurer may bring an action in the superior court of this state to recover the actual damages sustained, together with the costs of the action, including reasonable attorneys' fees and litigation costs." Plaintiffs argue Defendant unreasonably denied payment of benefits, including the costs of Ms. Evans' services and of remediating the property. (Dkt. No. 25 at 20-21.)

The Court finds that Defendant's inclusion of the cost of mold remediation in its repair estimates, coupled with the fact that Defendant has not refused to make payments, creates a genuine issue of material fact as to whether it unreasonably denied payment of benefits, despite what appears to have been inadequate attention to the problem, and despite Defendant's misrepresentation about its knowledge of the problem. This is a close call, but summary judgment is unwarranted for this claim.

G. Extension of Additional Living Expense coverage

Plaintiffs request an entry [*10] of summary judgment holding that they are entitled to an extension of Additional Living Expense ("ALE") coverage. Their insurance policy provides 24 months of ALE coverage. Plaintiffs argue that Defendant "squandered the first year and a half of the ALE period by failing to properly investigate." (Dkt. No. 25 at 21.) Defendant has agreed to extend the ALE period. (Dkt. No. 40 at 18.) Because a determination of the ALE issue will ultimately help to resolve the IFCA dispute, Defendant's agreement does not moot the issue. Nevertheless, the Court finds a genuine issue of material fact as to whether Defendant failed to investigate. For that reason, it is premature to resolve the ALE dispute at this time, and summary judgment on the matter is unwarranted.

III. CONCLUSION

For the foregoing reasons, Plaintiffs' motion for partial summary judgment (Dkt. No. 25) is GRANTED in part and DENIED in part. The motion is GRANTED in respect to the claims for misrepresentation and failure to respond to proofs of loss under [WAC § 284-30-330\(1\)](#). The motion is DENIED in all other respects.

DATED this 27th day of July 2015.

/s/ John C. Coughenour

John C. Coughenour

UNITED STATES DISTRICT JUDGE

End of Document

[Lease Crutcher Lewis WA, LLC v. Nat'l Union Fire Ins. Co. of Pittsburgh, PA](#)

United States District Court for the Western District of Washington

October 20, 2009, Decided; October 20, 2009, Filed

Case No. C08-1862RSL

Reporter

2009 U.S. Dist. LEXIS 97899 *; 2009 WL 3444762

LEASE CRUTCHER LEWIS WA, LLC, Plaintiff, v.
NATIONAL UNION FIRE INSURANCE COMPANY OF
PITTSBURGH, PA, et al., Defendants.

Subsequent History: Summary judgment granted by,
in part [Lease Crutcher Lewis WA, LLC v. Nat'l Union
Fire Ins. Co., 2010 U.S. Dist. LEXIS 110866 \(W.D.
Wash., Oct. 15, 2010\)](#)

Counsel: [*1] For Lease Crutcher Lewis WA LLC, a
Washington limited liability corporation, as successor in
interest to Lease Crutcher Lewis, a Washington
partnership, Plaintiff: David C Groff, LEAD ATTORNEY,
GROFF MURPHY TRACHTENBERG & EVERARD,
PLLC, SEATTLE, WA; Michael P Grace, LEAD
ATTORNEY, GROFF MURPHY, PLLC, SEATTLE, WA.

For National Union Fire Insurance of Pittsburgh PA, a
foreign corporation, Defendant: Curt H Feig, Thomas
James Braun, NICOLL BLACK & FEIG PLLC,
SEATTLE, WA.

For AIG Domestic Claims Inc, a foreign corporation,
Defendant: Curt H Feig, NICOLL BLACK & FEIG PLLC,
SEATTLE, WA.

Judges: Robert S. Lasnik, United States District Judge.

Opinion by: Robert S. Lasnik

Opinion

ORDER GRANTING IN PART AIG DOMESTIC
CLAIMS, INC.'S MOTION TO DISMISS

This matter comes before the Court on "AIG Domestic
Claims, Inc.'s Motion for Rule 12 Dismissal." Dkt. # 18.
Defendant seeks dismissal of all of plaintiff's claims on
the ground that AIG Domestic Claims, Inc., owed no
duty to plaintiff and/or cannot be liable under the claims

asserted. Having reviewed the memoranda and exhibit
submitted by the parties and having heard the
arguments of counsel, the Court finds as follows:

BACKGROUND

Plaintiff Lease Crutcher Lewis WA, LLC (hereinafter,
[*2] "Lease Crutcher") was the general contractor on a
construction project in Bellevue, Washington, known as
the Tower 333 project. On November 16, 2006, a tower
crane at the site collapsed, causing significant damage
to adjacent sites and killing a tenant in one of the
neighboring buildings. When Lease Crutcher was sued
in King County Superior Court, it tendered the defense
of the litigation to its insurer, defendant National Union
Fire Insurance Company of Pittsburgh, PA. National
Union accepted the tender and assigned the claim to a
sister company, AIG Domestic Claims, LLC, for
handling.

Plaintiff claims that AIG Domestic Claims, acting on
behalf of and with the authority of National Union,
implemented a claim settlement strategy that allowed
National Union to recover from a third party amounts
paid under the insurance policy before its insured was
made whole. Plaintiff alleges that this conduct (1)
constitutes bad faith and a breach of defendants'
fiduciary duties to Lease Crutcher; (2) violated the
Insurance Fair Conduct Act; (3) breached the insurance
contract; (4) violated the Consumer Protection Act; and
(5) converted funds that rightly belonged to Lease
Crutcher. Plaintiff also [*3] seeks a declaration that
Lease Crutcher has a right to be made whole that is
superior to any right National Union might have to
recover funds from other liable parties or insurers. AIG
Domestic Claims seeks dismissal of all of plaintiff's
claims against it pursuant to [Fed. R. Civ. P. 12\(b\)\(6\)](#) and
[12\(c\)](#).

DISCUSSION

A. Liability of Insurance Adjusters -- General

The theory underlying AIG Domestic Claims' motion to dismiss is that an independent adjuster, hired by an insurance company to handle a claim, owes no duty and has no personal liability to an insured for actions taken on behalf of the insurer. Defendant has not presented, and the Court has not found, any authority for this broad proposition. Under Washington law, employees and agents are regularly held liable for their individual participation in wrongful conduct, even if that conduct were performed for the benefit of its principal and could impose liability on the principal as well. *Dodson v. Econ. Equip. Co., Inc.*, 188 Wn. 340, 343, 62 P.2d 708 (1936) ("The liability of an officer of a corporation for his own tort committed within the scope of his official duties is the same as the liability for tort of any other agent or servant. That the [*4] agent acts for his principal neither adds to nor subtracts from his liability."); *Deep Water Brewing, LLC v. Fairview Resources Ltd.*, 152 Wn. App. 229, 215 P.3d 990, 1009-1012 (2009) (holding president of homeowner's association personally liable, along with association itself, for bad faith violations of restrictive covenants in which he participated). No distinct body of legal principles governs the liability of adjusters to insureds for their acts or omissions while handling a claim: the Court will therefore evaluate each theory of liability and the law pertaining thereto before determining whether plaintiff has stated a viable cause of action against AIG Domestic Claims. Thomas R. Malia, Annotation, *Liability of Independent or Public Insurance Adjuster to Insured for Conduct in Adjusting Claim*, 50 A.L.R.4th 900 (1986).

B. Bad Faith and Breach of Fiduciary Duty Claim

Lease Crutcher alleges that AIG Domestic Claims had an obligation to act in good faith toward plaintiff and/or a fiduciary duty that required it to protect plaintiff's financial interests even at the expense of its own monetary concerns. Plaintiff further alleges that AIG Domestic Claims breached these duties when it [*5] conditioned settlement of the claims against Lease Crutcher on a third party's payment of available insurance funds to National Union. AIG Domestic Claims argues that only the insurer, not its agent or adjuster, owes a duty of good faith toward, or has a fiduciary relationship with, the insured.

In order to prevail on a bad faith claim, the insured must prove a duty, breach of that duty, and damages arising from the breach. *Smith v. Safeco Ins. Co.*, 150 Wn.2d 478, 485, 78 P.3d 1274 (2003). Plaintiff argues that the

laws of Washington and the common law impose a duty of good faith on third-parties hired by an insurer to perform basic insurance functions. Plaintiff's statutory argument is well-taken. The insurance code of Washington applies to "all insurance transactions . . . and all persons having to do therewith" *RCW 48.01.020*. "Persons" is defined to include corporations such as AIG Domestic Claims. *RCW 48.01.070*. More importantly, the legislature has expressly imposed an obligation of good faith on those who represent insurers and insureds. *RCW 48.01.030* states:

The business of insurance is one affected by the public interest, requiring that all persons be actuated by good faith, abstain [*6] 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.

Lease Crutcher alleges that AIG Domestic Claims acted on behalf of and with authority from National Union in its dealings with the insured. National Union delegated one of the basic functions of an insurer -- claims handling and adjustment -- to a separate but related corporate entity. AIG Domestic Claims acted as National Union's representative and played a significant role in the insurance transaction which gave rise to this litigation. The statutory duty of good faith set forth in *RCW 48.01.030* is easily broad enough to encompass AIG Domestic Claims' conduct in these circumstances.

Defendant argues that "*RCW 48.01.030* cannot be read in isolation" and, relying on the Washington Administrative Code and *Rice v. State Farm Mut. Auto. Ins. Co.*, 2005 WL 2487975 (W.D. Wash., Oct. 7, 2005), maintains that "[n]othing in [the statutory] language imposes liability on an agent of an insurance company. . . ." Motion at 5-6. Although courts regularly consider administrative rules when [*7] resolving ambiguities in a statute, they "should not defer to an agency's interpretation of a statute if that interpretation conflicts with the statutory mandate." *Bostain v. Food Exp., Inc.*, 159 Wn.2d 700, 727, 153 P.3d 846 (2007). In this case, the statute is unambiguous: both the insurer and its representative must act in good faith toward the insured. If the regulations stated otherwise, the administrative agency would have exceeded its power by promulgating rules that amend or change the legislative enactment. *Wash. Pub. Ports Ass'n v. Dep't of Revenue*, 148 Wn.2d 637, 646, 62 P.3d 462 (2003). The issue is inapposite, however, because the regulations do not, in fact, contradict the statutory mandate. Although the

administrative agency has chosen to focus its regulations on the conduct of insurers,¹ at least one regulation expressly governs the conduct of an insurer's agent ([WAC 284-30-350\(2\)](#)). In addition, the regulations are not exclusive: "acts performed, whether or not specified herein, may also be deemed to be violations of specific provisions of the insurance code or other regulations." [WAC 284-30-310](#). Thus, the regulations do not preclude a finding that an adjuster must act in good faith pursuant [*8] to the clear mandate of [RCW 48.01.030](#).

Because AIG Domestic Claims had a statutory duty to act in good faith toward Lease Crutcher, the Court need not determine whether the parties had a fiduciary relationship or whether a common law duty of good faith also existed in these circumstances.

C. Insurance Fair Conduct Act, [RCW 48.30.015](#)

The Insurance [*9] Fair Conduct Act ("IFCA") authorizes "first party claimant[s] to a policy of insurance who [are] unreasonably denied a claim for coverage or payment of benefits by an insurer [to] bring an action in superior court of this state to recover the actual damages sustained, together with the costs of the action, including reasonable attorneys' fees and litigation costs." [RCW 48.30.015\(1\)](#). AIG Domestic Claims argues that the IFCA applies only to the activities of an insurer and does not create a cause of action against an insurer's agent, adjuster, or employee.

The IFCA creates a private cause of action in favor of first-party claimants who have been unreasonably denied insurance coverage. The authorizing language does not, however, specify the proper defendant: whether an adjuster handling a claim can be sued for its

participation in an unreasonable denial is not clear from [RCW 48.30.015\(1\)](#). The Court therefore looks to "the statute as a whole, giving effect to all that the legislature has said, and . . . using related statutes to help identify the legislative intent embodied in the provision in question." *In re Parentage of J.M.K.*, [155 Wn.2d 374, 387, 119 P.3d 840 \(2005\)](#). Consideration of the other sections [*10] of the IFCA is inconclusive. Pursuant to [RCW 48.30.015\(8\)](#), a first-party claimant is required to provide pre-filing notice "to the insurer and office of the insurance commissioner." An agent or representative of the insurer does not get notice under the Act from which one could infer that agents are not intended defendants. Pursuant to [RCW 48.30.015\(2\)](#), an award of treble damages is appropriate only if the court finds that "an insurer" has acted unreasonably in denying a claim. Both of these provisions suggest that the legislature intended to authorize claims against an insurer, not its agents. On the other hand, [RCW 48.30.015\(3\)](#), which requires the court to award fees and costs to a prevailing insured, is triggered by "a finding of unreasonable denial of a claim for coverage . . ." or an unfair claims settlement practice. Unlike the treble damages provision, an award of fees and costs is not contingent on a finding against "an insurer." In addition, at least one of the regulations on which an IFCA claim can be based expressly governs the conduct of an insurer's agents. [WAC 284-30-350\(2\)](#).²

Where the legislature's intent and purpose cannot be ascertained from the plain language of the statute, the Court "may look beyond the language of the act to its legislative history." *Bostain*, [159 Wn.2d at 726-27](#). The legislative history regarding IFCA is limited, but the final bill report states: "First party claimants to an insurance policy may sue insurers for unreasonable denials of coverage or payments of benefits." See Final Bill Report (<http://apps.leg.wa.gov/billinfo/summary.aspx?bill=5726&year=2007>). After considering all materials relevant to an interpretation of the IFCA, the Court concludes that the legislature intended to create a private cause of action for damages and attorney's fees against only the insurer, not its employees or agents.

¹ In *Rice v. State Farm Mut. Auto. Ins. Co.*, 2005 WL 2487975 (W.D. Wash., Oct. 7, 2005), the court found that an insurance company's employee was not an "insurer" as that term is used and defined in the regulations. The court then conflated plaintiff's claim of bad faith under [RCW 48.01.030](#) and his claim that State Farm had violated the insurance regulations by imposing the regulatory definition of "insurer" on both the statute and the regulations. The issue presented in *Rice*, namely whether the statute gives rise to a bad faith claim against individuals directly employed by the insurer, need not be determined by this Court. The duty of good faith created by [RCW 48.01.030](#) applies to an insurer's "representatives," a term that clearly encompasses separate corporate entities hired by the insurer to carry out fundamental insurance functions in its place.

² Although the legislature has imposed a general duty of good faith on representatives of the [*11] insurer, the IFCA is a separate -- and relatively new -- legislative enactment, and the parties have not identified any implementing regulations. Whether an adjuster is a proper defendant under the IFCA cannot be determined by considering the related statutes and regulations.

D. Breach of Contract

An action for damages for a breach of contract must be based on a valid contract between the parties. See [Lehrer v. Dep't of Soc. & Health Servs., 101 Wn. App. 509, 516, 5 P.3d 722 \(2000\)](#). [*12] It is undisputed that Lease Crutcher had no contractual relationship with AIG Domestic Claims. Nevertheless, plaintiff argues that because the defendants acted in concert to breach National Union's contractual obligations, there is a "juridical link" between defendants that allows Lease Crutcher to assert a breach of contract claim directly against AIG Domestic Claims.

A juridical link may exist "in cases in which as a matter of law each [defendant] must act in the same manner, so that the plaintiff class claims are identical for all defendant class members If the conduct being challenged by the plaintiff class depends on facts peculiar to each defendant's activities, however, then there is no juridical link" [Doe v. Spokane-Inland Empire Blood Bank, 55 Wn. App. 106, 115, 780 P.2d 853 \(1989\)](#) (quoting 7B C.Wright, A. Miller & M. Kane, [Federal Practice and Procedure](#) § 1785.1, at 148-50 (1986)). The cases cited in [Doe](#) involve the certification of a defendant class -- the issue is whether the named plaintiff has standing to pursue a claim against defendants who did not actually harm plaintiff³ but who were legally bound to act in the same injurious manner toward other members of the plaintiff [*13] class. Lease Crutcher has not identified any contractual or statutory authority compelling defendants' actions in this case. Nor does plaintiff seek to represent a class of individuals, some of whom may have a breach of contract claim against AIG Domestic Claims. Under the facts alleged, no one has standing to bring a breach of contract claim against AIG Domestic Claims because there is no contract. Lease Crutcher's claim seems to be based on the argument, not asserted in the Amended Complaint, that defendants acted in concert and/or that their separate corporate identities should be ignored because they share a common parent. Neither argument has merit. Plaintiff has alleged agency, not conspiracy, and has not attempted to establish facts which would justify piercing the corporate veil. Neither concerted action nor a common commercial interest can substitute for a key element of a breach of contract

³In [Wash. Educ. Ass'n v. Shelton Sch. Dist. No. 309, 93 Wn.2d 783, 790-91, 613 P.2d 769 \(1980\)](#), the court found that each of the defendants had contributed to the injury of which plaintiff complained.

claim, namely, the existence of a contract. See [LaMar v. H&B Novelty & Loan Co., 489 F.2d 461, 470 \(9th Cir. 1973\)](#) (disagreeing with Eastern District of Pennsylvania case in which a common commercial practice was held to be enough to serve as the juridical link). Plaintiff's breach of [*14] contract claim against AIG Domestic Claims fails as a matter of law.

E. Consumer Protection Act, [RCW 19.86 et seq.](#)

The Washington Consumer Protection Act ("CPA") prohibits "[u]nfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce." [RCW 19.86.020](#). A private cause of action exists under the CPA if (1) the conduct is unfair or deceptive, (2) occurs in trade or commerce, (3) affects the public interest, and (4) causes injury (5) to plaintiff's business or property. [Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co., 105 Wn.2d 778, 780, 719 P.2d 531 \(1986\)](#). AIG Domestic Claims argues that, in the absence of a contractual relationship between the parties, plaintiff's CPA claim must be dismissed.

A contractual relationship is not an element of a CPA claim. The Washington Supreme Court has confirmed that "any person who is injured" may sue under the statute, regardless of whether there is privity of contract. [Wash. State Physicians Ins. Exch. & Ass'n v. Fisons Corp., 122 Wn.2d 299, 312-13, 858 P.2d 1054 \(1993\)](#). [*15] See also [Stephens v. Omni Ins. Co., 138 Wn. App. 151, 175-76, 159 P.3d 10 \(2007\)](#). A statement to the contrary in [Int'l Ultimate, Inc. v. St. Paul Fire & Marine Ins. Co., 122 Wn. App. 736, 758, 87 P.3d 774 \(2004\)](#), is unsupported by any citation or analysis. Where there is a conflict in the case law, this Court will follow the pronouncements of the Washington Supreme Court.⁴

F. Conversion

The tort of conversion is "the act of wilfully interfering with any chattel, without lawful justification, whereby any person entitled thereto is deprived of the possession of it." [Judkins v. Sadler-MacNeil, 61 Wn.2d 1, 3, 376 P.2d 837 \(1962\)](#). Although the tort generally involves the loss of property, money may be the subject of a conversion

⁴Contrary to defendant's argument in reply, plaintiff's CPA claim is broadly alleged and may, in fact, be based on a violation of [RCW 48.01.030](#). There is no reason to conclude that the claim as stated in the Amended Complaint is "based solely on alleged violations of the WAC insurance regulations." Reply at 9.

claim in certain circumstances. Plaintiff alleges that National Union and AIG Domestic Claims "intentionally and wrongfully appropriated, used and expended funds to which Lewis had a priority right [*16] and claim" Amended Complaint at P 57.

AIG Domestic Claims argues that this claim is defective because defendant acted solely as National Union's agent in this matter. Although there appear to be significant flaws in plaintiff's conversion claim against AIG Domestic Claims, defendant's role as an agent is not dispositive. As discussed above, employees and agents are regularly held liable for their individual participation in wrongful conduct under Washington law, even if that conduct were performed for the benefit of its principal.

G. Declaratory Judgment

Plaintiff seeks a declaration that (1) its right to recover funds from third-parties is superior to any right National Union may have to the funds, and (2) National Union is obligated to reimburse plaintiff for funds already obtained. Amended Complaint at PP 61-62. Plaintiff argues that defendant is an appropriate target of a claim for declaratory relief because AIG Domestic Claims will carry out any further processing of plaintiff's insurance claim. The relief sought is directed solely at National Union, however, and plaintiff cannot amend its complaint through argument.

CONCLUSION

For all of the foregoing reasons, defendant's [*17] motion to dismiss is GRANTED in part and DENIED in part. Plaintiff's Insurance Fair Conduct Act, breach of contract, and declaratory judgment claims against AIG Domestic Claims are hereby DISMISSED. Plaintiff's bad faith, Consumer Protection Act, and conversion actions may proceed. The thorny issues discussed at oral argument regarding the possibility of multiple statutory damage awards for the same conduct have not been joined and are hereby reserved for later consideration.

Dated this 20th day of October, 2009.

/s/ Robert S. Lasnik

Robert S. Lasnik

United States District Judge

Searcy v. Esurance Ins. Co.

United States District Court for the District of Nevada

March 17, 2017, Decided; March 17, 2017, Filed

Case No. 2:15-cv-00047-APG-NJK

Reporter

2017 U.S. Dist. LEXIS 38705 *

ROSALIND SEARCY, Plaintiff, v. ESURANCE
INSURANCE COMPANY, Defendant.

Prior History: [Searcy v. Esurance Ins. Co., 2015 U.S. Dist. LEXIS 168803 \(D. Nev., Dec. 16, 2015\)](#)

Counsel: [*1] For Rosalind Searcy, Plaintiff: James J Ream, LEAD ATTORNEY, Law Offices of James J Ream, Las Vegas, Ne.

For Esurance Insurance Company, Defendant: Daniel Aquino, LEAD ATTORNEY, McCormick Barstow, LLP, Las Vegas, NV; Gordon M. Park, LEAD ATTORNEY, McCormick, Barstow, Sheppard, Wayte & Carruth, Las Vegas, NV.

Judges: ANDREW P. GORDON, UNITED STATES DISTRICT JUDGE.

Opinion by: ANDREW P. GORDON

Opinion

ORDER GRANTING IN PART AND DENYING IN PART THE DEFENDANT'S SUMMARY JUDGMENT MOTION

(ECF No. 74)

Plaintiff Rosalind Searcy brought this lawsuit for extra-contractual damages against her insurer, defendant Esurance Insurance Company, alleging Esurance refused to pay her policy limits in bad faith and engaged in unfair claims practices. Esurance moves for summary judgment, arguing Searcy's claims for breach of contract and unfair claims practices are barred by claim preclusion because Searcy should have brought those claims in her prior breach of contract action against Esurance. Alternatively, Esurance seeks summary judgment against any award of punitive damages

because it contends Esurance relied in good faith on its counsel's advice. Esurance also argues Searcy cannot recover attorney's fees and costs incurred in the underlying [*2] breach of contract action because she agreed to dismiss that action with each party to bear its own fees and costs. Finally, Esurance argues Searcy cannot recover damages for actions taken by Esurance's counsel in the underlying action because those actions are privileged.

Searcy responds that she properly waited until she established her entitlement to contractual benefits in the first litigation before bringing extra-contractual claims in this second lawsuit. As to the punitive damages, Searcy argues that Esurance cannot rely on the advice of counsel because Esurance had already decided to deny her the full policy limits and it ignored its attorney's advice to reevaluate her claim upon receipt of new evidence. As to the attorney's fees and costs, Searcy they are recoverable for her bad faith claim, which was not part of the prior action. Finally, Searcy contends the litigation privilege does not apply to Esurance for its bad faith conduct in forcing its insured to litigate past the time when her right to benefits became clear.

I. BACKGROUND

On August 2, 2012, Searcy was injured in a car accident caused by another driver rear-ending her vehicle. ECF No. 75-10 at 2-3. The insurance company [*3] for the person who caused the accident paid Searcy the policy limit of \$15,000. ECF No. 75-4 at 5.

Searcy was insured by Esurance for underinsured motorist coverage up to \$50,000 per person and \$100,000 per accident. ECF No. 75-1 at 2. Searcy made several demands on Esurance for the \$50,000 policy limit. ECF Nos. 75-5; 75-6; 75-7. Esurance agreed to pay some amounts as the case progressed, but never agreed to pay the full policy limit. ECF Nos. 75-7; 75-8.

On September 16, 2013, Searcy filed suit in Nevada state court against Esurance. ECF Nos. 75-9; 76-1. In that complaint (*Searcy I*), Searcy asserted a single claim that Esurance breached the insurance contract. ECF No. 76-1. She did not assert extra-contractual claims. *Id.*

The case went to arbitration and Searcy prevailed. ECF No. 76-2. The arbitrator issued his award on September 5, 2014, directing Esurance to pay the \$50,000 policy limit. *Id.* Following the parties' request for clarification, the arbitrator issued a second order on September 17 stating that Searcy was entitled to the entire policy limit without offset for prior recoveries. ECF No. 76-3. The next day, Esurance sent a check for the remaining balance on the \$50,000 policy [*4] limit to its attorney to forward to Searcy. ECF Nos. 75-11; 75-12 at 8. However, Searcy did not receive the check until October 23, 2014. ECF No. 75-12 at 9; 75-13. According to Esurance's attorney, the delay was caused by the check being mailed to the wrong address.¹ ECF No. 75-12 at 9. On February 3, 2015, the parties stipulated to dismiss *Searcy I* with prejudice, with each party to bear its own costs and attorney's fees. ECF No. 76-4.

Searcy filed this action (*Searcy II*) in Nevada state court on December 4, 2014. ECF No. 1-2. Esurance then removed the case to this court. ECF No. 1. In her amended complaint, Searcy asserts against Esurance claims for bad faith and unfair claims practices. ECF No. 43.

II. ANALYSIS

A. Claim Preclusion

I "must give to a state-court judgment the same preclusive effect as would be given that judgment under the law of the State in which the judgment was

¹ Esurance presents evidence that the delay in getting the check to Searcy was inadvertent but it does not specifically move for summary judgment on the issue of whether the check was delayed in bad faith. Although Buckwalter testified the check was sent to his former address, the check bears the new address. See ECF Nos. 75-11 (check bearing Russell Road address); 75-12 at 9 (Buckwalter testifying that check was sent to old address; arbitrator's decision was sent to old address); 75-13 (receipt showing Russell Road address); 76-2 and 76-3 at 3 (arbitrator's decisions sent to address on Buffalo Drive). Neither party provided the envelope in which the check was sent from Esurance to Buckwalter. Given that the check bears the new address, an issue of fact would remain about whether the delay can be explained by the check being inadvertently sent to the wrong address.

rendered." [White v. City of Pasadena, 671 F.3d 918, 926 \(9th Cir. 2012\)](#) (quotation omitted). I therefore look to Nevada's rules of preclusion to determine whether *Searcy I* bars the claims in this case. *Id.* Under Nevada law, claim preclusion applies where: (1) "the final judgment is valid," (2) "the parties or their privies are the same in the instant lawsuit as they [*5] were in the previous lawsuit, or the defendant can demonstrate that he or she should have been included as a defendant in the earlier suit and the plaintiff fails to provide a good reason for not having done so," and (3) "the subsequent action is based on the same claims or any part of them that were or could have been brought in the first case." [Weddell v. Sharp, 350 P.3d 80, 85 \(Nev. 2015\)](#) (en banc) (quotation and emphasis omitted).

Here, there is no dispute that the final judgment in *Searcy I* is valid. The parties stipulated to dismiss *Searcy I* with prejudice following the arbitrator's award. There also is no question the parties are the same in the two actions. Searcy sued Esurance in both cases.

The parties dispute whether Searcy's new claims are based on the same claims that were or could have been brought in the first case. "Generally, the date of final judgment in the first case marks the latest date at which the claim preclusion bar could apply." [Carstarphen v. Miilsner, 594 F. Supp. 2d 1201, 1209 \(D. Nev. 2009\)](#); see also [Lawlor v. Nat'l Screen Serv. Corp., 349 U.S. 322, 328, 75 S. Ct. 865, 99 L. Ed. 1122 \(1955\)](#) ("While the 1943 judgment precludes recovery on claims arising prior to its entry, it cannot be given the effect of extinguishing claims which did not even then exist and which could not possibly have been sued upon in the previous case.").

"Under Nevada law, however, [*6] it is not necessarily the case that all claims arising before the date of final judgment in the first case are barred." [Carstarphen, 594 F. Supp. 2d at 1209](#). This district has predicted that the Supreme Court of Nevada would adopt the majority rule that "claim preclusion extends to claims in existence at the time of the filing of the original complaint in the first lawsuit and any additional claims actually asserted by supplemental pleading." [Carstarphen, 594 F. Supp. 2d at 1210](#); see also [Round Hill Gen. Improvement Dist. v. B-Neva, Inc., 96 Nev. 181, 606 P.2d 176, 178 \(Nev. 1980\)](#) (holding that a delinquent assessment claim in the second action was not identical, and thus not precluded, when the evidence supporting the second claim related to a different time period than evidence supporting the first claim). There are exceptions to the majority rule: (1) where the "second claim depends on

the allegation that a series of wrongful acts constituted a single scheme, rather than merely later actions of the same type;" (2) the first action "incorporated a settlement intended to govern future, related transactions between the parties;" (3) the first action "resolved claims for declaratory or injunctive relief dealing with conduct persisting through trial or into the future;" or (4) the first action established "the [*7] legality of the continuing conduct into the future." [Carstarphen, 594 F. Supp. 2d at 1210-11](#) (quotations omitted).

Searcy's bad faith and unfair practices claims are claim precluded to the extent they rely on Esurance's conduct before the complaint in *Searcy I* was filed because she could have brought those claims in her complaint in *Searcy I*. See ECF No. 76-1 at 4-15 (alleging that Esurance had medical records of injuries resulting in over \$24,000 in medical bills and had no evidence those injuries pre-dated the accident but Esurance nevertheless refused to settle for policy limits); *id.* at 16 (alleging Esurance was concerned with minimizing its own costs, not investigating, and causing Searcy hardship and stating Esurance did not discharge its fiduciary-like duty to Searcy).

Additionally, those aspects of Searcy's bad faith claims that are based on the same acts and information that Esurance had when it denied her claim pre-*Searcy I* are barred because she has not alleged any post-filing acts that would support a new bad faith claim. For example, Searcy alleges that prior to the complaint being filed in *Searcy I*, Esurance had doctor's reports and related medical bills showing the extent of her injuries. ECF No. 43 at 3-4. She further [*8] alleges that no new information came to light during discovery to suggest that her injuries were not caused by the accident or were not as extensive as she initially claimed. *Id.* at 7-10. Her extra-contractual claims based on Esurance's continued refusal to pay therefore are barred because there is no post-filing act to support a separate bad faith claim. Rather, these allegations are a continuation of the same pre-filing bad faith claim that Searcy could and should have brought in *Searcy I*.

However, not all of Searcy's claims fall into this category. Searcy makes three allegations of post-filing events: (1) she hired an economist to do an economic loss valuation in *Searcy I* and Esurance still denied payment after receiving the expert's report; (2) Esurance unreasonably delayed payment for five weeks following

the arbitrator's award;² and (3) Esurance's attorney in *Searcy I* engaged in various aggressive litigation tactics, such as asking her embarrassing and irrelevant questions during her deposition. *Id.* at 5-7, 18-19. Searcy could not have brought a bad faith claim based on these allegations when she filed *Searcy I* because the facts supporting the claim were not yet in existence. Searcy did not amend, supplement, [*9] or move to amend or supplement her complaint in *Searcy I* to include extra-contractual claims for these post-filing events. Consequently, her claims are not barred to the extent they are based on Esurance's conduct following the filing of the complaint in *Searcy I*, unless her claims fall within one of the exceptions identified in [Carstarphen](#). Esurance did not present evidence or argument that Searcy's claims fall within an exception. As the party invoking claim preclusion, Esurance has the burden of proving Searcy's claims are barred. [Round Hill Gen. Improvement Dist., 606 P.2d at 178](#). It has not done so for Esurance's conduct after the complaint in *Searcy I* was filed.

Esurance relies on [Sosebee v. State Farm Mutual Automobile Insurance Company, 164 F.3d 1215 \(9th Cir. 1999\)](#), to argue Searcy's claims are barred because she knew all the facts supporting her claims before the final judgment in *Searcy I*. In *Sosebee*, an insured sued her insurer for breach of contract, bad faith, and violations of the insurance code after her insurer refused to pay medical bills following a dispute about the extent of her injuries from a car accident. *Id.* at 1216. The insurer prevailed on the bad faith claim at summary judgment. *Id.* The insured moved for reconsideration, which the district court denied. *Id.* The insured later moved to amend [*10] to add a new claim for continuing bad faith during the course of the litigation, but the district court denied that motion as well. [Id.](#) at 1217.

The breach of contract claim went to trial and the

² Given this allegation, Esurance's reliance on the cases cited in *Carstarphen* is puzzling. In those cases, just as here, the bad faith claim was based on the insurer's post-filing refusal to pay a judgment or award and the courts concluded the bad faith claims were not precluded. See [Rawe v. Liberty Mut. Fire Ins. Co., 462 F.3d 521, 529-30 \(6th Cir. 2006\)](#) (holding bad faith action not barred by prior contract action where insurer failed to pay the judgment from the first lawsuit until the plaintiff agreed to sign a release); [Pulley v. Preferred Risk Mut. Ins. Co., 111 Nev. 856, 897 P.2d 1101, 1102-03 \(Nev. 1995\)](#) (holding bad faith action not barred by prior contract action where it was based on insurer's failure to pay the arbitrator's award from the first action for fifty days).

insured prevailed. *Id.* Post-judgment, the insured again moved for reconsideration of her bad faith claim but the district court denied her motion. *Id.* The insured did not appeal. *Id.*

Instead, she filed a new action against her insurer for bad faith. *Id.* The district court ruled the second action was barred by claim preclusion. *Id.* The Ninth Circuit, applying Nevada claim preclusion law, affirmed the ruling that the insured's claims were claim precluded because "before the time to appeal the first judgment had expired, [the insured] knew, or competent discovery should have revealed, all the facts which she relied upon to file her second action." *Id. at 1218.*

Sosebee is not contrary to the majority rule as articulated by *Carstarphen*. Because the plaintiff in *Sosebee* pleaded a bad faith claim and attempted to add a bad faith claim based on her insurer's post-filing conduct, she was precluded from attempting to re-litigate those claims in a second action. Instead, she should have appealed the district court's rulings [*11] (1) granting summary judgment on the original bad faith claim and (2) denying the addition of a bad faith claim based on newly discovered facts. See *id.* ("By accepting the verdict and judgment and failing to appeal, *Sosebee* now has to confront the problem of res judicata as it relates to claims actually litigated and claims that could have been litigated in the first case."); *Carstarphen*, 594 F. Supp. 2d at 1210 (stating *Sosebee* held that claim preclusion applied "because the plaintiff had alleged bad faith in her first action, had moved to delay trial and reopen discovery on that claim, and failed to appeal denial of that motion"). *Sosebee* did not address the rules of preclusion where the plaintiff chooses not to attempt to supplement her complaint based on post-filing events. This may seem counterintuitive because the plaintiff in *Sosebee* was more diligent in trying to avoid piecemeal litigation than Searcy. However, by attempting to bring a post-filing claim into the pending litigation by supplementing her pleadings, the plaintiff in *Sosebee* was then required to litigate those claims to their conclusion in the first action or risk preclusion. Her failure to follow through and appeal the district court's denial was [*12] fatal to her second lawsuit. *Carstarphen*, 594 F. Supp. 2d at 1210.

Esurance also relies on the following quote from *Sosebee*: "we find no authority to suggest that the Nevada courts would allow a separate bad faith action based on the insurer's refusal to consider new evidence that was uncovered during discovery in *Sosebee I.*" *Sosebee*, 164 F.3d at 1217. However, that statement

must be considered in the context of the facts in *Sosebee* where the plaintiff tried to bring a bad faith claim initially, moved to supplement that claim based on post-filing facts, and then did not appeal the adverse rulings related to those claims. Also, the feature of Nevada law that allows a separate bad faith action based on a post-filing refusal to consider new evidence is the majority rule that claims that arise post-filing generally are not claim precluded. *Sosebee* did not consider that aspect of Nevada's claim preclusion law, nor did it need to given the factual context of that case.³

If, post-filing, the insurer's obligation to pay becomes clear and the insurer still does not pay, then a separate bad faith claim may arise. See *Pulley v. Preferred Risk Mut. Ins. Co.*, 111 Nev. 856, 897 P.2d 1101, 1102-03 (Nev. 1995) (bad faith claim based on post-filing refusal to pay arbitrator's award was not claim precluded by prior breach of contract action); [*13] *Guar. Nat. Ins. Co. v. Potter*, 112 Nev. 199, 912 P.2d 267, 272 (Nev. 1996) ("Bad faith is established where the insurer acts unreasonably and with knowledge that there is no reasonable basis for its conduct."); ECF No. 81-7 at 3 (Esurance's *Rule 30(b)(6)* designee testifying that Esurance owed a duty to Searcy throughout the litigation of *Searcy I.* Esurance argues that if facts arising after the complaint could form the basis of a second bad faith lawsuit, then virtually all insurance breach of contract claims will give rise to a second lawsuit for bad faith. But that assumes that insurers in breach of contract actions will engage in conduct that could support a bad faith claim. And as in any bad faith action, the insurer may take the position (like Esurance has done in this case) that it acted reasonably throughout the prior litigation.⁴

In sum, Searcy's extra-contractual claims are barred by claim preclusion to the extent they are (1) based on Esurance's conduct prior to September 16, 2013, the date Searcy filed her first lawsuit or (2) are a continuation of those same claims unsupported by new, post-filing acts. However, Searcy's extra-contractual claims are not precluded for Esurance's conduct post-dating September 16, 2013 relating to: (1) the refusal to pay after [*14] receiving the economist's report; (2) the failure to timely pay the arbitration award; and (3)

³ *Sosebee* also did not consider that, as a practical matter, amendments and supplements sought very late in the proceedings are likely to be denied.

⁴ See *Carstarphen*, 594 F. Supp. 2d at 1211 (rebutting the fear of successive litigation).

counsel's tactics during the litigation of *Searcy I*.⁵ I therefore grant in part and deny in part Esurance's motion for summary judgment based on claim preclusion.

B. Punitive Damages

Esurance contends that there is no clear and convincing evidence to support punitive damages in this case because Esurance relied on the advice of its counsel that Searcy was not entitled to the policy limit. Searcy responds that Esurance ignored its counsel's advice to reconsider payment if presented with new information. Searcy also argues the attorney's advice was irrelevant because Esurance had already decided not to pay the policy limit and to force Searcy to trial.

Shortly after *Searcy I* was filed, Esurance obtained an analysis of Searcy's claim from attorney Bryce Buckwalter. ECF No. 75-10. Buckwalter opined that Searcy's injuries had a total remaining value of \$11,000 to \$21,000. *Id.* at 6. Buckwalter noted that this evaluation did not account for future medical care. *Id.*

Esurance has presented evidence that it obtained an attorney's opinion that Searcy was not entitled to the policy limits. However, Esurance had already decided [*15] on its own not to pay the policy limits because it had denied Searcy's claim, leading her to file *Searcy I*. Additionally, the fact that Buckwalter opined early in the case that Searcy was not entitled to the policy limits does not take into account any of the post-filing events, which are all that remain of Searcy's extra-contractual claims. Esurance has not shown it relied on Buckwalter's advice (1) to conclude that Searcy was not entitled to the policy limits after reviewing the economist's report or (2) for the delay in payment of the arbitration award. Esurance thus has not met its initial burden of showing no issue of fact remains as to punitive damages for the remaining portions of Searcy's extra-contractual claims. I deny this portion of Esurance's motion.

C. Attorney's Fees in *Searcy I*

Esurance argues that Searcy cannot recover attorney's fees expended while litigating *Searcy I* because she executed a stipulation to dismiss the case with each party to bear its own costs and attorney's fees. Searcy responds that Nevada's arbitration rules limit the

attorney's fees and costs she could recover. She also argues that the stipulation must be read in context because she never asserted [*16] claims for attorney's fees or costs in *Searcy I*.

The parties in *Searcy I* executed a stipulation for dismissal with prejudice in which they agreed that Searcy's claims against Esurance in that case were dismissed with prejudice with "each party to bear their (sic) own costs and attorney's fees." ECF No. 76-4. Searcy admits she chose not to pursue attorney's fees and costs in *Searcy I* even though she could have obtained a partial award. ECF No. 81 at 8. Her agreement to dismiss the case with each party to bear its own costs and attorney's fees therefore bars her from seeking in this case the attorney's fees and costs incurred in *Searcy I*. I grant this portion of Esurance's motion.

D. Esurance's Counsel's Conduct

Esurance argues that Searcy cannot base a bad faith claim on its counsel's litigation decisions, such as hiring an expert, failing to conduct discovery, asking Searcy embarrassing questions at her deposition, or "forcing" her to appear at the arbitration. Esurance asserts that its counsel's conduct is protected by the litigation privilege. Searcy responds that while the litigation privilege may protect Esurance's counsel, it does not absolve Esurance of its obligation to act in [*17] good faith.

Under Nevada law, "communications uttered or published in the course of judicial proceedings are absolutely privileged, rendering those who made the communications immune from civil liability." [Greenberg Traurig v. Frias Holding Co.](#), 331 P.3d 901, 903 (Nev. 2014) (en banc) (quotation omitted). The privilege also applies to "conduct occurring during the litigation process." [Bullivant Houser Bailey PC v. Eighth Judicial Dist. Court of State ex rel. Cnty. of Clark](#), 128 Nev. 885, 381 P.3d 597 (Nev. 2012) (unpublished) (emphasis omitted). It is an absolute privilege that "bars any civil litigation based on the underlying communication." [Hampe v. Foote](#), 118 Nev. 405, 47 P.3d 438, 440 (Nev. 2002), abrogated by [Buzz Stew, LLC v. City of N. Las Vegas](#), 124 Nev. 224, 181 P.3d 670 (Nev. 2008).

The policy behind the privilege is to grant attorneys "the utmost freedom in their efforts to obtain justice for their clients." [Greenberg Traurig](#), 331 P.3d at 903 (quotation omitted). Indeed, the privilege is "primarily for the client's benefit." *Id.* at 904. The privilege's scope is "quite broad." [Fink v. Oshins](#), 118 Nev. 428, 49 P.3d

⁵ Whether Esurance's counsel's litigation tactics can support a bad faith claim is a separate question I address below.

[640, 644 \(Nev. 2002\)](#). Whether the privilege applies is a question for the court. [Id. at 643-44](#).

Esurance identifies as the privileged conduct: (1) that Buckwalter asked improper questions during Searcy's deposition that embarrassed her; (2) that Buckwalter relied on his own expert economist's opinions instead of Searcy's expert; (3) that Buckwalter did not investigate or conduct discovery that Searcy thinks should have been done, and (4) that Buckwalter "forced" Searcy to appear at her deposition and at [*18] the arbitration hearing. These communications and actions taken during the litigation are protected by the absolute litigation privilege for both Buckwalter and his client, Esurance. The privilege is primarily for the client's benefit to ensure zealous representation by its attorney. It would be a hollow privilege if it did not extend to the client because the attorney would feel constrained not to expose his client to potential liability based on his litigation conduct. Thus, Buckwalter's communications and actions taken during *Searcy I* cannot form the basis of Searcy's bad faith claim. I therefore grant Esurance's motion for summary judgment on Searcy's bad faith claim to the extent that claim is based on Buckwalter's litigation communications and conduct done on Esurance's behalf.

However, that does not excuse Esurance of its duty to adjust Searcy's claim in good faith throughout the time *Searcy I* was pending. For example, if Esurance received new information during the pendency of *Searcy I* that made clear its obligation to pay, its decision not to do so is not absolutely privileged. Nor does the privilege necessarily mean that evidence of what Esurance did in the litigation (through [*19] Buckwalter) is inadmissible at trial. See [White v. W. Title Ins. Co., 40 Cal. 3d 870, 221 Cal. Rptr. 509, 710 P.2d 309, 318 \(Cal. 1985\)](#) (holding litigation privilege bars a claim based on litigation communications but those communications can be used as evidence to prove bad faith claim based on other allegations); ECF No. 83 at 6 (stating Esurance is "not argu[ing] that an insurer's general actions taken during litigation are subject to absolute protection"). The admissibility of evidence in support of Searcy's remaining bad faith claims is best resolved at a later stage through a motion in limine.

III. CONCLUSION

IT IS THEREFORE ORDERED that defendant Esurance Insurance Company's motion for summary judgment (**ECF No. 74**) is **GRANTED in part and DENIED in part** as more fully set forth in this order.

DATED this 17th day of March, 2017.

/s/ Andrew P. Gordon

ANDREW P. GORDON

UNITED STATES DISTRICT JUDGE

End of Document

[Tavakoli v. Allstate Prop. & Cas. Ins. Co.](#)

United States District Court for the Western District of Washington

January 15, 2013, Decided; January 15, 2013, Filed

CASE NO. C11-1587RAJ

Reporter

2013 U.S. Dist. LEXIS 6078 *; 2013 WL 153905

HOSSEIN TAVAKOLI, et al., Plaintiff, v. ALLSTATE PROPERTY AND CASUALTY INSURANCE COMPANY, Defendant.

Prior History: [Tavakoli v. Allstate Prop. & Cas. Ins. Co., 2012 U.S. Dist. LEXIS 195257 \(W.D. Wash., May 25, 2012\)](#)

Counsel: [*1] For Hossein Tavakoli, Pourandok Shahnian, a married couple, and the marital community composed thereof, Plaintiffs: Joseph W Moore, Kyle C Olive, Timothy A. Bearb, OLIVE BEARB PLLC, SEATTLE, WA.

For Allstate Property and Casualty Insurance Company, an Illinois company doing business in the State of Washington, Defendant: Blake Edward Marks-Dias, Gavin Williams Skok, RIDDELL WILLIAMS, SEATTLE, WA.

Judges: The Honorable Richard A. Jones, United States District Court Judge.

Opinion by: Richard A. Jones

Opinion

ORDER

I. INTRODUCTION

This matter comes before the court on the parties' motions in limine. Dkt. ## 67, 69. The court GRANTS both motions in part and DENIES both motions in part. As the court's local rules require, Plaintiffs Hossein Tavakoli and Pourandok Shahnian and Defendant Allstate Property and Casualty Insurance Company ("Allstate") each filed a single motion in limine. [Local Rules W.D. Wash. LCR 7\(d\)\(4\)](#). Each motion is divided

into several parts, which the court addresses below.

This case follows Mr. Tavakoli's October 2007 car accident. Plaintiffs assert causes of action invoking the uninsured motorist ("UIM") coverage of their Allstate insurance policy, as well as causes of action based on Allstate's handling [*2] of their insurance claim. The court addressed these causes of action in a December 21, 2012 order resolving the parties' summary judgment motions. Dkt. # 63. The court will not repeat the factual summary or analysis from that order except as necessary. Among other things, that order separated the trial of Plaintiffs' claims into a first phase devoted solely to assessing their damages arising from the accident and a second phase to determine whether Allstate is liable for any damages arising from its claims handling.

II. PLAINTIFF'S MOTION IN LIMINE

Part One

Plaintiffs ask the court to prohibit William Partin, an accountant, from testifying at trial. Mr. Partin intends to offer expert testimony to rebut the testimony of John Fountaine, a vocational rehabilitation expert who will testify on Mr. Tavakoli's behalf regarding his loss of future income as a result of the accident.

Plaintiffs' first objection is a reprise of objections that the court put to rest in an order addressing the parties' first motions to exclude witnesses. That order (Dkt. # 64) explained that both parties conducted discovery and issued expert reports well after the deadlines the court imposed and that both parties were [*3] to blame for the late disclosures. As was the case in that order, there is no need to parse who is responsible for each late disclosure. Unless a party can point to prejudice arising from the late disclosure, the court will not exclude it. There is no prejudice arising from the timing of the disclosure of Mr. Partin's testimony.

Mr. Fontaine will offer testimony about Mr. Tavakoli's loss of wage-earning capacity by comparing his wage-earning capacity before the accident and after. As everyone recognizes, Mr. Tavakoli's *capacity* to earn wages is at best a part of an assessment of his past or future lost wages. The extent to which would be able to fulfill his earning potential matters as well. Mr. Partin intends to offer testimony that Mr. Tavakoli would not have fulfilled that potential. Among other things, he will opine that Mr. Tavakoli never met his earning potential before the accident, and that health problems unrelated to the accident will prevent him from meeting his earning potential in the future. This is appropriate rebuttal testimony. Mr. Partin is qualified to assess how different assumptions about Mr. Tavakoli's maximization of his earning capacity will affect the calculations [*4] of his lost earnings. To the extent those assumptions depend on medical evidence or vocational evidence that is outside his field of expertise, he may still rely on that evidence. Mr. Partin may not, however, offer his own opinions or assessments about occupations for which Mr. Tavakoli is or is not qualified. Mr. Partin is an accountant, not a vocational specialist. He may not opine, for example, about what level of restaurant service work Mr. Tavakoli is qualified for. He also may not opine about whether Mr. Tavakoli is currently qualified to work as a realtor.

Part Two

Plaintiffs want to prevent Allstate from offering evidence, during the first phase of trial, that Mr. Tavakoli hired a lawyer just days after the October 2007 accident. They contend that evidence is irrelevant. Allstate contends, however, that Mr. Tavakoli's medical treatment and other actions in the aftermath of the accident were driven by a desire to maximize his recovery in a lawsuit.

Allstate may offer evidence about Mr. Tavakoli's decision to hire a lawyer. And, to the extent it has *admissible* evidence, it may develop the theory that he sought unnecessary medical treatment or took other steps because of the possibility [*5] of litigation. The court cautions Allstate, however, that it may not inquire into Mr. Tavakoli's communications with his counsel. The court will not prohibit Allstate from offering evidence about Mr. Tavakoli's hiring of counsel, but it may, on proper objection, limit such evidence if Allstate chooses to belabor it.

Part Three

The court has already ruled that Allstate did not violate

the law during the time between the 2007 accident and Plaintiffs' attorney's first demand letter in December 2010. Now Plaintiffs ask the court to exclude (from phase two of the trial) all evidence relating to claims handling during that period.

The court denies this request. It will be impossible for the jury to understand Allstate's claims handling after December 2010 without at least a basic understanding of what had happened over the more than three years prior to December 2010. For example, Plaintiffs intend to argue that Allstate's investigation was unreasonably delayed. In light of that argument, the jury will likely be curious as to why Allstate did little for more than three years after the accident. Allstate is entitled to present evidence that it did little because Plaintiffs' attorney refused [*6] to provide information and repeatedly told Allstate to wait for a demand letter. Although the court may limit evidence regarding pre-December-2010 claims handling if either party spends too much time presenting it, it will not bar the evidence.

Part Four

Plaintiffs hope to introduce evidence about their contractual relationship with Allstate during the first phase of the trial. That will be unnecessary. The court will inform the jury before trial begins that Allstate is a defendant in this action because Plaintiffs' claim relies on their UIM coverage, and that in a UIM claim the insurance company stands in the place of the uninsured motorist. The court will tell the jury that Allstate concedes liability for the accident, but disputes the amount of damages. The jury does not need to know anything else about the contractual relationship between the parties to reach a verdict in phase one. In particular, Plaintiffs may not attempt to argue that a lawsuit is the "only way" to resolve disputes over UIM coverage.

Part Five

Plaintiffs demand that the jury decide whether or not to treble any damages it awards based on the Insurance Fair Conduct Act ("IFCA"). In another case, the court recently [*7] ruled that the [Seventh Amendment](#) requires the jury in federal court to decide whether to enhance IFCA damages in accordance with [RCW § 48.30.015\(2\)](#), even though the Washington legislature intended that the trial court decide whether to enhance damages. [F.C. Bloxom Co. v. Fireman's Fund Ins. Co., No. C10-1603RAJ, 2012 U.S. Dist. LEXIS 170543, at *17 \(W.D. Wash. Nov. 30, 2012\)](#). Plaintiffs want the court to reach the same conclusion in this case. Allstate

opposes the request, preferring that the court decide whether to enhance IFCA damages.

Although the court is likely to follow its prior order, Allstate has raised at least one argument that the court did not consider in that prior order. Accordingly, the court reserves ruling on whether it or the jury will resolve the enhanced damages issue. Nonetheless, the court will take the jury's verdict on enhanced damages. If the court ultimately adopts Allstate's view that the court should decide enhanced damages, it will treat the jury's verdict as advisory. See [Fed. R. Civ. P. 39\(c\)](#).

III. DEFENDANT'S MOTION IN LIMINE

Part One

Allstate asks the court to exclude evidence related to Ms. Shahnian's loss of consortium claim from phase two of the trial. [*8] The court denies that request, but may limit testimony on that issue if it becomes repetitive.

The jury will have decided whether Ms. Shahnian is entitled to loss of consortium damages during phase one of the trial. There are at least two issues in the second phase, however, to which those damages might again be relevant. The first is Plaintiff's contention that Allstate broke the law by refusing to make a partial payment of damages that were not reasonably in dispute. The second issue is related: Plaintiffs intend to argue that they suffered additional damages because Allstate's failure to pay left them unable to afford medical care and unable to keep Mr. Tavakoli's restaurant business open.

Plaintiffs may refer to their phase one damages as necessary to make the arguments the court has just identified. Plaintiffs will have already presented all evidence regarding those damages in phase one. The only evidence regarding those issues that ought to arise in phase two is evidence that some portion of those damages were undisputed, and evidence that Allstate knew or should have known that Plaintiffs were suffering additional damages because of Allstate's failure to make a partial payment.

The [*9] court's ruling that Allstate did not violate the law prior to December 2010 applies here as well. Plaintiffs may not argue that they suffered extracontractual damages prior to December 2010.

Part Two

Allstate requests that the court exclude evidence of the

effect of the accident on the restaurant that Mr. Tavakoli helped operate. It appears that, at the time of the accident, Mr. Tavakoli was a member of a limited liability company that operated a small restaurant called "Saffron Kabobs." Mr. Tavakoli also worked at the restaurant. The record is murky, but it appears that the LLC had members other than Mr. Tavakoli. Mr. Tavakoli intends to present evidence that because of his injuries, he could not work enough at the restaurant, the restaurant became less profitable, and it ultimately closed.

The limited liability company is not a party to this action, and Mr. Tavakoli cannot recover the company's lost profits. He can, however, present evidence that he received or expected to receive all or a portion of the company's profits in the form of wages or other compensation. To that extent, evidence of the company's financial performance is relevant, and the court will not exclude it.

The court [*10] also denies Allstate's request to exclude testimony from the company's accountant, Hamid Sharif. Mr. Sharif may provide testimony within his personal knowledge about the company's finances. He also may testify about Mr. Tavakoli's injuries and their effect on the business, as long as he has personal knowledge on those topics.

Part Three

Allstate contends that Mr. Tavakoli did not disclose evidence describing his wage history after Saffron Kabobs closed in March 2011, and thus should not be permitted to offer such evidence to support his claim for lost wages and future loss of wages. Allstate claims that Mr. Tavakoli provided only a generic response to an interrogatory requesting information on his lost income claim and did not provide documents about his post-March-2011 income in response to a request for production.

Allstate's description of the discovery Mr. Tavakoli provided is at best inexcusably forgetful and at worst an effort to mislead the court. Mr. Tavakoli provided the discovery responses that Allstate cited in July of 2012. Allstate neglects to mention that it deposed Mr. Tavakoli at the end of July and he described his post-March-2011 employment, wages, and financial status [*11] in considerable detail. Allstate further neglects to mention that Mr. Tavakoli updated his initial disclosures in August to reflect his most recent employment. And as a final omission, Allstate does not reveal that Mr. Tavakoli provided all of his tax returns from 2005 through 2011.

Allstate has no basis for its claim that Mr. Tavakoli did not adequately disclose evidence about his income and financial status after March 2011.

The court also denies Allstate's request to exclude Mr. Fountaine's testimony. He has the expertise to assess (in reliance on medical evidence and other evidence pertaining to Mr. Tavakoli's physical and mental capabilities) what occupations Mr. Tavakoli is qualified for and will be qualified for. He also has the expertise to assess his earning capacity. The court has already explained that Mr. Tavakoli's earning capacity is only part of the assessment of his lost past and future wages, but it is nonetheless relevant. The court will not exclude it.

Part Four

Allstate argues that its conduct after Plaintiffs filed this lawsuit in August 2011 is not relevant to Plaintiffs' extracontractual claims. The court disagrees. In a case like this one, where the insured's claim [*12] remains open, the insured's decision to sue its insurer does not cut off the insurer's obligations to adjust the claim. The litigation itself will impose new demands on the insurer, and if there were a conflict between the demands of litigation and the insurer's duty to adjust the claim, the court might have to decide how to resolve it.¹ Allstate has not identified any specific conflict in its motion.

Part Five

Allstate [*13] already filed a separate motion asking the court to limit the testimony of Robert Dietz, who intends to offer expert testimony on Plaintiff's behalf regarding the insurance industry. The court issued a separate ruling on that motion. In part five of its motion in limine, Allstate asks the court to limit his testimony further. The

¹ For example, the court in [Stegall v. Hartford Underwriters Ins. Co., No. C08-688MJP, 2009 U.S. Dist. LEXIS 2690, *3-7 \(W.D. Wash. Jan. 7, 2009\)](#) addressed whether Washington insurance regulations requiring prompt responses to inquiries from insureds applied to an insured's counsel's inquiry to the insurer's counsel during litigation. In that case, the insurer had already paid its insured and closed its file before the insured sued. [2009 U.S. Dist. LEXIS 2690, \[WL\] at *2-3](#). The *Stegall* court had no occasion to consider a case like this one, where the insurer has neither made a payment nor informed its insured that it has concluded its adjustment of the claim. The court does not interpret [Stegall](#) to impose a broad rule that an insurer cannot be liable for unlawful claims handling after its insured sues.

court declines to consider a second motion on the topic. The court reiterates its prior ruling.

Part Six

Allstate asks for a blanket ruling excluding evidence that purports to explain Allstate's legal obligations. The court cannot grant that request. During the second phase of the trial, it is likely that some witnesses will testify as to their understanding of what the law requires of Allstate. That is likely unavoidable. If necessary, the court will give the jury a limiting instruction during trial that the court will instruct them as to Allstate's legal obligations at the conclusion of trial, and that the court's instructions will govern over any conflicting evidence. If either party wishes to avoid an in-trial limiting instruction, they should not elicit testimony from witnesses as to their understanding of the law.

Part Seven

The court denies Allstate's request [*14] to prevent Dr. Richard Seroussi from testifying regarding the psychiatric impact of Mr. Tavakoli's injuries or testifying about his brain injuries. Dr. Seroussi is neither a psychiatrist nor a neurologist, but his experience in the field of psychiatry touches on both disciplines. If his opinions go beyond his expertise, Allstate can illustrate as much in cross-examination. The court observes that Allstate has already indicated that it intends to have its expert orthopedist testify regarding the psychiatric aspects of Mr. Tavakoli's claimed injuries, putting Allstate in a poor position to complain that one of Mr. Tavakoli's medical witnesses may testify as to matters somewhat outside the core of his specialty.

Part Eight

The court grants Allstate's request to exclude evidence of other claims, lawsuits, or the like. The jury will decide the second phase of this case based solely on Allstate's conduct with respect to Plaintiffs' claims.

Part Nine

The court grants Allstate's request to prohibit Plaintiffs' from offering evidence of Allstate's relative wealth, or their relative poverty, as a reason to enhance damages. Allstate's wealth is not relevant at all, and Plaintiffs' wealth is relevant [*15] only to the extent it bears on their inability to pay for medical care or other issues that are germane to their claims for compensatory damages.

The court does not, however, prohibit Plaintiffs from

arguing that the jury should enhance any IFCA damages it awards in order to punish Allstate. So long as that argument relates solely to Allstate's conduct toward Plaintiffs, the court will not prohibit it.

Part Ten

The court grants Allstate's request to exclude any evidence or argument related to Allstate's decision to designate certain documents as "confidential" during discovery. Those decisions relate solely to Allstate's litigation conduct, and are not relevant to any of Plaintiffs' claims.

IV. CONCLUSION

For the reasons stated above, the court GRANTS in part and DENIES in part the parties' motions in limine. Dkt. ## 67, 69.

DATED this 15th day of January, 2013.

/s/ Richard A. Jones

The Honorable Richard A. Jones

United States District Court Judge

End of Document

Zuniga v. Std. Guar. Ins. Co.

United States District Court for the Western District of Washington

May 24, 2017, Decided; May 24, 2017, Filed

CASE NO. C17-5176RBL

Reporter

2017 U.S. Dist. LEXIS 79821 *

JOSE T ZUNIGA, et al., Plaintiffs, v. STANDARD GUARANTY INSURANCE COMPANY, et al., Defendants.

Counsel: [*1] For Jose T Zuniga, Maria Aburto, husband and wife and the marital community comprised thereof, Plaintiffs: Isaac Ruiz, William Candler Smart, LEAD ATTORNEYS, Kathryn M Knudsen, KELLER ROHRBACK, SEATTLE, WA.

For Standard Guaranty Insurance Company, John Lewton, Jane Doe Lewton, husband and wife and the marital community comprised thereof, Assurant, Inc., doing business as Assurant Specialty Property, Defendants: Joseph D Hampton, Kathryn Naegeli Boling, Jeffrey S Tindal, BETTS PATTERSON & MINES (SEA), SEATTLE, WA.

Judges: HONORABLE Ronald B. Leighton, United States District Judge.

Opinion by: Ronald B. Leighton

Opinion

ORDER GRANTING MOTION TO REMAND

[Dkt. #s 14 and 15]

THIS MATTER is before the Court on Plaintiff Zuniga's Motion to Remand [Dkt. #15] Zuniga¹ purchased a home in Tacoma in 2015. He apparently failed to obtain a homeowner's insurance policy as required by his lender, Select Portfolio Servicing. As a result, SPS purchased a "policy /certificate" from Defendant Standard Guaranty Insurance Company, and paid for it

from Zuniga's escrow account. SPS informed Zuniga that it had done so, and why, and explained both that he was obliged to have insurance, and that he had the right to obtain better insurance of his [*2] choice; this particular insurance "policy/certificate" was more expensive and had less coverage than "normal" homeowner's insurance policies. [Dkt. #14-1]

In 2016, the home was damaged by fire. Zuniga made a claim under the Standard Guaranty policy. Standard Guaranty hired and independent adjuster (Defendant Assurant Specialty Property) to handle the claim. Assurant engaged one of its employees, Defendant John Lewton, to actually do the adjusting. Like Zuniga, Lewton lives in Washington. Standard and Assurant reside in other states.

Lewton offered Zuniga \$23,000 to settle his claim. Zuniga claims that is less than a third of the damage suffered. Zuniga also claims that Lewton and Assurant and Standard failed to do much of anything to secure or repair the home. Zuniga sued in Pierce County superior Court, asserting nine claims including breach of contract, bad faith, negligence, discrimination, [Washington Consumer Protection Act](#) claims, and constructive fraud.

Defendants removed the case, invoking this Court's diversity² jurisdiction under 28 U.S.C. §§ 1332 and 1441(b). They claimed that Lewton (the Washington defendant) was fraudulently joined and that his citizenship should be disregarded for diversity purposes. [*3] They argue that Lewton was joined for the sole purpose of destroying diversity.

Zuniga seeks Remand, arguing there is no diversity jurisdiction because Lewton was not fraudulently joined.

¹ Zuniga's spouse, Maria Aburto is also a plaintiff. This Order will use the singular reference "Zuniga" for clarity. No disrespect is intended.

² The parties do not dispute that the amount in controversy exceeds \$75,000. It is also undisputed that Zuniga and Lewton are Washington citizens.

Meanwhile, Defendants have moved to dismiss Lewton, arguing that Zuniga's claims against him fail as a matter of law. [Dkt. #] The Court will address the jurisdictional issue first.

The Defendants argue that Zuniga fraudulently joined the Washington resident, Lewton, to destroy diversity, and that his citizenship should be disregarded for purposes of ascertaining diversity jurisdiction.

A. Remand Standard

Under [Conrad Associates v. Hartford Accident & Indemnity Co.](#), 994 F. Supp. 1196 (N.D. Cal. 1998) and numerous other authorities, the party asserting federal jurisdiction has the burden of proof on a motion to remand to state court. The removal statute is strictly construed against removal jurisdiction. The strong presumption against removal jurisdiction means that the defendant always has the burden of establishing removal is proper. [Conrad](#), 994 F. Supp. at 1198. It is obligated to do so by a preponderance of the evidence. [Id.](#) at 1199; see also [Gaus v. Miles](#), 980 F.2d 564, 567 (9th Cir. 1992). Federal jurisdiction must be rejected if there is any doubt as to the right of removal in the first instance. [Id.](#) at 566.

Diversity jurisdiction requires that each defendant be a citizen of a different [*4] state than any plaintiff. [Allstate Ins. Co. v. Hughes](#), 358 F.3d 1089 (9th Cir. 2004) (citing [Morris v. Princess Cruises, Inc.](#), 236 F.3d 1061, 1067 (9th Cir. 2001)). A non-diverse defendant that has been "fraudulently joined," however, may be ignored when the court determines the existence of diversity. [United Computer Systems, Inc. v. AT & T Corp.](#), 298 F.3d 756, 761 (9th Cir. 2002) (citing [Morris v. Princess Cruises, Inc.](#), 236 F.3d 1061, 1067 (9th Cir. 2001)).

"Fraudulent joinder" is a term of art. [Morris v. Princess Cruises, Inc.](#), 236 F.3d 1061, 1067 (9th Cir. 2001) (citing [McCabe v. General Foods Corp.](#), 811 F.2d 1336, 1339 (9th Cir. 1987)). The non-diverse defendant has been fraudulently joined if the plaintiff fails to state a cause of action against that defendant, and that failure is "obvious according to the settled laws of the state." [McCabe](#), 811 F.2d at 1339. The removing defendant is entitled to present facts outside of the complaint to establish that a party has been fraudulently joined. *Id.* Doubt concerning whether the complaint states a cause of action is resolved in favor of remanding the case to state court. [Albi v. Street & Smith Publications](#), 140 F.2d 310, 312 (9th Cir. 1944).

B. Zuniga's claims against Lewton.

Defendants argue that Lewton was fraudulently joined because Zuniga has no legitimate, plausible claims against him; Lewton cannot be liable to Zuniga on any theory. They argue that he was instead named solely to destroy diversity.

Defendants' arguments are based primarily on a Washington case they claim holds that independent insurance adjusters owe no duties to insured claimants, at least in the absence of a direct contract between them. As a result, they argue, [*5] Zuniga's CPA, bad faith, negligence claims against Lewton are simply not viable.

They primarily rely on [Int'l Ultimate, Inc. v. St. Paul Fire & Marine Ins. Co.](#), 122 Wn App. 736, 758, 87 P.3d 774 (2004), which involves an different sort of claim and a different sort of contractual arrangement among the insurer and its adjuster. Nevertheless, the case does include the following analysis of the issue:

To be liable under the CPA, there must be a contractual relationship between the parties. Here, the contractual relationship was between IUI and its insurance providers. We dismiss IUI's claim against Zeller because the CPA does not contemplate suits against employees of insurers.

[Int'l Ultimate at 787](#). There are at least two problems with this. First, (as defendants concede) it is simply not correct that a CPA claim necessarily depends on the existence of a contract between the parties. Such a claim has five well-established elements, not one of which is a contract: (1) an unfair or deceptive act or practice; (2) occurring in trade or commerce; (3) impacting public interest; (4) injuring plaintiff in his or her business or property; and (5) causation. [Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co.](#), 105 Wash. 2d 778, 780, 719 P.2d 531 (1986) (en banc).

Second, the "holding"—not the *reasoning*; there is none of that—that the CPA does not "contemplate suits against employees of insurers" is, as other [*6] cases have since pointed out, dubious. Why doesn't it? Why is there such a specific exception, and why did the legislature fail to include it in the statute's text? The holding has no analysis and no citations.

Defendants claim that the result nevertheless stands, and that it is consistent with the rule that agents acting in the scope of their employment "are protected" from liability. But that is not entirely accurate, either. In the

tort context, the import of the agent's "acting in the scope of his authority" (as opposed to being on a "frolic and detour") is that the plaintiff can hold the principal vicariously liable for the tort, but it is almost always true that he can also sue and recover from the agent. See [Restatement \(Third\) of Agency, §7.01](#) (2006). The agent's "protection" from liability applies in a more limited context, where "the agent, so acting within the scope of his employment as to bind his principal, honestly believes representations made by him to induce the purchaser to contract with his principal to be true, he is not liable either on the contract or as for a tort." [Lasman v. Calhoun, Denny & Ewing, 111 Wash. 467, 470, 191 P. 409 \(1920\)](#), cited in [Annechino v. Worthy, 175 Wash.2d 630, 637, 290 P.3d 126 \(2012\)](#). The Court cannot determine the honesty of the agent's motives or beliefs at this stage.

Zuniga³ argues that a recent Washington [*7] appellate opinion instead holds that an insured can assert a viable CPA claim against an independent adjuster, and against an employee of an insurance company. See [Merriman v American Guarantee & Liability Insurance Co., 198 Wn. App. 594, 2017 WL 1330469 \(Div. 3, 2017\)](#). But *Merriman* also involves a different sort of claim and a different sort of contractual arrangement—the adjuster there was hired for a much broader set of tasks, including some intended to benefit the insureds. The insured's CPA claim against the adjuster was held to be viable. Defendants point out that the primary difference is that the scope of the adjuster's agreement with the insurer, and that is a good argument. But it undermines the Defendants' claim that *In'tl Ultimate* provided a bright line, obvious blanket prohibition on CPA claims against an insurer's employee.

Finally, the issue is not whether the claim can ultimately survive a motion to dismiss or for summary judgment—the remaining defendants will presumably argue at some point that Zuniga's claims against them are also fatally flawed and should be dismissed—it is whether Lewton was fraudulently joined. There is a difference between a claim that the plaintiff's claims against the defendants generally should be dismissed, [*8] and the argument that the plaintiff's claim against one of them is so obviously without merit that it is fraudulent.

The Court cannot conclude that Zuniga "obviously" has "no theory of recovery" against Lewton under the "well-settled law" of Washington, and thus cannot conclude

that he was fraudulently joined in this case.

The Motion to Remand is GRANTED and this case is REMANDED to the Pierce County Superior Court. The Court will not entertain a motion for fees. Lewton's Motion to Dismiss [Dkt. #14] is DENIED as moot, and without prejudice to re-file in state court.

IT IS SO ORDERED.

Dated this 24th day of May, 2017.

/s/ Ronald B. Leighton

Ronald B. Leighton

United States District Judge

End of Document

³Zuniga also points out that Lewton was *Assurance's* employee, *not* the insurance company's employee.

FURY DUARTE PS

July 14, 2017 - 2:45 PM

Transmittal Information

Filed with Court: Court of Appeals Division I
Appellate Court Case Number: 75731-8
Appellate Court Case Title: Moun & Aung Keodalaha, Petitioner v. Allstate Insurance Company and Tracey Smith, Respondents
Superior Court Case Number: 15-2-18663-9

The following documents have been uploaded:

- 757318_Answer_Reply_to_Motion_20170714143907D1758897_4277.pdf
This File Contains:
Answer/Reply to Motion - Response
The Original File Name was Appellate Reply.pdf

A copy of the uploaded files will be sent to:

- dgunter@foxrothschild.com
- gskok@foxrothschild.com
- sisterlaw@me.com
- steve@furyduarte.com

Comments:

Sender Name: Tonya Arico - Email: tonya@furyduarte.com

Filing on Behalf of: Scott David Jd Smith - Email: scott@furyduarte.com (Alternate Email:)

Address:
1606 - 148th Ave SE, Suite 102
Bellevue, WA, 98007
Phone: (425) 643-1606

Note: The Filing Id is 20170714143907D1758897